ANNOTATIONS INCLUDE 173 N. C.

NORTH CAROLINA REPORTS

VOL. 152

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1910

ROBERT C. STRONG
REPORTER

ANNOTATED BY
WALTER CLARK

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SPRING TERM, 1910

L. W. ANDERSON, ADMINISTRATOR OF PENELOPE BARNES, v. LIFE INSURANCE COMPANY OF VIRGINIA AND N. R. PARKER.

(Filed 25 February, 1910.)

Insurance—Procurement of Death of Insured—Fund, Right to.

A beneficiary who has caused or procured the death of the insured under circumstances amounting to a felony cannot recover on the policy; but when the contract of insurance was made with the company by the insured, and the question presented is whether the representative of the insured or of the beneficiary has a right to the proceeds of the policy, it is resolved in favor of the former.

APPEAL from *Ward, J.*, September, 1909, of PASQUOTANK, heard on appeal from a justice's court and on facts agreed.

The facts formally agreed upon were as follows: "That on 1 February, 1909, Penelope Newby, now Barnes, obtained from the Life Insurance of Virginia a policy of insurance on her life for the benefit of Seth Newby, her brother; that both Penelope Barnes and Seth Newby died on 3 July, 1909; that Seth Newby died by his own hand before Penelope Barnes died; that Penelope Barnes was murdered by Seth Newby; that the Life Insurance Company of Virginia has paid to N. R. Parker, administrator of Seth Newby, deceased, the sum of $110, the amount due under the said policy of insurance, with the understanding by all parties that Parker shall hold money to abide determination of this action, and that the policy of insurance hereto attached is an exact copy of the original policy of insurance, and the same is hereby made a part of this statement of facts."

(2) Upon these facts the court gave judgment for plaintiff, and the defendant N. R. Parker, administrator of Seth Newby, appealed.

C. E. Thompson for plaintiff.
E. L. Sawyer for defendant.

HOKE, J., after stating the case: It is a principle very generally accepted that a beneficiary who has caused or procured the death of the insured under circumstances amounting to a felony will be allowed no recovery on the policy. Vance on Insurance, 392-393; Cooley's Insurance Briefs, 3153; 25 Cyc., 153; 3 A. & E. (2 Ed.), 1021.

This wholesome doctrine, referred by most of the cases to the maxim, *Nullus commodum capere potest de injuria sua propria,* has been uniformly upheld, so far as we are aware, except in certain cases where the interest involved was conferred by statute, and the statute itself does not recognize any exception. Such an instance has occurred in our own Court, in *Owens v. Owens,* 100 N. C., 240, where a widow convicted as accessory before the fact to her husband's murder was awarded dower under the statute—a decision which caused an immediate amendment of the statute, Laws 1889, ch. 499; and this amendment has since prevailed as the law of the State on that subject.

The authorities are also to the effect that in cases like the present, where the contract is made between the insured and the company for another's benefit, that is, a valid contract of that character, a felony of the kind indicated on the part of the beneficiary will not relieve the company of all liability on the policy, but recovery can he had usually by the representative of the insured and for the benefit of the latter's estate. Vance and Cooley, *supra; Schmidt v. Ins. Co.,* 112 Iowa, 41; *Supreme Lodge v. Menkhausen,* 209 Ill., 277; *Ins. Co. v. Davis, admr.,* 96 Va., 737; *Shea v. Benefit Assn.,* 160 Mass., 289; *Tyler v. Odd Fellows Relief,* 145 Mass., 134; *Cleaver v. Mutual Res. Fund,* L. R. Q. B., 1892, p. 147.

This latter ruling would very likely not obtain in an ordinary life policy, where a valid contract of insurance had been made and purported to be between the company and the beneficiary, and such beneficiary was and continued to be throughout the owner of the policy and of all interest in it. Such a position, however, is not presented here in any aspect of it, as the company recognizes its liability on the policy, and the question is on the right to the fund as between the representative of the insured and of the beneficiary. On that question, and under the authorities cited, there is no error in the ruling of the court
(3) below, awarding the fund to the representative of the insured, and the judgement to that effect is

Affirmed.

HESTER A. BELANGIA ET AL. v. BRANNING MANUFACTURING COMPANY.

(Filed 25 February, 1910.)

Damages—Title—Evidence—Questions for Court—Instructions.

In an action for damages for cutting timber, plaintiffs claimed title as heirs at law of T. and R. D., Jr., deraigning title from a 60,000-acre grant to C., and from him to R. D., Sr., the father of T. and R. D., Jr., who conveyed 57,000 acres to one H., leaving a residue of 3,000 acres. R. D., Sr., devised his lands to his sons, T. and R. D., Jr., and his executor in 1823 sold the lands of R. D., among them "1,300 acres, the residue of said C. tract of 3,000 acres, to pay his debts, under a decree of court, and made deed to the purchaser under whom defendants claim by *mesne* conveyances, being purchasers for value. Since the deed of 1823 neither plaintiffs nor those under whom they claimed have exercised ownership of the *locus in quo*, or set up claim thereto, or paid taxes thereon: *Held*, no error to charge the jury, that if they found the facts as testified to, to find for defendants.

WALKER, J., dissenting.

APPEAL by plaintiffs from *Ward, J.*, Fall Term, 1909, of TYRRELL.

The facts are stated in the opinion of the court.

Aydlett & Ehringhaus for plaintiff.
Pruden & Pruden and W. M. Bond for defendant.

CLARK, C. J. Action for damages for cutting timber. The plaintiffs claim title as heirs at law of Thomas and Richard Davis, Jr. They deraign their title from a grant of 60,000 acres to Josiah Collins, 9 July, 1796, which it is admitted covers the *locus in quo*, and a deed, 11 March, 1809, from Collins to Richard Davis, Sr., for said 60,000 acres. On 27 March, 1809, Richard Davis conveyed 57,000 acres thereof by metes and bounds to Elisha Hassell. He made thereafter several deeds to other parties for land out of said 60,000-acre tract. These were not located, but the defendant contends that, presumably, they conveyed parts of the 3,000 acres which Davis had not conveyed to Hassell. The will of Richard Davis, Sr., probated July Term, 1822, devised his lands to his sons, Thomas and Richard Davis, Jr., and under decree of court Richard Halley, adminis- (4) trator of Richard Davis, Sr., 4 September, 1823, sold "the lands of Richard Davis," among them "1,300 acres, the *residue* of said (Collins) tract of 3,000," and executed title to the purchaser, Enoch Hassell. During all the years from 1823 down to the beginning of this action the plaintiffs and those under whom they claim have exercised no ownership over the *locus in quo*, set up no claim to it and paid no taxes upon it. His Honor correctly told the jury that if they found the

facts to be as testified to by the witnesses to find the issue as to title against the plaintiffs. The land was sold to pay the debts of Richard Davis, Sr., and the defendant bought this land years ago from the State Board of Education and paid for it. There was no evidence to warrant the jury in finding a verdict for the plaintiffs.

No error.

WALKER, J., dissenting.

STATE EX REL. M. G. WRIGHT, RELATOR, v. C. C. SPIRES.

(Filed 25 February, 1910.)

Elections—Ballots Prescribed—Difference in Size—Device.

When the statute contains directions to be observed at the count of the ballot, and expresses the classes of ballots to be excluded from the enumeration and declared void, and a charter empowers the board of aldermen of a city to determine upon the size of the ballots to be used, without declaring ballots of other sizes to be void, an election of an alderman receiving a majority ballot is not void by reason that the ballots for him were cast on paper 1½ x 3 inches, when the size prescribed was 1 x 3 inches. The mere difference in such sizes is an irregularity, and may not be regarded as a device to be condemned and rejected.

APPEAL from *Ward, J.*, September Term, 1909, of PASQUOTANK.

Quo warranto, to try the title to the office of Alderman of the City of Elizabeth City. The election was held on 11 May, 1909, pursuant to the charter of the city, at which the relator, M. G. Wright, and C. C. Spires were opposing candidates for election as aldermen of the Seventh Ward in said city. The relator received 66 votes, the defendant 44 votes. The judges of the election certified this result to the board of canvassers of the election. This board rejected all the ballots cast for Wright and declared the defendant duly elected; and he was duly admitted to the office, and now holds an enjoys its privieges and emoluments. After obtaining the consent of the Attorney-General, the relator brougt this action to recover the office. It is admitted in the answer as one of the causes of objection to relator's election (and no other is set out in the answer or suggested in the evidence), that "the ballots cast for the relator were not as prescribed by law, and that they were 1½ x 3 inches in size, instead of 1 x 3 inches in size, which size was prescribed by law." The evidence disclosed that the board of alderman had prescribed the size of the ballot to be 1 inch wide by 3 inches long; and the ballots cast for relator differed from this size, as set out in the answer.

(5)

His Honor instructed the jury that if they found the facts to be as stated above, then they should answer the issues in favor of the plaintiff. This was done, and judgment was rendered declaring plaintiff to have been duly elected, and entitled to the office, and ousting the defendant therefrom.

The defendant excepted to his Honor's refusal to nonsuit the plaintiff, and to the instruction given, and appealed to this Court.

J. B. Leigh and Pruden & Pruden for plaintiff.
G. J. Spence and Aydlett & Ehringhaus for defendant.

MANNING, J. The particular provision of the charter of Elizabeth City pertinent to the question presented by this appeal is section 22, chap. 290, Private Laws 1909, and reads as follows: "All ballots shall be printed or written, or partly printed and partly written, upon white paper, and shall be without device, mutilation or ornamentation, the size of the ballots to be fixed by the board of aldermen at same meeting at which election is called."

Section 25 contains the following directions to be observed at the count of the ballots: "And if there shall be two or more ballots rolled up together, or any ballot shall contain the names of more persons than the elector has the right to vote for, or shall have a device or ornament upon it, in either of these cases such ballot shall not be numbered in taking the ballots, but shall be void, etc."

It will be observed that these sections of the charter of Elizabeth City are nearly identical with sections 4344 and 4347, Revisal of 1905. This section 25 of the charter and 4347 of Revisal par- (6) ticularly specifies the classes of ballots to be excluded from the enumeration and to be declared void; but in these classes of ballots to be rejected are not specified those varying *in size* from the prescribed size. This defect must, we think, therefore be regarded as an irregularity, that will not avoid the ballots, unless the difference in size is so pronounced as possibly to be regarded a *device,* and, as such, to be condemned and rejected. *Baxter v. Ellis,* 111 N. C., 124.

In Paine on Elections, sec. 454, it is held a ballot, written or printed on colored paper, cannot be received, under a statute requiring all ballots to be "written or printed on plain white paper." *State v. McKinnon,* 8 Ore., 493. In *Kerr v. Rhodes,* 46 Cal., 398, the Court says: "A ballot cast by an elector in good faith should not be rejected for failure to comply with the law in matters over which the elector had no control, such as the exact size of the ticket, the precise quality of the paper, or the particular character of type or heading used, where the law has provisions to that effect; but if the elector willfully neglect to comply with

requirements over which he has control, such as seeing that his ballot, when delivered, is not so marked that it may be identified, the ballot should be rejected."

In McCrary on Elections, sec. 190, the learned author says: "If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the Legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done, within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election." *DeBerry v. Nicholson,* 102 N. C., 465; *Hendersonville v. Jordan,* 150 N. C., 35; *Younts v. Comrs.,* 66 S. E. Rep., 575; *DeLoatch v. Rogers,* 86 N. C., 357.

We do not think, therefore, that the difference in the size of the tickets used by the electors, in casting their votes for the relator, from the prescribed size, was such difference as rendered void the ballots so cast; and we conclude that his Honor's rulings were correct, and in the trial there was

(7) No error.

Cited: *Hill v. Skinner,* 169 N. C., 409; *Bray v. Baxter,* 171 N. C., 9.

ALLEN K. SMITH v. ISABELLA R. FULLER ET AL.

(Filed 25 February, 1910.)

1. Mortgagor and Mortgagee—Satisfaction, Entry of—Discharge.

The entry of satisfaction of a mortgage on the books in the office of the register of deeds by the proper person is conclusive of the fact of its discharge and satisfaction as to third parties.

2. Same—Purchaser—Notice Implied.

When executors sell certain lands to make assets to pay debts, the lands are bid in by the widow at a fair price, and one of the executors charges himself therewith in his account, makes deed to the widow and takes a mortgage back for the purchase price, and after the lapse of years buys the lands from the widow at a fair price and at the time cancels the mort-

gage, the widow and her son remaining in possession as tenants and paying rent therefor, his vendee is not, by the former relationship of mortgagor and mortgagee and the recorded but canceled mortgage deed, impressed with notice of any equities *dehors* the deeds existing between him and the widow.

3. Mortgagor and Mortgagee—Deraigning Title—Mortgage Deed—Equities—Notice.

When in deraigning title, one deed refers to another, the purchaser is constructively bound by all that the deed referred to would have disclosed, and he buys subject to any infirmity there apparent. So, likewise, where an infirmity appears in a deed constituting a necessary link in his chain of title.

4. Mortgagor and Mortgagee—Interpretation of Deeds—"Habendum"—Reference to Deeds—Equities—Implied Notice.

F. mortgaged certain lands to W., and thereafter W. bought the land from F. by deed at a fair price and canceled the mortgage of record. Thereafter W. sold to S. While some of the words in the granting clause of the deed of W. to S. seemed to be those of a quitclaim deed, the *habendum* and *tenendum* clause were in the usual words of bargain and sale, and the warranty clause referred to the deed of F. to W., which was absolute and unconditional in form. The word "quitclaim" was not used: *Held*, (1) the *habendum* and *tenendum* clause was used to enlarge the estate granted; (2) the language used did not put S. upon implied notice of any equities existing between F. and W. by reason of the mortgage from the one to the other, there being no reference to the mortgage deed.

APPEAL from *Lyon, J.*, March Term, 1909, of JOHNSTON. (8)

By order of reference theretofore made, the action had been referred to F. A. Daniels, Esq., to report his conclusions of fact and law to the court. The referee, after notice, took evidence and reported the same with his findings of fact and conclusions of law, to which, being adverse to the plaintiff, he excepted.

The defendants contended that the ancestor of plaintiff purchased with notice of the equity of the defendant Isabella R. Fuller; that the registration books showed the relation of mortgagor and mortgagee between the said Isabella R. Fuller and T. H. Whitley, the vendor of the plaintiff's ancestor, and that in equity plaintiff was bound by such relationship and was subject as his vendor to be held to an accounting for rents and profits received by his vendor.

The defendants further contended that the deed from T. H. Whitley to plaintiff's ancestor was itself notice of their equity against plaintiff's vendor.

It was admitted that Joseph Fuller died seized and possessed of the tract of land in controversy; that he left a will which was duly probated, in which he directed that his debts be paid and the remainder of his estate be divided equally between his wife, Isabella R. Fuller, and his

children, six in number, charging the share of one with a named advancement, and the share of one with a certain sum in excess of the others. He appointed his son, Frank G. Fuller, and his son-in-law, T. H. Whitley, executors, and directed that all his property, real and personal, be sold at public sale by his executors.

The testator was largely indebted at his death, and his widow dissented from his will. The administration proceeded, and no dower in his real estate being allotted to the widow in the tract of land which is the subject of this action, the executors advertised the land for sale pursuant to the powers in the will, the sale being regularly advertised to take place at the courthouse door in Smithfield, when and where, by arrangement, the widow became the last and highest bidder for the sum of $1,500—a reasonably fair price for the land, and a sum a little more than sufficient to pay the debts of the testator, except the amount due T. H. Whitley, and the sum of $300 due upon a judgment of doubtful validity.

The deed was made to Mrs. Fuller, and she, not having the money to pay for the land, T. H. Whitley, her son-in-law and one of the executors, loaned her the money and charged himself as executor with it in his account filed with the clerk. The deed to Mrs. Fuller was dated 7 January, 1895, the day of sale, and was recorded 11 March, 1896. Mrs. Fuller executed on the same date, 7 January, 1895, a mortgage on the land to T. H. Whitley, for $1,800—$1,500 the purchase price and $300 the amount of the doubtful judgment, which deed was recorded 11 March, 1869, and the defendant F. G. Fuller, son of Mrs. Fuller and co-
(9) executor, was the witness to the mortgage deed and proved the same.

At this time the said Whitley seems to have been a man of some means and credit, and was looked upon by Mrs. Fuller as a trusted adviser and her principal reliance for support.

As the sale at which Mrs. Fuller purchased was a public sale, duly advertised, we must assume the price she bid was a fair price for the land, and it was so according to the evidence reported by the referee, though there is no finding by him on this matter and no question of its inadequacy is raised by the defendants.

Subsequently, more than four years thereafter, on 12 April, 1899, Isabella R. Fuller executed a deed in fee simple to T. H. Whitley, which deed recited a consideration of $2,000, and was duly recorded on 20 April 1899, the subscribing witness to this deed and by whom it was proved being F. G. Fuller, the son of the grantor.

On 28 December, 1903, nearly five years thereafter, T. H. Whitley and wife conveyed the land to Allen K. Smith, plaintiff's ancestor, for the recited consideration of $2,500, which deed was recorded on 29

December, 1903, the said deed being as follows (omitting parts not material to this action): "That said T. H. Whitley and wife, Ida B. Whitley, in consideration of $2,500 to them paid by Allen K. Smith, the receipt of which is hereby acknowledged, hath bargained and sold and by these presents do bargain, sell and convey to said Allen K. Smith and his heirs and assigns all of their right, title and interest in and to a certain tract (describing same by metes and bounds), to have and to hold the aforesaid tract or parcel of land and all privileges and apurtenances thereto belonging, to the said Allen K. Smith, his heirs and assigns, to his only use and behoof forever. The said T. H. Whitley and wife, Ida B. Whitley, by this deed relinquish all right, title and interest in and to the said land by virtue of the above deed and no further, said deed made by Isabella R. Fuller."

The mortgage from Mrs. Fuller to Whitley was canceled by Whitley and marked by him satisfied on the record, on 20 April, the day the deed to him was filed for registration.

After the deed to Whitley was executed, the defendant F. G. Fuller rented the land from Whitley and paid him rent therefor, and Mrs. Fuller continued to live in the dwelling-house with her son, she not having ceased to live there since the death of her husband. The defendant Fuller was a tenant of Whitley at the time Whitley executed deed to Allen K. Smith. The summons in this action was issued 8 January, 1904, within fifteen days after the deed was executed. (10)

In addition to the above facts, the referee found the following additional facts: Mrs. Fuller dissented from her husband's will, and at the public sale the land was bid in for her at $1,500; deed was made to her by the executors; that she did not pay one dollar of the purchase money; that Whitley advanced for her all the purchase price; that she executed a mortgage to him for $1,800; that the $300 included was the amount of a judgment against her husband which had never been paid; that Whitley received the rents from the land; that she and her son lived on the land; that the land depreciated in condition; that she had nothing; that she was about 72 years old and depended for advice upon her son-in-law, Whitley; that she never paid anything on the debt; that at the time she made the deed her son-in-law told her he needed money; that she hesitated about signing the deed; that he did not produce any statement of account showing how much she owed; that he told her if she did not wish to make the deed, not to do so; that she said that if she must she would rather for him to have it than any one else; that her son, F. G. Fuller, was present and witnessed the deed; that Whitley did not pay her anything, and no receipts passed between them; that the rents received by Whitley would very nearly pay the debt due him, and

if the fair rental value of the land were applied, she owed him on 1 January, 1905, (exclusive of taxes and repairs), $236; that she had not paid any taxes on the place.

It seems that from the time Mrs. Fuller purchased, 7 January, 1895, to 28 December, 1903, the date of the deed to plaintiff's ancestor, she did not mention to any one that she asserted any claim of title or interest in the real estate.

The referee based his conclusions of law upon the relationship of mortgagor and mortgagee between Mrs. Fuller and Whitley and the presumption of this continued relationship. That the registration of the mortgage deed, though canceled nearly five years before the purchase by plaintiff's ancestor, was sufficient to put him on notice; and that while he paid a fair price for the land, he was affected with notice of Mrs. Fuller's equities and liable to account therefor for all the rents received by Whitley.

Allen K. Smith, Whitley's vendee, died after this suit was commenced, and the present plaintiff, his only heir at law, was made party.

His Honor held, upon the exceptions to the referee's report filed by plaintiff, that plaintiff's ancestor was a purchaser for value and without notice of Mrs. Fuller's equities, if any, and gave judgment
(11) for plaintiff, from which Mrs. Fuller appealed to this Court.

Pou & Brooks, E. S. Abell, John A. Narron, and T. H. Calvert for plaintiff.

F. S. Spruill and Aycock & Winston for defendant.

MANNING, J. The defendant Mrs. Isabella R. Fuller admits that the public sale of the land of her husband by his executors was a proper and legal exercise of their powers under his will; that the deed to her was regular and vested in her the legal title to the fee in said land; that she did not pay any part of the consideration recited in the deed to her, but her son-in-law, Whitley, advanced the money for her and in his account as executor charged himself with said sum and accounted for its disbursement. Mrs. Fuller executed a mortgage to Whitley to secure the payment of the purchase money advanced by him. In 1899, not having herself, as she admits, paid a cent of the mortgage debt, she made a deed to Whitley, witnessed by her son, by which she conveyed to him the fee simple in said land, and on the day the deed was offered for probate, Whitley canceled of record the mortgage. Whitley took possession of the land and F. G. Fuller rented it from him; he paid rent therefor and Mrs. Fuller lived with her son. In December, 1903, Fuller still occupying the land as tenant, Whitley sold for value—a fair and reasonable price—to Allen K. Smith.

It is not charged that Smith had any notice other than such as the law charged him with by reason of the recorded deeds and his own deed from Whitley disclosed. Assuming that Smith, before purchasing, examined the records of the county in which the land is situate, to ascertain his chain of title and the existing liens affecting the title, these records would have been discovered: (1) the will of Joseph Fuller; (2) the dissent therefrom of his widow, Isabella R. Fuller; (3) the deed from his executors (executing a power of sale) to Isabella R. Fuller; (4) the deed from Mrs. Fuller to Whitley for $2,000; and (5) the deed from Whitley to himself, referring to the deed from Mrs. Fuller. It is not denied that the deed from Mrs. Fuller conveyed in form and in terms the unconditional fee simple in the land.

If Smith had inquired of the man in actual possession, he would have ascertained the following facts: (1) That Frank G. Fuller, the coexecutor of Joseph Fuller, the son of Mrs. Isabella R. Fuller, the subscribing witness to her deed to Whitley, occupying the land as the tenant of Whitley and paying him rent as tenant, and his mother (through whom all the defendants would work out their claims and equities) living with her son, in apparent contentment, and demanding (12) nothing except that she be permitted to live at the old place and in her old home until her death; that the relation of landlord and tenant between Whitley and Fuller had continued for more than four years without dispute and without the suggestion of any other right or equity. The examination of the tax books would have disclosed to Smith the payment of taxes by Whitley and the listing of the land by him.

The answer of the defendants expressly admits that Whitley was in possession of the land; that his possession was uninterrupted and that he received the rents and profits; and the defendants seek, by and through this admitted possession of Whitley, to charge him and his vendee—the plaintiff—with the rents and profits; and, in this way, they claim that the mortgage debt has been practically discharged and they have thus become entitled to the land.

Conceding the soundness of the principle established by the decided weight of authority, that possession by a person other than the vendor, when such possession is open, notorious and exclusive, puts a purchaser upon inquiry and is notice of every fact which he could have learned by proper inquiry (as held by this Court in *Edwards v. Thompson,* 71 N. C., 177; *Staton v. Davenport,* 95 N. C., 12; *Tankard v. Tankard,* 79 N. C., 54; *ibid.,* 84 N. C., 286; *Bost v. Setzer,* 87 N. C., 187; *Johnson v. Hauser,* 88 N. C., 388; *Mfg. Co. v. Hendricks,* 106 N. C., 485; *Patterson v. Mills,* 121 N. C., 258), yet the admitted actual possession was consistent with the paper title, and the possession of *plaintiff's vendor* was open, notorious and exclusive. It is therefore clear that an inquiry

by the plaintiff as to the actual possession of the land and the character of that possession would not have discovered to him any right or equity inconsistent with his vendor's legal title; the possession followed the legal title and was in harmony with it. Notice by possession of lands never extends beyond the rights of the occupant and of those under whom he claims. *Roll v. Rea,* 50 N. J. L., 264.

It is not contended that the present plaintiff's ancestor, the vendee of Whitley, had any other notice than such as the record disclosed and such as the law impressed upon him by such records, to wit, constructive notice.

It is not shown by the evidence nor is it alleged that the vendee, Smith, even made an examination of the records, but his title would nevertheless be affected by any infirmity disclosed thereby.

(13) It is not contended that the consideration recited in any of the deeds is inadequate and certainly not so inadequate as to put the purchaser upon inquiry, as in *Durant v. Crowell,* 97 N. C., 367. It is, however, earnestly contended that the presence on the records of the canceled mortgage of Mrs. Fuller to Whitley fixed the plaintiff, Smith, the purchaser, with notice of the relationship of mortgagor and mortgagee between them, and the subsequent deed from this mortgagor to this mortgagee was presumptively fraudulent, and Smith, therefore, was bound to inquire at his peril as to whether the deed was executed freely, without oppression and for a fair and reasonable consideration.

It will be observed that the entry of satisfaction of the mortgage on the record of its registry was made by Whitley, the mortgagee; was in proper form, and was made more than four and one-half years before Smith purchased. This is not the case of the attempted cancellation of a mortgage or deed of trust by a person not authorized to make the entry of satisfaction. An existing, uncanceled mortgage, properly admitted to registration, is constructive notice to subsequent purchasers of the mortgaged premises of the rights of the mortgagee; but a mortgage or deed of trust properly canceled by a person authorized to cancel it, is notice to no one; it continues no lien upon the property. On the contrary, the entry of satisfaction by the proper person is conclusive of the fact of its discharge and satisfaction. A mortgage registered in a manner not authorized by law has been frequently held by this Court to be neither actual nor constructive notice. *De Courcy v. Barr,* 45 N. C., 181; *Todd v. Outlaw,* 79 N. C., 235; *Duke v. Markham,* 105 N. C., 131, and cases approving that case cited in the annotated edition.

The purpose of requiring registration of a mortgage is to give notice to others dealing with the mortgaged premises during the life of the mortgage, of the rights of the mortgagee and the transfer of the title of

the mortgaged premises to the mortgagee. *Collins v. Davis,* 136 N. C., 106. It is no purpose of the registry acts to protect the rights of the *mortgagor.* Upon what principle can a subsequent purchaser of property, once covered by a mortgage, but which, long before he deals with it, has been properly canceled and the entry of satisfaction properly entered on the record, be held to a notice of it, in his examination of the records to ascertain the then condition of the title of the property he is negotiating to purchase? If at that time it is not an existing charge upon the property (and the entry of satisfaction by the proper person is to him conclusive that it is not), he has absolutely no concern with it; and no statute and no adjudication of any court that we have discovered requires him to observe it, or affects him with constructive notice of its presence on the books, and assuredly none of any equities *dehors* the deed growing out of a relation once existing, (14) but by the entry of satisfaction properly made conclusively determined, as to him. It was never contemplated that such a burden should be imposed upon a person negotiating for the purchase of real property, that he should examine not only the record of cancellation of all recorded mortgages, but should read them and be affected with notice of the relationship of mortgagor and mortgagee created by them, and to inquire as to the facts and circumstances and conditions of such relationship. This result would be contrary to that public policy so well expressed by *Avery, J.,* in the following language: "It has been repeatedly declared to be sound public policy to remove every obstacle to the ready sale of real estate upon the market, in order to benefit commerce and thereby promote general prosperity. It was in furtherance of this object that our General Assembly, but a few years since, so altered our registration laws that persons proposing to purchase land could be well advised as to the title by a careful inspection of the public records." *Hughes v. Hodges,* 102 N. C., 236 (240). The same policy was expressed with equal force and clearness by *Connor, J.,* in *Wood v. Tinsley,* 138 N. C., 507. "The purpose of the statute was to enable purchasers to rely with safety upon the examination of the records and act upon the assurance that, as against all persons claiming under the 'donor, bargainor or lessor,' what did not appear did not exist. That hardships would come to some in applying the rigid statutory rule was well known and duly considered. . . . The change in our registration laws was demanded by the distresssing uncertainty into which the title to land had fallen in the State. No one could say for himself or advise others with any certainty or safety in regard to a title."

It will be observed that neither in the deed from Mrs. Fuller to Whitley nor from Whitley to Smith is there any reference by recital or otherwise to the mortgage. It was not necessary to look for it in deraigning

title; it was not a muniment of title. The other admitted facts in this case were calculated to negative its existence and to throw plaintiff's ancestor off his guard, rather than put him on notice.

It is undoubtedly true that if, in deraigning title, one deed refers to another, the purchaser is constructively bound by all that the deed referred to would have disclosed, and buys subject to any infirmity there discoverable. Such was the decision of the Supreme Court of Kansas in *Frazier v. Jenkins,* 57 L. R. A., 575, and the Michigan Court in *McKay v. Williams,* 57 Mich., 547; *Winter v. Truax,* 87 Mich., 324.

(15) In *McKay v. Williams, supra,* it appeared that an attorney in fact had executed a deed to the land of his principal and on the same day took back a deed to himself and a few weeks thereafter conveyed the land to another. It was thereupon held that the deed by the attorney and the deed back to him were *prima facie* fraudulent on their face; that they did not show the title had passed; that they imparted notice to the subsequent purchaser, and that title could be recovered in ejectment. The other two cases cited were conveyances by a guardian of his ward's land and reconveyances by the purchaser to the guardian. *Froneberger v. Lewis,* 79 N. C., 426. It will be observed that the vitiating fact necessarily appeared in deraigning the title, on the face of the deeds in the chain of title, and in one of the muniments of title (*Holmes v. Holmes,* 86 N. C., 205; *Whitaker v. Fuquay,* 127 N. C., 64). This fact alone is sufficient to distinguish those cases from the case now under consideration.

Another point earnestly urged upon our attention by the defendants is that the deed from Whitley and wife to Allen K. Smith is a quitclaim deed, and being such, is notice to him (Smith) of the equities between Mrs. Fuller and Whitley. While some of the words of the granting clause of the deed would seem to support this contention, the *habendum* and *tenendum* clause is in the words of the usual bargain and sale conveyance, "to have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging, to the said Allen K. Smith, his heirs and assigns, to his only use and behoof forever." If the granting clause purports to grant only the right, title and interest of the grantors, it will be observed that the word "quiclaim," the usual and appropriate word, is not used, and one of the purposes, as laid down by Blackstone, of the *habendum* and *tenendum* clause is to enlarge the estate granted. The warranty clause refers to the deed of Mrs. Fuller to Whitley—a deed absolute and unconditional in form, conveying the fee simple with full covenants of warranty of title; and Whitley and wife warrant the title only as conveyed by this deed. It may be they desired to insert a special and not a general warranty of title, but we cannot see

how the language used can be fairly interpreted to convey notice to the vendor's purchaser of the vendor's fraud in acquiring the very land sold.

In *Mansfield v. Dyer,* 131 Mass., 200, the Court said that taking a quitclaim deed is not of itself sufficient to charge the grantee with notice that the grantor's title was procured by fraud. In *Moelle v. Sherwood,* 148 U. S., 21, the Court says: "The doctrine expressed in many cases, that the grantee in a quitclaim deed cannot be treated as a *bona fide* purchaser, does not seem to rest upon any sound principle."

There is no question raised by the defendant Mrs. Fuller of (16) the effect of the deed from the executors to her upon her right of dower, or the effect of her deed to Whitley or of Whitley's deed to the plaintiff's ancestor upon her right of dower. After her dissent was filed, it seems that Mrs. Fuller took no further steps to have her dower allotted to her in the manner prescribed by law.

After a careful consideration of all the authorities cited by the learned counsel for the defendants in their well-considered brief, we have reached the conclusion that there was no error in the judgment of the court below, and the same is

Affirmed.

Cited: Lumber Co. v. Hudson, 153 N. C., 100; *Thompson v. Power Co.,* 154 N. C., 21; *King v. McRackan,* 168 N. C., 623.

W. H. KEATON ET AL. v. SOPHIA GODFREY.

(Filed 25 February, 1910.)

1. County Commissioners—Proceedings to Lay Off Roads—Appeal, When Taken—Trial de Novo.

An appeal from the final order of the county commissioners in proceedings to lay off a road carries the whole matter to the Superior Court for trial *de novo.* The appeal is properly taken from the final order of the board confirming the report of the jurors.

2. County Commissioners—Proceedings to Lay Off Roads—Parties Jurors—Disqualifications.

A petitioner in proceedings to lay off a road is disqualified to act as a juror, being a party to the proceedings; and, when such has been done, it is the duty of the county commissioners to set aside the report and direct the summoning of another jury.

APPEAL from *Ward, J.,* Fall Term, 1909, of PERQUIMANS. Tried upon an appeal by the defendant from the order of the county commissioners laying out public road across her lands.

The defendant moved the court to dismiss the report of the jury and to refer the matter to the county commissioners to appoint a new jury to lay off road, for that one of the jury was one of the petitioners. Overruled, and defendant excepted.

The defendant Godfrey then tendered an issue as to whether the proposed road was for the public good and convenience. The court, being of the opinion that the defendant Godfrey, not having appealed from the order to lay off the road, had waived her right to submit said issue, declined to submit said issue. Defendant Godfrey excepted.

The court then submitted the issue as to damages. The court then signed the judgment set out in the record. Defendant excepted,
(17) and appealed.

W. M. Bond and P. W. McMullan for plaintiff.
Pruden & Pruden, J. S. McNider, Charles Whedbee for defendant.

BROWN, J. It has been ruled by this Court that an appeal lies generally from the final order of the county commissioners in a proceeding to lay off a road. When taken, it carries the whole proceeding to the Superior Court for trial *de novo*. *Lamb v. Love,* 109 N. C., 305. The proper time to appeal is when the commissioners have confirmed the report of the jurors who laid off the road and assessed damages. *Sutphin v. Sparger,* 150 N. C., 518.

The sheriff erred in selecting R. H. Welch, one of the petitioners, as one of the jurors to lay off the road and assess damages. When that fact was made known to the commissioners they should have set aside the report and directed the summoning of another jury.

Welch was practically a party to the proceeding and disqualified to act as a juror in his own case. It is not given to mortals generally to hold the scales of justice with untrembling hand when their own interests are being weighed.

"When self the wavering balance shakes, 'tis rarely right adjusted."

As the case is to be tried *de novo* in the Superior Court, it is not necessary to remand it to the commissioners to correct the error.

New trial.

Cited: *S. v. Davis,* 159 N. C., 458.

(18)

WALTER C. CREDLE v. MARY A. BAUGHAM AND HER HUSBAND, WM. P. BAUGHAM.

(Filed 25 February, 1910.)

1. Partition—Judicial Sale—Guardian and Ward—Appointment of Guardian—Ward's Knowledge—Innocent Purchaser.

The title of a purchaser of lands for value at a sale under partition proceedings is not affected by the fact that one of the parties was a minor residing outside of the State, and who was unaware of the sale or any proceedings, when it appears that the proceedings were instituted in the proper court of the county wherein the land lay, having jurisdiction, and that a guardian has been duly appointed to represent the interest of the minor; that all parties were represented by attorney, and the proceedings were regular in all respects and confirmed according to our laws.

2. Guardian and Ward—Judicial Sale—Purchase by Ward—Personal Interest—Innocent Purchaser.

While, ordinarily, a guardian may not purchase the property of his ward at a judicial sale, he may do so where he has a personal interest in the land sold and it is necessary to protect his own interest; and the title of his vendee for value will not be disturbed by reason thereof.

APPEAL by plaintiff from *Ward, J.*, December Term, 1909, of BEAUFORT.

This action is brought to convert the *feme defendant* into a trustee for plaintiff's benefit in respect to a one-fourth interest in lot No. 22, Respass Town, Washington, N. C., formerly the property of Anne Eliza Credle, now deceased, sold for partition, purchased by and conveyed to Oliver Credle, and conveyed ultimately through *mesne* conveyances to the defendant Mary A. Baugham.

These issues were submitted:

1. Does the defendant Mary A. Baugham hold the lands described in the complaint in trust for the plaintiff? Answer: "No."

2. Is the plaintiff the owner in fee of the lands described in the complaint, or any part thereof? Answer: "No."

The court charged the jury that if they believed all of the evidence, and found the facts to be as testified to, to answer both issues "No." To this charge the plaintiff excepted.

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

Ward & Grimes for plaintiff.

W. C. Rodman, Small, MacLean & McMullan for defendants.

BROWN, J. The property in controversy belonged to Anne Eliza Credle, from whom it descended to plaintiff and her three other children, one of whom is Oliver Credle.

Plaintiff removed to Florida in 1889, and has resided in
(19) Florida ever since. He came of age in 1899. In 1892 Oliver Credle was appointed by the clerk of the Superior Court of Beaufort County as guardian of W. C. Credle, and duly qualified as such. On 10 January, 1894, an *ex parte* special proceeding was instituted in the Superior Court of said county by Charles F. Warren, attorney for petitioners, praying for a sale of the lot for partition, and entitled Oliver Credle and Thomas B. Credle, Annie B. Credle, and Walter Credle, the last three being infants, by their guardian, Oliver Credle, *ex parte*. Under formal decree approved by a judge of the Superior Court, the lot was sold by Charles F. Warren, commissioner, and purchased by Oliver Credle, and the sale duly confirmed. The plaintiff's share of the net proceeds was adjudged to be paid to the guardian, Oliver Credle, and was so paid by the commissioner. A deed was executed to Oliver Credle, who conveyed afterwards to one Hanniford, and thence by *mesne* conveyances the lot was conveyed to Mary A. Baugham on 22 March, 1902.

The plaintiff contends:

1. That the proceedings are void as to him, because the clerk of the Superior Court of Beaufort County had no jurisdiction to appoint a guardian for him or his property—he being a resident of Florida.

It is undoubtedly true that the courts of this State cannot legally appoint guardians for the persons of nonresident minors, nor of their property, unless it is situated, as the lot in question, within the State. But it is well settled that when a minor, who is a nonresident of the State, owns property within that State, the proper courts of the latter within the county where the property is situated have jurisdiction to appoint a guardian to represent the minor in the management and control of such property. 21 Cyc., 26; *People v. Medart,* 166 Ill., 384; *Barnswick v. Dewey,* 13 Ill. App., 111. Nor is it essential to the validity of the appointment of such guardian that the minor should have knowledge of it, nor that he should have knowledge of the institution of the special proceeding for partition. *Tate v. Mott,* 96 N. C., 19.

Our courts have invariably protected innocent purchasers in a proceeding of this character which appears to be regular on its face and where the infant was represented by counsel and the sale duly confirmed according to our laws. Even in the case of a foreign guardian, who has no power to sue in the courts of this State in behalf of his ward, but does so, our courts will recognize him as "next friend" to the infant and hold the proceedings valid, although he may be described therein as "guardian." *Tate v. Mott, supra.* See also, generally,
(20) *Harrison v. Hargrave,* 109 N. C., 346; *Herbin v. Wagoner,* 118

N. C., 656; *Williams v. Johnson,* 112 N. C., 424; *Sutton v. Schonwald,* 86 N. C., 198; *Smith v. Gray,* 116 N. C., 311.

It is contended, (2) that because of the purchase by Oliver Credle at the sale under the special proceedings set out in the record, he being guardian for the plaintiff, equity should declare him trustee for the plaintiff, which trust should descend through the *mesne* conveyances to the *feme* defendant in this action. This proposition is based upon the theory that the guardian purchased his ward's property, and that the *feme* defendant, in deraigning her title, is fixed with such knowledge.

It is undoubtedly true that one who occupies a fiduciary relation, such as guardian, administrator, executor, trustee and the like, cannot, ordinarily, legally purchase the property of the *cestui que trust,* whether the sale be made by himself or another. But to this wholesome doctrine there is an admitted exception, and that is, where the trustee has a personal interest in the property sold. In such case he must have the right to protect his own interest and, if necessary, to buy in the property. *Froneberger v. Lewis,* 79 N. C., 436, and cases cited.

It was held in *Lee v. Howell,* 69 N. C., 202, that a guardian could legally purchase his ward's property at a sale by the clerk and master, but we think that this decision is properly qualified and explained by the subsequent case of *Froneberger v. Lewis, supra.*

In the case at bar it appears that Oliver Credle owned as large an interest in the lot as his ward; that the commissioner was the attorney for all the tenants in common, and that upon this recommendation, with all the facts before the court, the sale was duly confirmed. Under such conditions the sale cannot now be declared void, or even voidable.

The judgment of the Superior Court is

Affirmed.

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(21)

WASHINGTON HORSE EXCHANGE v. WILSON & McCOY.

(Filed 25 February, 1910.)

Evidence—Attachment—Examination of Books—Testimony as to Contents, When.

In proceedings in attachment levied on the proceeds of a draft with bill of lading attached, drawn on plaintiff by defendants in payment for a carload of goods, the draft made payable to a bank, an intervenor, it is competent for the cashier of the bank to testify that the bank books showed that the bank purchased the draft for value before sending it out for collection, and that, at the time the attachment was levied, it was

the property of the bank; though he had no personal knowledge of the transaction and had based his testimony upon an examination of the books of the bank. This is of necessity so in a case when the books are without the State, and beyond the jurisdiction of the court, and could not well be introduced without stopping the business of the bank.

APPEAL by plaintiff from *Ward, J.*, December Term, 1909, of BEAUFORT.

The following issue was submitted to the jury: "Is the interpleader, First National Bank of Terre Haute, Indiana, the owner of the proceeds of the draft in question?" The jury answered the issue, "Yes."

The facts are stated in the opinion of the Court.

Bragaw & Harding for plaintiff.

W. C. Rodman for the intervenor, the First National Bank of Terre Haute.

BROWN, J. Plaintiff instituted suit in the court of a justice of the peace against defendant, and caused attachment to be issued, which was levied upon the proceeds of a draft drawn by defendant on plaintiff, for the purchase money of a carload of hay, shipped by defendant to plaintiff. The plaintiff recovered judgment. The draft made by defendant on plaintiff was payable to the order of the First National Bank of Terre Haute, Indiana, with bill of lading attached.

First National Bank of Terre Haute intervened, alleging ownership of the proceeds of the draft. This was the only question involved in the trial in the Superior Court.

The intervenor offered the deposition of Bertis McCormick, cashier of the First National Bank of Terre Haute, Indiana, and the plaintiff in apt time objected to and moved to strike out the same, upon the ground that it was hearsay, and incompetent.

Plaintiff, at the close of the testimony of the intervenor, requested the court to charge the jury: "That upon all the evidence in this case, the intervenor, First National Bank of Terre Haute, has not proved
(22) title to the fund attached, and you will answer the issue 'No.'"

This request was refused, and the plaintiff excepted.

The learned counsel for plaintiff bases this instruction upon the theory that the court erred in admitting the testimony of Bertis McCormick, the cashier of the intervenor, and contends that if that be excluded there is no evidence that the Terre Haute bank owned the proceeds of the draft at the time they were attached.

The witness in chief testified that the draft was purchased for value by this bank before it was sent out for collection, and that at the time the attachment was levied it was the property of that bank. Upon

cross-examination witness stated that he had no personal knowledge of the transaction, as it was not done through him personally; that he had charge of the books of the bank and had examined them; that they showed that the Terre Haute bank discounted this draft on 8 August, 1907, and forwarded it for collection; that the proceeds were credited to drawers and the bank had never been reimbursed.

It is contended that the cashier's evidence was incompetent and that the books were the only competent evidence.

The books of the intervenor were in Terre Haute, Indiana, beyond the jurisdiction of the court, and could not well be introduced without stopping the business of the bank. The case cited by Major Rodman, the learned counsel for the intervenor, in his well-considered brief, decides the very point against this plaintiff. In the opinion the Supreme Court of the United States says: "The next assignment of error is the admission in evidence of such parts of the deposition of A. L. Turner and C. P. Steers as refer to what appeared or did not appear on the books of the Tioga County Bank." The Court proceeds to say: "When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination. Here the object was to prove, not that the books did, but that they did not show certain things. The results sought to be established were not affirmative, but negative. If such testimony be competent as to the former, *a multo fortiori* must it be so to prove the latter?"

We are also inclined to think that the testimony of Dumay was sufficient to take the case to the jury, but it is unnecessary to decide that point in view of our ruling upon the other. The judgment is

Affirmed.

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(23)

DARE COUNTY v. SMITH CONSTRUCTION COMPANY.

(Filed 25 February, 1910.)

1. Fraud—Contracts—Evidence—Burden of Proof.

It is incumbent upon the party alleging fraud in a contract to prove it by the preponderance of the evidence to the satisfaction of the jury, and the mere allegation of fraud with vituperative epithets has no such effect.

2. County Commissioners — Contracts — Courthouses — Inspection—Acceptance—Damages—Estoppel.

The county commissioners, having contracted for the erection of a courthouse and providing in the contract for a method of inspection and acceptance as the work progressed and when completed, which method had

accordingly been followed and the work finally accepted upon the completion of the building, without evidence of misconduct on the part of the contractor or that they were in any manner prevented from inspecting the work, are concluded from a recovery of damages alleged to be caused by the faulty construction of the building or improper material therein used.

3. Same—Subsequent Board—Incompetency—Fraud—Evidence—Burden of Proof.

The county commissioners are concluded by an acceptance by a former board of a courthouse built under a contract with a provision for inspection as the work progressed, which was inspected and accepted accordingly, and may not recover of the contractor damages alleged by reason of faulty construction and material used, upon the charge of incompetency of the former board and those appointed by it to inspect and accept the building, in the absence of affirmative proof that the contractor knowingly and deliberately took advantage of said incompetency and ignorance to deceive and mislead, and that he thereby did deceive and mislead them.

4. Contributory Negligence—Negligence Intervening—Damages.

While a person cannot take advantage of his own wrong, the court will not furnish a person a remedy for a wrong when he cannot prove a legal claim for damages without showing that his own negligence intervened between the act of the alleged wrongdoer and the result complained of, which was the real and efficient cause of the injury.

APPEAL from *Ward, J.*, Fall Term, 1909, of PERQUIMANS.

On 9 December, 1903, the commissioners of Dare County, North Carolina, contracted with the defendant in the above-entitled cause to build a courthouse for the county at Manteo, according to the plans and specifications then adopted and made a part of the contract between the parties, for which building the county agreed to pay to the defendant the sum of $16,500 in its bonds of the denomination of $500 each, except in the case of the last bond, which was to be for $1,500.

Among other things, the contract expressly required that the
(24) commissioners of the county should "appoint a committee competent to judge as to the quality and character of the material and work," to "inspect and report upon the work and material during the construction of the building"; and the committee was also required by the terms of said contract, when "any material was furnished therefor or work done which, in their opinion, was not in accordance with the plans and specifications, to notify all the parties to the contract, and the work affected by said notice was to cease and not be resumed until the matter had been settled by competent authority"; and it was further provided that if the said committee "permitted any part of the work to be completed without objecting thereto and giving notice as provided, it should be considered as an approval thereof."

It was still further provided that if a disagreement arose between the parties to said contract, in reference to the work or material, or both, the matter should be referred to a board of arbitrators, whose decision should be final, as provided in the contract; and, lastly, it was provided that "upon final completion of the work, the party of the second part (who were the commissioners of the county) should examine the same, and if completed according to contract, they should accept it and make final settlement with the party of the first part (who is the defendant in this cause).

In accordance with the terms of said contract, plans and specifications, the defendant thereafter promptly began work upon the courthouse, and continued the same until the building was finally completed in the fall of 1904; the board of commissioners, upon the execution of the contract, promptly appointed a building committee whose duty it was to inspect all material and work supplied during the construction of said building, and to ascertain whether the same was in accordance with the plans, specifications and contract, and to report to the commissioners. The committee duly inspected the materials and work as the same were supplied by the contractor, and never objected thereto, and when the building was finally completed the commissioners then examined and accepted and paid for the same, that is, on 10 October, 1904, as required by the terms of the contract. During the progress of the work the commissioners made payments to the defendant from time to time, upon the recommendation of the building committee that the material and workmanship were in accordance with the terms of said contract.

Some time after the work had been completed, accepted and paid for, the roof, which was made of metal shingles, was found to be leaking, and the defendant was notified thereof. That was the first and only notice, before the bringing of this suit, of any defects whatsoever which was given to defendant, and he immediately went to Manteo, had the roof examined, and it was agreed between the said (25) board of commissioners and the representative of the defendant that a metal-shingle roof was not practicable for that particular locality, owing to its close proximity to the ocean and the salt air, and it was then agreed to substitute for the metal-shingle roof a slate roof, it being also agreed that the county should pay to the defendant the difference between the cost of the metal-shingle roof and a slate roof; while the slate roof was being put on, the material and workmanship was likewise inspected from time to time by the building committee, and after it had been completed, it was likewise examined, approved, accepted, and the amount due was paid by the then existing board of commission-

ers on 15 May, 1905, the defendant giving bond whereby he guaranteed said slate roof against leaks and defects for the period of one year thereafter.

From 15 May, 1905, to 21 February, 1908, a period of nearly three years, no further complaint was made to the defendants that the roof or any portion of the said building was not in every respect satisfactory and as required to be under the contract and guarantee made by the defendant. On 21 February, 1908, the defendant was sued by an entirely new board of commissioners, and the county of Dare claimed that it had been damaged in the sum of $6,000 by reason of the defendant's fraud, deceit and corruption, and breach of contract, as alleged in the complaint filed in said cause. That suit was the only other notice the defendants received of any defect in the building, it being nearly four years after the competion of the building and nearly three years after the slate roof had been completed, accepted and paid for. A change of venue was taken to Perquimans, where the case was heard.

Between 9 December, 1903, when the contract was made, and 10 October, 1904, when the building was accepted and paid for, the personnel of the board of commissioners remained the same; but in the fall election of 1904 some of the members of the old board were retired and new ones elected, and such was the situation when the slate roof was finished and accepted on 15 May, 1905; but when this suit was brought an entirely new board had been elected, so that none of the old members of the board who entered into the contract, supervised and accepted the work thereunder and paid therefor, formed any part of said new board.

The board which brought this suit had nothing whatever to do with the making of the contract or the supervision or acceptance of the building or the payment therefor, and yet in the complaint which was filed it is charged that by fraud and deceit and corruption on the part of the defendant, the old board was influenced to make the contract set
(26) up in this suit, and the county paid some $6,500 more than the building was reasonably worth, and that, by said fraud and deceit, improper advantage was taken of an incompetent building committee, and the commissioners themselves were thereby induced to accept a defective building and pay the alleged exorbitant price therefor. The deceit and fraud charged against the defendant in the complaint is of the grossest character, and such is made the basis of the right of the plaintiffs in this case to disregard the final acceptance and payment for the building by the old board of commissioners, and also to make such deceit and fraud the basis of its alleged claim for damages.

The court, on motion of the defendant, entered a judgment of nonsuit, and the plaintiff appealed.

Ward & Grimes for plaintiff.
I. M. Meekins for defendant.

WALKER, J., after stating the case: We find not the slightest testimony in the record tending to show any fraud or deceit on the part of the defendant. It is not sufficient merely to charge fraud. Vituperative epithets do not prove it, but the party who alleges any corruption in the making or execution of a contract must establish his allegation by evidence, not beyond a reasonable doubt, nor even by clear and convincing proof, but by a preponderance of the testimony and to the satisfaction of the jury. There being no fraud shown by the plaintiff, the case depends for its just decision upon the ordinary principles applicable to such contracts. It was placed within the power of the plaintiff to inspect the building as the work progressed, and, moreover, it was given the authority to appoint the committee of inspection itself. The evidence shows that the county commissioners had ample opportunity to make the inspection without any interference or obstruction by the plaintiff, and if it failed to do so the fault must be imputed to the county and not to the plaintiff.

We do not understand that the board of commissioners who made the contract and were in office when the courthouse was being built, make any complaint against the contractors, who, so far as it appears in this case, were free from any blame. We must do them the justice to say that the proof acquits them of any charge involving misconduct on their part. On the contrary, they seem to have dealt leniently with the county, and they endeavored, in all respects, to comply with their contract. At least, there is no evidence sufficient to show the contrary.

We cannot better express our views of the law in this case than to quote substantially from the opinion of the court in *Pauley* (27) *Mfg. Co. v. Hemphill County,* C. C. A., 608, changing the names or titles of the parties to adapt the ruling to the precise facts of this case. The Court says: "The case as presented for our judgment shows that the defendants were nonresidents, acting entirely through their agent, and the provision in the contract which places it in the power of the plaintiff to select its own committee to act as inspectors during the construction of the building was honestly carried out in accordance with the terms of the agreement, has been of the greatest protection to both the contracting parties, and would appear to be a wise and prudent protection in the plan of said work, the actual performance of which must necessarily be delegated to the representatives of each and could not be

scrutinized by the principals of either. Every opportunity, in reason, was given to the plaintiff to secure good material and work, and the defendant was, at the same time, protected from the faults of it and enabled to correct them, and also from any complaints that might be subsequently made too late to determine their truth or falsity. The action of said arbitrator or supervisor, in the absence of any complaint made at the time, and in the manner provided in the contract, is *prima facie* evidence of compliance with the contract, and should be conclusive except upon clear and distinct proof."

That case is in point with the one under consideration and clearly sets forth the true principle which the courts apply with respect to such a contract as is now under consideration. This case is also in line with the rulings of the courts in the following cases: *R. R. v. March,* 114 U. S., 549; *Kihlberg v. U. S.,* 97 U. S., 398; *R. R. v. Price,* 138 U. S., 185.

The plaintiff's alleged right to recover on the ground that its building committee and its commissioners were incompetent and ignorant, is of no consequence in determining this case upon its merits, unless it had been shown by affirmative proof that the contractor knowingly and deliberately took advantage of said incompetency and ignorance to deceive and mislead, and thereby did deceive and mislead them. But as no such evidence was offered and no evidence of any kind even tending to show that such advantage was taken by the contractor, it is too late now for the plaintiff to complain of the incompetency of its commissioners or of the committee selected by them. The contract required the plaintiff to select a *competent committee,* capable, of course, of passing upon the character of the material and workmanship. The commissioners assumed the duties in this respect which the contract laid upon them by mutual agreement, and it was their plain duty to
(28) know, as they could have known, *before* they selected such committee, that it would be qualified to discharge the duties which the contract required of it. The commissioners not only owed it to themselves to select nothing but a competent committee, but they owed it to the county and to the contractor; and if they did not perform this duty, the contractor is not to be charged with a breach of the contract. As it now appears that the contractor exercised no influence over the commissioners in the selection of the committee or in the discharge of its duties, and as it further appears from the evidence that the committee could have seen and known all the defects mentioned in the testimony and alleged in the complaint, if there was any such breach of the contract in any particular, it was a failure of duty on the part of the county and not of the contractor, in thus selecting a committee contrary to the provisions of the contract. The county cannot escape the conse-

quences of any incompetency or neglect of duty on the part of said commissioners or committee, in the absence of fraud, even though it was clearly established that such incompetency existed.

In *R. R. v. Price,* 138 U. S., 185, already cited, the Court said: "The mere incompetency or mere neglect of the engineer does not meet the requirements of the case, unless such engineer or inspector made such gross error as to imply bad faith. We are of the opinion that the ultimate facts do not authorize the railroad company to go behind the estimates from time to time by its division engineer, which were approved and certified by the assistant engineer and chief engineer. Within a reasonable interpretation of the contract the last monthly estimates of the work assessed, followed by the acceptance by the company of the whole work, was a certificate of complete performance entitling the plaintiff to be paid in full according with the terms of the contract."

In *Coal & Iron Co. v. Gordon,* 151 U. S., 285, the Court substantially said: It is difficult to say what effect should be given an acceptance of work by the superintendent of it, if not to foreclose the parties from thereafter claiming that the contract had not been performed according to its terms. It would appear from the report and the recitals in the final decree of the court, that the main contest was over the construction of a certain guaranty in the contract that all the work was to be done in good workmanlike manner and of suitable material, and each part to be adequate, in design, strength, capacity and workmanship, for the purposes for which it was intended; that the superintendent should pass upon the work every two weeks and if to his satisfaction, it should be finally accepted by the company, so far as done; but if (29) not in compliance with the contract and to his satisfaction, as to the quality of the material and character of workmanship, the commissioners agreed to make it so as rapidly as possible.

The evidence in that case showed that the superintendent of the company made an inspection and supervised the work from time to time and approved it when, in his judgment, it was in compliance with the contract. The contractor claimed to have finished the work on 8 August, 1888, and requested its final acceptance. The president of the Sheffield and Birmingham Coal and Iron Railway Company referred the matter of final acceptance to the said superintendent, who on 18 August accepted in writing the work as completed, according to the terms of the contract. The Court held that as the work was inspected by weekly visits as it progressed, and as the whole was finally accepted on the completion of the contract, such acceptance, in the absence of fraud or mistake on the part of the superintendent, was conclusive.

The same principle is recognized in the case of *Sweeny v. U. S.,* 109 U. S., 618. In the contract which is the foundation of this suit, there

is a clause providing for the appointment of a committee to pass upon certain matters of vital interest to the parties. We are, therefore, to presume, from the terms of the contract, that both parties considered the possibilities of dispute arising between them in reference to the execution of the contract, and it is to be presumed that neither thought of the possibility that the committee might err in its determination of such matters. The parties further considered that the interests of neither party should be put in peril by disputes as to any of the matters covered by their agreement, or in reference to the terms of their agreement, or in reference to the quantity of work to be done under it, or the compensation which the plaintiff might be entitled to demand for the work and material furnished by him.

The law does not afford relief to one who suffers by not using the ordinary means of information, whether his neglect be attributed to indifference or credulity; nor will industrious activity in other directions, to the neglect of such means, be of any avail. *Andrus v. Smelting and Refining Co.,* 130 U. S., 643.

If the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of
(30) reliance on the representations made to him may be excluded. *Farrar v. Churchill,* 135 U. S., 616.

Our cases are in perfect accord with those decisions and the great weight of authority upon the important question now before us. We said in *Eagin v. Newsom,* 121 N. C., 22: "It is a very reasonable principle that the purchaser should not be entitled to an action of deceit if he may readily inform himself as to the truth of the facts which are misrepresented." See, also, *Cash Register Co. v. Townsend,* 137 N. C., 658; *Lytle v. Bird,* 48 N. C., 225; *Saunders v. Hatterman,* 24 N. C., 32. *Williamson v. Holt,* 147 N. C., 524, is directly in point upon the general question.

A person cannot take advantage of his own wrong, is a maxim of the law; but it also enforces that other rule, which is quite as well established, that the court will not constitute itself a guardian of persons of mature age and ordinary intelligence, protecting them against the result of their own negligence; and that it will not furnish a person a remedy for a wrong where he cannot possibly prove a legal claim for damages without showing that his own negligence intervened between the act of the alleged wrongdoer and the result complained of, and was the real efficient cause of the injury. *Bostwick v. Insurance Co.,* 67 L. R. A., 724. To the same effect are *Slaughter v. Gerson,* 80 U. S., 379; *Develop-*

ment Co. v. Silver, 125 U. S., 259. The recent decision in *Burgin v. Smith,* 151 N. C., 561, discusses all the questions raised in this case, and the Court ruled adversely to the plaintiff upon every one of them. If anything, this case is much stronger against the plaintiff than was that case. The two cases are, at least, substantially the same, and we do not hesitate to follow our decision in that case.

Affirmed.

Cited: Hodges v. Wilson, 165 N. C., 328.

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(31)

C. T. VAUGHAN v. K. R. WISE ET AL.

(Filed 25 February, 1910.)

Trusts and Trustees—Deeds and Conveyances—Fee—Limitations—Creditors—Repugnancy.

In a fee-simple devise with a subsequent provision that during the life of the devisee the property is to be "managed" by the trustees, paying to him the income and exempting the property from liability for his debts, the provision is repugnant to the fee, and the limitations imposed are void; and at the suit of a purchaser for value under a deed from the devisee and the trustee, judgment against the latter and in favor of the plaintiff for possession should be granted. The "Spendthrift Trust," Revisal, 1588, is inapplicable.

APPEAL from *Peebles, J.,* at Fall Term, 1909, of HERTFORD.

The will of M. W. Wise contained this provision: "8. All that portion of my property that I have given to my son K. R. Wise, I give in trust to my daughter, Eula S. Smith, and my son W. B. Wise, to be managed for him and paid to him as he may need and require it, they giving security for the faithful performance of this duty. I do not owe anything to his creditors, and therefore do not feel under any obligations to them." In section 6 of the will the testator had given all his estate, not specifically devised, "to be equally divided between my three children, K. R. Wise, W. B. Wise and Eula S. Smith." Thereafter, on 17 June, 1904, the three children above named made a voluntary partition by deed of the realty, allotting to each one-third, to be held in severalty. On 9 September, 1904, K. R. Wise gave a deed in trust on a part of his allotment to secure certain indebtedness to the plaintiff. The said Eula S. Smith and W. B. Wise refused to qualify as trustees for K. R. Wise, as specified in the will, and Isaac Pipkin was appointed trustee in their stead by the clerk of the Superior Court. *Roseman v. Roseman,* 127 N. C., 494.

On 7 March, 1907, the indebtedness to plaintiff having become due and being wholly unpaid, K. R. Wise executed a conveyance of the property embraced in his aforesaid deed of trust to the plaintiff; said Isaac Pipkin, trustee, and the daughter of K. R. Wise, at his request, joining in said conveyance. And further, at request of plaintiff, on 17 April, 1908, the trustee in the deed of trust sold the property after due advertisement, and according to the terms of the deed in trust, at which sale the plaintiff purchased and received a deed for the property.

(32) This is an action for possession of the property against K. R. Wise; his daughter, and Isaac Pipkin, the trustee, being joined as defendants.

Judgment for plaintiff upon the facts agreed. Defendant appealed.

L. J. Lawrence and Winborne for plaintiff.

D. C. Barnes for defendant.

CLARK, C. J., after stating the case: In *Mebane v. Mebane,* 39 N. C., 131, *Ruffin, C. J.,* said: "In *Dick v. Pitchford,* 21 N. C., 480, the question arose upon a conveyance of negroes to one, in trust, annually to apply the profits to the use of the donor's son, H. P., so that they should not be subject to be sold or disposed of by H. P., or the rents and profits anticipated by him, or in any manner subject to his debts; and it was held that the son's conveyance was nevertheless effectual to pass his interest as *cestui que trust* for the term of his life. . . . Whatever interest the debtor has in property of any sort may be reached by his creditors, either at law or in equity, according to the nature of his property. Terms of exclusion of the donee's creditors, not amounting to a limitation of the estate, can no more repel the creditors than a restraint upon alienation can tie the hands of the donee himself. Liability for debts ought to be and is just as much an incident of property as the *'jus' disponendi;* for, indeed, it is one mode of exercising the power of disposition. In *Bank v. Forney,* 37 N. C., 184, the Court said that, however anxiously the benefit of the donee personally may be looked to by the donor, the policy of the law will not permit property or a trust to be so given that the donee may continue to enjoy it after his bankruptcy, or, in other words, against his creditors. In *Brandon v. Robinson,* 18 Ves., ch. 429, there was a trust to pay dividends from time to time into the proper hands of a man, or on his receipt, and that they should not be grantable or assignable by way of anticipation; and it was held that this interest passed to his assignees in bankruptcy; *Lord Eldon* remarking that any attempt to give property, and to prevent creditors from obtaining any interest in it, could not be sustained; and that the gift must be subject to the incidents of property, and it could not

be preserved from creditors unless given to some one else, that is, limited over. Following that case was *Graves v. Dolphin,* 1 Sim., 66, in which estates were devised in trust to pay an annuity to the son for his personal support for life, not liable to his debts, and to be paid from time to time into his own proper hands, and not to any other person (and his receipt only to be a discharge); and *Sir John Leach* declared that, although the testator might have made the annuity deter- (33) minable by the rankruptcy of his son, yet, as he had not done that, the policy of the law did not permit property to be so limited that it should continue in the enjoyment of the donee, notwithstanding his bankruptcy; therefore, that the annuity passed under the commission."

Then, after citing divers other cases, *Chief Justice Ruffin* further says: "The foregoing cases sufficiently establish that by the use of no words of art can property be given to a man, or to another for him, so that he may continue to enjoy it, or derive any benefit from it, as the interest, or his maintenance thereout, or the like, and at the same time defy his creditors, and deny them satisfaction thereout. The thing is impossible. As long as the property is his it must, as an incident, be subject to his debts, provided only that it be tangible. The only manner in which creditors can be excluded is to exclude the debtor also from all benefit from or interest in the property, by such a limitation, upon the contingency of his bankruptcy or insolvency, as will determine his interests and make it go to some other person."

In *Pace v. Pace,* 73 N. C., 125, it said by *Rodman, J.:* "It is settled that by no form of words can property be given to a man or to another in trust for him, so that he shall not have a right to dispose of his estate in it, unless there be in the instrument of gift a provision that upon an attempted alienation it shall go over to some third person. *Dick v. Pitchford,* 21 N. C., 480; *Mebane v. Mebane,* 39 N. C., 131."

In *Ricks v. Pope,* 129 N. C., 55, it is said: "The clause against liability for the debts of Isaac (the grantee) is incompatible with and repugnant to the grant of the fee-simple estate, and void," citing several cases.

Here, there is a devise in fee simple to K. R. Wise, with a subsequent provision that during his life the property is to be "managed" by trustees, who are to pay over the income to him, as the devisor wishes the property exempted from liability for K. R. Wise's debt. The deed to plaintiff has been executed, both by him and the trustee, and in any view upon the facts agreed, judgment was correctly entered in favor of the plaintiff. This devise does not come within the terms of a "Spendthrift Trust" authorized by Revisal, 1588, which section is to be strictly construed. *Gray v. Hawkins,* 133 N. C., 1.

Affirmed.

Cited: Fowler v. Webster, 173 N. C., 444.

(34)

J. R. VOLIVAR v. RICHMOND CEDAR WORKS.

(Filed 25 February, 1910.)

1. Limitation of Actions—Suspension—Nonresident Defendants—Property—Agent.

Revisal, sec. 366, suspending the running of the statute as to nonresident defendants, applies notwithstanding the fact that defendant has property within the State and an agent therein duly appointed, upon whom process could have been served.

2. Limitation of Actions—Nonresident Defendant—Suspension—Corporations.

Revisal, sec. 366, suspended the running of the statute as to nonresident defendants, applies to nonresident corporations.

APPEAL by defendant from *Ward, J.*, at Fall Term, 1909, of TYRRELL. The facts are sufficiently stated in the opinion of the Court.

Aydlett & Ehringhaus for plaintiff.
W. M. Bond, W. W. Starke, and Shepherd & Shepherd for defendant.

CLARK, C. J. Action for damages against a nonresident corporation. More than three years elapsed after the damage was committed before this action was begun. The defendant contends that Revisal, sec. 366, suspending the running of the statute as to nonresident defendants, does not apply: (1) Because it owns property in this State. This has been decided against the defendant. *Grist v. Williams,* 111 N. C., 53. (2) Because, in accordance with our statute, the defendant had a duly appointed agent in this State, upon whom process could have been served. This contention has also been held adversely to the defendant. *Williams v. B. and L. Assn.,* 131 N. C., 267; *Green v. Ins. Co.,* 139 N. C., 309; *Williams v. R. R.,* 64 L. R. A., 794, and cases there cited. In *Green v. Ins Co.,* 139 N. C., 310, this Court, speaking of this contention, said: "That service can thus be had upon a nonresident corporation may be a reason why the General Assembly should amend Code sec. 162 (now Revisal, sec. 366), so as to set the statute running in such cases; *but it has not done so,* and the courts cannot."

Ownership of property in this State does not make a nonresident corporation or individual a resident of this State, neither does the appointment of a local agent upon whom process can be served have that effect.

(35) That the suspension of the statute applies to nonresident corporations as well as individuals was held in *Alpha Mills v. Engine Co.,* 116 N. C., 797; *Grist v. Williams,* 111 N. C., 53; *Green v. Ins. Co.,* 139 N. C., 310.

No error.

ARTHUR BURNETT v. ROANOKE MILLS COMPANY.

(Filed 25 February, 1910.)

1. Minors—Dangerous Machines—Presumption of Intelligence—Rebuttal—Evidence.

There is a presumption in law that a boy over fourteen years of age, who is employed by a cotton mill company to operate a picker machine, has sufficient intelligence to perform the work, which may be rebutted by the evidence.

2. Master and Servant—Conflicting Evidence—Dangerous Machinery—Verdict Conclusive.

In this case there was conflicting evidence as to whether the employer had sufficiently instructed the employee over fourteen years of age as to the dangerous character of a picker machine in a cotton factory at which the latter was employed to work, and there being no error in the trial, the findings of the jury are conclusive.

3. Master and Servant—Disobedience of Servant—Consequent Injury—Scope of Employment.

In disobeying the orders of his superior, in attempting to unchoke a picker machine in defendant's cotton factory, a servant acts independently, and the master is not liable in damages for an injury the servant may have received while so acting.

4. Master and Servant—Damages—Dangerous Machinery—Safe and Unsafe Methods.

Damages are not recoverable for an injury received by an employee while improperly attempting to unchoke a picker machine in defendant's cotton factory, by removing the lid from one part of it in an unsafe manner, when the proper and safe method was in removing the lid from another part.

5. Same—Instructions of Master.

When there is a safe way for an employee to do his work, and he attempts, against his employer's instructions, to do it in an unsafe manner, he cannot recover; and when under proper evidence and correct instructions the jury have so found, the verdict will not be disturbed.

6. Tales Jurors—Two Years—Disqualifications.

The disqualification of a tales juror to serve on a jury within two years is applicable only when he has "acted" thereon within that time; and when it appears that he was summoned, but was excused before he was sworn or served, an objection on that account is untenable. In this case it appeared that the juror had previously been summoned as a regular juror.

7. Procedure—Rulings—Harmless Error.

A ruling of the court upon the admissibility of evidence not seriously controverted, and which could not have prejudiced the objecting party, if erroneous, is harmless.

8. Issues—New Trial as to One—Matter of Right.

A party to an action can never, as a matter of right, have one of the issues found adversely to him by the jury set aside and demand a new trial as to that one though the court may, in certain instances and in its discretion, order a partial new trial, or a new trial as to one or more of the issues.

(36) APPEAL by plaintiff from *Guion, J.*, March Term, 1909, of HALIFAX.

E. L. Travis and Claude Kitchin for plaintiff.

W. E. Daniel, George C. Green, R. C. Dunn, and Davis & Davis for defendant.

WALKER, J. This action was brought by the plaintiff to recover for a personal injury received by him while operating a machine known as the "picker," in the cotton mill of the defendant. The machine had two lids, which were near each other; the smaller one covered the feed rolls and the larger one the "beater." The plaintiff was hurt while raising the lid for the "beater," by being caught in the machinery. Sometimes the machine is choked with cotton, but this occurs in the feed rolls, which are covered by the smaller lid, and never in the "beater," which is covered by the larger lid. The plaintiff was fifteen years old and an intelligent and bright boy. It appears that the proper way to unchoke the machine, or to remove the cotton which retards the movement of the machinery, is to throw the belt on its side, which causes the machine, except the beater, to stop; the smaller lid can then be raised and, with the hand inserted in the feed rolls, the person in charge of the machine can easily and safely remove the accumulated cotton.

There was evidence in the case tending to show that the plaintiff had been fully instructed by the superintendent or "boss" of the mill, how to unchoke the machine; and he was also directed not to attempt to do so, but if anything occurred in the operation of the machine, to report to the "second boss," Mr. Bray. There was further evidence on the part of the defendant that the plaintiff was specially instructed not to raise the lid over the beater, as it was not necessary in order to unchoke the machine.

(37) Evidence was introduced by the plaintiff tending to show that he had not been fully instructed as to the manner of operating the machine and of unchoking the feed rolls which obstructed or impeded its operation.

Much evidence was introduced by both sides as to whether proper instructions had been given to the plaintiff or not. The case was sub-

mitted to the jury under instructions from the court, *Guion, J.*, which clearly set forth the contentions of the respective parties upon the issue raised between them, as to whether the plaintiff had sufficient intelligence to operate the machine with safety to himself and had been properly instructed as to the method of unchoking the machine.

Every principle of law applicable to the case was fully and explicitly stated to the jury and the charge, as appears from the record, was one characterized by exceptional ability and learning. We have been unable, after a most careful examination of the instructions of the court, to discover any error in them.

The plaintiff complains that the court charged the jury, with reference to the capacity and intelligence of the plaintiff, that the law raises the presumption that a person over fourteen years of age is endowed with sufficient intelligence to perform the work assigned to him, but the presumption is not a conclusive one and may be rebutted by proof satisfactory to the jury that the plaintiff did not, in fact, have such intelligence or capacity. This objection is clearly answered by this Court in the case of *Baker v. R. R.*, 150 N. C., 562, in which *Mr. Justice Brown*, for the Court, stated the law with clearness and precision as follows: "An infant of the age of fourteen years is presumed to have sufficient capacity to be sensible of danger and to have power to avoid it, and this presumption will stand until rebutted by clear proof of the absence of such discretion as is usual with infants of that age. At what age this presumption arises is not a question of fact, but one of law. The inquiry, 'At what age must an infant's responsibility for negligence be presumed to commence?' cannot be answered by referring it to a jury. That would furnish us with no rule whatever. It would simply produce a shifting standard, according to the sympathies or prejudices of those who compose each particular jury. One jury might fix the age at fourteen, and another at eighteen, and another at twenty. The responsibilities of infants are clearly defined by text-writers and courts. At common law, fourteen was the age of discretion in males and twelve in females. At fourteen, an infant could choose a guardian and contract a valid marriage. After seven, an infant may commit a felony, although there is a presumption in his favor, which may, how- ever, be rebutted; but, after fourteen, an infant is held to the same responsibility for crime as an adult. Inasmuch as an infant over fourteen may select a guardian, contract a marriage, is capable of harboring malice and of committing murder, it is not a great imposition on him to hold him responsible for his own acts." The learned justice, after citing numerous authorities, says: "This presumption of discreet judgment, which arises after fourteen years of age, must stand until overthrown by clear proof of absence of such natural intelligence

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as is usual with infants of similar age. If such evidence is offered by the plaintiff to rebut such presumption, its weight and value are for the jury to estimate." That case fully covers the objection of the plaintiff to the charge by the Court with reference to the intelligence and capacity of the plaintiff.

The other question, namely, whether the plaintiff was properly instructed as to the operation of the machine, was, as we have said, submitted to the jury with correct instructions and practically reduced the issue between the parties to one of fact, which the jury found against the plaintiff. So far as the law on this branch of the case is concerned, it is fully stated in *Patterson v. Lumber Company,* 145 N. C., 42, and the principle therein announced is specially applicable to the facts of this case. We said in *Patterson's case* that "Where the employee steps outside the line of his duty or goes beyond the scope of his employment and does something he is not required to do, he cannot recover from his master for any consequent injury, for in that particular he is not his servant, and his contract does not provide for the new risk which he thus assumes and to which he exposes himself. The result is the same where the servant, without the order or request of his employer or representative, or contrary to his orders, or at the request of another employee who has no authority from the master to make it, undertakes to do something not assigned to him. In such a case he assumes all the risk of injury. The master contracts to exercise ordinary care for the purpose of keeping his premises, his machinery, his tools and his appliances in a reasonable condition of safety for the protection of his servant employed to perform a stated service, and who is entitled to that protection while engaged in his work and so long as he continues therein and confines himself to what he is employed to do. The duty of the master to furnish safe and suitable implements and appliances, which due care for the protection of his servant would suggest, extends only to those employees who are required, permitted or expected, in the course of the employment, to make use of the instrumentalities provided by him, or who, while in the performance of their work,
(39) may be injured by them if they are defective. Where the servant departs from the sphere of his assigned duty, the relation of master and servant is considered as temporarily suspended. The servant's position is, then, analogous to that of a trespasser, or perhaps, of a bare licensee, and his master owes him no duty, nor is he under any legal obligation to anticipate his deviation from his instructions and the possible danger which may arise to him therefrom, and, consequently, to provide meanse for averting it. The servant becomes a volunteer as to the particular act which is outside the scope of his service and which he attempts to perform. He must, therefore, take

things as he finds them and suffer the consequences of his own error. The master cannot be held liable therefor, as the law will not, on obvious grounds of justice, compel the master to answer in damages for any injury which the servant has brought on himself by undertaking to do that which he was not directed or required to do, and it refers his injury not to the fault of the master, but to his own unnecessary and gratuitous act. Where the servant leaves his own work to do something else for which he was not engaged, the duty of the master towards him reaches its vanishing point, as it has been said, at the moment of the transition, and his corresponding liability for a resulting injury disappears. There being no longer a contractual or legal relation imposing any duty on the master, for a breach of which he would be liable, it follows that there is nothing upon which to rest any claim for damages, because no cause of action arises from a failure to perform a mere act of humanity, or for the violation simply of a moral obligation not involving any legal duty. This principle is well established, if not elementary. It is grounded in wisdom and justice, it is perfectly fair to the master and to the servant, and, moreover, is supported by the highest authority."

The same doctrine was announced by us in *Whitson v. Wrenn,* 134 N. C., 86, in the following language: "The servant was ordered to do his work in a safe way, and he preferred to do it in another and what proved to be a dangerous way. Why should the master be liable if the servant acted in disobedience to his orders and was thereby hurt? It must be admitted that he was the author of his own injury. . . . The plaintiff in this case has simply done something which his master virtually told him not to do. He substituted his own will for that of his employer, and his case comes within the maxim, *volenti non fit injuria.* No man by his voluntary and wrongful act can impose a liability on another, nor will he be permitted to take advantage of his own wrong and willfulness."

The jury have found in this case that there was a safe method (40) of doing the work, and that the plaintiff, upon his own responsibility and against express instructions, attempted to do it in an unsafe way. He has, therefore, brought the injury upon himself and cannot charge the defendant with liability and damages for his own voluntary and willful act, committed in direct violation of the instructions which he had received from his employer. Numerous cases sustain the proposition which we have stated, but as they are all collated in the defendant's brief, we will not cite them in this opinion.

We find no error in the trial of the case upon its substantial merits. The jury found as a fact, under instructions from the court, which are sustained by the law, that the injury to the plaintiff was caused

proximately by his own negligence, and this, of course, defeats a recovery in this action.

But the plaintiff contends that the court erred in overruling his objection to a juror, W. T. Clement, who was challenged by him for the reason that he had acted as a petit juror in the said court within two years prior to the trial of this case. The court found the facts involved in this challenge, and it appears from the findings that Clement was summoned by the sheriff, at a prior term, as a juror, and appeared in court to serve as such, but asked to be excused from service upon grounds stated to the court, and he was excused until the afternoon, when the judge discharged him for the term, upon his application previously made. He was never sworn as a juror and, of course, never sat in the trial of any case. Upon these facts, it was held by the court that he was a competent juror and the plaintiff's challenge was rejected. We think this ruling was correct. The statute requires that in order to disqualify a juror, he should have *acted* as such within two years next peeceding the term of the court at which he is challenged. It is clear to us that Clement had not "acted" as a juror within two years preceding the term. The objection was made and answered in the case of *S. v. Thorne,* 81 N. C., at p. 558, where *Smith C. J.* for the Court says: "The facts do not come within the statute and the objection is not tenable. The juror had been summoned on a special venire, and had attended a term of the court within that time, but his name was not drawn and, a jury being obtained without him, he was discharged. The disqualification attaches to the juror who 'has acted' or served as such, and not to one who has been at the court under a summons, liable only to be called on for such service. The juror was, therefore, not incompetent." To the same effect is *S. v. Whitfield,* 92 N. C., 831. It further appears that Clement had been summoned, not as a tales juror, but as a regular juror (41) for the term. Revisal, sec. 1967.

The plaintiff further objected that the court ruled out the question which he asked the witness Patterson, as to the amount of salary he was receiving from the defendant. Admitting, for the sake of the argument, that this question was competent, we do not think it was sufficiently relevant to constitute error. We have carefully read the testimony of the witness, and do not find that he stated anything which was seriously controverted in the case. His testimony largely related to the construction and operation of the machine, and not to anything which bore on the material issue in the case. If there was error, it was harmless, and where it clearly appears in the case that a ruling of the court has not been prejudicial to the appellant, we will not disturb the judgment.

The other exceptions of the plaintiff are, we think, without any merit and do not require any special discussion by us.

We observe that the plaintiff moved to set aside the verdict upon the second issue, and not for a new trial generally. We held in *Nathan v. R. R.,* 118 N. C., 1066, that while it is competent for this Court to direct a new trial as to any one issue, leaving the verdict to stand as to others, where in the exercise of a sound discretion such a course is deemed proper, and while this course might be pursued by a judge at *nisi prius,* the party cannot, as a matter of right, move for a new trial as to only one of the issues. In that case, the Court, by *Justice Avery,* said: "The motion of counsel must be for a new trial, and while he may suggest or ask that it be partial, he cannot demand it as a right, and by his motion attempt to restrict the action of the court to one or more issues without forfeiting his right to have the refusal of the motion reviewed." We do not intend to imply that there may not be a partial new trial, or a new trial as to one or more of the issues in certain cases, either in the court below or by the order of this Court; but counsel cannot select one issue which has been answered adversely to his client and demand a new trial as to that, in the exercise of any right which the law allows him.

We have carefully examined the case and find no error in the rulings and judgment of the court.

No error.

R. J. SNIPES v. CAMP MANUFACTURING COMPANY.

(Filed 25 February, 1910.)

1. Railroads—Negligence—Circumstances of Danger—Persons on Track—Warnings—Duty of Engineer.

When in the starting and operation of a moving railroad train the engineer, in the proper performance of his duty, saw or should have seen a person in front of the engine in such a position that ordinary effort on his part would not likely avail to save him from injury, and that a collision was not improbable, it was his duty to give a signal or adequate warning before starting the engine, and he is negligent if he fails to use all means at his command, consistent with the safety of the passengers or property in his charge, to prevent the collision or injury; and where there is evidence of such failure of duty, or of negligence, and that it caused the injury complained of a judgment of nonsuit upon the evidence should not be granted. This doctrine applies to "logging" roads using steam as a motive power under *Sawyer's case,* 145 N. C., 24.

2. Same—Issues—Contributory Negligence—Last Clear Chance.

When there is evidence that the plaintiff, a fireman on defendant's engine, with the engineer and others of the train crew, got off the engine at a trestle where it had stopped owing to repairs being made on the latter, and went forward some fifteen or twenty feet on the trestle to watch the workmen, and while doing so plaintiff sat down on the trestle and talked to the workmen making the repairs, and then the engineer passed by him going to the engine, and started the engine without signals or adequate warnings colliding with plaintiff, and causing the injury sued on, the only question upon the issue of contributory negligence for the jury is whether the plaintiff was negligent, the proximate cause of the injury, in not getting up from his position when the engineer passed to his engine; and should the verdict on this issue establish contributory negligence, a further issue should be found by the jury involving the question, whether there was a negligent failure on the part of the defendant to avail itself of the last clear chance of avoiding the injury, and, if so, was such failure the proximate cause of plaintiff's injury. *Strickland's case*, 150 N. C., 4, cited and distinguished.

(42) APPEAL from *Guion, J.*, June Term, 1909, of HALIFAX.

The evidence tended to show that defendant was a manufacturing company, operating a logging road under a charter, etc., and that on 21 June, 1907, plaintiff, employed as fireman on defendant's engine, was run over by said engine and seriously injured; that at the time of the occurrence the engine in question had stopped at a trestle which was being repaired, and the engineer and plaintiff, and others of the crew, went forward fifteen or twenty feet on the trestle to observe the work and note its progress; plaintiff sat down on a cross-tie, and he and the engineer were both talking to some of the track force; that

(43) while plaintiff was so engaged, the engineer went back to his engine, started it without signal or warning of any kind, and moved the same upon the plaintiff before he was able to arise or escape, and causing the injuries complained of; the track was straight, and the position of plaintiff at the time being in full view or readily observable.

The plaintiff, a witness in his own behalf, among other things, testified as follows:

Q.: State whether in June, 1907, you were in the employ of the Camp Manufacturing Company. A.: Yes, I was.

Q.: What were you doing? A.: I was firing an engine for them in 1907.

Q.: What was the Camp Manufacturing Company doing with this engine? A.: Hauling logs out.

Q.: On their private road? A.: Yes.

Q.: Who was engineer under whom you were firing? A.: Mr. Lonnie Spivey.

Q.: State to the court and jury whether or not you were injured about 21 June, 1907. A.: On 21 June, 1907, the train ran over me; I was on the trestle.

Q.: State how you came to be on the trestle, and the entire facts and circumstances. A.: I was firing the engine in 1907, June 21st, and they went down hill to a good long trestle, and the engineer, of course, he stopped; he had a signal to stop. He got down and went in front of the engine and was talking with one of the section boys, and I got down off the engine and went between him and the engine, and I sat down between the rails—straddled a cross-tie, with my feet hanging down. There was a pair of mules in front of me and all of the hands, I can't tell how many; I wasn't paying any attention to anything else. Mr. Spivey and Mr. Butts passes right by me and gets on the engine; I was there running on with them, talking while they were working, and Mr. Spivey and Mr. Butts gets up and goes to the engine—pass right by me—and Mr. Spivey didn't say, come on he was going, or nothing; he never blowed whistle nor rung the bell or gave a signal; he just moved the engine off over to where they were hauling, and when I saw the engine she was within five or six feet of me; I got up, I was so scared, and I didn't know any more after I got up.

Q.: What did the engine do to you at the time it struck you? A.: She ran over me.

Q.: How did it run over you? A.: It just knocked me down; my feet went through the trestle and the pilot pushed me down and rolled me across the ties until I got to the place where the ties didn't give way or anything, and they had to back the engine off me. I was stopped by those ties.

Q.: How did it injure you? A.: It broke my right ankle (44) and broke me in two—twice in my breast; it broke three ribs in my breast and six in my back and my right shoulder blade.

Q.: Describe what was hitched to the engine, if anything. A.: Nothing at all; just the engine and tender.

Q.: When you got off the engine and sat down on the track, about how far in front of the engine was it that you sat down A.: About fifteen or twenty feet.

Q.: How near was the engine to you when you saw it moving up on you? A.: About five or six feet.

Q.: How were you sitting at the time when you first saw that engine moving upon you—what was your position on the track? A.: I was sitting straddled of one of the ties, with my feet hanging down over the trestle.

Q.: Where did you say the team of mules were working? A.: They were working right in front of me.

Q.: What kind of work were they doing? A.: They were working on the trestle doing something; the mules were dragging some logs.

Q.: Where was your attention directed—which way were you looking? A.: I was looking right down at the mules and the men that were working.

Q.: About how high was the trestle? A.: It was about six or seven feet.

Q.: You say the engineer got up and passed by you? A.: Yes.

Q.: Was he going towards the engine? A.: Yes sir.

Q.: Had he been sitting or standing? A.: I couldn't tell whether he was standing or sitting.

Q.: Did you see him any more after he passed by you? A.: No, sir.

Q.: You didn't see him get up on the engine? A.: No, sir.

Q.: What did he say to you when he passed by you? A.: Nothing at all.

At the close of plaintiff's evidence, on motion, plaintiff was nonsuited by order of court, and excepted and appealed.

E. L. Travis, Claude Kitchin, and George Green for plaintiff.
W. E. Daniel and B. B. Winborne for defendant.

HOKE, J., after stating the case: The Court is of opinion that on the facts and circumstances as now presented there was a duty imposed upon the defendant's engineer to give a signal or some adequate warning, before starting the engine; and that on the ordinary issues in actions of this character, and under various decisions of this Court applicable to the case, if these facts and circumstances are accepted by the jury, (45) the verdict as to defendant's negligence should be resolved against the company. *Farris v. R. R.*, 151 N. C., 483; *Ray v. R. R.*, 141 N. C., 84; *Smith v. R. R.*, 132 N. C., 819; essentially qualifying, if it does not expressly overrule, this same case as it appears in 130 N. C., 344.

And the Court is further of opinion that on the facts in evidence, if established, the ordinary inferences permissible where one goes on a railroad track do not obtain here, and that it was not a negligent act on part of plaintiff in going forward on the track, nor in taking the position described in the testimony. So far as these facts now disclose, the only engine whose approach was to be apprehended, and the one which caused the injury, was then at rest, and the entire crew, including the engineer himself, had gone forward to observe the men engaged in re-

pairing the trestle and note the progress of the work; and the only conduct, if any, which could be imputed to plaintiff for negligence on this evidence was not getting up from his position when he saw the engineer leave the trestle and return to his engine. Whether under all the facts and circumstances, as they may be received by the jury, this was negligence on part of plaintiff and the proximate cause of the injury, may be submitted on the second issue as to contributory negligence, and determined on principles controlling that question. *Ramsbottom v. R. R.*, 138 N. C., 38.

If such contributory negligence is established by the verdict, the case will then present the question whether defendant negligently failed to avail itself of the last clear chance of avoiding the injury, under the doctrine as recognized and applied in *Sawyer v. R. R.*, 145 N. C., 24-27. In that case, on pages 27-28, speaking to the question here presented, the Court said:

"These logging roads, in various instances and in different decisions, have been described and treated as railroads and held to the same measure of responsibility and the same standard of duty. *Hemphill v. Lumber Co.*, 141 N. C., 487; *Simpson v. Lumber Co.*, 133 N. C., 96; *Craft v. Lumber Co.*, 132 N. C., 156. And it is well established that the employees of a railroad company engaged in operating its trains are required to keep a careful and continuous outlook along the track, and the company is responsible for injuries resulting as the proximate consequence of their negligence in the performance of this duty. *Bullock v. R. R.*, 105 N. C., 180; *Dean v. R. R.*, 107 N. C., 686; *Pickett v. R. R.*, 117 N. C., 616. This particular duty arises not so much from the fact that railroad companies are common carriers or *quasi*-public corporations, as from the high degree of care imposed upon them on account of the dangerous agencies and implements employed and the great probability that serious and in many instances fatal (46) injuries are almost certain to result in case of collision."

And numerous other decisions with us uphold the same principle. Ordinarily, cases calling for application of the doctrine indicated arise when the injured person was down on the track, apparently unconscious or helpless, as in *Sawyer v. R. R.*, just referred to, or in *Pickett v. R. R.*, 117 N. C., 616, or in *Dean v. R. R.*, 107 N. C., 687; but such extreme conditions are not at all essential, and the ruling should prevail whenever an engineer operating a railroad train does or, in proper performance of his duty, should observe that a collision is not improbable, and that a person is in such a position of peril that ordinary effort on his part will not likely avail to save him from injury; and the authorities are also to the effect that an engineer in such circumstance should resolve doubts in favor of the safer course.

This was held in *Clark v. R. R.*, 109 N. C., 430, 443, 444; *Bullock v. R. R.*, 105 N. C., 180, and others of like import.

In *Bullock v. R. R., Avery, J.*, for the Court, said: "It is the duty of an engineer, when running his engine, to keep a constant 'lookout for obstructions, and when an obstruction is discerned, no matter when or where, he should promptly resort to all means within his power, known to skillful engine-drivers, to avert the threatened injury or danger.' Woods' R. L., sec. 418, p. 1548; *R. R. v. Williams*, 65 Ala., 74; *R. R. v. Jones*, 66 Ala., 507. If the engineer, so soon as he discovered that the wagon was detained upon the track and could not, for the time, get out of the way, or so soon as with proper care and watchfulness he would have had reason to think such was its condition, had used every means and appliance in his power to stop the train, the defendant would not have been liable. But the judge omitted to tell the jury that it was negligence on the part of defendant, if the engineer could have seen, by watchfulness, though he did not in fact see, that the road was obstructed in time to stop his train before reaching the crossing. *Carlton v. R. R.*, 104 N. C., 365; *Wilson v. R. R.*, 90 N. C., 69; *Snowden v. R. R.*, 95 N. C., 93. The defendant could not complain of this error. It is true that, ordinarily, an engineer has a right to assume that one who has time will get out of the way, but he is not warranted in acting upon this assumption after he 'has reason to believe that he is laboring under some disability, or that he does not hear or comprehend the signals.'"

And in *Clark v. R. R., supra*, the Court said: "It is settled law in this State that where an engineer sees that a human being is on the track at a point where he can step off at his pleasure and without delay, he can assume that he is in full possession of his senses and faculties
(47) without information to the contrary, and will step aside before the engine can overtake him. But where it is apparent to an engineer, who is keeping a proper outlook, that a man is lying prone upon the track, or his team is delayed in moving a wagon over a crossing it has been declared that the engineer, having reason to believe that life or property will be imperiled by going on without diminishing his speed, is negligent if he fails to use all the means at his command, consistent with the safety of the passengers and property in his charge, to stop his train and avoid coming in contact with the person so exposed." Citing *Deans v. R. R.*, 107 N. C., 686; *Bullock v. R. R.*, 105 N. C., 180.

As the case goes back for a new trial, we do not consider it advisable to discuss the testimony or its application more fully; but, under the authorities cited, we hold that there was error in dismissing the action, and that plaintiff is entitled to have his case passed upon by the jury. The order of nonsuit, therefore, will be set aside, and the question of defendant's responsibility considered on the two issues as to negligence

on part of plaintiff; and in case a verdict on these issues require it, a further issue should be submitted, involving the question whether there was a negligent failure on part of defendant to avail itself of the last clear chance of avoiding the injury, and if so, was such failure the proximate cause of plaintiff's injury.

There is nothing in this case that in any way conflicts with the decisions of this Court in *Strickland v. R. R.*, 150 N. C., 4. In that case the intestate killed by a train had entered and was walking on the track of a railroad in the night-time, and about the schedule time of a fast passenger train, at or about the begining of a trestle. It was held that the intestate was clearly guilty of contributory negligence, and that under the facts and attendant circumstances there was nothing to indicate to the engineer that the intestate was in a position of peril, or that called for the application of the doctrine of the last clear chance.

For the error indicated, the order of nonsuit is set aside and a new trial awarded.

Error.

Cited: Edge v. R. R., 153 N. C., 214; *Twiddy v. Lumber Co.*, 154 N. C., 240; *Hines v. R. R.*, 156 N. C., 226; *Holman v. R. R.*, 159 N. C., 46; *Shepherd v. R. R.*, 163 N. C., 521; *Talley v. R. R., ib.*, 571, 579; *Hanford v. R. R.*, 167 N. C., 279; *Hall v. Electric Co., ib.*, 286; *McNeill v. R. R., ib.*, 400; *Buchanan v. Lumber Co.*, 168 N. C., 44; *Hill v. R. R.*, 169 N. C., 741; *Hall v. R. R.* 172 N. C., 348.

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(48)

R. C. CHRISTMAS ET AL. v. R. W. WINSTON.

(Filed 2 March, 1910.)

Wills—Fee—Restraint Upon Alienation.

A limitation by will restricting for any period of time the sale of land by one to whom the fee is previously devised is repugnant to the fee, and void.

APPEAL from *W. R. Allen, J.*, January Term, 1910 of WAKE.

From a judgment for defendant, the plaintiffs appeal.

The facts are stated in the opinion of the Court.

Edward A. Johnson for plaintiff.

Aycock & Winston for defendant.

BROWN, J. J. H. Miller devised the land in question to the plaintiffs J. H. Christmas, G. C. Christmas and Roscoe C. Christmas, and "their heirs, equally share and share alike," and in a subsequent part of his will provided that "the property and estate given, devised and bequeathed by this last will and testament is given, devised and bequeathed upon condition that it shall not be divided or disposed of until said three parties, or all of them who shall live that long, shall reach the age of twenty-four years." One of said parties, J. H. Christmas, is dead, without leaving wife or children. G. C. Christmas is twenty-five years of age, and R. C. Christmas is twenty-two years of age.

The question presented is whether the devisees under the will of J. H. Miller can, at this time, execute a fee-simple deed to the defendant Winston, and give him immediate possession of the property described in the case agreed.

We are of opinion that the condition attempted to be fastened upon the estate already conveyed in fee is such a restraint upon alienation as makes it void.

The general subject is clearly and learnedly discussed by *Mr. Justice Montgomery* in *Lattimer v. Waddell,* 119 N. C., 374, and the conclusion reached that a condition annexed to a conveyance in fee simple, by deed or will, preventing alienation of the estate by the grantee within a certain peroid of time, is void.

It seems to be the law that since the statutes of *quia emptores,* and 12 Car. II., the conveyance of a fee-simple estate in land carries with it as a necessary incident the right of free and unlimited alienation. *Wool v. Fleetwood,* 136 N. C., 465, in which case *Mr. Justice Walker* says: "It cannot be questioned that a condition of non-alienation annexed to the grant of an estate in fee is void, though confined in its
(49) operation to a limited period of time." *Dick v. Pitchford,* 21 N. C., 484.

Among the older text-writers and adjudged cases authority can be found to the effect that this rule is not so comprehensive in its operation as to prevent all conditions and restraints upon the power of alienation, and in a number of cases such restraints as were limited in time and reasonable in application were upheld. 1 Wash. on R. Prop., 67-69; 4 Kent Com., 135. This was the opinion of *Chief Justice Pearson* as expressed in his Law Lectures, p. 135, and is recognized as sound law in a *dictum* by *Merrimon, J.,* in *Munroe v. Hall,* 97 N. C., 209.

But this subject underwent a most complete and thorough examination in *Peyster v. Michael,* 6 N. Y., 467, and in *Mandlebaum v. McDonell,* 29 Mich., 87, doubtless the ablest and most learned discussions of the subject to be found in the books. In the former case it is held by *Chief Justice Ruggles* that, upon the highest legal authority, it may

be affirmed that in a fee-simple grant of land a condition, although limited in time, that the grantee shall not alien is void on the ground that it is repugnant to the estate granted.

In concluding his elaborate and learned opinion in the *Mandlebaum case, Judge Christiancy* says: "The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable and void."

In referring to this opinion Mr. Gray commends it as the fullest argument against the validity of such conditions and conditional limitations to be found in the books. Restraints on Alienation, 41. See, also, *Roosevelt v. Thurman,* 1 Johns. Chan., 220; *Kepple's App.,* 53 Pa., 211; *Hardy v. Galloway,* 111 N. C., 519; *Potter v. Couch,* 141 U. S., 296.

Mr. Gray admits that it has often been said a condition against alienation confined to a limited period is good, but says such remarks have been generally *obiter dicta,* without reasoning or citation of authorities. But he declares that since the full discussion and decision in the *Mandlebaum case,* followed and approved by *In re Rosher* and *Potter v. Couch,* the validity of such restrictions upon alienation of a fee simple, though limited in time, is now firmly established, except in the Province of Ontario.

Of courses, this does not apply in its strictness where the devise is made to trustees, but only where made directly to the devisees themselves.

Hill v. Jones, 123 N. C., 202, is supposed by the learned counsel (50) for the defendant to contain some intimation against this view.

The will is not set out in the report, and it may be that a trust was created in that case in the husband for the benefit of the children.

However that may be, we deem it best to follow what may be now regarded as an established principle of the law of real property. The judgment is

Affirmed.

Cited: Trust Co. v. Nicholson, 162 N. C., 264; *Schwren v. Falls,* 170 N. C., 252; *Lee v. Oates,* 171 N. C., 722.

A. H. McINTOSH ET ALS. v. NORTH STATE FIRE INSURANCE COMPANY.

(Filed 2 March, 1910.)

1. Insurance, Fire—Sole and Unconditional Owner—Dower Interest.

One who has married a widow and has constructed a house on her dower interest in the lands of her former husband, and has had it insured in his own name under a standard policy form, may not, upon the loss of the house by fire, recover the proceeds of the policy, as he is not a sole and unconditional owner within the meaning of the terms of the policy contract.

2. Insurance, Fire—Sole and Unconditional Owner—Equity—Reformation.

By a bill in equity a written policy of fire insurance may be reformed, after a loss has occurred, upon the ground that it does not express the true contract; that because of mutual mistake, or a mistake of the draftsman, the name of another was substituted for the sole and unconditional owner of the insured premises, and when this is established by the proper degree of proof, the real parties can recover under the contract.

APPEAL from *Guion, J.*, December Term, 1909, of CRAVEN.

Upon motion, the court adjuged that the complaint failed to state a cause of action against the defendant, and rendered judgment dismissing the action

Plaintiffs, complaining of the defendant, allege:

1. That the defendant is, and was at the times hereinafter complained of, a corporation engaged in the fire insurance business in the State of North Carolina, as plaintiffs are advised, informed and believe.

2. That the plaintiff A. H. McIntosh, on 14 June, 1899, married the plaintiff Sally Ann McIntosh, who was then the widow of C. R. Price, deceased, and that the said A. H. McIntosh and Sally
(51) Ann McIntosh were man and wife at the times hereinafter mentioned.

3. That the plaintiffs Sadie and Pearlie Price are the infant children of the said Sally Ann McIntosh and her former husband, the said C. R. Price, now deceased, and that the said Sadie and Pearlie being infants without general or testamentary guardian, the said plaintiff A. H. McIntosh was duly appointed their next friend by this court on 6 November, 1908.

4. That the said C. R. Price died intestate prior to 1899, seized in fee simple and possessed of a tract of land situate in Craven County, N. C., and described in that certain deed executed by Z. B. West and Sophia A. West, his wife, to C. R. Price, dated 28 January, 1899, and registered in the office of the register of deeds of Craven County, N. C., in book 99, page 413, which deed is hereby referred to and made a part of this allegation.

5. That the said Sally Ann McIntosh and her infant children, the said Sadie and Pearlie Price, are the heirs at law of the said C. R. Price, deceased.

6. That after the marriage of the said A. H. McIntosh and Sally Ann Price, the said A. H. McIntosh, at his own cost and expense, repaired, enlarged and constructed a house on said tract of land, which was used for several years, and until destroyed as hereinafter set out, as a home for himself and said wife and their little children, the said infant plaintiffs.

7. That during 1907 the plaintiff A. H. McIntosh was solicited by representatives of the defendant to insure against loss by fire the said house.

8. The plaintiff A. H. McIntosh is an unlettered man who cannot read nor write more than his own name, and that his wife and her children are uneducated people and ignorant of business matters.

9. That, finally, plaintiff A. H. McIntosh was induced by the agents of the defendant to insure in the said defendant company the said house in the sum of $500 against all direct loss or damage by fire for a period of three years from 18 July, 1907, at noon, to 18 July, 1910, at noon.

10. That at the time the contract of insurance was entered into by and between the said plaintiff and defendant on 18 July, 1907, both the plaintiff and the defendant supposed that the written policy then issued named the proper beneficiaries and payees of the amount of said insurance in case of direct loss or damage by fire, and both parties supposed and believed that the policy issued by the defendant on said property was a good and valid policy of insurance; whereas, by mistake, the said policy named the said A. H. McIntosh as beneficiary and payee. The said policy is hereby referred to and will be pro- (52) duced by plaintiffs at the request of the defendant.

11. That the plaintiff A. H. McIntosh had an insurable interest in said property, and, together with the other plaintiffs, owned said property in fee simple at all times herein set forth, as plaintiffs are advised, informed and believe.

12. That a premium of $10 was paid by said plaintiff A. H. McIntosh to said defendant in consideration for said insurance at the time said contract of insurance was entered into, and plaintiffs have performed on their part all conditions of said contract, as they are advised, informed and believe.

13. That on 2 October, 1908, said property, insured as aforesaid by said defendant was totally destroyed by fire.

14. That the plaintiffs' loss thereby was not less than $1,000.

15. That the plaintiff A. H. McIntosh immediately thereafter notified the defendant of said loss, and on 23 October, 1908, furnished the defendant with proof of said loss.

16. That the defendant, on 24 October, 1908, denied its liability for said loss to plaintiffs, giving as a reason therefor that the beneficiary named in said policy was not the owner of the property insured.

17. That plaintiffs are advised, informed and believe that notwithstanding that the beneficiary named in the policy had at all times mentioned an insurable interest in said property, yet the mutual mistake of plaintiff A. H. McIntosh and defendant will avoid the policy unless the same is reformed and corrected so as to make all the owners of said property beneficaries in said policy.

18. That said mistake was not discovered until after said loss had occurred and notice of said loss had been given to the defendant.

19. That no part of said loss has been paid, and the said sum of $500 is now due plaintiffs by the defendant.

Wherefore, the plaintiffs pray judgment:

1. That the policy of insurance issued by the defendant to the plaintiff in consideration of $10 premium paid, be reformed and the mutual mistake corrected, and that all the plaintiff owners interested in said property and insurance thereon be made beneficaries and payees in said policy.

2. That after such correction and reformation of said policy, the plaintiffs recover judgment against the defendant for the sum of $500, with interest on said sum from 24 October, 1908, till paid.

3. For the costs of this action.

4. And for such other and further relief as the plaintiffs may be entitled to.

R. A. NUNN,
Attorney for plaintiffs.

(53) Plaintiffs appealed.

W. D. McIver and R. A. Nunn for plaintiffs.
Simmons and Ward & Allen for defendant.

BROWN, J. This action appears from the complaint to be brought by A. H. McIntosh, Sadie and Pearlie Price, infants, by their next friend, A. H. McIntosh, and Sallie McIntosh, wife of A. H. McIntosh, to recover for a loss by fire upon a standard policy of insurance in which A. H. McIntosh is the sole beneficiary.

From the complaint it appears that the property belonged to C. R. Price, and at his death descended to his two daughters, the infants herein named, and that his widow has a dower interest in a portion of it. Plaintiff A. H. McIntosh married the widow, and afterwards at his

own expense "repaired, enlarged and constructed a house, on his wife's part of the land," which is the house destroyed by fire and covered by the policy of insurance.

The policy is referred to and made a part of the complaint. It is standard in form and contains the following clause: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material facts or circumstance covering this insurance, or the subject thereof; or if the interest of the insured in the property be not truly stated herein; . . . or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple."

1. It is patent that upon the allegations of this complaint A. H. McIntosh cannot recover. He is not an unconditional or sole owner. In fact, he has no legal or equitable estate in the land. *Jordan v. Insurance Co.*, 151 N. C., 340; *Weddington v. Insurance Co.*, 141 N. C., 234, 239; *Hayes v. Insurance Co.*, 132 N. C., 702; *Coggins v. Insurance Co.*, 144 N. C., 7; *Cuthbertson v. Insurance Co.*, 96 N. C., 480.

2. But it may be that as to the other plaintiffs the complaint is a defective statement of a good cause of action, and that it may be made plain by amendment. A bill in equity may be entertained to reform a written policy of insurance after the loss has occurred, upon the ground that it does not express the true contract entered into because of mutual mistake or a mistake of the draftsman. *Snell v. Insurance Co.*, 98 U. S., 25. There is nothing sacred about an insurance policy which exempts it from reformation under the same equitable doctrine applicable to all other written contracts. (54)

In *Henkle v. Insurance Co.*, 1 Ves., case 156, p. 318, the bill sought to reform a written policy after loss had actually happened, upon the ground that it did not express the intent of the contracting parties. *Lord Hardwicke* said: "No doubt but this Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts, so that if reduced to writing contrary to the intent of the parties, on proper proof, it would be ratified."

If the plaintiffs can establish by the proper degree of proof that this contract of insurance was made for the benefit of the wife and the two infants, who are the owners of the property, and that by mutual mistake, or the error fo the draftsman, A. H. McIntosh was erroneously made the beneficiary therein, instead of the other plaintiffs, they will have made out a cause of action which will entitle them to a reformation of the written policy.

The cause is remanded, to the end that the plaintiffs be allowed to file another complaint. The plaintiffs will be taxed with costs of this Court. The judgment of the Superior Court is modified and

Affirmed.

Cited: *Archer v. McClure,* 166 N. C., 147.

W. F. MORTON ET AL. v. BLADES LUMBER COMPANY.

(Filed 2 March, 1910.)

1. Nonsuit—Evidence, How Construed.

Upon a motion to nonsuit upon the evidence, the plaintiff's evidence must be construed in a light most favorable for him, and every fact, and essential ingredient in the cause of action, which it tends to prove, must be taken as established.

2. Deeds of Administrator—Fraud on Heirs—Equity.

The evidence fairly tending to establish the allegations of the complaint, held in this case, reported in 144 N. C., 31, to be sufficient to set aside a conveyance of land procured through collusion with an administrator in fraud of the rights of the heirs at law of the intestate, *it was error* in the lower court to sustain defendant's motion for nonsuit upon the evidence; and the mere statement of the administrator that he had no fraudulent intent would not be decisive.

APPEAL by plaintiffs, from *O. H. Allen, J.,* at November Term, 1909, of CRAVEN.

At the conclusion of the evidence of plaintiff, the defendants (55) moved for judgment of nonsuit. His Honor sustained the motion, and plaintiffs appealed to this Court.

In the report of this case on a former appeal, 144 N. C., 31, there will be found a statement of this controversy as presented by the pleadings, and it will not be here repeated, for the record indicates no change in the pleadings.

W. D. McIver for plaintiff.
W. W. Clark and Moore & Dunn for defendant.

MANNING, J. This case being presented to us upon the ruling of his Honor, upon plaintiff's evidence, allowing the motion of the defendants, under the statute, to nonsuit the plaintiffs it has been held uniformly by this Court that "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 ingrediment of the cause of action, must be taken as established, as the jury, if the case had been submitted to them, might have found the facts from the testimony." *Cotton v. R. R.*, 149 N. C., 227; *Brittain v. Westhall,* 135 N. C., 492; *Freeman v. Brown,* 151 N. C., 111.

The principles of law controlling the decision of this case are declared in the opinion of this Court upon the former appeal, 144 N. C., 31.

We think the evidence fairly establishes those facts held by this Court in that opinion to entitle the plaintiffs to relief in a court of equity. Concisely stated, the evidence offered at the trial established the following facts: That the note owed by the intestate was purchased by the administrator at the request of the defendant Blades and with his money; that the foreclosure sale was made by his request also; that Blades' attorney prepared the advertisement and deed conveying the mortgaged property to the purchaser, Blades; that at the time of the sale the mortgaged property was worth more than $5,000—it brought $350; that the defendant Morton acted in the dual capacity of administrator—"subject to the elementary principles which apply to other trustees or fiduciaries"—and as the agent of Blades, doing as Blades requested him. It did not appear in evidence that the Farmers and Merchants Bank, the mortgagee, had made a conveyance of the mortgaged land with a transfer of the power of sale to J. A. Morton, or to any other person or corporation; it did not execute the deed to the purchaser, Blades; Mr. Stevenson, the attorney who transferred the note for the Neuse River Lumber Company, the then holder, to J. A. Morton, testified that there was no such conveyance, to his knowledge. Nor did it appear that there existed any necessity for J. A. Morton, occupying to the estate of which he was administrator (56) the relation of trustee or fiduciary, to sell the land to reimburse Blades for the money he had advanced for the purchase, through the administrator, of the note. No evidence was offered showing that the administrator had exhausted the personal estate of his intestate. The mere statement of J. A. Morton that he had no fraudulent intent would not be decisive of the right of the plaintiffs, in view of the facts above stated.

Under the well-settled doctrine of this Court, declared in *Williams v. Teachey,* 85 N. C., 402; *Dameron v. Eskridge,* 104 N. C., 621; *Hussey v. Hill,* 120 N. C., 312, and approved in this case on the former appeal, 144 N. C., 31, the deed made by the assignee of the note did not pass the title to the land, and the plaintiffs were entitled to an

instruction from his Honor to the jury, that the deed made by such assignee was ineffective to pass the title to the land. That being true, the relation of mortgagor and mortgagee still subsisted, and the plaintiffs were entitled to a reasonable time to redeem and to an accounting for the rents and profits received from the land.

There appears in the record a paper-writing purporting to be a conveyance of the mortgaged property, but we do not feel at liberty to pass upon its sufficiency, for the reason that it is stated in the record that it was not offered in evidence by either party, nor was its execution proved or admitted. This instrument, however, does not appear to have been executed under a seal, as none appears attached to it, nor does it purport to have any seal.

There was error in sustaining the motion to nonsuit, and there must be a

New trial.

Cited: Heilig v. R. R., post, 471; *Phillips v. Orr, post,* 585; *Boddie v. Bond,* 154 N. C., 370; *Kelly v. Power Co.,* 160 N. C., 285; *Madry v. Moore,* 161 N. C., 298; *Trust Co. v. Bank,* 166 N. C., 115; *Horton v. R. R.,* 169 N. C., 116; *Lamb v. Perry, ib.,* 442; *Brown v. Foundry Co.,* 170 N. C., 40.

J. S. BOND ET AL. V. LUCY BEVERLY ET AL.

(Filed 2 March, 1910.)

1. Deeds and Conveyances—Limitations of Actions—Deeds of Executors—Color—Adverse Possession.

A deed of lands sufficient upon its face to pass title, made by the executors of deceased erroneously under the impression that their testator had not parted with the title, is "color" of title, under which title will ripen in the vendee by open, notorious and adverse possession for seven years.

2. Deeds and Conveyances—Color—Limitation of Actions—Adverse Possession—Presumption.

When there is no delimitation to the possession of those claiming title to land by adverse possession under a deed describing the *locus in quo*, the possession will be taken as extending to the outer boundaries of the land described in the deed.

3. Deeds and Conveyances—Privity of Color—Limitation of Actions—Adverse Possession.

Those who have entered into possession of lands under a deed of their lessor, which is "color" of title, may ripen this color of title into a good

title for themselves by their continued adverse possession for seven years, though the deed from him under which they claim may be void for uncertainty of description.

4. Husband and Wife—Coverture—Color—Adverse Possession—Limitation of Actions.

Sections 2 and 3, chapter 78, Laws 1899 (now Rev., sec. 363), repealed the disability of coverture, and when it appears that defendant had taken actual possession by his tenants of the *locus in quo* and subjected himself to a suit in ejectment by plaintiff to have his deed canceled as a cloud on her title, and her right of entry and title were defeated by defendants' adverse possession for seven years under color before the action was commenced, the plea of coverture will not avail her.

APPEAL from *Peebles, J.*, at Fall Term, 1909, of HERTFORD.

The case was presented to his Honor below upon the follow- (57) ing agreed facts:

That on 6 February, 1869, H. B. Knox commenced a civil action in the Superior Court of Hertford County, North Carolina, against Lawrence Askew, Mills Sumner and George H. Mitchell. The summons was served 11 February, 1869, on the defendants. At October Term, 1869, of said court, the plaintiff recovered judgment in said action against the defendants, Lawrence Askew and George H. Mitchell, for $1,954.24 and for $18.35 cost, with interest on $1,654.50 from 18 October, 1869, until paid.

That said judgment was recovered on a bond executed 11 October, 1866, by Lawrence Askew, Mills Sumner and George H. Mitchell, payable to the order of John W. Harrell, administrator of William Montgomery, for $1,654.50, payable six months after date, with interest from date.

That execution was issued on said judgment to the sheriff of Hertford County, who, on 3 January, 1870, sold thereunder the "Powell tract," at the courthouse door, as required by law, as the property of Lawrence Askew, and John A. Vann became the purchaser and received a deed from said sheriff therefor, dated 5 April, 1870. The *locus in quo* is embraced in the boundaries of said Powell tract.

That on 1 November, 1871, said John A. Vann conveyed the (58) said Powell tract to the plaintiffs, heirs at law of Julia A. Newsome, who were grandchildren of said Lawrence Askew and also his heirs.

That said Lawrence Askew died about the year 1884, domiciled in Hertford County, leaving a last will and testament, which was duly admitted to probate in said county, in which he appointed J. B. Slaughter and Blount Willoughby his executors, and who were duly qualified as such.

That the will of said Lawrence Askew contains the following item: "I leave all my land not otherwise disposed of to be sold, the Brantley and Reynolds land both containing about 100 acres, the Rasbery land, 50 acres, adjoining W. H. Godwin, and all other lands not otherwise mentioned; the piece of land on which the ginhouse stands contains 100 yards square; and the money arising from said sale shall be assets in the hands of my executors."

That the Powell tract is not mentioned by name or description in said will. That on 12 October, 1885, said executors, under the above item in the will of said Askew, sold the right, title and interest of said Lawrence Askew in the Powell tract, and S. S. Harrell became the purchaser and received a deed from said executors for said right, title and interest in the said Powell tract. See Exhibit "A."

That on 23 December, 1890, said S. S. Harrell executed to Benjamin Beverly a deed or paper-writing, a copy of which is hereto annexed, marked Exhibit "B," as a part of these facts; said Beverly, after getting said paper-writing or deed from S. S. Harrell, settled upon and occupied the western portion of the Powell tract of land, which includes within its boundaries the *locus in quo*.

That said Benjamin Beverly died intestate on .. March, 1902, leaving the defendants as his widow and heirs at law.

That either side may use as a part of these facts any deed or paper-writing in their respective chain of title.

This action was begun on 17 December, 1908. The plaintiff Bettie J. Newsome married J. S. Bond, 12 July, 1882, and has since her said marriage been under coverture; Levinia R. married, first, Hosea Baker, 29 September, 1886; Baker died in 1897, and she married W. R. Hughes 7 July, 1899.

On 22 December, 1890, said S. S. Harrell executed the deed hereto attached, marked Exhibit "C," to Whitmel Young, who, after getting said deed, settled upon and occupied the eastern portion of said Powell tract of land; and that after 22 December, 1890, said Beverly and said Young divided the Powell tract between themselves and continued to live on and occupy said Powell tract of land, up to known
(59) and visible lines and boundaries up to the beginning of this action. See Exhibit "D."

The Powell tract of land described in the complaint and the deeds aforesaid is the same tract of land.

The Exhibit "A"referred to in the agreed facts is the deed from the executors of Lawrence Askew to S. S. Harrell and his heirs, dated 7 June, 1886, conveying one certain tract or parcel of land lying and being in Hertford County aforesaid, and known and described as follows: "The tract of land known as the Powell or Stallings tract

of land, owned by Lawrence Askew, and bounded on the north by White Oak Swamp, on the east by other lands of said Askew, on the west by the lands of W. H. Godwin, J. B. Chamblee, Jr., and Thomas Eiley; on the south by the Slaughter lands, containing 131 acres, be the same more or less." Exhibit "B" is the deed from S. S. Harrell to Benjamin Beverly, ancestor of defendants, dated 22 December, 1890, and contains the following granting clause: "has granted, bargained and sold, and by these presents do grant, bargain and sell and convey to said Benjamin Beverly, his heirs and assigns forever, his interest in about one-half of a piece of land, as per survey of recent date, known, etc.," describing it as the Powell land and referring to the deed to him by the executors of Lawrence Askew. The deed to Whitmel Young referred to is made by S. S. Harrell on 22 December, 1890, same day as the deed to Beverly, and contains a granting clause and description in the same language.

The defendant denied that the plaintiffs were the owners of the land in controversy, and pleaded the seven-year statute of limitations and adverse possession thereunder. The agreement between Beverly and Young, establishing the dividing line between them, was in writing duly signed and dated 30 March, 1901. The possession of Beverly and his heirs of the western half to the agreed dividing line has been adverse, open, notorious and exclusive since then; in like manner has been the possession of Young of the eastern half. Upon the agreed facts, his Honor rendered judgment that plaintiffs were the owners of and entitled to the possession of the land, and adjudged the costs against the defendants, and ordered the writ of possession to issue. The defendants appealed.

Winborne & Winborne for plaintiff.
R. C. Bridger and John E. Vann for defendant.

MANNING, J. The title in fee to the land in controversy was undoubtedly, at one time, vested in Lawrence Askew; it was divested by a deed of the Sheriff of Hertford County to John A. Vann, on 5 April, 1870, this deed being made pursuant to a sale by (60) the sheriff under an execution issued on a judgemnt against Askew. On 1 November, 1871, John A Vann conveyed the lands to the plaintiffs; thus they became the owners of it in fee simple; and, as the legal title draws to it the possession, the plaintiffs, nothing else appearing, would be entitled to recover the land from the defendants.

The defendants, however, to avoid a recovery by the plaintiffs, show: 1. The death of Lawrence Askew in 1884, his will appointing Slaughter and Willoughby executors, directing them to sell certain named tracts of land and all other lands not otherwise mentioned.

2. A public sale by the executors of the land in controversy to S. S. Harrell, and a deed to him by the executors therefor, dated 7 June, 1886.

3. A deed from Harrell to Benjamin Beverly, dated 22 December, 1890, purporting to convey to him and his heirs "his interest in about one-half of a piece of land, etc." (describing the land in controversy).

4. The adverse and uninterrupted possession of Beverly from that date, to wit, 22 December, 1890.

5. A similar deed to Whitmel Young of the same date an in the same words.

6. The written agreement between Beverly and Young, establishing the dividing line between them, dated 30 March, 1901.

It will, therefore, be seen that the defense is rested upon two grounds: First, that the deed from Harrell to Beverly is, itself, color of title, and the adverse and uninterrupted possession of Beverly, for seven years before this action was begun, under it matured the colorable title into a good title. The plaintiffs reply that this deed of Harrell to Beverly is void for the vagueness and uncertainty of the description and is not good as color of title. Second, that if the Harrell deed to Beverly is void, then the deed from the executors, Slaughter and Willoughby, to Harrell is color of title, and Beverly having been put into possession of the land by Harrell, without a valid delimitation of the land possessed by him, the possession of Beverly extended to the outer limits of the land described in the deed of the executors to Harrell, which is the *locus in quo;* and Beverly's possession for more than seven years before this action was begun, being adverse to all persons except his lessor, Harrell, and being uninterrupted, ripened the colorable title of Harrell into a good title against the plaintiffs. The plaintiffs reply that nothing short of twenty years' adverse possession would defeat their title, and that the deed to Harrell, being
(61) made by the *executors* of Askew, who had no title, was not color of title.

The result will be the same to the plaintiffs, if either defense is sustained, for in either event they cannot recover.

Passing for the moment the matter offered as the first ground of defense, we will consider the second defense. While it is true, Lawrence Askew had no title to the land in controversy at the time of his death, for the reason it had been divested in the manner hereinbefore stated, yet his executors undertook to sell it as his property, and did convey it to Harrell by a deed fully sufficient in form to pass the title in fee. In section 780, Sedg. and Wait on the Trial of Title to Land, many instances are enumerated of deeds held to be color of title, including the following: a deed made by an administrator with the will

annexed, though no power of sale was given by the will, and no sale had been ordered by the court, a deed of a grantor, purporting to convey as an administrator, under a special act of the Legislature, which act was unconstitutional and void; a paper-writing purporting to be a will, proved before the proper tribunal by the oath of one witness only. These instances are approved by the decisions of this Court. *McConnell v. McConnell,* 64 N. C., 342; *Taylor v. Smith,* 121 N. C., 76; *Britton v. Ruffin,* 122 N. C., 113; *Smith v. Allen,* 112 N. C., 223; *Mfg. Co. v. Brooks,* 106 N. C., 107; *McFarland v. Cornwell,* 151 N. C., 428; *Ellington v. Ellington,* 103 N. C., 54, where other instances are given, form the decisions of this Court.

We see nothing to prevent the deed executed by the executors from being color of title. An analysis of the definition of the color of title by *Henderson, J.,* in *Tate v. Southard,* 10 N. C., 119, will make this clear. Said that learned judge: "Color of title may be defined to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it or the defective mode of conveyance which is used; and it would seem that it must be so obviously defective that no man of ordinary capacity could be misled by it." This definition is approved in other decisions, and is in substantial agreement with *Judge Gaston's* definition in *Dobson v. Murphy,* 18 N. C., 586, and with *Judge Hoke's* in *Smith v. Proctor,* 139 N. C., 314. If there was a want of title in the executors, still their deed, being fully sufficient in form to pass the fee, and conveying it, would be color of title. The very term imports that the true title is not passed; if it were, the doctrine of color of title would not be applicable.

Under the facts agreed it does not appear that either the plaintiffs or Harrell, or any other person claiming under either of them, were in the actual possession of the *locus in quo* from 1886 to 1890; therefore the legal possession continued in the plaintiffs as the (62) holders of the superior title, and so continued until actual entry by any adverse claimant. This adverse entry occurred on 22 December, 1890, when Harrell put Beverly, the ancestor of the defendants, and one Young, into the possession of the land and they took possession of it. Since then this possession has been under a claim of title adverse, continuous, and there being no delimitation of their possession, then to the outer boundaries of the land described in the deed to Harrell, which embraces the entire *locus in quo. Ruffin v. Overby,* 105 N. C., 85, and cases cited in annotated edition.

But the plaintiffs contend that Beverly and Young entered under a paper-writing purporting to be deeds, but which are void as deeds

because of the vague and uncertain description, and they cannot tack their adverse possession to Harrell's colorable title and mature it into a good title. Passing for the moment the alleged want of description in the instruments executed by Harrell to Beverly and Young, as not material to the ground of defense now under consideration, we think, under the decisions of this Court and the doctrine stated by text-books of recognized authority, the defendants can rely, to perfect their title, upon the colorable title in Harrell, their lessor, their entry and claim of title under his deed, and their adverse and continuous posesssion for the statutory time, and thereby ripen their imperfect title into a good title.

In *Brown v. Brown,* 106 N. C., 451, this Court said: "A vendee in possession under a contract of purchase is in privity with his vendor, and is entitled to have the time when he held possession under his vendor added to that after receiving his deed, in determining whether colorable title was matured into a perfect title by possession. The possession of the plaintiff under contract for title was, up to the time of the execution of the contract and taking of the deed, the possession of their vendors, and inured to the benefit of the vendees just as *if they were tenants of the particular tract contracted to be sold;* and after the deed to them, the possession under color continued." *Neal v. Nelson,* 117 N. C., 393. It is likewise held in *Love v. Edmonston,* 23 N. C., 152; *Allen v. Taylor,* 96 N. C., 37; *Jones v. Boyd,* 80 N. C., 258, and in other cases decided by this Court, that one let into possession of land under a contract of sale is a tenant at will of the vendor, and that the principle that a lessee cannot dispute the title of his lessor extends to him. In 24 Cyc., 1040, citing *Bay St. Louis v. Hancock County,* 80 Miss., 364, it is stated that one holding under a void sale is a tenant at will of his vendor.

In *McNeeley v. Langan,* 22 Ohio St., 32, the Supreme Court
(63) says: "The mode adopted for the transfer of the possession may give rise to questions between the parties to the transfer; but, as respects the right of third persons against whom the possession is adversely held, it seems to us immaterial if successive transfers of possession were in fact made, whether such transfers were effected by will, deed, or by mere agreement, either written or verbal."

The attempted conveyances by Harrell to Beverly and Young, though we may treat them as void, as deeds, in determining the question we are now considering, clearly establish the privity between them and Harrell, and their possession, or even, perhaps, the possession of either of them, being adverse as to the plaintiffs and all others except their lessor, continuous and notorious, for seven years before action begun, inured to the benefit of Harrell's title and matured this colorable title into a good title.

To repel the effect of the adverse possession, the plaintiffs say, and it is so stated in the facts agreed: "The plaintiff Bettie J. Newsome married J. S. Bond, 12 July, 1883, and has since her marriage been under coverture; Levinia R. married, first, Hosea Baker, 29 September, 1886; Baker died in 1897, and she married W. R. Hughes, 7 July, 1899." This action was begun 7 December, 1908. The act of 1899, ch. 78, secs. 2 and 3 (now sec. 363, Rev. 1905), declares: "In any action in which the defense of adverse possession is relied upon, the time computed as constituting such adverse possession shall not include any possession had against a *feme covert* during coverture, prior to 13 February, 1899." It is clear that this act repealed the disability of coverture since 13 February, 1899, and it has so been decided by this Court. *Norcum v. Savage,* 140 N. C., 472. So that the coverture of the *feme* plaintiff was no bar to the running of the seven years' statute, and their right of entry and title were defeated before this action was commenced. It would seem to be clear that Harrell, after his deed was registered, and up to 22 December, 1890, was subject to be sued by the plaintiffs to have his deed canceled as a cloud upon their title; and after 22 December, 1890, when he took actual possession by his tenants, Beverly and Young, to an action of ejectment.

On the first ground of defense, to wit, that the paper-writing from Harrell to Beverly is itself color of title, we have serious doubts, and are inclined to agree with the plaintiffs, that the decription is too vague and uncertain. *Cathey v. Lumber Co.,* 151 N. C., 592, and cases therein cited. But we do not think it necessary to determine this question, in view of our conclusion upon the second ground of (64) defense.

After carefully considering the record and the brief of the learned counsel of the plaintiffs, in our opinion the defendants were entitled to judgment upon the agreed facts, and the judgment entered by his Honor for the plaintiffs is erroneous, and is

Reversed.

Cited: Barrett v. Brewer, 153 N. C., 552, 554; *Graves v. Howard,* 159 N. C., 598; *Riley v. Carter,* 165 N. C., 336; *Vanderbilt v. Chapman,* 172 N. C., 814.

D. S. JONES v. CITY OF NEW BERN.

(Filed 2 March, 1910.)

1. Cities and Towns—Streets—Necessary Expense.

The cost of maintaining, repairing and paving the public streets of a city is a necessary expense.

2. Cities and Towns—Bond Issues—Elections—Majority Vote—Constitutional Law.

When a debt to be contracted by a city is for a necessary expense, the restrictive provision of the Constitution, requiring a majority of the qualified voters, does not apply.

3. Same—Legislative Control.

The issue of bonds by a city to meet its necessary expense is controlled by a special legislative enactment relative thereto; and the bonds are valid if the requirement of the act is met, that a majority of the votes cast shall be in favor of the issue.

4. Cities and Towns—Bond Issues—Sinking Fund—Interest—Validity of Bonds.

A failure to provide a sinking fund for the payment of principal, or a special tax for the payment of interest, does not affect the legality of the bonds issued by a city, but only the means and method of payment.

APPEAL from *Peebles, J.*, February Term, 1910, of CRAVEN.

Action to test the validity of a bond issue by the defendant. A demurrer to the complaint was sustained upon the ground that no cause of action is stated in the complaint. Defendant appealed from a judgment dismissing the action.

The facts are stated in the opinion of the Court.

R. A. Nunn for plaintiff.
W. D. McIver for defendant.

BROWN, J. There are three objections made to the validity of the bond issue authorized by the ordinance of the board of aldermen of the defendant city: (1) That the ordinance was not ratified by a
(65) majority of the qualified voters, but only a majority of the votes cast at the election; (2) that there is no provision made for payment of principal or interest; (3) that no notice of the election was given, as required by law.

It appears from the complaint and the ordinance, which is made a part thereof, that the bonds are to be issued for street improvements and paving purposes, in pursuance and by authority of defendant's charter, Private Laws 1899, ch. 82 and the amendments therto; Private Laws

1907, ch. 61. The charter contains this provision: *"Provided,* that before any bonds are issued as herein provided, the question shall be submitted to a vote of the qualified voters of the city, and a majority of the votes cast at such election shall be in favor of the issuing of said bonds."

It may be considered settled in this State that no city or other municipal corporation can contract a debt for other than necessary expenses, except by legislative sanction, ratified by a majority of the qualified voters. But when the debt to be contracted is for a necessary expense, the restrictive provision of the Constitution as to a majority of the qualified voters does not apply.

It has likewise been held that the cost of maintaining, repairing and paving the public streets is a necessary expense. *Commissioners v. Webb,* 148 N. C., 122. Nevertheless, a municipality, such as a city, town or county, is subject to the control of the General Assembly even in respect to necessary expenses. Const., Art. VII, sec. 4; *Burgin v. Smith,* 151 N. C., 566: It is therefore held that the directions of the Legislature must be followed and the provisions of the statute complied with before the municipality may lawfully issue bonds for even necessary expenses. *Commissioners v. Webb, supra,* and cases cited.

In respect to the bond issue under consideration, the General Assembly has seen fit to require ratification by a majority of the votes cast at the election. The debt to be incurred being for a necessary expense for a city of the size and character of New Bern, the legislative requirement is met by no constitutional obstacle.

The second objection cannot be sustained. The alleged failure to provide a sinking fund for payment of principal or a special tax for payment of interest does not affect the legality of the bonds, but only the means and method of payment. *Commissioners v. McDonald,* 148 N. C., 126-148.

The third objection is equally untenable, as Exhibit "A" is (66) made a part of the complaint, and to us it appears to give full and complete notice of the election. *Tyson v. Salisbury,* 151 N. C., 469. The judgment of the Superior Court is

Affirmed.

Cited: Trustees v. Webb, 155 N. C., 388; *Murphy v. Webb,* 156 N. C., 406; *Hotel Co. v. Red Springs,* 157 N. C., 140; *Pritchard v. Comrs.,* 159 N. C., 638; *S. c.,* 160 N. C., 479; *Gastonia v. Bank,* 165 N. C., 511; *Swindell v. Belhaven,* 173 N. C., 3.

MISSOURI BULLOCK v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 2 March, 1910.)

1. Carriers of Passengers—Wrong Train—Wrong Information—Passenger—Alight—Assistance—Negligence.

The purchaser of a ticket who has taken the wrong train in accordance with the information given by its porter, is a passenger thereon until she leaves the train, and the company is liable in damages proximately caused by the failure of the conductor or porter to stop the train at a suitable place, or to provide the proper steps or assistance for her to alight.

2. Same—Place to Stop Train.

The railroad company owed a duty to plaintiff ejected from its train to put her off the train at a suitable and proper place, either at a station or near a house, even though she had not been rightfully a passenger. Revisal, 2629.

3. Pleadings—Demurrer—Practice Suggested.

The allegations of a complaint are taken as true upon demurrer. It is suggested that on such allegations as contained in the complaint in this case the defendant should answer, and not by demurrer ask the court to justify, as a matter of law, its conduct.

APPEAL by defendant from *Ward, J.*, at Fall Term, 1909, of HYDE. The facts are stated in the opinion of the Court.

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

CLARK, C. J. The complaint alleges that the plaintiff (who was sick and traveling with her three children and baggage) had a ticket over the defendant's road from Wilmington to Washington, N. C.; that on reaching Parmele she had to change cars, and there being several trains waiting there, she asked defendant's porter which was the train for Washington, N. C., and with her children entered the train he showed her, relying upon his statement; the train thus entered proved to be the defendant's train for Williamston; the plaintiff did not discover
(67) her mistake until the conductor called for her ticket, when the train had gone two miles; she informed the conductor that she was sick and on her way to Washington for medical treatment, and offered to pay him to take her back to Parmele, but the conductor immediately stopped the train, and at an unsafe and improper place for her to get off, the distance from the lower step at that place being three feet from the ground, the roadbed sloping towards the ditch, and negligently refused to provide her portable steps usual in such cases, and negligently refused to provide her any assistance by porter or otherwise, though knowing that she was in a great hurry and excitement and sick, and with baggage

and children to assist and care for, and though the defendant's porter had negligently caused her to take the wrong train, whereby she was seriously hurt and internally injured by the fall and jar, and causing her great bodily pain and suffering, and permanent impairment of health and physical condition. The defendant demurred upon the ground that complaint did not state facts sufficient to constitute a cause of action.

His Honor properly overruled the demurrer. The plaintiff was a passenger on the defendant's road, and continued to be such while on the platform at Parmele. *Daniels v. R. R.*, 117 N. C., 592.

If the porter hold her to get on this train, she had a right to presume that he knew what he was talking about, and would properly discharge his duties, which by general knowledge and consent cover assistance to passengers. *Tillett v. R. R.*, 118 N. C., 1031; *R. R. v. White*, 99 Tex., 359, 13 Ann. Cas., 965, and cases in the notes. Besides, even if the plaintiff had not been a passenger, it was the duty of the defendant to put her off at a suitable and proper place, and either at a station or near a house. Rev., 2629; Moore on Carriers, 750; *Book v. R. R.*, 84 Mo. App., 76. Of course, it was not its duty to run the train back to Parmele.

We are compelled, on a demurrer, to take the allegations of the complaint as true. Upon the coming in of the answer, and a trial before the jury a different state of facts may be shown. It would be better on such allegations as these for the defendant to answer and deny the allegations, if it can, than by a demurrer to ask the Court to justify, as a matter of law, such conduct on its part as is alleged in the complaint in this case.

Affirmed.

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(68)

M. O. HOLTON v. JOHN L. ROPER LUMBER COMPANY.

(Filed 2 March, 1910.)

1. Master and Servant—Instructions of Superior — Dangerous Work—Rule of the Prudent Man—Questions for Jury.

When an employee has been instructed by his superior to direct another, an inexperienced employee, in working at a dangerous machine, the instruction of the former is the instruction of the master, and where there is evidence that a negligent order was given by him, which a reasonably prudent man would not have given, which proximately caused the injury complained of, the case should be submitted to the jury.

2. Same—Safe Place to Work.

And the result is the same when there is evidence of a safe, as well as an unsafe place in which to do the work, as more than one inference may be drawn as to defendant's negligence and the proximate cause.

3. Master and Servant—Instructions to Servant—Inexperienced Servant—Dangerous Machinery—Warning—Questions for Jury.

If an employee is instructed by his superior to do a dangerous act, without warning against the danger, he having had no previous experience therein, the question of the employer's negligence is one for the jury.

APPEAL by defendant from *Councill, J.*, at December Term, 1909, of PAMLICO.

The facts are sufficiently stated in the opinion.

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

CLARK, C. J. The plaintiff had been employed by the defendant for two weeks in its sawmill, as a common laborer. He was a young man without experience in the use of machinery. The foreman then sent for the plaintiff and told him that a workman around the machinery had been discharged and he wanted the plaintiff to help Hadder, the chief oiler, and to do whatever Hadder told him to do. Plaintiff testified: "Hadder told me how to oil the machinery, and after I had been there two or three days Hadder told me to raise the hood of the 'hog' and sharpen the knives; he said that if I knew how, I could throw the rope around the shafts and could raise the cap of the hog machine while he was raising it upstairs; I said I did not know how to do it, and he said he would show me how; two or three days later when the knives were to be sharpened, Hadder got the men in the lathe-room to raise the steel chute; he showed me how to take the rope and put about two hitches around the shaft so as to save us the strain; the shaft was running
(69) about 200 revolutions a minute; he went upstairs and left me on the first floor to do the work as best I could; the third time I did this the rope ran a little across. I pulled the rope and it slipped for some cause and reversed the action of the shaft, caught my hand, jerked it into the shafts, crushing my arm from the wrist to the elbow, breaking it all to pieces and breaking several of my ribs and my shoulder blades; the rope also caught me around my throat, my body, my side, and my head." He then described his physical injuries in detail. Hadder testified that he did not warn plaintiff of danger in raising the hood by throwing the rope over the shaft. The plaintiff, who was a "green" man without any experience whatever, threw the rope over the shaft as he had been instructed to do by Hadder, his foreman, and when he attempted to pull the rope and raise the hood he was jerked into the machine and injured as above described.

At the close of all the evidence the motion of the defendant to dismiss the action was allowed. This was error. The plaintiff was told to obey the instructions of Hadder, and henceforward the instructions of Hadder

became the instructions of the defendant. Hadder instructed the plaintiff to raise the hood by throwing a rope around the revolving shaft and pulling the rope, without warning plaintiff as to the danger of doing so. Where one having authority to give orders to another, who is inexperienced, gives a negligent order which a reasonably prudent man would not give, and the servant is injured in attempting to obey said order, and the giving said order was the proximate cause of his injury, the servant is entitled to recover. *Avery v. Lumber Co.*, 146 N. C., 592; *Chesson v. Walker, ib.*, 511; *Noble v. Lumber Co.*, 151 N. C., 76; *Shies v. Cotton Mills, ib.*, 290.

Where there is evidence tending to show that an injured employee did not have a reasonably safe place to work, or was not instructed as to the danger attending the act he was told to do, the question whether it was a reasonably safe place to work or whether the failure to warn him of the danger was the proximate cause of the injury should be submitted to a jury. The evidence that there was a safe way to do this act did not warrant the withdrawal of the case from the jury in view of the evidence in the case. When more than one inference can be drawn as to the negligence, or the proximate cause, it is for the jury to determine. *Dorsett v. Mfg. Co.*, 131 N. C., 254; *Marks v. Cotton Mill*, 138 N. C., 401.

If an employee is instructed to do a dangerous act, without warning against the danger, he having had no previous expe- (70) rience in doing the act, the question of the defendant's negligence is for the jury. *Craven v. Mfg. Co.*, 151 N. C., 352; *Wood v. McCabe, ib.*, 457.

Reversed.

Cited: Walters v. Sash Co., 154 N. C., 325; *Norris v. Mills, ib.*, 483; *Pigford v. R. R.*, 160 N. C., 101; *Steeley v. Lumber Co.*, 165 N. C., 34; *Ensley v. Lumber Co., ib.*, 696; *Hopkins v. R. R.*, 170 N. C., 488.

BURLINGTON LUMBER COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 2 March, 1910.)

1. Instructions—Substantially Given.

It is sufficient when the charge of the court substantially gives the instructions requested.

2. Carriers of Goods—Penalty Statutes—Published Rates—Absence of Knowledge—Excuse.

It is the duty of the common carrier to establish, file and publish rates on interstate shipments, and its failure to do so will not relieve it from

a liability for the penalty incurred in refusing to accept freight for shipment. In this case there was no evidence that the carrier did not have these rates, nor that the agent could not have procured the information as to the desired rate of carriage by proper effort.

3. Same—Presumption of Publication.

In the absence of evidence to the contrary, the Court will presume that a common carrier has established, filed and published its joint rates on interstate shipments, as required by law.

4. Carriers of Freight—Penalty Statutes—Refusal to Receive—Interstate Commerce—Constitutional Law.

It is established by the former decisions of this Court that Revisal, 2631, imposing a penalty on the refusal to accept interstate shipments, does not contravene the commerce clause of the Federal Constitution, both because the act is prior to the beginning of transportation and because there is no provision of the act of Congress attempting to regulate it; and further, the State act is in aid of, not an interference with, interstate commerce.

5. Instructions—Unsupported.

Prayers for special instruction, unsupported by evidence, are properly refused.

6. Carriers of Freight—Penalty Statutes—Consignor and Consignee—Goods on Approval and Return—Party Aggrieved.

A consignee to whom goods are shipped on approval owes it as a duty to the consignor to return them if they are unsatisfactory, and he must do so to relieve himself of liability to the consignor; and he is the party aggrieved, under Revisal, sec. 2631, and may maintain his action thereunder for the penalty prescribed upon the refusal of the carrier to accept them for shipment.

7. Carriers of Freight—Penalty Statutes—Refusal to Receive—Continuous Tender.

Placing a shipment of goods in the depot of the carrier, prepared for and with request for shipment, and thus leaving them there, makes each day's delay by the carrier "a refusal to ship," under Revisal, sec. 2631, and the carrier, thus refusing, is responsible for the penalty.

BROWN, J., dissenting; WALKER, J., concurring in the dissenting opinion.

(71) APPEAL from *Long, J.*, at May Term, 1909, of ALAMANCE.

The plaintiff sought to recover the penalty prescribed by Revisal, 2631, for the refusal of the defendant to recive for shipment to Saginaw, Michigan, certain milling machinery tendered it by the plaintiff on 28 January, 1907, no bill of lading for said machinery being issued until 3 April, 1907. The plaintiff's contention was that the defendant failed and refused to receive said machinery for shipment upon tenders made daily and continuously for a period of sixty-five days, and that by reason of said refusal said defendant became indebted to the

plaintiff in the sum of $3,050, all of this amount in excess of $2,000 being remitted by the plaintiff. The defendant denied that there was any tender of machinery for shipment until 3 April, 1907, the day on which bill of lading was issued. It alleged that Revisal, 2631, was unconstitutional, in so far as it affected interstate shipments. It also alleged that the plaintiff had no such interest in the said machinery as entitled it to bring this action. There was a verdict for the plaintiff and a judgment in accordance therewith, from which defendant appealed.

W. H. Carroll for plaintiff.
W. B. Rodman and Parker & Parker for defendant.

CLARK, C. J. The exceptions 1, 2 and 12 are for failure to give certain prayers for instruction. On examination we find they were given substantially in the charge, which is sufficient. *Harris v. R. R.*, 132 N. C., 163; *R. R. v. Horst*, 93 U. S., 201.

Exceptions 4, 5, 6 and 7 are for refusal to give defendant's prayers for instruction 3, 4, 6 and 7, which, are in substance, that this being an interstate shipment, the defendant was required to establish, file and publish its rate between Burlington, N. C., and Saginaw, Mich., before shipping this freight, and that the burden was on the plaintiff to show that the rate had been so filed. The duty to file such rate was on the defendant, the fact was in its peculiar knowledge, and its failure to show that it had discharged such duty cannot absolve it from its duty to the plaintiff to accept and ship his freight. It cannot plead its own default as a defense to another default. Indeed, on 3 April, the (72) agent at Burlington did get such rate from division headquarters at Greensboro, twenty-one miles away. There is no evidence that such rate could not have been procured at any time prior thereto.

The court committed no error in refusing these prayers for instruction. The proper establishing, publication and filing rates will be conclusively presumed. In *Reid v. R. R.*, 150 N. C., 764, the Court, in passing upon the same contention, said: "The presumption is that the company has complied with the law, and if it were otherwise we are of the opinion that the act of Congress and the orders of the commission made thereunder, requiring the publication of rates, was made for an entirely different purpose from that involved in this inquiry, and does not constitute such interfering action." To same purport *R. R. v. Oil Mills*, 204 U. S., 449.

In *Harrill v. R. R.*, 144 N. C., 540, the Court says: "It must be presumed against the contention of the defendant that it has complied with the law by filing its schedule of rates, fares and charges with the commission, and by publishing the same."

The Federal statute does not prohibit the receipt or forwarding of a single shipment, but forbids the carrier to "engage or participate in the transportation of passengers or property," interstate, without filing its rates. It is the *business* of a common carrier which the defendant is forbidden to exercise without filing its rates, and the statute has no sort of application to this case, where the defendant was carrying on such business and presumptively, at least, under authority of law.

Exceptions 6, 13, 14 and 16 call in question the constitutionality of Rev., 2631, as applied to interstate shipments. We have repeatedly passed upon this contention. The defendant's brief admits this, and cites eight decisions of this Court which it asks us to overrule. In one of the latest of these, *Reid v. R. R.*, 149 N. C., 423, the authorities were reviewed and the Court said: "The defendant contends, however, that Revisal, sec. 2631, giving a penalty for refusing to accept freight for shipment, is unconstitutional when the freight is to be shipped into another State. But refusing to receive for shipment is an act wholly done within this State; it is not a part of the act of transportation, and our penalty statute applies. This was held by *Avery, J.*, in *Bagg v. R. R.*, 109 N. C., 279, where the railroad company received the shipment for a point in another State, but negligently detained it for five days before shipping. The precise point herein was raised in *Currie v. R. R.*, 135 N. C., 536, and it was held that this section, giving a penalty for failing and refusing to accept for shipment the car-load of lumber,
(73) was not unconstitutional as an interference with interstate commerce when the lumber was offered for shipment to a point in another State. Both of these cases were cited and reaffirmed by *Walker, J.*, in *Walker v. R. R.*, 137 N. C., at page 168. In *Twitty v. R. R.*, 141 N. C., 355, *Brown, J.*, it was held that where the agent held the freight in storage, but refused to give a bill of lading because he did not know the freight rates, this was 'a refusal to receive for transportation, and the railroad company was liable for a penalty under Revisal, 2631.' In *Harrill v. R. R.*, 144 N. C., 532, *Walker, J.*, it was held that Revisal, sec. 2633, imposing a penalty for failure to deliver freight, was valid, though the freight was interstate." There the penalty was incurred after the transportation had ceased. Here the penalty occurred before the transportation had been begun and before the freight was even received and accepted for transportation.

When the case was again before the Court, *Reid v. R. R.*, 150 N. C., 764, *Justice Hoke*, after reviewing and approving the former decision, said: "Since this decision in *Morris-Scarborough-Moffitt Co. v. Express Co.* was rendered, the Supreme Court of the United States, the final authority on these matters, held on a question relevant to this inquiry that, 'Notwithstanding the creation of the Interstate Commerce Com-

mission and the delegation to it by Congress of the control of certain matters, the State may, in the absence of express action by Congress or by such commission, regulate for the benefit of its citizens local matters indirectly affecting interstate commerce.' This principle was announced and sustained in *R. R. v. Flour Mills,* 211 U. S., 612, a case which involved the right of the court to compel the railroad company or common carrier to place cars on a siding which had been prepared for the purpose and for the benefit and convenience of a flouring mill engaged in making shipments of interstate commerce."

The above decisions have been since followed by *Connor, J., Garrison v. R. R.,* 150 N. C., 575, 592, with full review of the authorities and no dissent. In fact, the duty to receive freight "whenever tendered" was a common law duty. *Alsop v. Express Co.,* 104 N. C., 278, cited and approved in *Garrison v. R. R., supra,* 582.

That the interstate commerce did not begin till the goods were accepted for shipment and bill of lading issued is held. *Match Co. v. Ontonagon,* 188 U. S., 94, citing *Coe v. Errol,* 116 U. S., 517, where *Bradley, J.,* held that "not till goods have begun to be transported from one State to another do they become the subjects of interstate commerce and as such subject to Federal regulation." In this opinion (p. 528) he says: "It is true, it was said in the case of the *Daniel Ball,* 10 Wall., 565, 'Whenever a commodity has begun to move as an article of trade (74) from one State to another, commerce in that commodity has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. . . . Until shipped or started on its final journey out of the State, its exportation is a matter altogether *in fieri,* and not at all a fixed and certain thing."

Besides, the statutory enforcement, under penalty, of the common-law duty to accept freight "whenever tendered" is not in the scope of terms of any act of Congress, and is neither an interference with nor a burden upon interstate commerce, but in aid of it.

Exceptions 9, 10 and 11 are for refusal of prayers based on the theory that the goods were accepted for shipment 28 January, 1907, which is not supported by evidence, and were properly refused. *Hassard-Short v. Hardison,* 117 N. C., 60.

Exceptions 17, 18, 19, 20, 21, 22 and 23 present only one question, and may, therefore, be treated together. Did the plaintiff have the right to bring this action? Was he the aggrieved party? The law is correctly set forth in the following citations: "The shipper of the goods is the party aggrieved and is the one entitled to sue for the penalty prescribed in Revisal, sec. 2631, which arises from the wrongful refusal of the

carrier's agent to accept them for transportation. *Reid v. R. R.*, 149 N. C., 423; *s. c.*, 150 N. C., 753.

"In giving the penalty to the party aggrieved the statute simply designates the person who has the right to sue and restricts it to him who by contract has acquired the right to demand that the service be rendered. The party aggrieved in statutes of this character is the one whose legal right is denied, and the penalty is enforcible independent of pecuniary injury." *Rollins v. R. R.*, 146 N. C., 156; *Cardwell v. R. R., ib.*, 218; *Summers v. R. R.*, 138 N. C., 295.

This machinery had been shipped to the plaintiff on approval, and as it proved unsatisfactory, it was the plaintiff's duty, if it would relieve itself of liability, to return it to the vendors at Saginaw, Mich., and it had the legal right to demand of the defendant its transportation to that point, and was the party aggrieved by failure to do so.

Connor, J., speaking for a unanimous Court, said in *Garrison v. R. R.*, 150 N. C., 586: "The defendant next urges that the penalty of $50 for each day the said company refuses to receive said shipment can be recovered only when a tender is made on each day. We cannot concur in that view. The plaintiff hauled his lumber to the defendant's regular depot, and with his consent placed it upon the car (in this case, in
(75) its depot), demanding a bill of lading, which was refused. Plaintiff says he went to the agent two or three times and asked if he had shipped it, and he said he had not. . . . To require the defendant to haul the lumber home and return it to the depot each day, or to go through the empty form of making a constructive tender, imposes either an unwarranted hardship or savors of trifling with a man's substantial rights. The plaintiff left the lumber on the car with a standing tender and demand that it be shipped. . . . The statute would be of little value as a remedy for existing evil if the narrow construction is given as contended by defendant. The Legislature evidently intended to impose a penalty for each day upon which the freight was at the depot ready for shipment. Each day's delay in shipping was 'a refusal to ship' within the meaning of the statute."

The verdict of the jury established that the defendant failed and refused for sixty-one days to receive said goods for shipment. The plaintiff remitted all in excess of the penalty for forty days.

If the defendant had offered to ship to the end of its line, and declined to ship farther for lack of rates, a different point might have been presented; but there is no such exception in the record or in appellant's brief, and more than one of defendant's prayers is predicated on its refusal to issue any bill of lading because the agent at Burlington did not have the rates to Saginaw, though he had applied to the agent at Greens-

boro for them. But the neglect of the agent at Greensboro, or of those "higher up," was the failure and default of the defendant. Besides, if the defendant had issued the bill of lading, it is common knowledge that it would have contained the words "said company agrees to carry to its usual place of delivery, if on its road, *otherwise to deliver to another carrier on the route to said destination.*" These words, always used in such cases, are retained in the bill of lading prescribed by the Interstate Commerce Commission. The plaintiff asked for no other kind of bill of lading, and could not have expected the defendant to be responsible for shipment beyond the end of its own line. The defendant refused to issue any bill of lading at all (which would have been, of course, in the usual form for such shipments) or to ship at all, and the defendant is liable. *Twitty v. R. R.*, 141 N. C., 355, in which the opinion is by *Brown, J.*, is exactly in point.

Affirmed.

BROWN, J., *dissenting:* The facts appearing from the plaintiff's (76) evidence are as follows: On 28 January, 1907, plaintiff delivered to defendant at its depot in Burlington, North Carolina, one blowpipe machine, with directions to ship it to Allison & Curtis Manufacturing Company, Saginaw, Michigan. The blowpipe was not the property of the plaintiff, but had been sent on trial and was being returned to the owners. The defendant's agent stated that he had no rates on Saginaw, Mich., and could not ship the blowpipe until he could get them. Plaintiff's agent said that was all right, that he would pay freight as soon as he got bill of lading. The blowpipe was placed on the platform of defendant's depot. Defendant's agent tried to get the rates next day from the division freight agent's office at Greensboro, but did not succeed in getting them until 1 April, 1907, and two days thereafter the bill of lading was issued and the pipes were shipped.

The plaintiff claimed an indebtedness by way of penalty for $3,050 under the statute of this State, Revisal 1905, sec. 2631, but did not make a claim for any actual damage sustained by the delay. Whether from motives of benevolence, fearing that such drastic penalties in a transaction of such small value will bankrupt the defendant, or whether from fear of removal to the Federal courts, for some reason, the plaintiff demands judgment for only $2,000.

1. I am of opinion that under the language and spirit of the statute, the plaintiff is not the party aggrieved, and therefore cannot maintain this action. It is admitted by plaintiff's witness that the goods were not plaintiff's property, but the property of the Allison & Curtis Company, of Saginaw, Mich.; that they had been sent out for examination, and

were being returned. In returning the pipes, the title to which had never been in plaintiff, the clerk of plaintiff was acting for the Allison Company.

If the defendant is liable at all for a penalty it is liable to the Allison Company, for that company alone has sustained any actual damage by delay. The statute plainly designates who is the party aggrieved, by coupling him with the one who has sustained actual damage, in these words: "and shall pay to the party aggrieved the sum of $50 for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive the freight." This language is peculiar to this statute, and does not appear in the other penalty laws. Unless the plaintiff can recover actual damages incident to the delay, then it follows that the penalty must go to the party who has sustained them.

(77) In this case it is admitted that it is the consignee who owned the property, and to whom it was being returned, and who alone could be endamaged in any way by the delay. It follows that the consignee alone can sue for the penalty. This is the principle laid down by this Court in *Stone v. R. R.*, 144 N. C., 220, and as late as last term of this Court by *Mr. Justice Walker* in *McRackan v. R. R.*, 150 N. C., 332.

It is plain to me that the General Assembly has not subjected the defendant to two penalties, one to consignor and one to consignee, but by the express language of the act has given the one penalty to the party who has sustained actual damage. It is therefore manifest that a judgment against defendant in this action would be no bar to a recovery by the Allison & Curtis Company for actual damages and for this same penalty in connection therewith.

2. I am of opinion that this transaction is one of interstate commerce, to which section 2631 of our Revisal cannot apply.

This is especially true since the act of Congress of 29 June, 1906, 34 Stat. L., 584, by which Congress has extended its jurisdiction over the whole subject of interstate shipments and ousted that of the States, if they ever had any, to regulate or to penalize carriers in respect to such shipments. This exact question is discussed in the dissenting opinion, concurred in by *Justice Walker* and myself, in *Reid v. R. R.*, 150 N. C., 766, in which I cited *R. R. v. Mays*, 201 U. S., 321, as direct authority against the right of a State to penalize a transaction of this kind, upon the ground that it is an attempt to regulate and impose a burden upon interstate commerce.

It would seem to me that a statute which permits the recovery as penalty of over $3,000 in a small transaction by a party who has sus-

tained no loss, and claims no actual damage, does impose an unreasonable burden upon interstate or any other kind of commerce, which few common carriers can bear and still perform their duties to the public.

It appears to me to be immaterial upon whom rests the burden of proving that defendant's schedules had not been filed and published in accordance with the act of Congress. The act is cited for the purpose of showing that by its regulations and requirements Congress has itself assumed exclusive control of this kind of commerce, and thus ousted that of the States. If it is material, then it appears from plaintiff's testimony (defendant offered none) that defendant company had no rates to Saginaw, Mich., and, presumably, had filed and published none, as Saginaw is not on defendant's line. There are many lines of railway, belonging to different carriers, between Burlington and Saginaw, and surely the burden of proof cannot rest on this defendant to show that these several carriers had not filed and published their rates in accordance with the act. (78)

3. There is another, stronger reason which impels me to believe that the General Assembly never intended the statute to apply to a transaction of this kind.

Before this plaintiff can recover the penalty it must show that the defendant was under a legal obligation to accept the pipes for transmission to Saginaw, Mich., and to give a bill of lading to that point.

It is universally held in this country that a common carrier cannot be compelled to accept freight for shipment and delivery to a point beyond its own lines. It may voluntarily contract to do so, but it cannot be compelled by any legislative authority. Hutchinson on Carriers, sec. 145, and cases cited in notes.

As said in the dissenting opinion referred to in *Reid v. R. R., supra:* "The liability of the carrier beyond the terminus of its own line must be based on contract, and no authority has been shown, and none exists, so far as my researches have discovered, to the effect that a State can compel an interstate carrier to enter into such a contract and give a through bill of lading to points in another State beyond its own lines, and penalize the carrier for its refusal."

It is not to be supposed that the Legislature of this State intended to impose a penalty upon a common carrier for refusing to enter into a contract of carriage which it had no power to compel it to enter into.

This principle of law was practically recognized in the opinion of the Court in *Reid v. R. R., supra,* p. 765, but the Court held that Scottsville, Tenn., was on defendant's line of railway, according to the evidence in that case. In this respect that case differs materially from this, for it is a matter of common knowledge, of which courts may take judicial

notice, that the Southern Railway Company's lines do not extend anywhere near to the State of Michigan. *Harper v. Express Co.*, 144 N. C., 639. Therefore, I take it to be undeniable that when the plaintiff tendered the pipes to defendant's agent at Burlington, N. C., and demanded a bill of lading to Saginaw, Mich., the agent had a right to refuse the proffered shipment altogether, unless the shipper should signify that he desired a bill of lading to the nearest point on defendant's own line of railway, which in this case was not done.

Giving the demanded bill of lading to Saginaw was a matter of private contract, and the refusal to do so was not a violation of any public duty which the defendant owed plaintiff. Therefore, defendant's agent acted well within his rights when he refused to give a bill of lading, and thus enter into a written contract to deliver the goods at Saginaw, until, through the traffic department of the defendant, joint rates with
(79) the other carriers had been arranged.

It is a matter of general knowledge that transportation rates all over the United States are being constantly changed, and it is impossible for any common carrier to keep track of the various rates to every railway station in this Union and to be able at once to give them on demand. Under such circumstances they have, in my opinion, the right to refuse such shipments altogether or to hold up the issue of bills of lading until the necessary inquiries are made.

This Court has held that a refusal to issue a bill of lading at once upon tender of the freight to the point named by the shipper is a refusal to receive, and brings down upon the carrier the penalty given in section 2631.

This action is brought to recover the penalty for refusal to issue the bill of lading to Saginaw, and not for a delay in shipping the goods after receipt, and, under the opinion of the majority, the plaintiff, if he had asked it, would be entitled to recover $50 per day from 28 January, when the bill of lading was demanded, to 3 April, when it was issued, although this contract was one which, it must be admitted, the State of North Carolina had no power to compel the defendant to enter into.

I am unable to reconcile such decision with the well-settled principles of law to which I have adverted.

MR. JUSTICE WALKER concurs in this dissenting opinion.

Cited: Reid v. R. R., 153 N. C., 491, 496.

N. R. DEPPE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 9 March, 1910.)

1. Motion to Nonsuit—Evidence, How Considered.

Upon a motion to nonsuit upon the evidence, 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 regarded as established.

2. Negligence—Railroads—Sparks from Engine—Evidence—Origin — Primal Cause.

When, in an action for damages for the destruction of plaintiff's lumber dry-kiln by fire alleged to have been caused in the daytime, by a spark from defendant railroad company's locomotive, the plaintiff has introduced evidence of the condition and surroundings of the kiln, tending to exclude the possibility of the fire originating therein, and there is evidence that a short time before the fire was discovered the locomotive was shifting cars near the kiln, that it had enveloped the kiln in smoke, that the fire was discovered near a ventilator in the top of the kiln, it is sufficient to take the case to the jury upon the question as to whether the primal cause of the fire was a spark from the locomotive entering the kiln through the ventilator; and it was unnecessary to prove directly by eye-witnesses that such was the cause.

3. Negligence—Railroads—Evidence — Spark from Engine — Proper Equipment—Rebuttal.

Where there is competent evidence to show that a fire to plaintiff's lumber dry-kiln originated from a spark from defendant's locomotive, it is sufficient to charge the latter with negligence; and the burden is upon it to show that it had used all the precautions for confining sparks or cinders which are approved and in general use, and that the appliances furnished were used by a competent and skilled engineer in a careful way.

APPEAL from *Guion, J.*, at November Term, 1909, of CRAVEN. (80)

At the close of plaintiff's evidence the defendant moved for judgment as upon a nonsuit. His Honor sustained the motion, to which ruling plaintiff excepted and appealed to this Court. The facts, as established by the evidence, are stated in the opinion of the Court.

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

MANNING, J. This case being presented to us upon motion for judgment, under the statute, made by the defendant at the conclusion of plaintiff's evidence, the rule established by this Court for the consideration of the evidence is thus stated: "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 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; *Freeman v. Brown,* 151 N. C., 111.

The plaintiff sues to recover damages for the negligent destruction, by fire, of two dry-kilns, a large lot of lumber and a sawmill plant and appurtenances, located at Deppe, in Onslow County, and near a track of the defendant. The fire occurred on the morning of 15 August, 1908. A freight train operated by the defendant stopped, on that morning, at Deppe and the engine was, for fifteen or twenty minutes, shifting cars backwards and forwards on the sidetrack running to plaintiff's plant; that the kilns were built near the sidetrack, 60 feet from it;
(81) they lay lengthwise along the track, and in the green end of the kiln, *i. e.,* the end through which the trucks full of lumber are run into the kiln; at the top there was a ventilator, 4 or 4½ by 8 feet, opening back about 6 or 7 feet high; the kilns were each about 20 feet wide, and were used for drying out lumber; they were heated by steam conducted in iron pipes from a boiler 156 feet away; the pipes, after reaching the kilns, were laid on iron pipes in the bottom of the kilns and the ventilators were used for the discharge of the hot air moistened by the water from the lumber; the kilns were tightly built, and no fire was in or about them; from the iron pipes to the place where the fire was discovered in the top of the kilns was 12 to 14 feet. When the fire was discovered near the top of the kiln and near the ventilator, between the ceiling and the roof, no fire was discovered around the pipes or nearer them than the ventilator. The ventilators were open. The wind was blowing from the railroad track towards the kilns, and they were enveloped in the black smoke of the shifting engine while there. The boiler, which furnished the steam heat to the kiln, was 156 feet away from the kiln, and the wind was blowing its smoke and cinders from its smokestack away from the kilns. Only one of the two kilns was heated the morning of the fire. The mill was idle and no fire in its boiler. It was in evidence that it was impossible for the fire, occurring in the part of the kiln, where it was when first seen, to have been caused by the steam-heated pipes. The time between the departure of the defendant's train and the breaking out of the fire was estimated by the witness to have been from three-quarters of an hour to an hour and three-quarters; some of them described it as a short time. The witnesses explain in detail the construction of the kilns, the location in them of the steam pipes, and a map of the premises was used, showing the relative location and distances of the sawmill, lumber sheds, kilns, boiler and railroad tracks.

The first question, therefore, presented is, "Was the defendant's engine the origin of the fire?" Does the evidence, construed in the view most favorable to the plaintiff, tend to prove this primal fact?

The defendant contends that no witness testified that he saw sparks emitted by the engine or that he saw the sparks from the defendant's engine ignite the plaintiff's lumber kiln. In considering this contention, it must be remembered that this fire occurred in the daytime—in the brilliancy of a summer sun, rendering sparks emitted by an engine incapable of being seen by the human eye. That no one saw the sparks ignite the burned property was the fact in *McMillan v. R. R.*, 126 N. C., 725, and *Williams v. R. R.*, 140 N. C., 623; in which latter case this Court comments upon a similar contention: "No one testified (82) that he saw the sparks fall from the engine upon the right of way. It is rarely that this can be shown by eye-witnesses, for it would be put out by the observer. But here the fire was seen on the right of way, it burnt along the track between the ditch and the ends of the ties, and thence had gone into the woods. The wind was blowing from the northwest across the track, the fire being on the south side. Two witnesses testified that they first saw the smoke about thirty minutes after the defendant's engine passed. How long before that the fire began, no one knew, but there was no fire before the engine passed. The other witness first saw the fire after a longer interval, and there was evidence the fire burnt both ways. These were matters for the jury." The evidence offered in the present case tends to fix the origin of the fire upon the defendant's engine by exclusion of every other known cause. There was no fire before the defendant's engine began shifting cars on the track; there was no fire about the kiln or within 156 feet, more than twice the distance of defendant's engine; that smoke from the engine entirely enveloped the kiln; the only opening in the kiln was the ventilator—the place at which, or near which, the fire was discovered; it was impossible for the fire to have originated from the steam pipes; the wind was blowing the smoke from plaintiff's boiler away from the kiln, and was blowing the dense smoke from defendant's engine on the kiln, until it was enveloped.

We think the evidence ought to have been submitted to the jury, as the triers of the fact, to determine the primal fact, if the defendant's engine was the cause of the fire. As the evidence tended to prove this fact, we must, for the purposes of this motion, assume that this fact was established, and that the jury would have so found.

In considering the *origin* of the fire, it is immaterial whether the fire caught on or off the right of way. The place of ignition is important on the second question.

The second question presented is, Could the jury find from this primal fact that the plaintiff's property was negligently burned by the defendant? In 2 Shear. and Redf. on Negligence, sec. 676, the learned author says: "The decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks or cinders (as the case may be) which have already been mentioned as necessary. This is the common law of England, and the same rule has been followed in New York, Maryland, North Carolina, South
(83) Carolina, Illinois, Wisconsin, Missouri, Nebraska and Texas," *Ellis v. R. R.*, 24 N. C., 138; *Mfg. Co. v. R. R.*, 122 N. C., 881; *Hosiery Co. v. R. R.*, 131 N. C., 238; *Lumber Co. v. R. R.*, 143 N. C., 324.

If the defendant can show at the trial that it "had used all those precautions for confining sparks or cinders" which are approved and in general use, and the jury shall so find the fact, the trial judge will instruct them to answer the issue of negligeuce "No," provided the precautions were used by a competent and skilled engineer, in a careful way. Rule 1 in *Williams v. R. R.*, 140 N. C., 623; *Knott v. R. R.*, 142 N. C., 238.

In this case, we assume the kilns were not on the right of way of defendant, and it would seem that the case falls under Rule 1 of the summary of the rules of negligence, stated with such clearness by the *Chief Justice* in *Williams v. R. R.*, 140 N. C., 623. We, therefore, think his Honor erred in sustaining the motion to nonsuit, and this judgment is reversed and there will be a

New trial.

Cited: Edge v. R. R., 153 N. C., 220; *West v. Tanning Co.*, 154 N. C., 46; *Kornegay v. R. R.*, 154 N. C., 392, 393; *Hamilton v. Lumber Co.*, 156 N. C., 523; *Currie v. R. R., ib.*, 423; *Deppe v. R. R., ib.*, 56; *Thorp v. Traction Co.*, 159 N. C., 35; *Young v. Fiber Co., ib.*, 377; *Hardy v. Lumber Co.*, 160 N. C., 117; *Aman v. Lumber Co., ib.*, 373; *Machine Co. v. Bullock*, 161 N. C., 7; *Beck v. Bank, ib.*, 206; *Madry v. Moore, ib.*, 298; *Brown v. R. R., ib.*, 476; *Nance v. Rourk, ib.*, 649; *Armfield v. R. R.*, 162 N. C., 28; *Ballthrash v. McCormick, ib.*, 473; *Johnson v. R. R.*, 163 N. C., 442; *Forsyth v. Oil Mills*, 167 N. C., 181; *McRainey v. R. R.*, 168 N. C., 573.

FRED WOLFENDEN v. BOARD OF COMMISSIONERS OF BEAUFORT COUNTY.

(Filed 9 March, 1910.)

1. Taxation—Solvent Credits—County Commissioners—Revision—Interpretation of Statutes—Constitutional Law.

Under sec. 68, ch. 440, Public Laws of 1909, the board of county commissioners are given full power and authority, and provided with ample machinery to revise the taxable value of property, and a resolution simply requesting a taxpayer to properly list his solvent credits, upon advice received by the board that he has not done so, is not a revision of an assessment for taxes in accordance with the requirements of the statute, passed to make effective the mandates of sec. 3, Art. V, of the Constitution.

2. Same—Meeting of Board.

The power of the county commissioners to revise the tax list of a county for the year 1909 is derived from sec. 68, ch. 440, of the legislative acts of that year, which requires that they shall meet on the second Monday in July, and shall sit for one day at least, and, when necessary, until the revision is complete; and when they, in attempting to revise the tax list, have increased the value of a solvent credit of a taxpayer without regard to this requirement, at a subsequent and separate meeting, the increase in the valuation is void.

3. Same.

When the board of county commissioners have completed the revision of the tax lists as authorized and empowered by sec. 68, ch. 440, Laws 1909, its duties and powers as a revising board cease and determine, until the time appointed by the statute for the next succeeding year.

4. Taxation—County Commissioners—Board of Equalization—Distinct Entities.

The powers and duties of equalization conferred by sec. 18, ch. 440, Laws 1909, are not conferred upon the board of county commissioners as a distinct corporate body, but as a board of equalization to act every fourth year, when taxable property is revalued.

5. Taxation—County Commissioners—Revision—Notice—Hearing.

It is necessary for the board of county commissioners at its meeting for the revision of the list of taxable property under the power conferred by statute, to give notice to the owner, or his agent, of property it has determined to increase the tax value of, and to fix a time for a hearing.

6. Taxation—County Commissioners—Revision—Solvent Credits—Meetings of Board—Interpretation of Statutes.

The board of county commissioners having fixed the value for taxation of certain solvent credits of plaintiff, which was not thereafter changed at its meeting as a board of revision, and having raised the tax value of the notes at a regular and not at the meeting prescribed by the statute for revision, in accordance with the sum realized by a sale of land under mortgage securing the notes, without notice to plaintiff, or his agent, their action is void, and the increase in value is a nullity.

HOKE, J., concurring in result; CLARK, C. J., dissenting.

(84) APPEAL from *Ward, J.*, at December Term, 1909, of BEAUFORT, and heard on appeal from a judgment of a justice of the peace.

The action was determined by his Honor upon the following statement of agreed facts:

1. That prior to 1 June, 1907, the plaintiff was the owner of a certain tract of land lying in Beaufort County, North Carolina, and on 11 December, 1906, the said plaintiff sold said tract of land to one N. C. Hughes, Jr., in consideration of the sum of $25,000, and executed a deed to the said Hughes therefor. On 14 December, 1906, the said N. C. Hughes, Jr., executed notes or bonds unto the plaintiff, under seal, aggregating the sum of $25,000, representing the purchase money for said land, and said notes were secured by mortgage upon said land, which said mortgage was duly registered in the register of deeds' office in Beaufort County.

2. In the month of June, 1907, the plaintiff listed his taxes with a list-taker, who had theretofore been duly appointed to receive the tax list for Chocowinity Township, in which township plaintiff resided.

(85) That on said list the plaintiff returned the aforesaid notes or bonds of the said N. C. Hughes, Jr., which was secured by mortgage upon the aforesaid tract of land, as being worth $25,000.

3. The said list-taker duly returned his list to the county commissioners of Beaufort County or the register of deeds, and the same were placed with the register of deeds of said county of Beaufort, in order that the tax list for the county of Beaufort for the year 1907 might be made up from said tax list. After the said tax list had been returned to the register of deeds of the county of Beaufort, and before the register of deeds had made up the tax books for the year 1907, the plaintiff, who was then a member of the Board of County Commissioners of Beaufort County, instructed the Register of Deeds of Beaufort County, who was the clerk of said board and who made up the tax books for said county, not to value said notes at $25,000, but to leave the matter open for the commissioners as to their value. The county commissioners at a regular meeting ordered that said notes be listed by the plaintiff for the year 1907 at $12,500, and the register of deeds of said county, being clerk of said board, entered said notes upon the tax books of the said county of Beaufort for the year 1907 at the valuation of $12,500, being the valuation fixed by the board of county commissioners. On 1 June, 1907, plaintiff was not indebted to any one.

4. The plaintiff paid the taxes assessed against said notes for the year 1907, based on the valuation of $12,500, being the sum at which they were entered upon the tax books of the county of Beaufort by the register of deeds, clerk of the board of county commissioners, under the

instruction of the board of county commissioners, instead of at the sum of $25,000, for which the same had been listed with the list-taker.

5. On 1 June, 1908, plaintiff was the owner of the said notes, given by the said N. C. Hughes, Jr., as aforesaid and secured by mortgage, as aforesaid, but had borrowed the sum of $3,000 and had given the said notes as collateral security for said loan of $3,000. He owed no other debts on 1 June, 1908.

6. The plaintiff, during June, 1908, listed the said notes for taxation with the list-taker for Chocowinity Township, who had been duly appointed to take the tax list for said township. In listing said notes for taxation the plaintiff returned the same as being worth the sum of $11,000 and deducted from the said $11,000 the amount of his indebtedness on the said notes, towit, the amount of $3,000, leaving a net balance of $8,000 as the amount on which the plaintiff was to pay taxes for the year 1908 by reason of the ownership of the said notes of the face value of $25,000, subject to a lien of $3,000 for money (86) borrowed.

7. On the second Monday in July, 1908, the members of the board of county commissioners for the county of Beaufort met, according to law, as the board of equalization for the county of Beaufort, for the purpose of equalizing the tax valuation throughout the county of Beaufort.

8. At the session of the said board of equalization the following resolution was passed:

"It has been reported to the county commissioners that Mr. Fred Wolfenden has in his possession, to wit, solvent credits that he has failed to list for taxation for the year 1908. The said board, upon receiving such information, requests Mr. Wolfenden to list such property, if it has not been listed as the law requires."

The plaintiff was a member of the board of commissioners of Beaufort County, and a member of the board of equalization when said resolution was passed. No other action was taken in regard to said matter at said meeting.

9. On the first Monday in March, 1909, plaintiff, after due advertisement, according to the terms of the said mortgage, sold the lands described in said mortgage, securing the notes, at public auction at the courthouse door in the county of Beaufort, at which sale S. R. Fowle became the last and highest bidder for said land in the sum of $22,500. The plaintiff, as mortgagee, duly executed to the said S. R. Fowle a deed for said land. S. R. Fowle is solvent and was solvent at said time.

10. At the time of the sale of said land, under the said mortgage or deed of trust, as aforesaid, the plaintiff had not then paid the taxes which were assessed against him for the year 1908.

11. On the first Monday in March, 1909, the Board of County Commissioners of Beaufort County, without notice to the plaintiff, raised the valuation of said notes as listed by said Fred. Wolfenden, of which he was the owner on 1 June, 1908, to the sum of $22,500, being the sum of $11,500 in excess of valuation which plaintiff had put upon said notes in 1908, in returning the same to the list-taker, and $14,500 in excess of valuation placed on tax books.

12. The plaintiff, by his attorney appeared before the Board of County Commissioners of Beaufort County, at the March meeting in 1909, on the day after the valuation was raised, and protested against the action of the board of county commissioners, and upon the request of plaintiff, through his attorney, the Board of County Commissioners of Beaufort County continued the action on the matter of raising the taxes on the said tax list until the meeting of the said board of
(87) county commissioners could be held in April, 1909.

13. At the meeting of the Board of County Commissioners of Beaufort County, and upon the request of plaintiff, the plaintiff and his attorney appeared before the said board, and after inquiry, the said board of commissioners, over the plaintiff's protest, adopted the following resolution:

"It appearing to the satisfaction of the board that Fred. Wolfenden's solvent credits were listed for the year 1908 at $8,000, and it appearing upon further investigation that the actual value was $22,500, it is now, therefore, ordered, adjudged and decreed that he be charged for the difference, which is $14,500; amount of tax $116."

14. On 4 June, 1909, the plaintiff paid to George E. Ricks, Sheriff of Beaufort County and tax collector, the sum of $116, being tax on $14,500, under protest, in writing, that the assessment of said tax was contrary to law. After the first Monday in March, 1909, and before 4 June, 1909, plaintiff had paid to George E. Ricks, sheriff and tax collector of Beaufort County, the taxes which had been assessed against him on the said notes, which had been listed by him for the sum of $8,000, net, that is $11,000, from which was deducted the $3,000 due and owing plaintiff—that is, the plaintiff paid the taxes assessed on said $8,000 as the value of said notes.

15. On 10 June, 1909, the plaintiff demanded of J. F. Taylor, Treasurer of Beaufort County, a return of said sum of $116; the said amount has not been returned, and defendant still refuses to return the same, except the sum of $24, being the taxes on $3,000, the amount of the indebtedness of plaintiff on 1 June, 1908, and for which the said notes had been duly pledged as aforesaid, as collateral security. The sum of $24 defendant has offered to return and has tendered to the plaintiff, defendant admitting that said sum of $24 should not have been collected

by the sheriff, by reason of the fact that plaintiff was entitled to have deducted from the actual value of said notes the amount of his indebtedness, to wit, $3,000. Plaintiff has refused to accept same.

On 4 May, 1909, plaintiff issued a summons against George E. Ricks, Sheriff of Beaufort County, and entered a suit against said Ricks, and said suit proceeded to judgment. A copy of the record in said cause is hereto attached and made a part of this case agreed and is marked "A."

16. It is agreed that if the court is of opinion that the commissioners of Beaufort County, at their meetings in March and April, had no power and authority to increase the value of said notes as listed, and are bound by the return made by plaintiff of his taxes to the list-taker in June, 1908, and if the court is of the opinion that defendant cannot lawfully collect the tax, upon the difference in value of (88) said notes between the amount for which said notes were listed and the amount for which said land was sold in March, 1909, and if the court should be of the opinion that the plaintiff is not liable for the taxes upon the additional sum of $11,500 for the year 1908, then it is agreed that the judgment shall be entered against the defendant for the said sum of $116 and costs. On the other hand, it is agreed that if plaintiff cannot maintain this action and is not entitled to recover of the defendant the amount collected by the sheriff, as aforesaid, and that plaintiff is liable for the taxes on the said additional sum of $11,500 for the year 1908, then judgment shall be entered in favor of the defendant.

Upon the agreed facts, his Honor rendered the following judgment: "This cause coming on to be heard by consent before his Honor, *George W. Ward,* judge presiding, at the above-named term of court, on an appeal by the defendant from A. Mayo, justice of the peace, upon an agreed statement of facts, submitted as an agreed statement of facts, and the court, after considering the facts, being of the opinion that the plaintiff is not entitled to recover, except $24: It is now, upon the motion of W. C. Rodman, attorney for the defendant, ordered, adjudged and decreed, that the said action be dismissed and that the plaintiff take nothing by said suit except the $24 heretofore tendered by the defentant, which by consent it is ordered be recovered by said defendant. It is further ordered that the plaintiff pay the costs to be taxed by the clerk."

From this judgment the plaintiff appealed to this Court.

H. C. Carter for plaintiff.
W. C. Rodman for defendant.

MANNING, J., after stating the facts: Chapter 440, Laws 1909, designated as the Machinery Act, contains, as similar acts for many years past have done, a well-considered plan and procedure for determining

the value of all property, the subject of taxation, in the earnest endeavor to make effective the mandate of sec. 3, Art. V, of the Constitution. The controlling purpose of the law is to reach all taxable property and to have it placed upon the list, as near as may be, at its actual value, that it may not require of the taxpayer any more than his just proportion of the public burden, but that he shall certainly be required to "render unto Cæsar the things that are Cæsar's."

The particular section of the above act under which the board of commissioners acted in the present case is section 68. The cor-
(89) responding section of the act of 1881, sec. 18, ch. 117, being in language almost identical with this, was construed by this Court in *Commissioners v. R. R.*, 86 N. C., 542, in which *Smith, C. J.*, delivering the opinion of this Court, said: "The notice required before the meeting in August (now, by section 68, to be held in July) is general, and has reference to a general revision of the lists of the whole county, with a view to an equal and uniform assessment among the several townships, and it is to give opportunity to all who may be dissatisfied with the valuation of their property to make complaint and have it corrected. This sitting must be protracted until the work is completed. But authority is expressly conferred 'to raise the valuation upon such property as they deem unreasonably low'; and of this proposed increase special notice must be given to the owner or agent. As the commissioners do not meet after their lists are delivered to their clerk (section 16) before the second Monday in August, and then can only make the examination and ascertain that any property has been valued unreasonably low, it is obvious that, in order to the giving notice, they must do so at a future day, when the owner can be present and can be heard before the matter can be determined. Nor can any reason be suggested why it should be earlier than the regular meeting in September. The commissioners have complied with the requirements of the act." In that case the commissioners, at their meeting in August—the time then fixed by the statute—determined to increase the valuation of defendant's roadbed from $3,000 to $6,000 per mile, and ordered that notice issue to the company to appear at their next meeting on the first Monday in September, and show cause why the valuation should not be fixed at the proposed increased amount.

It will be observed that the commissioners in that case began the procedure to increase the valuation at the meeting prescribed by law for that purpose, and followed up the matter so begun, without break or discontinuance, in the prescribed procedure to the final act. The only action taken by the commissioners, in the present case, at the meeting on the second Monday in July, was the adoption of the following resolution: "It has been reported to the county commissioners that Mr.

Fred. Wolfenden has in his possession, to wit, solvent credits that he has failed to list for taxation for the year 1908. The said board, upon receiving such information, requests Mr. Wolfenden to list such property, if it has not been listed, as the law requires." If the commissioners were correctly informed that the plaintiff had omitted to list any chose in action, their power was ample under section 72 of the act to secure the placing of such omitted property upon the tax (90) list.

In both cases—that of undervaluation, under section 68, and of omitted property, under section 72—the commissioners are vested with ample powers of inquiry by examining witnesses, calling for papers and calling upon the taxpayer himself, and the machinery for obtaining information to increase the value of such property as they shall deem to be listed unreasonably low is ample. But the subsequent action of the commissioners in this case conclusively shows that it was not omitted property, but undervalued property, they were in search of. Property willfully omitted from the tax books or willfully concealed in order to evade its fair and just contribution to the public expense has small claim to the sympathy of the Legislature or judicial departments of the Government; but where the question at difference is one of valuation—a matter generally difficult of exact ascertainment and in ascertaining which there is generally place for honest difference of opinion—we are of the opinion that the law in providing the procedure to determine this has fixed, both by its letter and spirit, a defined time at which this shall be finally determined for each fiscal year. This would seem to be clear from this language of section 68, to wit: "and it shall be the duty of the register of deeds, without additional compensation, to complete the list by computing the tax payable to (by) each person, affixing the same opposite his name"; and "The board of commissioners shall sit for one day at least, and, when necessary, shall sit until the revision is complete, etc." It is evident that the time of this meeting was changed from August (under the older statutes) to July, to enable the commissioners to complete the work of revision and give time to the register of deeds to make up the tax books and compute the taxes by the first Monday of September, when the tax books are directed to be delivered to the sheriff or tax collector, with order for collection of taxes.

Section 68 does not create the board of commissioners technically a board of equalization; this board is created by section 18 of the act and meets only once in four years—the year in which all real estate and personal property is valued by the board of assessors; but the duty and power of revision is specifically imposed upon the board of commissioners by section 68, and the time definitely fixed when it is to begin the performance of this duty. If the board of commissioners is invested

with the general power of revision, and can exercise it at any meeting in the year, why has the law fixed a definite time for it to meet to perform this particular duty? While it is important that the State and
(91) its several subdivisions invested with the taxing power should receive from every species of taxable property its fair and just proportion to the public expense, it is equally important that the taxpayer should know and have definitely settled, at some prescribed time in each year, how much his contribution in taxes to this public expense shall be. Especially is this important in view of the provision of the law that the tax constitutes a lien upon real estate from 1 June, and the tax lists, when delivered to the sheriff or tax collector, constitute a judgment and execution against personal property and require but the levy by the officer to completely subject it to the payment of the tax obligation. As was said by this Court in *Wilson v. Green,* 135 N. C., 343, at p. 348: "A thorough and complete system of procedure is established, by virtue of which the taxpayer can be heard upon all questions concerning the valuation of his property for taxation, and be restored to any and all rights he may have lost by any irregular or fraudulent action of the assessors." While in that case the Court was discussing the procedure prescribed by statute for use in that year, when there was to be a revaluation of all property, yet the statement of the Court above quoted is equally applicable to the other years.

To hold that the Board of Commissioners is invested with the power of revision, to be exercised at any meeting, would lead to great confusion and uncertainty and would subject the taxpayer, who owned the land or personal property, to the risk of having the value of his property increased for taxation at any time during the year, when by a sale of it it had brought a higher price than the value at which it was listed. The same result would follow to that taxpayer whose credits depended for their value entirely upon the property pledged for their payment. It was not, in our opinion, contemplated by the statute under consideration that this doubt, confusion and uncertainty should exist. We have examined similar statutes of other States and the decisions of their courts construing them, and the construction we have placed upon our statute is in harmony with the construction given by other courts to their statutes. *Peterson v. Bank,* 8 Kan. App., 508; *Sumner v. Colfax Co.,* 14 Neb., 524; *Wiley v. Flournoy,* 30 Ark., 609; *Yocum v. Bank,* 144 Ind., 272; *Phillips v. New Buffalo,* 64 Mich., 683; *Auditor v. Chandler,* 108 Mich., 569; *Land Co. v. Carter Co.,* 142 Cal., 116; *Fowler v. Russell,* 45 Kan., 425; *Lead Co. v. Simms,* 108 Mo., 222.

Concisely stated, then, in our opinion, the power of revision conferred upon the board of commissioners by section 68 is a special power, not one of its general and ordinary powers enumerated in section

1318, Revisal of 1905; that the board must meet on the second (92) Monday of July to begin the exercise of the particular power of revision; that it must continue its session until the work of revision is complete; that when it determines to increase the value of property already listed, it must give notice to the owner or his agent, fixing a time for its hearing; that it may continue its session, by adjournment, as a board of revision until such time, and may further continue its session when necessary; that ample machinery and power is conferred upon it to obtain information to reach a just conclusion; that when it completes the work of revision thus begun, its duties and power as a revising board cease and determine, and it cannot resume such duties until the time appointed by statute in the next year; that in the fourth year, the year of revaluation of property, the powers and duties of equalization and revision are conferred by section 18 upon the board of equalization, and not upon the board of commissioners, as a distinct corporate body.

Applied to the present case, the plaintiff listed solvent credits, which consisted entirely of the purchase money notes of the land; that exact information was given to the board the preceding year and it valued them at $12,500, the tax value of the land; that plaintiff valued the same notes the next year at $11,000; that this valuation was not changed by the board of commissioners sitting as a board of revision; that the land was sold on the first Monday of March, 1909, and brought $22,500, and the proceeds were applied to plaintiff's notes; that the commissioners then increased the tax value of plaintiff's solvent credits. We think this action of the board unwarranted by law. We do not wish to be understood as passing upon the power of the board of commissioners in cases of fraudulent undervaluation of property. That question is not presented by or involved in the decision of this case.

Upon the statement of agreed facts, his Honor should, as we think, have rendered judgment for the plaintiff for the sum of $116—the tax collected on the increased amount of valuation—and in declining so to do there was

Error.

HOKE, J., concurring in result: I concur in the disposition made of this case, for the reason that it appears that the amount of the notes, the consideration, the land held as security therefor, and all the data affording information as to the true value of the notes in question were well known to the commissioners at the time of their July meeting and had been for more than a year, and where this is true the statute contemplates and provides that any increase in such valuation shall be made or proceedings looking to that end should be formally (93)

instituted at the July meeting referred to, and regularly pursued; and that an increase at any subsequent time arising from the fact, and that alone, that a subsequent sale of the land has disclosed that the valuation appearing on the tax list may have been too low, is without warrant of law. Where, as stated, all the data relevant to the inquiry are known to the authorities before the regular meeting provided for the purpose, a taxpayer has a right to rely on the valuation fixed at that time, and to provide for paying his taxes for the year on that basis. He should not be subjected to the uncertainties incident to a subsequent raise of the valuation in the discretion of the commissioners, where, as stated, all the pertinent facts were fully known to them at the regular meeting specially provided by law for the purpose.

CLARK, C. J., *dissenting:* It appears from the facts agreed that in June, 1907, the plaintiff was owner of $25,000 in first-mortgage bonds secured on a tract of land which he had sold, and that he listed them for taxation at that sum. In February, 1908, on his application, the board of commissioners, of which the plaintiff was at that time a member, reduced the valuation to $12,500. In June, 1908, the plaintiff on his own motion listed the bonds for taxation in the sum of $11,000, deducting therefrom $3,000 for indebtedness due by him. At their meeting in July the board passed a resolution as follows: "It has been reported to the county commissioners that Mr. Fred. Wolfenden has in his possession solvent credits that he has failed to list for taxation for the year 1908. The said board, upon receiving such information, requests Mr. Wolfenden to list such property, if it has not been listed, as the law requires."

The board then and there took notice that the property had not all been listed or had been listed for only a part of its value. It is not material whether the property had been listed at an undervaluation or part of the bonds had not been listed at all. The effect is the same. The object of the statute is to require equality, to the end that all property shall bear its just share of the public burdens. But in fact there was here, according to language of above resolution, a failure to list, an omission to place $14,000 of these bonds upon the tax list, for he only listed $11,000, though he held $25,000, of the bonds. The plaintiff took no notice of the request of the board of commissioners to "list such property."

(94) In March, 1909, the property was sold under the mortgage, and brought $22,500. Thereupon the board, taking notice that the plaintiff had not complied with their request, themselves raised the valuation to $22,500. The plaintiff appeared before the board and protested, whereupon four weeks notice was given him, and he was heard

at the April meeting, when the valuation was fixed at $22,500. There is no suggestion in the record that this is more than the true value.

The plaintiff complains, not that the property was not worth $22,500, but because the board raised the valuation, or listed the omitted bonds, after the July meeting. He contends that to make a change after that meeting will cause confusion and instability in the tax list. He listed these bonds at $25,000 in June, 1907, and persuaded the board to reduce their valuation for taxation to $12,500 in February, 1908. It did not occur to him that *this* change would produce confusion and instability in the tax list. In June, 1908, he either listed them by undervaluation, or by omission of some of them, at $11,000, and it could not produce confusion to raise them to their true valuation in March, 1909, when it had not done so to reduce their valuation in February, 1908. The plaintiff's valuation of the property was $25,000 when he sold it and took the mortgage bonds. At sale under the mortgage, the property brought $22,500; so it follows that for the year 1907 the plaintiff had at least $10,000 of bonds which were exempted from taxation and now he is claiming in this action that $11,500 should be exempt from any share of taxation for 1908.

The plaintiff's sole ground is that the board could only correct the tax list at the July meeting. He did not act upon that theory when he caused the board to make a change of $12,500 in his favor in February, 1908. Besides, in 1908, the commissioners did take action at the July meeting by requesting the plaintiff to correct his valuation by either raising it or adding the omitted bonds, whichever it may be considered.

It is physically impossible for a board of county commissioners to discover and correct all the omissions and undervaluations upon the tax list at their meeting in July. The object of the statute is that all property which has been omitted or undervalued shall be put upon the tax list whenever discovered. The duty is as imperative when brought to the attention of the board at any subsequent meeting as at the July meeting. All that the delinquent taxpayer is entitled to is that he shall have notice and an opportunity to be heard, and these this plaintiff had.

It is true that the tax is a lien upon real property, and it may be that, if the land is sold before the correction of the tax valuation, a purchaser without notice would not be liable for the added taxa- (95) tion. But there is no such question here. There can be no inconvenience to the public, nor any injustice to the plaintiff, in requiring him at the April meeting to pay taxes upon the true value of the property after due notice and hearing and proof that the property was worth $22,500, especially when he had been requested at the July meeting to list the property at its correct value. And more especially, since at his instance in February, 1908, the board had corrected the tax

valuation of these bonds for 1907 by reducing them to about half of their true value, whereby he escaped taxation on $11,000 or $12,000 for 1907.

It has always been right and just that all property should bear its fair share of public burdens. With the increase in the objects and functions of government and the increase in revenue thereby necessitated, it has become vitally important that all property shall be listed at its true value. We know that the wealth of the State does not always bear its *pro rata* part of taxation. This throws the burden of taxation with crushing force upon those of moderate or humble means whose little belongings are visible and tangible and cannot escape the hand of the tax collector, while intangible and invisible property, such as bonds, notes, shares, stocks, and similar invisible or intangible property, are often either omitted wholly from the tax list by omission to list them, or partly so by undervaluation. The Legislature in passing this statute to correct this great and growing evil certainly never intended that the board of county commissioners, with many thousands of names before them on the new tax list at their July meeting, should, then and there, correct all omissions and undervaluations of property, and that if an evading taxpayer should escape their notice at that meeting the board should be powerless to make the proper corrections when omissions or undervaluations are brought to their attention at any subsequent day.

In Switzerland, and some other countries, the statute provides that all estates of deceased persons go into the hands of a public administrator, who shall compare the value of the estate with the tax list, and, if there is any discrepancy, he shall go back several years, estimating as fairly as he can what ought to have been on the tax list for those years, and shall take out of the estate the taxes on omitted or undervalued property. In England the revenue act just approved at the polls requires that all increase in the value of real property since the last valuation shall pay one-fifth of such increase into the public treasury. Our statute has not gone to such an extent, but it is evident that the intention of our Legislature was that all property should
(96) be valued and taxed on an equality, and there was no intention that if an omission or an undervaluation should escape the attention of the board of commissioners at their meeting in July, that the inequality should not be corrected at any subsequent day during the year, even when brought glaringly to their attention by a public sale at which the property brought, as in this case, more than double the value at which the property was listed. This board of commissioners and the judge below should be commended, and not reversed, in seeking to subject such property to its fair and equable share of taxation.

The board of commissioners, however, in this case, did take action at their July meeting. They requested the plaintiff to list this very property "as the law requires." They doubtless thought he would do so, without being compelled by further action on their part. On finding, later, that he had not complied with their request, it was their duty to see that the property was properly listed, after giving him due notice and a hearing, as they did. They could not know till after the July meeting that he had failed to comply with the notice and request which they gave him at that meeting.

It is an inherent power of the State at any and all times to collect the taxes due it by its citizens. The State may go back any number of years to collect taxes upon property which has not borne its share. *Wilmington v. Cronly,* 122 N. C., 383, and cases there cited. Sections 68 and 18, ch. 440, Laws 1909 (the Machinery Act), are directory, and not mandatory, in that the powers therein given can be exercised at any time.

Section 68 says: "They shall have power, after notifying the owner or agent, to raise the valuation of such property as they shall deem unreasonably low." This part of section 68 does not confine the board to the second Monday of July, even when construed with the remainder of said section, but leaves the time open, requiring only that notice be given to the taxpayer so that he may appear and be heard. In the present case all this was done, and it is certain from the record, and is not denied, that the valuation placed upon the property listed by the plaintiff was unreasonably low. This fact, as already stated, had been called to plaintiff's attention by the board in July, and it was placed beyond question by the property having brought $22,500 at public sale.

Section 73 of the Machinery Act of 1909 gave the board of commissioners power, in any event, to put upon the tax list the unlisted valuation of the bonds in question. It can make no difference whether the shortage in the amount was caused by the omission to list part
(97) of the bonds or by the omission to place full and just value upon all of them. The same power is also given by section 72.

The object of the Legislature was to secure the placing of omitted or undervalued property upon the tax list. There could be no surer way to defeat this purpose than for the act to require that to be done on one certain day, and that if the board is not then informed, or fails to act, that the tax dodger who escapes detection on that day can snap his fingers at the board all the other 364 days of the year. The Legislature intended no such futility. There are no words restricting the board to that day. The duty is a general and a continuing one. The essential thing is the duty, not the date.

The board of commissioners after notice and hearing raised the valuation to $22,500. The plaintiff does not even suggest that this is too much, and could not, as the property when sold under his mortgage brought that figure. He paid the $116 taxes due on the valuation which he had not listed. He owed that sum to his State and county.

His honor properly held, as I think, that the plaintiff was not entitled to recover it back.

Cited: *Ford v. Manning, post,* 154.

J. J. R. WHITFIELD v. JOHN D. ROBERSON.

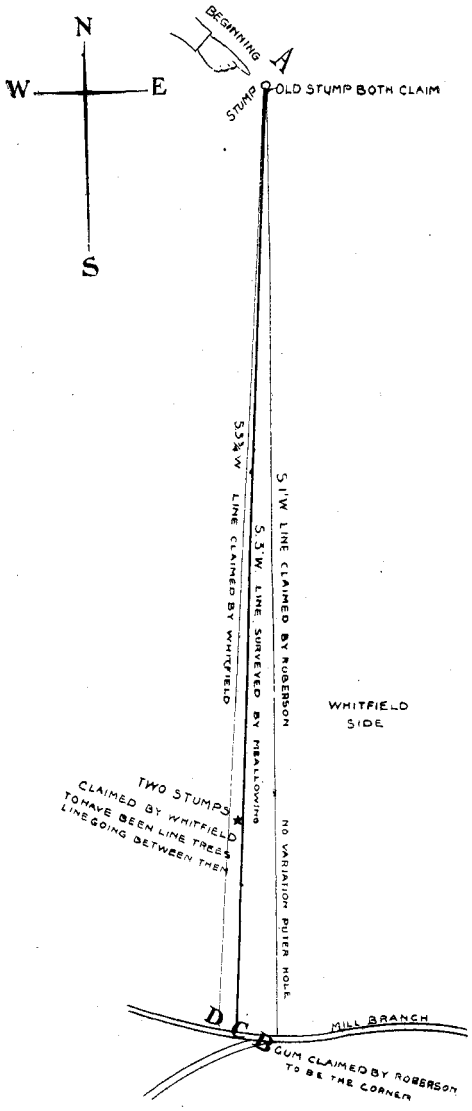
(Filed 9 March, 1910.)

Trespass—Dividing Line—Variation of Magnetic Needle—Questions for Jury—Line Trees—Evidence.

In an action of trespass to determine the dividing line between the adjoining lands of the parties, there was evidence of a variation of the magnetic needle since the time of the original survey, and that to fix the line as given by the deed, by running from an admitted corner, without allowing for this variation, would establish the line contended for by defendant; there were other surveys made from this admitted corner to locate this line allowing for the variation of the needle, and there was testimony that on one of them there were certain marked stumps, regarded as line trees. There was evidence on plaintiff's part that he had been cultivating the land for fifty years in accordance with this last-named line, and that it was the true dividing line: *Held,* (1) a question of fact for the jury; (2) it was not error to refuse defendant's prayer for instruction that the line which was run without allowing for the variation of the magnetic needle should be established as the true line; (3) the line stumps should be regarded as evidence tending to show the location of the true line.

APPEAL from *O. H. Allen, J.*, at June Term, 1909, of MARTIN.

Action for trespass to determine the dividing line between the (99) adjoining lands of plaintiff and defendant. The plaintiff claimed his line to be A to D on the map; the defendant claimed the line to be A to B; one of the surveyors located it from A to C. A was an admitted corner. There were two pine stumps at the cross on the line from A to D which some of the evidence tended to show were line stumps; at B there was a hole in Mill Branch, called the "Pewter Hole," and there was evidence tending to establish this as the corner. The jury found A to D to be the line, as contended for by plaintiff, and assessed plaintiff's damages at $25. Judgment was rendered for the plaintiff, the defendant appealed.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W
E
S
BEGINNING
A
STUMP
OLD STUMP BOTH CLAIM
5 1/4 W LINE CLAIMED BY WHITFIELD
5 1/4 W LINE CLAIMED BY ROBERSON
5 3/4 W LINE SURVEYED BY MBALLOWING
WHITFIELD SIDE
TWO STUMPS CLAIMED BY WHITFIELD TO HAVE BEEN LINE TREES LINE GOING BETWEEN THEM
NO VARIATION PUTER HOLE
D
C
B
MILL BRANCH
GUM CLAIMED BY ROBERSON TO BE THE CORNER

Martin & Critcher and A. O. Gaylord for plaintiff.
H. W. Stubbs and A. R. Dunning for defendant.

MANNING, J. The only exception in the record is the refusal of his Honor to give this instruction prayed by defendant: "If the jury find from the evidence that the Pewter Hole was the dividing corner between the Whitfield and Manning lands and the survey under call in plaintiff's deed, 'South one degree west to Mill Branch,' without variation, went to the Pewter Hole, then they should answer the first issue, from A to B." His Honor charged the jury, in response to this prayer, as follows: "That if the jury should find from the evidence that the Pewter Hole was a corner between the plaintiff's and defendant's land, and should further find from the evidence that this was at point B, then their answer to the issue should be A to B." The line sought to be located is described in the deed as "south 1° west to Mill Branch." The points, B, C and D, on the plat, are each in or at Mill Branch.

One of the surveyors testified that there was a known variation in the needle of the compass, and that he did not understand it. He testified, "that the usual variation for the time, according to my understanding, would be two degrees, and allowing this variation of two degrees, I ran south 3° west—the line A to C."

The plaintiff testified that, "A to D has always been the line. The line ran between two stumps. I saw survey sixty years ago. It ran that line. The two pines were then chopped. Have worked up to the line A to D for fifty years."

The defendant's evidence located the terminus on Mill Branch at B, the place known as the Pewter Hole, and one surveyor testified that running the call of this line, without allowing any variation in the needle, B would be the terminus.

The location of the line was a matter for the jury; and we (100) think the modified form in which his Honor gave defendant's instruction was correct. *Cherry v. Slade,* 7 N. C., 82; *Echerd v. Johnson,* 126 N. C., 409; *Hill v. Dalton,* 140 N. C., 9. In the case of *Gaylord v. Gaylord,* 48 N. C., 367, to which our attention is called by the learned counsel for the defendant, this Court said: "The division line between them (plaintiff and defendant), when the partition was made in 1825, was the course indicated by the compass at that time, and it could not change with the variation of the needle." It cannot be understood from the above quotation that the learned jurist who wrote that opinion intended that the variations of the magnetic needle should be entirely ignored in the attempt to locate the lines of old boundaries by new surveys. That this cannot be done is a scientific fact well established, but the exact allowance for it is difficult of ascer-

tainment; of course, the actual boundary does not change with the variation of the needle. The *quid est demonstrandum* would be reached by starting at A, a point fixed fifty years ago, to reach B, a point fixed by the same survey, and reading the course as recorded by the compass of to-day. It would indicate a different degree in the course of the line, assuming equal skill in the surveyor and equal accuracy in the instruments. The purpose of the present action was to have relocated the divisional line, as it was located in 1859 or prior thereto—the exact date of the original survey does not appear in the record. The two stumps between which the line ran when located, and which were marked as line trees, and these stumps being still existent, would, under the decisions cited, be influential in fixing the location of the line. A question of fact being raised for the determination of the jury, we think they were properly instructed by his Honor.

No error.

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(100)

A. P. WILLIS v. JARRETT CONSTRUCTION COMPANY.

(Filed 9 March, 1910.)

1. Contracts, Written—Inspection—Omission—Parol Evidence.

A written agreement to furnish piles to a railroad company f. o. b. cars, etc., being silent as to which party is to procure or furnish cars for the loading, or how often inspection by the company was to be made, under a written provision that inspection be made, it is competent to show by parol which of the parties was to furnish the cars and how often the piles were to have been inspected, as such is not required by law to be in writing, and is not a variance of the written terms of the instrument.

2. Same—Place of Delivery.

When in a written contract it appears that the plaintiff agreed to furnish certain piles at an agreed price, and sued upon the contract for the piles sold and delivered, it is competent to show by parol, the instrument itself being silent as to the place of delivery, excepting the expression "f. o. b. cars N. and S. rail," the agreed place of delivery.

3. Contracts, Entire—Part Performance—Default of Other Party.

One who has violated his contract in such manner as to prevent its fulfillment by the other party may not escape liability under his contract on the ground that the contract was entire and only partly performed by the other party.

4. Contracts, Entire—Delivery—Weekly Inspection—Construed.

When it is established that, under a contract between the plaintiff and defendant railroad company, the former had sold and was to deliver certain piles to the latter, to be weekly inspected and a certain percentage

of the price to be then paid, until the complete performance by plaintiff, when the retained percentage was to be paid, the contract will not be construed as "entire and indivisible," so as to prevent recovery of the contract price for the piles delivered, on the ground that all the piles specified by the contract had not been delivered.

5. Contracts—Delivery—Damages—Deductions—Issues, New Trial on One.

The plaintiff having sold to defendant a specified number of piles, which the latter refused to accept, certain creditors of the plaintiff, the owners of the land from which he had cut the piles and the laborers employed to assist therein, sold some of the piles with plaintiff's knowledge, and applied the proceeds thereof to plaintiff's debt to them: *Held*, (1) the plaintiff is entitled to recover of the defendant the contract price of the piles actually delivered, less the proceeds of the sale of the piles by his creditors, which was applied to his debts to them; for, otherwise, he would, as to the amount of such proceeds, be twice paid; (2) there being error in the charge of the lower court in this respect, the verdict on the issue of damages will be set aside, and a new trial thereon will be had.

(101) APPEAL from *Guion, J.*, at October Term, 1909, of CRAVEN.

Issues were submitted to the jury, and, with their responses, are as follows:

1. Did the plaintiff perform, on his part, his contract, or was he ready, able and willing to perform the same? Answer: Yes.

2. Did defendant perform the contract on its part, or was it ready to perform the same? Answer: No.

3. If the plaintiff was able and ready to perform his part of
(102) the contract, was he prevented from performing the same by the refusal of defendant to perform its part of such contract? Answer: Yes.

4. Did plaintiff deliver or tender to the defendant 260 piles in accordance with the terms of the contract and agreement between plaintiff and defendant, as alleged? Answer: Yes.

5. If not, how many of said piles were so tendered? (Not answered.)

6. Were said piles so delivered, in accordance with the specifications required to pass inspection, under the terms of the contract? Answer: Yes.

7. Did defendant wrongfully fail and refuse to accept such piles so tendered or delivered? Answer: Yes.

8. After the execution of such contract, did plaintiff voluntarily abandon the same for any cause? Answer: No.

9. What damage, if any, has plaintiff sustained? Answer: $1,105.

The written contract between plaintiff and defendant was as follows:

NEW BERN, N. C., 5 August, 1907.

Please deliver the following piling as per Standard R. and P. S. Specifications: 400 black cypress piles 45′ long at 10 cents per lineal

foot f. o. b. cars at Norfolk and Southern rail. Above subject to inspection at Vanceboro. Payments to be made as follows: 80 per cent upon inspection and after same are loaded and B/L turned over to us. Balance to be paid when whole number are shipped. Above order to be filled in 30 days.

A. E. KINLOCH.

Accepted: A. P. WILLIS.

It was admitted that the abbreviations, "Standard R. and P. S. Specifications," meant "Standard Raleigh and Pamlico Sound Specifications," and "f. o. b." meant "free on board." It was also admitted that A. E. Kinloch was the representative of the defendant; that "45' long" meant "45 feet long." One of the controverted questions of fact was, who was to furnish the cars to receive the piles, and how often the inspection was to be had, the plaintiff contending, and surporting his contention by evidence, that the defendant agreed to furnish the cars and have weekly inspections. This the defendant denied. Another controverted question arises upon the proper interpretation of the words of the contract determining the place of delivery, to wit, "at Norfolk and Southern *rail.*" The plaintiff contended that this meant, and was agreed to, on or about Vanceboro, and the defendant contended these word words, in connection with other words in the contract, meant *at* Vanceboro. The plaintiff delivered 260 piles, which he contended came up to the specifications, and they were refused by the defendant, and that the defendant refused to furnish cars as agreed upon, (103) or to have the piles inspected.

From the judgment upon the verdict the defendant appealed.

E. M. Green and R. A. Nunn for plaintiff.
L. I. Moore for defendant.

MANNING, J., after stating the case: The sixty-three errors assigned by the defendant in the record can be fully considered under the following heads: 1. Exceptions taken to the admission of parol evidence of the agreement of the defendant to furnish cars on which plaintiff was to load the piles, and to make weekly inspections at Vanceboro of the piles loaded on the cars. 2. Exceptions taken to the admission of evidence that defendant designated the places of delivery upon plaintiff's demand, and made clear the words in the contract, "at Norfolk and Southern rail," and that plaintiff delivered the piles at places within the distance designated by defendant and so notified it. 3. Exceptions taken to the refusal of the learned trial judge to hold that the contract was an entire contract, and that, as plaintiff had not deliv-

ered the 400 piles, he could not recover. 4. Exceptions taken to the rule laid down as the proper measure of damages.

We will consider the exceptions in the order of the above grouping.

It is well and definitely settled by numerous decisions of this Court that while parol evidence is inadmissible to contradict, add to, or explain the written memorial of the agreement between two or more parties, yet such evidence is admissible "where a contract does not fall within the statute; the parties may, at their option, put their agreement in writing, or may 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 an entire contract." *Evans v. Freeman*, 142 N. C., 61, and cases cited; Clark on Contracts (2 Ed.), p. 85. The written memorial of the agreement between the plaintiff and defendant is silent as to which party is to procure or furnish the cars on which the piles were to be loaded and how often the inspections were to be made, and it was competent to admit parol evidence of the oral agreement between them as to these two matters. A reading of the evidence shows that the learned trial judge admitted parol evi-
(104) dence clearly within the rule, and the exceptions of the defendant, contained in this group, cannot be sustained.

The exceptions embraced in the second group: The written agreement uses the words, "f. o. b. cars at Norfolk and Southern rail." The defendant contends that the word *"rail"* means established siding or station of the Norfolk and Southern Railroad Company. We cannot see that the word is capable of this interpretation, unaided by parol evidence. It would seem to mean, unaided, the iron rail of the Company's track. The word is not found in Black's Law Dictionary, nor in Words and Phrases, judicially defined, except in connection with the word "all," as "all rail," used in directions for transportation. The meaning given by the lexicographers is, "a strip of timber or metal used generally for wheels to run upon," corresponding with popular acceptation of the word. It certainly does not mean, unaided by evidence of the particular meaning intended by the agreement of the parties, an established siding or station. With this word used in the contract, as fixing the location of the delivery of the piles, capable of covering every point on the line of the Norfolk and Southern Railroad, the plaintiff requested the defendant to locate more definitely the places on the railroad at which delivery would be accepted. The defendant did so, and the plaintiff offered evidence of delivery at those places. The jury was fully instructed by his Honor upon the matters in difference on this question, and its verdict establishes the fact of delivery, by the

plaintiff, at the places designated by the defendant. We overrule the exceptions of the defendant presented in this group.

Third group. Exceptions taken to the refusal of the trial judge to hold that the contract was an entire contract, and that as plaintiff had not delivered the 400 piles, he could not recover for the 260 piles delivered. In considering these exceptions, we must accept the contract as established by the verdict of the jury. The contract so established embraced other stipulations than those embraced in the writing, to wit, that the defendant was to furnish the cars and make weekly inspections. It follows therefrom that there were to be cars loaded by plaintiff each week and inspections each week, and payment of the percentage specified in the writing each week, until the complete performance of the contract by the plaintiff, when the retained percentage should be paid. The performance of the contract by the plaintiff was to be in installments, and payments to be made likewise—*toties quoties.* The evidence and the verdict establish the fact that plaintiff was ready, able and willing to perform his contract; that defendant failed to perform its part of the contract by failing, and refusing, when notified by plaintiff, to furnish cars on which plaintiff was to (105) load the piles; and that such failure by the defendant prevented plaintiff from performing his part of the contract. The act of the defendant was not only inconsistent with, but a violation of, the duty imposed upon it by the contract.

We do not understand the law to compel one of the parties to a contract to proceed with his performance until completed, where the other party has violated the contract by doing some act in violation of the duty imposed upon him, and indicating a purpose not to perform, and shield himself from liabiltiy by pleading the failure of the other party to entirely perform the contract. In *Dula v. Cowles,* 52 N. C., 290; *Pearson, C. J.,* speaking for this Court, said: "The principle is this, where a contract is *entire,* and not made divisible by its terms, one of the parties cannot take advantage of his own default, either from *laches* or from a willful refusal to perform his part, for the purpose of putting the contract out of his way, so as to enable him to maintain *assumpsit* on the common counts, and thereby evade the rule; that while the special contract is in force, general *assumpsit* will not lie, and the contract is considered to remain in force until it is rescinded by mutual consent, or until the opposite party does some act, *inconsistent with the duty imposed upon him by the contract,* which amounts to an abandonment. This is as plain as we can find language in which to express the principle." In the present action, the plaintiff seeks to recover only the contract price of the 260 piles actually delivered by him, less the cost of loading on cars, found by the jury to be 25 cents per pile; he does not

seek to recover any damages for the 140 piles undelivered by reason of the defendant's breach of contract. It is this demand of the plaintiff that the defendant seeks to defeat by this contention, that the contract is for the delivery of 400 piles, is an entire contract, and the 400 not being delivered, the plaintiff can recover nothing, the defendant not having used any of those delivered. The general rule, stated in *Cutler v. Powell,* 2 Smith L. C., 1, quoted with approval by this Court in *Tussey v. Owen,* 139 N. C., at p. 462, and in many of its decisions, is not applicable to the present case. The plaintiff did not willfully refuse without legal excuse, to complete the performance of his part of the contract. In commenting upon the inclination of the courts to relax the rigor of the common-law rule, allowing no recovery upon special unperformed contracts, and in construing them to be entire contracts, *Smith, C. J.,* speaking for this Court in *Chamblee v. Baker,* 95 N. C., 98, said, quoting from *Gorman v. Bellamy,* 82 N. C., 496: "Accordingly, restrictions are imposed upon the general rule, and it is confined (106) to contracts entire and indivisible, and when by the nature of the agreement, or by *express provision, nothing is to be paid till all is performed.*" *Wooten v. Walters,* 110 N. C., 251. Applying this rule of law, which has been approved in many decisions of this Court, the contract between plaintiff and defendant, as established by the verdict, is not "entire and indivisible," and there was no error in the refusal of his Honor to so instruct the jury.

The fourth group of exceptions contains the exceptions taken to the measure of plaintiff's recovery. In arriving at this, we think, the piles having no market value, it was proper for the jury to take the contract price, as they found that the piles delivered came up to the specifications, and to deduct therefrom the cost of loading. His Honor so charged the jury. It appeared in the evidence, and of this there seems to be no contradiction, that after the 260 piles were delivered and the defendant had declined to accept any of them, the land owners from whose land plaintiff had cut some of them under contracts of purchase, and who were not paid by plaintiff, and other persons who had aided plaintiff in cutting or hauling them, and who had not been paid, sold some of the piles and applied the proceeds to plaintiff's indebtedness to them on these several accounts; and this was done with the knowledge of the plaintiff. As the purchase price of the standing timber, the cutting and hauling of the piles each entered into cost, the amount received for the piles so sold and applied to plaintiff's indebtedness in performing his contract ought to be applied to reduce the amount of plaintiff's recovery. Otherwise, this would be compelling defendant to pay a second time these amounts to the plaintiff. As plaintiff received the benefit, with knowledge, of the property of defendant so sold, he ought not again

to recover this sum from the defendant. Stated in different language, the plaintiff sues to recover the contract price of 260 piles, upon the theory that he had delivered these and *pro tanto* performed his contract; that delivery being complete, the piles became the property of defendant, and it owed the contract price. The plaintiff subsequently receives the benefit of the proceeds of the sale of some of these piles, the property of the defendant; he ought, therefore, to be required to credit such sum as a payment by defendant, and have judgment for the balance. According to the evidence, there seems to have been no market value for the piles. This view seems to have been overlooked by his Honor in his clear and exhaustive charge.

The finding of the jury to the 9th issue will be set aside and (107) new trial had only upon that issue, in order that the contract price of the piles, fixed at $1,105, be reduced by the amount received for those sold for the benefit of the plaintiff. We find no other error in the trial. The defendant will pay the costs of the appeal.

Partial new trial.

R. W. CLARY ET ALS. v. S. H. HATTON ET AL.

(Filed 9 March, 1910.)

1. Tenants in Common—Adverse Possession—Ouster—Evidence.

Tenants in common hold their estate by unity of possession, and the possession of one inures to the benefit of his cotenants, not only as concerns themselves, but also as to strangers; and while a tenant in common in possession may so act as to amount to an actual ouster of his cotenants and put them to their action of ejectment, it must be clear, positive, and equivalent to an open denial of the cotenants' rights, and to putting them out of seizin.

2. Same—Presumptions—Rebuttal.

When the sole adverse possession of one as tenant in common is relied on to establish title by his heir at law, his declarations while in possession are competent evidence as against himself or those claiming under him to explain and qualify his possession and to show its true character; and when there is evidence that he had thus said eight years before his death that he only claimed certain interest in the *locus in quo* as tenant in common, and that his sisters owned the other interests, it would tend to rebut any presumption of an ouster at any time prior to such declarations.

APPEAL from *Cooke, J.*, at December Term, 1909, of MARTIN.

Proceeding in partition. The plaintiffs allege that they are tenants in common with defendants of the town lot described; that S. R. Clary

as sole heir of Sarah Clary is entitled to one-third undivided interest; that the other plaintiffs, W. A. Ellison, S. H. Ellison, J. R. Ellison, Susan Roberson and Belle Goddard, are entitled to one-third as the heirs of Belle Ellison, and that defendants S. H. Hatton and Mary B. Gurganus are entitled to one-third as the heirs of John Hatton.

The defendants pleaded sole seizin. At conclusion of plaintiff's evidence, motion to nonsuit was sustained. Plaintiffs excepted and appealed.

Harry W. Stubbs for plaintiffs.
Martin & Critcher and Winston & Everett for defendants.

(108) BROWN, J. It is admitted in the pleadings that the lot in controversy is situated in the town of Williamston, that it is known as the Hatton place, and that Samuel Hatton, the common ancestor of plaintiffs and defendants, remained in possession until his death.

It is admitted in the record that Samuel Hatton and his wife, Susan, left three children, John H. Hatton, Sarah Clary and Belle Ellison. It is further admitted that S. R. Clary, one of the plaintiffs, was the only son and heir at law of Sarah Hatton, who afterwards intermarried with R. W. Clary, and that the said Sarah Hatton was the dughter of Samuel and Susan Hatton; that the other plaintiffs were the only children and heirs at law of Belle Hatton, who afterwards intermarried with J. H. Ellison, and that she, also, was the daughter of Samuel and Susan Hatton; that the defendants S. H. Hatton and Mary B. Gurganus are the only children and heirs at law of John H. Hatton, who was the brother of the said Belle Ellison and Sarah Clary and the only son of Samuel and Susan Hatton.

There is evidence tending to prove that Samuel Hatton and his wife Susan and children aforesaid resided on this lot for ten years up to Samuel Hatton's death, in 1863; that this occupation as a residence was continued by his widow and children after his death; that the widow continued to reside there for twenty years up to her death in 1872; and that from 1872 to his death in 1908 John Hatton, the defendant's father, continued to reside there. Since his death the defendants, his children, have been in possession. This proceeding was instituted 8 April, 1909.

The evidence of continuous occupation by Samuel Hatton and his successors up to the date of this proceeding is more than sufficient to put title out of State, even if such evidence be necessary, in a proceeding of this kind, where sole seizin is pleaded and the defendants claim title and right of possession to the whole property. We think that the only question presented relates to the character of John Hatton's

possession from death of his mother in 1872 up to the time of his death. Is there evidence sufficient to go to the jury that John Hatton's possession was permissive and inured to the benefit of his sisters; or was it adverse, so that the law will presume such an ouster as would have enabled his cotenants to bring ejectment against him?

It is elementary that tenants in common hold their estates by unity of possession, and that the possession of one inures to the benefit of all his cotenants, not only as concerns themselves, but also as to strangers. 2 Blackstone, 192.

Nevertheless, one tenant in common may hold such possession of the common property as will amount to an actual ouster of his cotenants, so as to put them to their action in ejectment to be let (109) into possession. But such possession, in order to have that effect, must be manifested by some clear, positive and unequivocal act equivalent to an open denial of the cotenants' rights, and to putting them out of the seizin. These principles of law are so fully and learnedly discussed by *Mr. Justice Walker* in the recent case of *Dobbins v. Dobbins*, 141 N. C., 213, that it is useless to further elaborate them.

We think there is abundant evidence to go to the jury that the possession of defendant's ancestor, John Hatton, was never adverse to the rights of his sisters, or to these plaintiffs, and that, consequently, he acquired no title by reason of his possession after his mother's death in 1872 up to his own death in 1908.

The evidence tends to prove that John Hatton's possession was the continuation of that of his parents; that no deed can be found under which he claims; that he told one Keith eight years before he died, and while he was then living on the lot, that he only claimed or owned one-third of the lot, and his sisters each owned a third, and for that reason he had not improved it and did not wish to spend any money on it.

These declarations of John Hatton are inconsistent with a claim of sole ownership or exclusive possession, and are competent, not to impeach any title that he had already acquired by twenty year's possession, but to show that in reality he had never acquired any title by such possession, because his possession during the entire period it continued, from 1872 to the day the declaration was made, was of a permissive and not of an adverse character; and that it was with his sisters' consent. This would tend to rebut any presumption of an ouster at any time prior to such declaration.

John Hatton could have remained there a century, had he lived so long, with the consent of his sisters, and acknowledging their title, without putting them to an action to assert their rights. As long as he acknowledged their title they had no cause of action.

The declarations of John Hatton, made eight years before his death in 1908, and while he lived on the property, qualified and explained his entire previous possession. His declaration in 1900 in acknowledgment and recognition of his sisters' title, is evidence that prior to then he had never claimed adversely to them. It is elementary learning that the declarations and conduct of a person in possession of land are always competent as against himself or those claiming under him to explain and qualify his possession and to show what was the true (110) character of such possession.

Professor Greenleaf says: "In regard to the declarations of persons in possession of land, explanatory of the character of their possession, there has been some difference of opinion; but it is now well settled that declarations in disparagement of the title of the declarant are admissible as original evidence. Possession is *prima facie* evidence of seizin in fee simple; and the declaration of the posessor, that he is tenant to another, it is said, makes most strongly against his own interest, and therefore is admissible." 1 Greenleaf on Evidence, sec. 109; 9 Am. & Eng., 8; *Yeates v. Yeates,* 76 N. C., 142; *Kirby v. Masten,* 70 N. C., 540; *Hilliard v. Phillips,* 81 N. C., 104.

We are of opinion that his Honor erred in sustaining the motion to nonsuit.

New trial.

Cited: Boggan v. Somers, post, 395.

McG. LEGGETT, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 9 March, 1910.)

1. Master and Servant—Assumption of Risk—Master's Negligence.

By assuming all those risks naturally incidental to the work he is employed to do, an employee does not thereby assume those arising exclusively from his employer's negligence.

2. Master and Servant—Carriers of Freight—Dangerous Track—Duty of Master.

A carrier is conclusively presumed to have knowledge of the fact that its track has become so out of repair as to be dangerous to its own employees and its passengers, for it is its duty to provide a reasonably safe roadbed.

3. Master and Servant—Carriers of Freight—Dangerous Track—Negligence —Evidence.

Evidence that plaintiff's intestate, a brakeman on defendant railroad company's work train, was seen on a car of its moving train by its engineer, and shortly thereafter, when the engineer looked again, he was missing; that the engineer went back looking for him and found him dead from injuries apparently received by the train passing over him; that the track was in such a dangerous, uneven and bad condition as to probably have caused him to fall from the train and receive the injury; that at place his body was found there was a very rough place and sink in the track, is sufficient to warrant the reasonable inference that the rough condition of the track was the cause of the intestate falling to his death, and take the case to the jury.

4. Same—Corroborative Evidence—Discrepancies.

And when, in corroboration, a witness testifies that he, at or about the time and place of the occurrence, saw the train with a man on it; that he saw the cars of the train slamming and jarring, suddenly stop, and when it again started he did not see the man again, the next morning again identifying the place by blood on the track, the evidence clearly indicates that the death of the intestate resulted from defendant's negligence, notwithstanding there is a slight discrepancy in this witness's testimony as to the number of cars and the position of the intestate thereon; and such evidence is sufficient to sustain a verdict of defendant's negligence.

APPEAL from *Cooke, J.,* December Term, 1909, of MARTIN.

These issues were submitted: (111)

1. Was the plaintiff's intestate killed by the negligence of the defendant company, as alleged? Answer: Yes.

2. Did the plaintiff's intestate, by his own negligence, contribute to his death? Answer: No.

3. What amount of damages is the plaintiff entitled to recover? Answer: $7,229.

From the judgment rendered the defendant appealed. The facts are stated sufficiently in the opinion of the Court.

A. R. Dunning for plaintiff.

F. S. Spruill and H. W. Stubbs for defendant.

BROWN, J. There are no assignments of error relating to the reception or rejection of evidence, and we think that all the other assignments of error, relating to the charge of the court, may be considered in passing upon the motion to nonsuit. This motion and the several exceptions to the charge are based upon the contention that there is no evidence that the alleged negligence of the defendant was the proximate cause of the intestate's death.

The doctrine of assumption of risk has no application here, for it is not contended by plaintiff that he is entitled to recover unless he

should satisfy the jury that the cause of the death of his intestate was the negligence of the defendant.

It is elementary that while an employee assumes all those risks naturally incidental to the work, he does not assume those arising exclusively from his employer's negligence.

The evidence, offered by the plaintiff, tends to prove that the intestate was a brakeman on defendant's freight train running on defendant's belt line around Wilmington. The duties of the train on which he was employed were to shift cars around the belt line to and from the Wilmington yard and the several factories on the belt line; to take out empty cars that had been unloaded and put in cars loaded with material for the factories, and *vice versa*. On the night of the accident, the (112) engine, with its crew of men, one of whom was the plaintiff's intestate, was at an industrial plant on the belt line known as the Standard Turpentine Works. The train was made up of an engine running tender forwards, pushing two empty box cars and one empty flat car; immediately next the engine in the string of cars being drawn was the one empty flat car. When the work at the Standard Turpentine Works was finished, the signal indicating that the work was done and directing the engineer to go on into the Wilmington yards was given by the plaintiff's intestate, who was then standing on the box car next to the flat car that was attached to the head of the engine. The crew were then six or seven miles out from the Wilmington yards.

In response to the signal given by the plaintiff's intestate, the engineer started with his train back to the Wilmington yards. When the train arrived at Fernside junction, on the way into Wilmington, the engineer discovered that the plaintiff's intestate was missing. The train at once backed back on the track, taking the engine with the flat car at the head of it and the two wood-rack cars behind, and leaving the other cars in the switch at the Delgado Cotton Mills.

They found plaintiff's intestate lying across the track, dead, his body cut in two parts evidently by the train passing over it.

There is abundant evidence in the record that about where the body was found the track was in a fearfully bad condition, quicksand foundation, and water running across the track; that there was a very rough place in the track just where intestate's shoes were found. In fact, the evidence is not contradicted that the entire track of the belt line is in a most unsafe and dilapidated condition. That the defendant is conclusively presumed to have knowledge of it is beyond controversy, because one of its obligations to its employees, as well as to passengers, is to provide a reasonably safe roadbed. *Thomas v. R. R.*, 131 N. C., 592.

There is evidence that while the train was speeding towards Wilmington at twelve miles an hour over this rough, uneven and sinking track, the intestate, as brakemen are called upon to do, was moving along the cars presumably in the discharge of his duties.

It is contended that he fell between the cars and was run over. We think it quite plain, from the undisputed evidence, that the intestate met his death in this manner. We have no difficulty in holding that the evidence warrants the reasonable inference that the rough condition of the track was the cause of the fall. This is manifest when we consider its condition at and about the place where the body and the shoes were found. (113)

There is another ground of negligence alleged, and supported by evidence of the witness David Baldwin. He testified that on the evening of 3 October, 1907, at about 6:30 o'clock, he was coming home from hunting, and passed within about fifteen or twenty steps of the track of the belt line; that while he was there a freight train passed him with two wood-rack cars in front of the engine and eight or ten cars behind it, going towards Delgado Mills; that he saw a man on the rear part of the train, sitting on the car, his feet hanging down between the cars. He had his lantern, and his right hand on the brake; that about half the distance between Sixth and Seventh streets the train was going a pretty good speed, and stopped all at once, and those cars rushed on the engine and made a most violent slamming and jarring of the cars, and then the train started again; that after the sudden stopping of the train he did not see the man again; that the next morning he was down at the track, and at the point where the cars slammed together he saw evidences of blood, etc., on the ground. At this place the track was in a very uneven, rough and bad condition.

Although this witness may be in error as to the number of cars, the description of the train and the position of the brakeman, yet his evidence is to be considered by the jury upon the main question of negligence. His discrepancies may effect his credibility, but he testifies unequivocally to the violent jarring and slamming. He also testifies to the blood, and it was not far from where the body was found. Undoubtedly, the blood testified to by Baldwin came from the intestate's body. It is not claimed that any one else was killed or hurt on the belt line that night.

That the evidence, taken as a whole, was sufficient to go to the jury, and warrants the reasonable inference that the bad condition of the track and the violent "slamming" of the cars and stopping of the train threw the intestate off his balence between the cars and caused his death is hardly debatable. With due deference to the argument of the

learned counsel for defendant, we cannot resist coming to that conclusion ourselves, although we are not triers of the fact.

We find nothing in the evidence to support the plea of contributory negligence, and we find no assignment of error in the brief bearing upon the issue of damage.

No error.

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(114)

H. A. BROWN v. ALSOP & PIERCE.

(Filed 9 March, 1910.)

1. Contracts, Oral—Reference to Writing—Parol Evidence.

Under a verbal contract for plaintiff to deliver sand to defendants for the latter to use under a written construction contract between them and a city, in the latter of which there was a stipulation that all materials must meet requirements of the city engineer, it is competent to show by parol evidence that the plaintiff had refused to agree that the city engineer should pass upon the sand to be delivered, but that the defendants had agreed to take the sand which was shown to them prior to delivery.

2. Same—Pleadings—Admissions.

In an action upon an oral contract to furnish defendants certain sand to be used by the latter in certain construction work under a written contract they had with a city, the mere reference to the city contract in the complaint, for the purpose of fixing upon the quantity of sand for plaintiff to have delivered, is no admission that the plaintiff had agreed that the sand should be subject to inspection by the city engineer, because of a stipulation in the city contract that the materials used by the defendants in the construction work should be inspected by him, so as to exclude plaintiff's evidence that he had expressly refused to agree to this under his contract with defendants.

APPEAL from *Guion, J.*, November Term, 1909, of CRAVEN.

ACTION to recover damages for a breach of contract for the sale and delivery of sand to be used by defendant in paving the streets of New Bern.

The following issues were submitted without objection:

1. Did defendant enter into a contract with plaintiff to furnish all the sand to the defendants that they needed in paving the sidewalks of the city of New Bern? Answer: Yes (by consent).

2. Did plaintiff and defendant contract that defendants were to pay plaintiff only for such sand as was accepted by the city engineer? Answer: No.

3. If so, was plaintiff able, ready and willing to perform such contract on his part? Answer: Yes.

4. Did defendants wrongfully break their contract, as alleged? Answer: Yes.

5. If so, what damage is plaintiff entitled to recover? Answer: $700, with interest.

6. What damage, if any, is defendant entitled to recover by reason of their counterclaim?

From the judgment rendered defendants appealed.

D. L. Ward for plaintiff. (115)
Simmons, Ward & Allen for defendant.

BROWN, J. We find no error committed in the trial below, and as the controversy is one almost entirely of fact, we deem it unnecessary to discuss the several assignments of error in detail.

The principal question of law presented arises upon the exception taken to the refusal of the court below to direct the jury upon all the evidence to answer the second issue in the affirmative. This contention of defendants is based upon the theory that plaintiff made the contract between the city of New Bern and Alsop & Pierce the basis of his action, and said contract requiring that "all material . . . must meet requirements placed upon it by the engineer," these requirements became parts of Brown's contract with Alsop & Pierce. We find nothing in the evidence of the plaintiff as to the terms of the contract between plaintiff and defendants which justifies the assumption that the city engineer was to be the arbiter who should pass on and finally determine the quality of the sand to be furnished by plaintiff to defendants. On the contrary, the plaintiff testifies that the sand was not to be approved by the city engineer, that he refused to enter into a contract of that nature, and made defendants' superintendent examine the sandbeds in advance.

The following extracts from the record place this beyond controversy:

Q. Their contract required the approval of the city engineer. A. Yes, sir.

Q. You knew that when you entered into the contract? A. I knew it was to be approved by the city engineer.

Q. And you pretend to say you entered into a contract whereby you were to furnish certain sand, whether approved by the city engineer or not? A. Yes, sir; I declined to make a contract subject to any man's approval; I contracted to deliver from a certain bank after they examined it before approval.

Q. They told you they would accept the contract for delivery out of that bank. A. Yes; they told me that that sand was all right.

There is evidence by defendants that contradicts the plaintiff's version of the terms of the contract. As the agreement between plaintiff and

defendants was not in writing, the judge properly submitted the matter to the jury.

But it is contended that the complaint itself contains an averment which is practically an admission that plaintiff contracted in respect to the quality of the sand as contended by defendant. This allegation is as follows: "First. That the defendants, G. Y. Alsop and R. T. Pierce, are partners doing business as Alsop & Pierce, and at the time (116) herein mentioned had a contract to pave the sidewalks of the city of New Bern, and were engaged in paving said sidewalks."

There is no other reference in the complaint to the contract of defendants with the city. In the remaining sections of the complaint the references to a contract are plainly intended to refer to the verbal contract between plaintiff and defendants.

We do not think the mere reference to the city contract in the first section of the complaint can reasonably be construed into an admission that its provisions were made a part of the contract between plaintiff and defendants. It is referred to because the defendants had contracted with the plaintiff for the delivery of all the sand needed by them in that particular work, which was to be the measure of the quality of sand contracted for. When the contract was being negotiated between plaintiff and defendants the latter had the right to demand that the sand should pass the inspection of the city engineer. This, according to the finding of the jury, they failed to exact, but entered into the contract with plaintiff without such requirement.

The exceptions to the charge upon the issue of damages are without merit. The charge of the learned judge is very lucid upon the entire case, especially so upon the issue of damages. An examination of it leaves no doubt that he withdrew from the jury the consideration of every element of damages except the profits legitimately accruing from so much of the contract as defendants prevented plaintiff from performing. He expressly told the jury that for the sand washed away by the storm the jury should not give plaintiff damages, but only for the sand that he was prevented from delivering under the terms of his contract.

We think the case was fairly and ably tried and that no error has been committed.

No error.

(117)

J. B. EVERETT v. W. S. WILLIAMS AND WIFE.

(Filed 9 March, 1910.)

1. Judgment—Estoppel—Same Cause and Parties.

A verdict and judgment in a former action is an estoppel in a subsequent one between the same parties for the same cause of action.

2. Courts—Instructions—Verdict, Directing—Nonsuit—Estoppel—Appeal and Error—Procedure.

A party is estopped by a verdict by not immediately taking a nonsuit and appeal before verdict entered under an instruction by the trial judge to the jury, or upon his intimation that he would so instruct or render judgment for the other party to the action.

3. Courts—Instructions—Verdict, Directing—Burden of Proof.

The trial judge can always direct a verdict against the party to an action on whom rests the burden of proof, if there is no evidence or presumption in his favor.

APPEAL by plaintiff from *Cooke, J.*, September Term, 1909, of MARTIN.

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

Winston & Everett, A. R. Dunning for plaintiffs.
Martin & Critcher, H. W. Stubbs, A. O. Gaylord for defendant.

CLARK, C. J. On a former trial between the same parties, the judge (having first refused a motion to nonsuit the plaintiff) instructed the jury that "under all the evidence their answer to the issue should be, No." The jury so responded, and judgment was thereupon entered against the plaintiff.

This action being between the same parties and for the same cause of action, his Honor properly held the verdict and judgment in the former case an estoppel. When his Honor instructed the jury to render a verdict for the defendant (or upon intimation that he would do so) the plaintiff, if unwilling to be estopped, should have taken a nonsuit immediately, before the verdict was entered. Not having elected to do so, he is now estopped by the verdict.

The plaintiff contends that the verdict and judgment in the former case are void because the judge cannot direct a verdict. The court can always direct a verdict against the party on whom rests the burden of proof, if there is no evidence in his favor. As in a criminal case the burden is on the State to overcome the presumption of innocence, a verdict in such cases can be directed against the State, but never

(118) against the defendant, though the court, in a plain case, may instruct the jury "if you believe the evidence you will find the defendant guilty." This is not "directing a verdict."

The whole subject is fully discussed in *S. v. Riley,* 113 N. C., 648; see, also, cases approving that case cited in Anno. Ed. In *S. v. Shule,* 32 N. C., 153 (cited in *S. v. Riley, supra*), *Pearson, J.,* said: "When a plaintiff fails to make out a case, the judge may say to the jury that if all the evidence offered be true, the plaintiff has not made out a case, and *direct a verdict* for the defendants, *unless the plaintiff chooses to submit to a nonsuit.*"

Affirmed.

J. B. H. KNIGHT v. S. J. EVERETT, ADMINISTRATOR.

(Filed 9 March, 1910.)

1. Deceased Persons—Communications and Transactions—Services of Physician.

Testimony by a physician, the plaintiff, that he attended deceased as such, for which he had an account against him, of the number of visits, sum due therefor, etc., is incompetent, as being "personal transactions" with the deceased prohibited by the statute (Revisal, sec. 1631), the defendant not having testified as to such matters.

2. Instructions—Limitations of Actions—Harmless Error.

When by the exclusion of evidence on appeal the plaintiff cannot recover in his action, it is unnecessary for the Supreme Court to consider the charge of the court on the statute of limitations on a different branch of the case, as such, if erroneous, would be harmless error.

APPEAL by plaintiff from *Cooke, J.,* at December Term, 1909, of MARTIN.

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

S. A. Newell for plaintiff.
Winston & Everett for defendant.

CLARK, C. J. This is an action for medical services rendered by the plaintiff, a physician, to the defendant's intestate. The plaintiff was offered as a witness in his own behalf to prove that he attended on the defendant; had an account against him therefor; to prove the items of the account, the number of visits he made, the sum due him therefor and the value of his services. Each of these questions was objected to, and was properly ruled out. Such evidence was clearly as to "personal (119) transactions" with the deceased and incompetent under the terms

of the statute, Rev., 1631; *Bunn v. Todd,* 107 N. C., 266, and cases cited thereunder in the Anno. Ed., the defendant not having testified as to these matters.

The plaintiff cannot prove by his own testimony either an express contract which would be a "communication" with the deceased, or an implied contract by showing a "personal action," as services rendered. *Dunn v. Currie,* 141 N. C., 125; *Davidson v. Bardin,* 139 N. C., 1.

The only other exception is to the charge of the court upon the statute of limitation and need not be considered, for, as by the exclusion of the plaintiff's testimony there was no indebtedness proven, and instruction upon the statute of limitation, if erroneous, would be harmless error.

No error.

PARKER BUGGY CORPORATION v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 9 March, 1910.)

Carriers of Freight—Consignor and Consignee—Open Bill of Lading—Presumption—Party Aggrieved.

When goods are shipped under an open bill of lading and the consignor has never in any way rescinded or abandoned the contract of sale with the consignee, or resumed possession of the goods, but still holds him responsible, and they are in the railroad warehouse at their destination, the former is not the "party aggrieved," and may not maintain his action for damages to the goods, there being no evidence to rebut the presumption of *prima facie* ownership by the consignee arising from the consignor's delivery of the goods to the carrier upon a bill of lading of this character.

APEAL from *Guion, J.,* at October Term, 1909, of CRAVEN.

Action to recover damages for delay and injury to goods shipped over defendant road.

There was evidence tending to show that the goods were shipped by plaintiff, manufacturers of buggies, on an open and ordinary bill of lading to one J. M. Arnold, consignee, at New Bern, N. C., and that there was wrongful delay in the shipment, and negligent injury done the goods imputable to the defendant, the A. C. L. Railroad Company.

At the close of plaintiff's evidence, and at the close of the entire evidence, there was a motion to nonsuit under the Hinsdale act.

Both motions denied, and exceptions duly made and entered. (120) The jury rendered the following verdict:

1. Has the plaintiff been damaged by the negligence of the defendant Atlantic Coast Line Railroad Company, as alleged? Answer: Yes.

2. If so, what damage has he sustained by reason of wrongful delay in delivering such vehicles, as alleged? Answer: $100.

3. If so, what damage, if any, has he sustained by reason of the negligent conveyance of said vehicles while in transit over defendant Atlantic Coast Line Railroad Company's line? Answer: $200.

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

R. A. Nunn for plaintiff.
Rouse & Land for defendant.

HOKE, J. The decisions of this State uphold the position that where goods are shipped with a common carrier, under circumstances importing absolute ownership of same on the part of the consignee, and of all pecuniary and beneficial interest in the contract of shipment and its proper performance, the right to recover damages for delay in the shipment, or negligent injury to the goods during their transportation, rests in the consignee, and he alone can maintain an action for such wrong.

Our authorities are also to the effect that where a vendor ships goods to a vendee on an ordinary and open bill of lading, that the purchaser designated as the consignee in such bill of lading is *prima facie* the owner of the goods, and of all interest in the contract of shipment; and, in the absence of any evidence tending to qualify or restrict the condition stated, on injury wrongfully suffered, the consignee and not the consignor is the proper party to institute and maintain the suit.

The principle indicated has of late been more frequently recognized and applied with us in actions against common carriers under the penalty statutes of the State in defining who is the "party aggrieved," designated in most of them as the person who may bring the suit, as in *Stone v. R. R.*, 144 N. C., 220, but they are made to rest on the principle that where a vendor ships goods to a purchaser with a common carrier designated by such purchaser, or with a common carrier whose lines afford the usual route and ordinary method of shipment, and on a bill of lading of the kind described, the carrier is considered the agent of the vendee, and on delivery to such carrier the title passes to such (121) vendee, thereafter, nothing else appearing, he is the real party interested in the proper performance of the contract. *Hunter v. Randolph,* 128 N. C., 91. In *Gaskins v. R. R.,* 151 N. C., 18, the doctrine was applied to a case directly involving the right of a consignor to maintain a suit for damages, when it appeared, without more, that the goods had been shipped to a purchaser on an open bill of lading; and it was held that the action would not lie.

We are aware that other courts, eminent for their ability and learning, hold, as we interpret their opinions, that in actions on the contract

of carriage both the consignor and consignee may ordinarily sue, and if it is disclosed on the trial that the consignee is the sole owner of the goods, and of all interest affected by the wrong, that the recovery will be to his use. Mr. Hutchinson, in his valuable and accurate work on carriers gives an interesting account of some different decisions on the subject, Hutchinson, 3 Ed., secs. 1304-5-6-7 *et seq.* (original secs. 720 *et seq.*) and adds the weight of his own opinion in favor of this view, Secs. 1312-13. The author, however, states that the contrary position is maintained by courts of recognized authority, citing *Potter v. Lausing*, 1 Johnson, 215; *Meigs v. Hagan,* 86 Fed., 926; *Everett v. Salters,* 15 Wendell, 474; *McLanglin v. Mastin,* 12 Col. App., 268; 55 Pacif., 195; *R. R. v. Metcalf,* 50 Neb., 452, and other authorities in support of this statement.

While we are deeply sensible of the great consideration due and which should always be given to courts and text-writers of the character referred to, we have concluded to adhere to our own position on the question presented, as grounded on repeated adjudications with us, as more in keeping with the spirit and letter of our law, which requires that actions shall be prosecuted in the name of the real party in interest; and as presenting, perhaps, fewer complications than may often arise in the administration and enforcement of the contrary ruling.

While, on the facts presented, this is the position which *prima facie* obtains with us, it is open to the consignor to sustain his right to sue on the contract by evidence relevant and sufficient tending to qualify the conditions indicated. Thus he may show that the goods were shipped under stipulations that in effect retained the title thereto, or some interest therein, in the consignor, as in *Mfg. Co. v. R. R.,* 149 N. C., 261; or that the goods were shipped on consignment, or under other circumstances showing that the consignor had a pecuniary and beneficial interest in the proper performance of the contract of shipment; as in *Summers v. R. R.,* 138 N. C., 295, or in *Rollins v. R. R.,* 146 N. C., 153, or *Caldwell v. R. R.,* 146 N. C., 218; or it may be shown that, owing to the carrier's default, the parties have re- (122) scinded the contract and restored the title to the consignor before action brought, as in *R. R. v. Commercial Guano Co.,* 103 Ga., 590. This case being digested in part as follows: "1. Where a consignee of freight refuses to receive goods on account of damages done to them in the hands of the common carrier, and the goods are subsequently thrown back on the hands of the consignor, the latter has a right to bring an action for such damages against the carrier." And other qualifying conditions might be suggested. But wherever it appears, as stated, that a vendor has shipped goods to a purchaser on an open bill of lading by a carrier selected by the purchaser, or by a carrier whose lines afford

the usual route and ordinary methods of shipment, in which case a selection by the purchaser may be presumed, and there is no fact in evidence which tends to restrict or qualify the interest of the purchaser designated as consignee in the bill, in such case, and under our decisions, the consignee alone has a right of action for wrongful delay in shipment or negligent injury to the goods during transportation on the part of the carrier. And so it is here. The testimony set out in the case on appeal discloses that the goods were shipped by plaintiff to J. M. Arnold, as consignee and purchaser, at New Bern, N. C., under an open bill of lading; and it further appears that the plaintiff, consignor, has never in any way rescinded or abandoned the contract or resumed possession of the goods; but, at the time of action commenced, and at the time of trial, the same were in a railroad warehouse in New Bern, N. C., and plaintiff's president and general manager testified that the plaintiff still held the consignee responsible on the contract, as the matter now appears, of bargain and sale.

On these facts, we are of opinion, and so hold, that the defendant's motion to nonsuit should have been sustained,

Reversed.

Cited: Elliott v. R. R., 155 N. C., 236; *S. v. Fisher*, 162 N. C., 568; *Ellington v. R. R.*, 170 N. C., 37; *Grocery Co. v. R. R., ib.*, 246, 249; *Aydlett v. R. R.*, 172 N. C., 49; *Tilley v. R. R., ib.*, 365.

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(123)

WILLIAM BISSELL v. GREENLEAF-JOHNSON LUMBER COMPANY.

(Filed 9 March, 1910.)

1. Master and Servant—Safe Place to Work—Suitable Implements—Duty of Employer.

An employer is required to provide for his employee a reasonably safe place to work, and to supply him with appliances and implements safe and suitable for the purpose.

2. Master and Servant—Safe Place to Work—Implements—Defects—Promise to Repair—Assumption of Risks.

It is not the mere working in the presence of an obvious defect in an appliance furnished by the master that will constitute contributory negligence on the part of the servant; and assurances on the part of the former that needed repairs will be made will frequently relieve the latter of this charge, which might otherwise bar his recovery of damages for an injury thereby sustained by him. (The doctrine of contributory negligence discussed by HOKE, J.)

3. Same—Fellow-servant Act—Logging Roads.

The Fellow-servant Act, Revisal, sec. 2646, applies to logging roads, and when an injury arises to an employee as the proximate result of a defect in the "machinery, ways or appliances of the company," the defense of assumption of risk, as it originally obtained, is not available.

4. Master and Servant—Safe Place to Work—Suitable Implements—Engine Cab—Illness—Evidence—Damages—Questions for Jury.

When there is evidence that the cab of defendant's engine had been destroyed and not replaced in several weeks, and that its engineer, being thus exposed, was thereby caused to be ill and his health impaired, without sufficient explanation of delay, the question of defendant's negligence and plaintiff's damages is one for the jury.

APPEAL from *Cooke, J.*, September Term, 1909, of MARTIN.

Action to recover damages for injury caused by alleged negligence of defendant.

The plaintiff, a witness in his own behalf, testified, in part, as follows: "I was locomotive engineer in the service of the defendant in 1904, and had been so engaged with that company for fourteen years. During the months of July and August, 1904, I was engaged every day except Sunday as engineer on one of the log trains in hauling logs. The first part of July the cab of the engine was burned. Before then there had always been one on all the engines I operated for them, a covered cab on the engine protected me from the sun, heat and rain. Ambrose was the manager and general superintendent of the work. He hired, paid off and discharged the agents and servants. I was working under his direction. The weather during the (124) months of July and August was excessively hot with excessive rainstorms. I was exposed after the burning of the cab to the rain and heat until I was taken sick. My health was good before that time. After each of the rains I would be drenched, and then the sun would come out and the heat from the boiler. I would go on between 3 and 4 o'clock a. m. and would remain continuously, sometimes until 10 or 11 o'clock p. m. I would be upon the engine hauling logs and sometimes would be standing still to load the car with logs. Ambrose would frequently ride with me on the engine, and I would ask him when he was going to have the cab put back, and he said as soon as possible. I asked him to replace the cab repeatedly, and he said he would do so as soon as possible. I remained there because I expected he would replace the cab and relying upon his promise; I had the position and desired to retain it."

The witness testified further as to the promise to repair the engine made by the superintendent and manager; and there was also evidence on part of plaintiff tending to show that owing to the defect in the

engine, as described, and the incident and necessary exposure, the plaintiff suffered a severe attack of illness, the injury complained of.

The ordinary issues in actions of this character were submitted. There was verdict for plaintiff; judgment, and defendant excepted and appealed.

H. W. Stubbs for plaintiff.
Martin & Critcher, Winston & Everett for defendant.

HOKE, J., after stating the facts: Under a charge free from error the jury have accepted the plaintiff's version of the matter, and, this being true, a clear cause of action has been established in plaintiff's favor.

Under repeated adjudications of this Court, we have held that an employer is required to provide for his employees a reasonably safe place to work, and to supply them with appliances and implements safe and suitable for the purpose; and, even in cases where the doctrine of assumption of risk is applicable, it is not merely working in the presence of an obvious defect that will constitute contributory negligence. In Shearman and Redfield on Negligence, sec. 211, the authors state what they consider the correct rule as follows: "The true rule, as nearly as it can be stated, is that a servant can recover for an injury suffered from defects due to the master's fault, of which he had notice, if under all the circumstances a servant of ordinary prudence, acting with such prudence, would, under similar conditions, have continued the same work under the same risk." A statement that has been substan-
(125) tially affirmed by us in *Pressly v. Yarn Mills,* 138 N. C., 410, and other cases of like import.

It is also well recognized that promises and assurances of needed repairs on the part of an employer will frequently relieve an employee of the charge of contributory negligence, which might otherwise be maintained against him. Shearman and Redfield, sec. 215, note 1; *Springs v. R. R.,* 130 N. C., 186.

While the principles just referred to were presented by counsel as arising on the testimony, they can hardly be considered as directly apposite to the case at bar; for we have held in several of the more recent cases that our statute, called the Fellow-servant Act, Revisal 1905, sec. 2646, applies to these logging roads. *Sawyer v. R. R.,* 145 N. C., 24-27, citing *Hemphill v. Lumber Co.,* 141 N. C., 487; *Simpson v. Lumber Co.,* 133 N. C., 96; *Craft v. Lumber Co.,* 132 N. C., 156. And under our decisions construing this statute, when an injury arises to an employee as the proximate result of a defect in the "machinery, ways or appliances of the company," the defense of assump-

tion of risk, as it ordinarily obtains, is not available to defendant. *Coley v. R. R.*, 129 N. C., 409.

There is, in fact, very little conflict in the testimony on the essential features of this demand. The superintendent, testifying for the company, admitted that the engine was without a cab for two or three weeks, and offers no satisfactory or sufficient explanation of the delay. On cross-examination this witness said "that he regarded the building of the cab as a convenience, but not a necessity"; and this is, no doubt, the reason that greater effort was not made to expedite the needed repairs. In our opinion, the case has been correctly tried.

No error.

Cited: Twiddy v. Lumber Co., 154 N. C., 240; *Harvell v. Lumber Co., ib.*, 263; *Roberson v. Lumber Co., ib.*, 329; *Russ v. Harper*, 156 N. C., 449; *Hamilton v. Lumber Co., ib.*, 524; *Pigford v. R. R.*, 160 N. C., 100; *Deligny v. Furniture Co.*, 170 N. C., 203.

THOMAS STRINGFIELD v. SOUTHERN RAILWAY COMPANY.

(Filed 9 March, 1910.)

1. Carriers of Freight—Negligence—Contracts—Restricting Liability.

A common carrier cannot, in its contract of shipment, stipulate against recovery for a loss or damage occasioned by its own negligence, whether such loss or damage is a total or partial one.

2. Same—Live Stock—Agreed Valuation—Negligence—Restricting Liability.

By a stipulation in an ordinary live-stock contract of shipment a common carrier cannot restrict the amount of recovery brought about by its own negligence, it appearing that the contract was for the shipment of a valuable horse, that there was no effort of the parties to fix upon or approximate its correct value, but the restriction was inserted according to an arbitrary and inadequate valuation clause in a printed formula, predetermined and without reference to the real value of the animal, and without effort to ascertain such value. (*Jones v. R. R.*, 128 N. C., 449, cited and distinguished.)

3. Same—Fraud—Pleadings—Evidence.

The doctrine that a shipper may not recover the actual value of his loss or damage caused by the negligence of the carrier, when he is guilty of positive fraud in representing the character and value of the goods shipped, reasonably relied on by the carrier, does not apply when there is no allegation or suggestion of such fraud; and the mere fact that it received for

shipment a valuable horse under its ordinary live-stock contract, restricting a recovery in case of damage, through its negligence, to an arbitrary and predetermined value of such animals, is not evidence thereof.

4. Carriers of Freight—Negligence—Restricting Liability—Public Policy—Estoppel.

A shipper is not estopped to recover on the basis of the actual value of a horse injured by the carrier's negligence, and shipped under a carrier's general live-stock contract containing an arbitrary and predetermined restriction on the value, as such restriction, so far as it affects injuries arising from the carrier's negligence, is against public policy and void.

5. Carriers of Goods—Verdict—Value at Destination—Freight.

It appearing that, under the instructions of the court, the jury awarded the amount of freight charges in a certain ascertained sum in addition to the valuation of the horse at its destination of shipment, the verdict is modified by deducting the amount of freight charges, as the valuation there necessarily included them.

CLARK, C. J., concurring; BROWN and WALKER, JJ., dissenting.

APPEAL from *Ferguson, J.*, at July Term, 1909, of HAYWOOD.

(126) Action to recover damages for injuries done to a mare, shipped over the lines of defendant company, and attributed to negligence on part of defendant and its employees.

There was evidence to the effect that the mare in question was a valuable animal, standard-bred, about six years of age, with fine qualities and great speed, and was bought by plaintiff from W. A. Davis, Esq., at Lettsworth, La., in September, 1906, for $450; that she was shipped from Lettsworth to New Orleans, and there reshipped to plaintiff at address, Waynesville, N. C., on 25 September, 1906; that the ordinary time between the points was something like four days, but the mare did not arrive at Waynesville until 9 October, having been sent to a wrong place and by improper routes, and by reason of this delay and lack of proper care and attention, she arrived finally at Waynesville in a very bad plight and condition, and was thereby seriously and permanently injured; that the charge

(127) for freight and feed paid by plaintiff amounted to $56.50; and plaintiff testified that the mare at Waynesville, in good condition, would have been worth from $1,000 to $1,500, and in her actual condition and owing to damage done in shipment, she was not worth more than $125 or $150. There was other testimony as to the high value of the mare, her excellent condition when received for shipment, and the great damage done by lack of proper care and attention on the route.

The mare was shipped in a single car, under an ordinary live-stock contract, in which it was stipulated: "That should there be damage

for which said carrier may be liable, the value at the date and place of shipment shall govern the settlement; and in which the amount claimed shall not exceed, for stallion or jack, $150, for horse or mule, $75, for mare and colt together, $100, and which amount it is agreed are as much as such animals as are herein agreed to be transported are reasonably worth," etc.

Defendant offered no evidence, and there was no testimony of any representations made as to the value of the mare, nor any inquiry made by defendant's agents as to such value, or any agreement or bargaining together on such value, except as contained in the printed ordinary live-stock contract, signed by the shipper at the time the mare was received.

On the argument the plaintiff did not insist as a basis of adjustment on the value except at the place of shipment, and in the charge, on the question of damages, the court instructed the jury that this position having been taken by plaintiff, the jury could not in any event act upon a greater valuation; and they were further instructed that, if damages were allowed, they could add to the amount of the injury done the $56.50 costs for feed and transportation between the shipper and receiving party.

In apt time, and with other requests, the court was asked by defendant to charge the jury specially:

"4. That if the shipper declared the value of the mare, and the carrier accepted the same in good faith as the real value, and the freight rate was based thereon, then the stipulation is valid and binding upon the plaintiff, and the plaintiff is now estopped to claim a greater amount than the agreed valuation in the contract.

"5. That in no view of the case is the defendant entitled to recover more than $75."

Which requests were refused, and the defendant excepted.

The jury rendered the following verdict:

"1. Was the plaintiff's mare injured by negligence of defend- (128) ant, as alleged in complaint? Answer: Yes.

"2. If so, what damages is plaintiff entitled to recover? Answer: $356.50."

Judgment on the verdict, and defendant excepted and appealed.

W. T. Crawford for plaintiff.

W. B. Rodman and Moore & Rollins for defendant.

HOKE, J., after stating the case: It is a principle well established in this State, that a common carrier, in its contract of shipment, cannot stipulate against recovery for a loss or damage occasioned by its

own negligence, and it can make no such stipulation as to either total or partial loss.

Speaking to this question, in *Everett v. R. R.*, 138 N. C., 71, the Court said: "It is the law of this State, declared by repeated decisions, that common carriers are not permitted to contract against loss occasioned by their own negligence. They can contract neither for total nor for partial exemption from loss 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. 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 which could avail to prevent anything like adequate and substantial recovery by the shipper. Therefore it is held that any limitation of liability by contract designed for the purpose is forbidden."

And the doctrine so stated is declared and sustained in numerous cases here and in other courts of recognized authority. *McConnell v. R. R.*, 144 N. C., 90; *Parker v. R. R.*, 133 N. C., 335; *Mitchell v. R. R.*, 124 N. C., 238; *Capehart v. R. R.*, 81 N. C., 438; *Calderon v. Steamship Co.*, 170 U. S., 272; *R. R. v. Solan*, 169 U. S., 135; *R. R. v. Lockwood*, 84 U. S., 357; *Moulton v. R. R.*, 31 Minn., 85; *R. R. v. Wynne*, 88 Tenn., 320; *Hudson v. R. R.*, 92 Iowa, 231; *R. R. v. Hall*, 124 Ga., 322; *R. R. v. Keener*, 93 Ga., 108; *Express Co. v. Blackman*, 28 Ohio St., 156.

In those States, however, where the principle indicated more fully obtains, it has been held that when properly understood and applied it does not prevent parties from agreeing upon the valuation of a given shipment which shall form the basis of adjustment in case of loss or damage; and where this is done in the *bona fide* effort to fix upon the true value, and is made the basis of a fair and reason-
(129) able shipping rate, the parties will be held to the agreed valuation though the loss shall occur by reason of the carrier's negligence. Conditions under which this apparent limitation upon the more general principle is at times permissible are suggested in *Everett v. R. R., supra,* as follows: "Such agreements are upheld when the carrier, 'being without knowledge or notice of the true value,' and, it might be properly added, 'without fair and reasonable opportunity for obtaining the same,' the parties agree upon a valuation of the particular goods shipped, approximating the average value of ordinary goods of like kind, and make such valuation the basis of a just and reasonable shipping rate."

And in *Moulton v. R. R., supra,* the same limitation (more broadly stated) and the reason for it are given as follows (page 89): "Yet

there is no reason why the contracting parties may not in good faith agree upon the value of the property presented for transportation or fairly liquidate the damages recoverable, in accordance with the supposed value. Such an agreement would not be an abrogation of the requirements of the law, but only an application of the law as it is by the parties themselves to the circumstances of the particular case."

And in accord with this suggestion, in Hutchinson on Carriers, sec. 426, the author, after considering the various decisions on the subject, states the rule to be as follows: "For the purpose, therefore, of securing such information and of establishing a basis upon which to compute his charges, the carrier may, by a contract fairly and honestly entered into with the owner of the goods, stipulate either that the goods are of a certain value or that their value does not exceed a certain sum, and that, in the event of loss, his liability shall not exceed the sum at which the goods are valued; and when fairly entered into with a view to placing a *bona fide* value on the goods, the contract will be conclusive on the owner, and the carrier will not be liable for a greater sum than that at which the goods are valued, although his own misconduct has caused their loss." And in section 427: "And it may be stated as the better rule that, where the value agreed upon is so out of harmony with the ordinary value of similar kinds of goods as to indicate that the question of value did not in fact enter into the agreement, and the carrier, under the circumstances, must have known of the discrepancy, the agreement placing a value on the goods will be considered as a mere attempt by the carrier to secure a partial exemption from liability, and of no effect in relieving him from the obligation of responding for their real value where his misconduct has occasioned their loss. So, in the absence of fraud or concealment on the part of the owner of the goods whereby the carrier has been misled, the valuation agreed upon, it is said, must be reasonable, (130) regard being had to the real value of the goods; and if such value be unreasonable, the owner will not be estopped from claiming damages on the basis of their real value."

The apparent limitation pointed out and stated in these citations was applied by this Court to a live-stock contract in *Jones v. R. R.*, 148 N. C., 480, where a quantity of stock was shipped in carload lots, and an average valuation placed on the shipment of $100 a head. While the average valuation fixed upon now for several years may have been too low, according to the price of stock which now prvails, and though the damage done to the particular horse and mule in that case was somewhat in excess of the average agreed upon, the Court was of opinion that the discrepancy or disposition was not so marked as to justify it in holding, as a matter of law, that the general average agreed upon

in the contract was in violation of the public policy which forms the basis of the general rule. So the agreed valuation in that particular stipulation was upheld. And a like ruling was made at the present term, in *Winslow v. R. R.*

But, as pointed out in the concurring opinion in *Jones v. R. R., supra,* in order to extend the application of the doctrine suggested to a given shipment, all the conditions indicated must concur, and the ruling and the reason for it are, we think, correctly stated as follows:

"In the rare and exceptional cases when a carrier is allowed, on recovery had for breach of contract of carriage of certain classes of goods, to limit the amount of such recovery to a value fixed and predetermined by the contract of shipment, the rule is, I think, correctly stated in *Everett's case,* as follows: 'Such agreements are upheld where the carrier being without knowledge or notice of the true value, the parties agree upon a valuation of the particular goods shipped, approximating the average value of ordinary goods of like kind, and make such valuation the basis of a just and reasonable shipping rate.' 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. But to permit or uphold such a contract, when the loss arises from negligence, all the conditions suggested must exist. The carrier must be without knowledge or notice of the true value; the valuation must be the fair average valuation of property of like kind, and it (131) must have been made the basis of a fair and reasonable shipping rate."

Adding to the statement, as heretofore suggested, the carrier being without notice or knowledge of the true value or fair and reasonable opportunity for ascertaining the same.

We are not inadvertent to decisions in Massachusetts and in some other States to the effect that where a contract, fairly entered into betweeen the carrier and the shipper, fixes the property at a stated value, and makes same the basis of the shipping rate and of adjustment in case of loss or damage, such valuation will be upheld, though the injury complained of arose from the carrier's negligence. *Wynne v. R. R.,* 98 Mass., 239; *Graves v. R. R.,* 137 Mass., 137. And we are aware that such a principle was expressly applied by the Supreme Court of the United States in *Hart v. R. R.,* 112 U. S., 331-343, and that this decision has since been followed by others of our State courts

of high repute, as in *R. R. v. Weakly,* 50 Ark., 397; *R. R. v. Sowell* 90 Tenn., 17; *Johnston v. R. R.,* 39 S. C., 55; *Zouch v. R. R.,* 36 W. Va., 524.

In this last case, however, there was a strong dissenting opinion from *Lucas, President,* to which attention is especially called; and we submit that the general principle, as maintained in these decisions, if it can be upheld at all to the extent stated in the absence of actual fraud, is erroneously applied where, notably as in the *Hart case,* the disproportion between the actual and the stipulated value is so pronounced that it is plainly apparent that no effort was made to fix upon the true value of the property shipped, or even to approximate it. Such a ruling on the facts indicated is entirely inconsistent with the doctrine so often and clearly announced by our highest court, and which so generally obtains here and elsewhere: that while a common carrier may by a contract, reasonable in its terms and founded on a valuable consideration, relieve itself from liability as insurer, it cannot, in the absence of legislative sanction, limit its responsibility for loss or damage resulting from its negligence. *Lockwood's case, supra; Solan's case, supra.*

Applying, then, the doctrine as it prevails with us, we are of opinion that the restrictive provisions of this contract relied upon by defendant cannot avail for its protection; for on the facts presented, it appears that the loss arose from defendant's negligence, and that there was no effort by the parties to fix upon a correct valuation of this mare, nor to approximate it; nor was there any place for determining the valuation by reference to the fair average valuation of a particular shipment, sometimes permissible, as in shipment of stock in quantities; but the restriction was inserted according to a valuation in a printed formula, arbitrarily predetermined without reference (132) to the real value of the animal, nor any effort to ascertain such value. And under numerous and well-considered decisions, here and elsewhere, a restrictive valuation so arrived at is invalid where the loss or damage arises from the carrier's negligence.

This was the only question presented in *Everett's case,* several times referred to. In that case, household goods were shipped at a reduced rate under a restrictive valuation of $5 per hundred pounds. The loss attributed to the carrier's negligence as per contract rate amounted to $30, and in actual value it was $250; on verdict had, a recovery for the true value was sustained, notwithstanding the restrictive stipulation of the contract, and though it was entered into with the sanction and approval of the Corporation Commission. Speaking to the question in *Everett's case,* the Court said: "We are satisfied that in this instance both the commission and the railroads were prompted by a laudable motive to

afford shippers of small means a lower freight rate. But we cannot allow such consideration in a particular case to the change the rule of law that we here uphold. It is one in which the entire public is interested as well as the individual shipper, established and adhered to for grave and weighty reasons, and necessary for the protection of the great body of shippers. A principle so vital to the public interest should not be altered, or weakened, because, in a given instance, the motive is good and the particular result desirable. If this valuation entered as an essential element into the rate here contended for, and the result would enable carriers to evade the law, the rate itself is invalid, and to that extent is not a binding regulation."

And after referring to various rulings of other courts, on such contracts, the opinion further says: "But in none of these is the valuation relied upon in this bill of lading sanctioned or justified to the extent here claimed for it. So far as we can discover, all of them condemn an effort to limit liability for negligence by a uniform predetermined valuation arbitrarily fixed and placed in a printed bill of lading without any reference to the actual value of the property and without any estimate made or attempt to value the property of the particular shipment, more especially where the difference between the stipulated and actual value is so pronounced that the evident purpose and necessary effect are to practically deny recovery for negligence."

And in *Keener v. R. R.*, 93 Ga., 108, *Simmons, J.*, delivering the opinion, said: "Where a shipper enters into an express contract with a common carrier, by which he agrees in consideration of a reduced
(133) rate of freight that the carrier shall not be liable for more than a stated sum in case the goods shipped are lost while in the carrier's possession, the contract will be upheld as to loss not involving negligence on the part of the carrier, but carriers cannot by any special contract exempt themselves from liability for loss occasioned by their negligence, and this is so as well where the contract provides for partial or limited exemption as where it contemplates total exemption from liability." After stating that under certain circumstances an agreed valuation will be upheld, *Judge Simmons* continues: "But the principle which relieves the carrier from liability for more than the agreed value does not apply where the real value is merely arbitrary and fixed without reference to the real value of the goods, and this is understood by the carrier as well as the shipper. In the present case there is no inquiry on the part of the carrier as to the value of the goods, and it is clear that a valuation of $5 per hundred pounds for wearing apparel and household goods indiscriminately could not have been understood to represent their actual value. The contract in question was simply an attempt to limit the liability of the carrier without regard to the actual value of the

property, and it follows from what we have said that it was inoperative for that purpose, if the loss was occasioned by negligence on the part of the defendant. There being no explanation as to how the loss occurred, the presumption is that it resulted from the defendant's negligence."

And in *R. R. v. Hall, supra,* on a contract of this same kind, it was held: "4. A railway company, in its capacity as a common carrier, may, as a basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment, embracing an actual and *bona fide* agreement as to the value of the property to be transported; and in such case the latter, when loss, damage or destruction occurs, will be bound by the agreed valuation. But a mere general limitation as to the value, expressed in a bill of lading and amounting to no more than an arbitrary preadjustment of the measure of damages, will not, though the shipper assent in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value."

And these and other cases of like import are in accord with the doctrine approved and sustained by numerous and well-considered decisions of the Supreme Court of the United State, notably in *Calderon v. Steamship Co.,* 170 U. S., 272. This was an action involving a construction of what is known as the "Harter Act," a statute passed by Congress in February, 1893, chiefly for regulating the liability of carriers of freight by water. Section 1 of the act, endeavoring to preserve the common-law liability of carriers, contained a provision prohibiting such carriers from making stipulations against liability for loss or (134) damage arising from their negligence in certain features of their contract of shipment. In the contract in question there was a provision as follows: "It is also mutually agreed that the carrier shall not be liable for gold, etc., works of art, etc., or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor with the value therein expressed and a special agreement is made." In action for loss attributable to the carrier's negligence, the restrictive stipulation of the contract was held void as against the provision of the act. Such provision, being expressive of the public policy, obtaining here, and *Associate Justice Brown,* in delivering the opinion, among other things, said:

"Under this interpretation there is a clear attempt on the part of the carrier to exonerate itself from all responsibility for goods exceeding the value fo $100 per package. Such exemption is not only prohibited by the Harter Act, but is held to be invalid in a series of cases in this Court, culminating in *R. R. v. Solan,* 169 U. S., 133, 135, wherein it was said that 'any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility for loss or damage

arising from the negligence of himself or servants, is void as against public policy, as attempting to put off the essential duties resting upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principle upon which the law of common carriers was established.' The difficulty is not removed by the fact that the carrier may render itself liable for these goods, if 'bills of lading are signed therefor, with the value therein expressed and a special agreement is made.' This would enable the carrier to do, as was done in this case—give a bill of lading in which no value was expressed, under which it would not be liable at all for the safe transportation and proper delivery of the property. This would be in direct contravention of the Harter Act. Indeed, we understand it to be practically conceded that under the construction we have given to this clause of the contract the exemption would be unreasonable and invalid."

It is contended that to allow plaintiff to recover damages estimated on a valuation greater than that agreed upon, when such valuation was made the basis of a reduced shipping rate, would be to sanction and uphold a fraud; but we do not think that any such position is open to defendant in this case. There is doctrine well recognized that if a shipper is guilty of positive fraud in representing the character
(135) and value of goods shipped, reasonably relied upon by the carrier, that recovery for the actual value will be denied; but no such principle is applicable here. The plaintiff, the shipper, bought the mare in Louisiana, and, so far as appears, was not present when the contract of shipment was entered into, and while he, no doubt, would be bound by the valid stipulations of his agent, there is no allegation or suggestion of positive fraud or misrepresentation on the part of either of them; no such issue was raised by the pleadings, and no such evidence offered; and counsel for defendant, on being questioned in this respect on the argument, frankly admitted that defendant had no such evidence at the trial, but stated that he had reason to believe that such evidence could be procured, and would be forthcoming if opportunity were given by another trial.

The fact that a single animal was shipped from New Orleans to Waynesville, at a cost of $56.50, might well be considered as affording fair notice that $75 was no correct valuation, and it is perfectly apparent, as heretofore stated, that the mare was shipped on an arbitrary valuation under a printed formula, and that no effort was made to fix upon a correct value, and no statement or inquiry was made by either side on the subject.

Speaking to a like position urged in *Everett's case,* so often quoted from, the Court said: "It is not claimed here that the carrier was misled or deceived in any way as to the kind or value of these goods. There

is neither allegation nor issue addressed to any such question; and, as we understand it, the defendants did not intend or desire to raise it. Some of the goods lost were perhaps not correctly classified as household goods, but the amount properly described as household goods was more than sufficient to justify the verdict. As a matter of fact, no inquiry was made about the value of the goods and no statement made concerning them one way or the other. The agent just classified them at the established rate and uniform valuation provided for by the regulation and printed in the bill of lading, and no effort was made to estimate or put any value on the goods of this particular shipment."

Nor do we think that the doctrine of estoppel as applied in many of the cases relied upon by defendant should avail defendant here. Some of these decisions could be reconciled on the ground that if the disproportion between the actual and the stipulated values is so great as to give clear indication that there was no effort made to fix upon or approximate the true value, as in this case, it could be properly held that such a contract would be neither fair nor reasonable; but in many of them we think the doctrine of estoppel is too broadly stated. For if a contract like that one we are considering is such as to deny substantial recovery for loss occasioned by the carrier's negligence, it is void (136) as against public policy, and it is not permissible to uphold such an agreement on the principle of estoppel. Such a position carried to its logical conclusion would enable individuals as to their personal contracts and conduct towards each other to set at naught both the public statutes and police regulations of the State. Accordingly, we find that except in cases of positive fraud, which in whole or in part may operate to set aside the contract relation, the doctrine of estoppel as ordinarily applied is only available in aid or extension of valid contracts. Bigelow on Estoppel (5 Ed.), citing *Brightman v. Hicks,* 108 Mass., 246; *Langorn v. Sankey,* 55 Iowa, 52; *Shurman v. Eastin,* 47 Ark., 351; *Klink v. Kudbel,* 37 Ark., 304; authorities which fully support the text.

It may be well to note that the feature of the restrictive stipulation which makes the value at the place of shipment the basis for adjustment in case of loss or damage is not presented for consideration, as the plaintiff's counsel admitted on the argument that the value at the place of shipment should constitute such basis, and the court directed the jury to accept and act upon such valuation in considering the case. Here, as in other features of these restrictive contracts, the cases are in conflict. Hutchinson on Carriers, sec. 430, the author stating, however, that the weight of authorities favors the validity of such a stipulation, and the writer, speaking for himself, is inclined to the opinion that such a provision is a reasonable one and should be upheld, affording, as it does, data for adjustment ordinarily more reliable and more easily obtained.

On the whole matter, we are of opinion, and so hold, that the damage done having been occasioned by the carrier's negligence, the defendant is responsible for the actual loss as ascertained by the verdict, and that the stipulations of the agreement by which defendant seeks to restrict the value as a basis for adjustment at $75 is in contravention of public policy and void.

We note, however, that the court instructed the jury in effect that they could add to the damage done the mare the $56.50 paid for transportation and feed, and it is apparent that the jury have followed the instruction and added this amount to their estimate. As the mare was received at Waynesville, and the animal as valued at that point is owned and possessed by plaintiff, it would seem that the charges for getting her to Waynesville is included in such value, for it would cost as much to transport the animal in the one case as the other. The verdict will, therefore, be modified by reducing same by this $56.50, and, so reduced, (137) the verdict and judgment will be affirmed.

Modified and affirmed.

CLARK, C. J., *concurring:* The Hepburn amendment to section 20 of the Interstate Commerce Act (U. S. Comp. Stat. Supp. 1907, p. 906) provides that the initial carrier is liable for any loss, damage or injury to the goods *caused* by it or any connecting carrier, and makes void any contract, receipt, rule or regulation which attempts to exempt the carrier from this liability. 12 Ann. Cases, 1133, and cases cited. In *R. R. v. Crenshaw,* 5 Ga. App., 675, it is held that the State courts have jurisdiction of an action arising under the Hepburn Act, and that any limitation of value or preadjustment of damages by a stipulation restricting the recovery of damages to an amount less than the actual loss caused by the carrier's negligence, is void under this act. To same effect, *Latta v. R. R.,* (U. S. C. C. A.), 172 Fed., 850. Under these decisions the doctrine laid down in *Hart v. R. R.,* 112 U. S., 331, is reversed by the Hepburn Act, which restores in its intergrity the common-law rule that a common carrier cannot contract to be relieved in whole or in part from liability for damages caused by its negligence. The Pennsylvania Court in *Grogan v. Express Co.,* 114 Pa., 523, 60 Am. Rep., 360, even prior to the Hepburn Act, refused to followed the decision in *Hart v. R. R., supra,* and many other courts of repute did the same; and it may be said with some confidence that the best legal thought of the country sustained them. The effect of the *Hart case, supra,* if unreversed, would have been to place the business interests of the country in the power of the common carriers, for the shipper cannot contract on equal terms with them. The law must, as of old, forbid unjust and unequal stipulations in the contract of carriage.

Independent of, and anterior to, the Hepburn Act, it was held that a provision limiting liability to an agreed amount is invalid if the injury was caused by the carrier's negligence. It was so held in England, Alabama, California, Colorado, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, New Jersey, North Carolina (*McConnell v. R. R.*, 144 N. C., 90, and cases there cited; *Everett* v. R. R., 138 N. C., 68), Pennsylvania, Tennessee and Texas. See cases collected 12 Ann. Cas., 1131-1133.

BROWN, J., *dissenting:* I regret always to differ with my brethren, and frequently yield my judgment to the majority, but, with entire deference, it appears to me that their conclusion in this case is at variance with all of our own adjudications on the subject, as well (138) as other recognized authorities.

The admitted facts are that plaintiff's agent tendered to defendant at New Orleans for shipment to Waynesville, N. C., a mare of great speed, standard-bred and claimed by plaintiff to be worth at least $1,000. A few days before shipment plaintiff had paid $450 for her. When calling for bill of lading plaintiff's agent said nothing whatever about the real intrinsic value of the mare, and there is not even a suggestion that defendant's agent had any knowledge thereof. It is not claimed that he could have acquired such knowledge by mere observation. The mare was received as an ordinary animal, and a bill of lading issued and accepted by plaintiff's agent without demur or objection, fixing the value of the animal at $75 and containing this paragraph: "And which amounts, it is agreed, are as much as such animals, as are herein agreed to be transported, are reasonably worth." In consequence of such valuation the plaintiff received a much lower rate of freight than he would have received had the true value of the animal been given. There was delay in delivering the mare at Waynesville, and when delivered she was in a damaged condition. Plaintiff sues for damages, fixing them at $800. The jury assessed the damages at $356.50.

In apt time the defendant requested, in writing, the court to instruct the jury: "That if the shipper declared the value of the mare and the carrier accepted the same in good faith as the real value, and the freight rate was based thereon, then the stipulation is valid and binding upon the plaintiff, and the plaintiff is now estopped to claim a greater amount than the agreed valuation in the contract." This request was refused, and defendant excepted.

I agree fully with the general principle declared in *Everett's case,* 138 N. C., 71, that a common carrier cannot be permitted to contract against loss occasioned by its own negligence. That is the law as declared by this and many other courts of this country, and is founded upon a sound principle of public policy.

Nevertheless, those tribunals, including our own, which stand by that principle hold that common carriers may contract with their patrons in reference to the value of live stock offered for shipment, and where the value is reasonable for that species of property, it will be upheld.

This is the law as repeatedly decided by this Court. *Selby v. R. R.*, 113 N. C., 588; *Mitchell v. R. R.*, 124 N. C., 246; *Gardner v. R. R.*, 127 N. C., 293. This rule is approved and recognized in the *Everett case, supra,* clearly decided in *Jones v. R. R.*, 148 N. C., 581, and as late as last term reiterated in *Winslow v. R. R.*, 151 N. C., 250. In (139) *Jones v. R. R.* we held that "A voluntary agreement by the shipper with the carrier, in consideration of a reduction in the rate of freight, that the valuation should not exceed $100 per head, is valid as fixing, in good faith, a stipulated and reasonable value for the species of property of uncertain value, concerning which, in case of loss, the carrier would be without evidence."

Again, in the case of *Winslow Bros., supra,* we held: "A stipulation in a bill of lading for the carriage of live stock, that, in case of loss, the liability of the carrier should not exceed $100 per head, made in consideration of reduction in freight rate, is valid."

In *Everett's case, Mr. Justice Hoke,* speaking for a unanimous Court, said: "Such agreements are upheld where the carrier, being without knowledge or notice of the true value, the parties agree upon a valuation of the particular goods shipped approximating the average value of ordinary goods of like kind, and make such valuation the basis of a just and reasonable shipping rate."

In the *Jones case, supra,* in his concurring opinion the same justice repeats with approval the above, and says: "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. But to permit or uphold such a contract, when the loss arises from negligence, all the conditions suggested must exist. The carrier must be without knowledge or notice of the true value; the valuation must be the fair average valuation of the property of like kind, and it must have been made the basis of a fair and reasonable shipping rate."

It appears to me that the words of my learned brother are peculiarly applicable to this transaction, and that counsel had the printed page before them when they framed the prayer for instructions. It would seem that, if the standard fixed by him in the *Everett case* be applied to the

facts of this case, the plaintiff should be held to his contract, and permitted to recover no more than the value his agent accepted.

1. The parties agreed upon a value, which is plainly stated in the bill of lading so that plaintiff's agent could read it. He knowingly accepted the written contract with that stipulation in it, and refrained from stating to defendant's agent the true value of the mare. It is elementary learning that one who accepts a written contract and acts under it is fixed with knowledge of its provisions and is bound by them. Upon this principle the plaintiff, who by his agent accepted this bill of lading, is deemed to have been cognizant of its stipulations (140) and to have agreed to them.

2. The carrier's agent was without knowledge or notice of the true value of the mare. There is not a suggestion in the record that the defendant's agent at New Orleans knew anything about the mare, that distinguished her from ordinary animals of the horse species.

We know from every-day observation and experience that the true value of a standard-bred racing horse is not apparent from mere inspection. Neither his pedigree nor record is apparent on the face of the animal. To the non-expert nothing is more deceptive than horseflesh. According to equine history, some of the most noted kings and queens of the trotting track and the turf have been very ordinary looking animals. The renowned Dexter in his earlier days is said to have sold for a very insignificant sum, and tradition says that the great Boston was an ordinary looking animal. The famous Godolphin Arab, whose descendants have been the glory of the English turf, pulled a scavenger's cart through the streets of Paris, and was sold for a mere song to the English nobleman whose name has been handed down to posterity because he gave it to this peerless Son of the Desert.

It was no difficult matter, therefore, to palm off on defendant's agent this $1,000 trotter for an ordinary horse such as is shipped by railways almost every day in the year. It was not necessary to make any verbal misrepresentation in order to deceive. The agent of the plaintiff was guilty of a legal and moral fraud which should not be tolerated, much less rewarded, when he accepted a shipping contract at a valuation of $75 for a $1,000 mare, and kept his silence when he should have spoken, in order to get a much reduced freight rate. Having gotten the rate, through the conduct of his agent, the plaintiff, although personally innocent, should be held to the contract made for him.

3. The valuation placed upon the mare in the contract is the average value of ordinary horses, such as the agent had the right to suppose plaintiff's mare to have been.

Common observation in the absence of any evidence, should be sufficient to convince us that this value of $75 is not merely nominal, and not

intended as an evasion of defendant's liability as a carrier. It is an average value of horses that are shipped by thousands over the railroads of the country. If the tax books could be examined it would be seen that it is greater than is placed upon the average farm horse by
(141) tax assessors. I doubt if the mare in question would have brought much more than that at a public sale in a community that knew nothing about her.

4. The valuation, acccording to the terms of the written contract, was made the basis of a reduced shipping rate. It stands to reason that the carrier would charge and should receive much more for transporting a $1,000 race horse than for a $100 animal. *Gibbon v. Paynton,* 4 Burrows, 2298; *Batson v. Donovan,* 4 B. & A., 21; *Hart v. R. R.,* 112 U. S., 339-343.

I think I have demonstrated that, judged by the standard so recently fixed by *Mr. Justice Hoke,* and gauged by the four tests laid down by him, this transaction has every element necessary to constitute a valid shipping contract, which should be upheld. The application of the rule should not be made to depend upon the number of animals shipped. The very reason upon which the rule is founded forbids it.

The principle upon which the ruling is based is that ordinary shipments of goods and merchandise disclose their approximate value, and the carrier's agent by inspection can learn it, but that, in respect to horses and live stock generally, their value cannot be determined by ordinary inspection, and therefore the carrier, being without evidence as to their true value, has the right to protect itself against exorbitant and fictitious values by agreeing upon a value in the contract of shipment itself. This is a most reasonable and just rule, and if ever there was a case where the contract should be upheld, this, in my opinion, is one. To no case can the words of an impartial and able judge be more applicable than those of the late *Chief Justice McIver* are to this: "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." *Johnson v. R. R.,* 39 S. C., 61. I am advertent to the fact that the mare was not shipped by the plaintiff in person, but however innocent of intentional wrong he admittedly is, in law he is bound by the acts of his agent, who shipped the mare for him.

I am of opinion that the trial judge should have given the defendant's prayer for instruction quoted above.

WALKER, J., concurs in the dissenting opinion.

NOTE.—Paragraph 1 of the head note is now crystallized as law by the "Cummins" Amendment.

Cited: Kissenger v. Fitzgerald, 152 N. C., 250; *Breeding Association v. R. R., post,* 346; *Harden v. R. R.,* 157 N. C., 243, 244; *Mule Co. v. R. R.,* 160 N. C., 224; *Kime v. R. R., ib.,* 462; *Horse Exchange v. R. R.,* 171 N. C., 72.

(142)

JOHNSTON COUNTY SAVINGS BANK v. SCROGGIN DRUG COMPANY.

(Filed 9 March, 1910.)

1. Notes—Equitable Owner—Possession—Defenses.

When a plaintiff sues upon a note as the equitable owner, and not as a holder in due course, it is sufficient for him to show possession, by producing the note at the trial, whether it is negotiable or not; and he may recover upon it in his own right as a holder thereof, subject to any defenses the maker may have against the original payee.

2. Notes—Principal and Agent—Agent's Authority—Ratification.

The doctrine that one dealing with an agent of limited authority must ascertain at his peril the extent of the agent's power to act for his principal, does not apply when it appears that the principal has received the benefit of the act and has acquiesced therein. In this case the act in question was that of the manager of an incorporated drug-store company giving a note in his principal's behalf in consideration of jewelry and a piano, sold and delivered, and upon evidence tending to show that the principal received the advantage of the transaction and did not repudiate the alleged unauthorized act, the question was one for the jury.

APPEAL by defendant from *Cooke, J.,* October Term, 1909, of FRANKLIN.

The facts are stated in the opinion of the Court.

P. H. Cook and Frank S. Spruill for plaintiff.
Wm. H. Ruffin and W. H. Yarborough, Jr., for defendant.

WALKER, J. This action was brought to recover the amount of a note for $499.20, payable in fixed installments to the Equitable Manufacturing Company. There was written, on its back, an indorsement to the plaintiff, but there was no proof introduced by the plaintiff of the genuineness of the indorsement, the court ruling that the production of the note was sufficient to show that the plaintiff was its equitable owner, without any proof that the note had been indorsed in writing to it, as the plaintiff does not claim as an innocent purchaser or a holder in due

course. The note was originally signed by the Boddie-Perry Drug Company, by C. B. Avent, manager. The name of the Boddie-Perry Drug Company was changed to that of the Scroggin Drug Company, the defendant in this case, and the case must be considered with reference to the liability of the defendant to the plaintiff, as if the note had been signed in the name of the Scroggin Drug Company, by C. B. Avent, manager. The execution of the note by the defendant, or its pre-
(143) decessor, was alleged in the complaint and denied in the answer.

It was shown that the note had been presented for payment to the defendant, and that payment was refused. This was the substance of the plaintiff's testimony. The defendant moved to nonsuit the plaintiff; the motion was overruled, and the defendant excepted. The defendant thereupon introduced testimony for the purpose of showing that C. B. Avent was not authorized to execute the note in its behalf. The defendant was engaged in the drug business and the note was given in consideration of jewelry and a piano, either sold or consigned to the defendant. The contention of the defendant was, that as these were not articles used in the drug business, it was beyond the scope of the authority of C. B. Avent to execute a note for the same which would impose any liability upon it. We think, though, the evidence tends to show that C. B. Avent was the general manager of the defendant's business, that he was secretary and treasurer of the company, and had full authority over and control of its affairs, and more especially it tended to show that the defendant, through its proper officers, had notice of the purchase of the piano and jewelry and failed to repudiate the alleged unauthorized act of Avent, even if it did not ratify the same, with full knowledge of the facts.

As the plaintiff did not allege that it was an innocent holder of the note, but only the equitable owner, it can recover against the maker without showing a written indorsement, and, therefore, the ruling of the court, as to the proof of the indorsement, becomes immaterial. Having produced the note, the plaintiff was entitled to recover upon it as the holder thereof, subject to any defenses which the maker had against the Equitable Manufacturing Company, the original payee. *Tyson v. Joyner,* 139 N. C., 69. The authorities upon this subject are fully collected in the case just cited, and it is unnecessary, therefore, to refer to them more especially, or to discuss the general principle which they have established. Indeed, the doctrine that the production of a promissory note at the trial of an action to recover the amount of it is sufficient proof of the plaintiff's ownership, is too well settled to be now questioned. It is very true that the plaintiff cannot succeed in the cause if the defendant has any valid or equitable defense as between it and the original payee. *Tyson v. Joyner, supra.*

It is now contended by the defendant that the doctrine which permits the plaintiff to recover upon his equitable ownership of a note, by the production of it at the trial, which is *prima facie* proof of his ownership, nothing else appearing, applies only to negotiable instruments, and counsel cite *Gregg v. Mallett,* 111 N. C., 78, to sustain this position; but we do not think that case is in point. *Tyson v. Joyner, supra,* which we have already cited, distinctly holds that the production of a note (144) entitles the plaintiff to recover as its equitable owner, but does not cut off any defense as between the original parties, which can only be done by written indorsement, where the note is payable to order. The headnote in that case, by the former reporter, now Judge Biggs, states clearly the principles which we then laid down, and is as follows: "1. In an action on a note, it is error to hold that the mere introduction of the note, with the name of an indorsee written on the back, is evidence of its indorsement by such indorsee, so as to vest the legal title in the plaintiff and cut off any defenses against the indorsee, as the signature of the indorsers, where indorsement is required to vest the legal title, must be proved. 2. In an action on a note the mere introduction of the note raises a presumption that the holder is only the equitable owner, and it is subject to any equities or other defenses of the maker against prior holders. 3. A note payable to order must be specially indorsed by the payee (and prior indorsees, if any) to the holder, or at least in blank, to make him its legal owner and the *bona fide* holder of a title good against prior equities of which he is not shown to have had notice. 4. An instrument payable to bearer can be negotiated by delivery, and consequently no indorsement is required. 5. Where a note is indorsed in blank, the holder has the authority to make it payable to himself or to any other person, by filling up the blank over the signature, and this may be done at or before the trial. 6. Where in an action on a note the plaintiff has proved only an equitable title thereto, an instruction was erroneous which cut off matters of defense existing between the defendant (maker) and an indorsee." *Tyson v. Joyner,* 139 N. C., 69. In *Osgood v. Artt,* 17 Fed., 575; *Judge Harlan* says: "It is a settled doctrine of the law-merchant that the *bona fide* purchaser for value of negotiable paper, payable to order, if it be indorsed by the payee, takes the legal title unaffected by any equities which the payor may have as against the payee. But it is equally well settled that the purchaser, if the paper be delivered to him without indorsement, takes by the law-merchant only the rights which the payee has, and therefore takes subject to any defense the payor may rightfully assert as against the payee. The purchaser in such case becomes only the equitable owner of the claim or debt evidenced by the negotiable security, and in the absence of defense by the payor may demand and receive the amount due, and,

if not paid, sue for its recovery in the name of the payee, or in his own name when so authorized by the local law."

In *Trust Company v. Bank,* 101 U. S., 68, it is said: "The (145) contract cannot, therefore be converted into an indorsement or an assignment. If it could be treated as an assignment of the note, it would not cut off the defenses of the maker. Such an effect results only from a transfer according to the law-merchant, that is, from an indorsement. An assignee stands in the place of his assignor and takes simply an assignor's rights; but an indorsement creates a new and collateral contract."

But the other question now under consideration is considered in 1 Daniel Neg. Instr. (5 Ed.), sec. 574, and that able and learned text-writer states the principle thus: "When, however, a bill or note unindorsed by the payee, or indorsed by the payee specially and unindorsed by his indorsee, is in the possession of another person, the question whether or not its bare possession is evidence of his right to demand payment is of a different character. Without the indorsement of the payee or special indorsee, such possession would clearly not entitle the holder to the privileges of a *bona fide* holder for value, as, at best, he would only hold the equitable title to the instrument, and could not sue at law upon it as a ground of action." Referring to this extract from the treatise of Mr. Daniel, we said, in *Tyson v. Joyner, supra,* at page 73: "The signature of indorsers, where indorsement is required to vest the legal title, must be proved. Norton on Bills and Notes, 331. In the case of an assignment of a bill or note, which transfers only the equitable ownership, as distinguished from an indorsement according to the law-merchant, which transfers the legal title, the equitable owner being the party in interest may now sue in his own name (Code, sec. 177), and he may recover subject to prior equities. *Spencer v. Tapscott* and *Breese v. Crumpton, supra.* When it is said in the cases that 'there is a *prima facie* presumption of law in favor of every holder of negotiable paper to the extent that he is the owner of it, that he took it for value and before dishonor and in the regular course of business,' it will be found that reference is made to a holder by indorsement or to an instrument which, under the law-merchant, was not required to be indorsed, but which was negotiable by delivery. The expression was used in *Treadwell v. Blount,* 86 N. C., 33, cited by plaintiff's counsel; but in that case the note was indorsed and the signature of the indorser was proved."

As to the authority of C. B. Avent to bind the drug company, it is very true, as argued by defendant's counsel, that where a party deals with an agent with limited authority, he must ascertain, at his peril, the extent of his power to act for his principal, and in some cases this doctrine may extend to what are sometimes called general agents, under certain

circumstances. *Bank v. Hay,* 143 N. C., 326; *Swindell v. Latham,* (146) 145 N. C., 144; *Metal Co. v. Durham Co.,* 145 N. C., 293; 10 Cyc., 940 H. It may also be conceded for the sake of argument and as contended by the defendant's counsel, that a general manager, who is not authorized to do so, either expressly or by implication arising out of the course or conduct of the business of a corporation, or from the nature of the transaction, has no power to execute a negotiable instrument in its name and behalf. 10 Cyc., 929, and Note 93. We said, in *Bank v. Hay, supra,* that, "The power to bind a principal by the making or indorsing of negotiable paper is an important one, not lightly to be inferred. It should be conferred directly, unless by necessary implication the duties of the agent cannot be performed without the exercise of the power, or where, as otherwise expressed, the power is practically indispensable to accomplish the obejct of the agency, and the person dealing with the agent, subject to the principles heretofore stated, must see to it that his authority is adequate." See, also, Tiffany on Agencies, p. 215, sec. 48; Mechem on Agency (1889), secs. 389-393. While we have referred to this contention of the defendant's counsel, it must not be understood that we think the principle thus alleged by them to be established has any application to this case, for it sufficiently appears that the defendant failed to repudiate the unauthorized act of its agent, if he had no power to act as he did, and so far ratified his act as to become liable for the amount of the note, which is now in suit. It also appears in the case that the defendant, before this action was brought, made a payment on the note and thereby recognized its validity. But however this may be, the case, as to the ratification of the defendant, was properly submitted to the jury upon the evidence, and they have found against the defendant.

We have examined *Witz v. Gray,* 116 N. C., 48, which is now cited to us by defendant's counsel, and cannot see that it has any bearing upon the question of Avent's authority to execute the note. The plaintiff does not seek to recover upon this note as a holder in due course, or as an innocent purchaser of a negotiable instrument properly indorsed, but simply as the equitable owner of the note, which ownership it has established by producing the note at the trial. If the defendant was liable to the Equitable Manufacturing Company upon the note when it was executed or delivered to that company, it is now liable to the plaintiff upon the evidence in this case, nothing else appearing. The case was correctly tried in the court below, and we must, therefore, affirm the judgment.

No error.

Cited: Steinhilper v. Basnight, 153 N. C., 295; *Bank v. R. R., ib.,* 349.

(147)

W. A. ELLISON ET AL. v. TOWN OF WILLIAMSTON ET AL.

(Filed 9 March, 1910.)

Taxation—Bond Issues—Necessaries—Vote of People—Legislative Intent.

While a municipality may ordinarily provide for the lighting of its streets by electricity, as a necessary expense, by an issue of bonds without submitting the question to the qualified voters (Constitution, Art. VII, sec. 7), it may not do so when there is an existing special legislative act requiring it to be so submitted, whether the act in question be expressed in terms permissive or mandatory, for such a statute in either case is equivalent to a legislative declaration and requirement that the sense of the voters shall be had before the undertaking is entered upon. Constitution, Art. VIII, sec. 4.

APPEAL from *Cooke, J.*, at December Term, 1909, of MARTIN, heard on return to a preliminary restraining order.

On the hearing it was made to appear that on 15 September, 1909, the town authorities had formally passed the following resolution:

"Whereas, experience has demonstrated the necessity for providing a system of lighting the streets of said town, and that all experiments herebefore made to do so have proved unsuccessful; and whereas, upon careful investigation, the board has ascertained that an electric light plant can be installed of sufficient capacity to furnish lights for the town and its inhabitants at a cost of eight thousand sollars: We, therefore declare the installment of an electric light plant for the said town is a public necessity, and that it is necessary to contract a debt of $8,000 for such purpose. It is therefore resolved to issue bonds in said amount of $8,000, each carrying interest at 6 per cent, payable semiannually, and to mature twenty years from date. The said bonds shall not be sold for less than par, and the proceeds of such sale shall not be used for any other purpose than the purchase and establishment of said plant.

"It is also resolved that a tax of 16⅔ cents on property, 50 cents on each poll, in addition to the municipal taxes as now collected, be levied for the payment of the interest on said bonds and a sinking fund to pay the principal at maturity.

"Above resolutions adopted at a meeting of the town commissioners 15 September, 1909, and ordered to be spread upon the minutes as a record thereof."

That said authorities were entering into a contract for the purpose indicated, and were proceeding in other respects to carry out the terms of the resolution, when stayed by preliminary order issued in the cause.

That the acts of the Legislature bearing on the question presented,
(148) and relevant to the inquiry, were Private Laws, 1901, ch. 129;

Private Laws, amending said chapter, 1907, ch. 146, and the general provisions of Revisal, ch. 73, particularly sec. 2924, to the extent

that these general provisions were unaffected by the special legislation referred to.

It was admitted that the proposition had not been submitted to the voters of the town. There was evidence tending to show that the special tax-levy, contemplated and directed by the resolution, would exceed the amount permitted by the terms of section 2924 of the Revisal, referred to. The court entered judgment making the restraining order perpetual, and defendant excepted and appealed.

A. R. Dunning for plaintiff.
H. W. Stubbs for defendant.

HOKE, J. After stating the case: Chapter 146, Private Laws of 1907, this being the statute more directly applicable to the question presented, after conferring on the Town Commissioners of Williamston "the power, if they deemed best, to submit to the voters of the town a proposition to issue bonds in the amount of $10,000 for the purpose of building a town hall," contains the following provision:

"*Provided further,* that if the commissioners shall desire to hold similar elections for the issue of bonds or to borrow money for any municipal improvements, as electric lights, sewerage, waterworks or street improvements, and shall so vote at two separate meetings, not coming within two months of each other, and shall record such vote in their minutes, and have a majority present and a majority voting in favor of it at each meeting, they may order an election held in the same manner as above stated, by complying in every way with the full meaning and form of this act. Said elections shall be held as are elections of town officers, and no new registration had unless required by said commissioners."

And we hold it to be a proper construction of the statute, and others of similar import, that where a legislature confers power upon a municipal corporation to submit the question of a bond issue for an enterprise of this character to the voters of a municipality, and the statute is still in effect, it is equivalent to a legislative declaration and requirement that the sense of the voters shall be had before the undertaking is entered upon. True, we have decided in several of the more recent cases that where the question is presented as an open proposition, the obligations of the municipality incurred for the purpose indicated should be considered a necessary expense, that they do not come within the (149) constitutional provision as to incurring municipal indebtedness, contained in Article VII, sec. 7, and that no vote of the people is ordinarily required. *Bradshaw v. High Point,* 151 N. C., 517; *Webb v. Commissioners,* 148 N. C., 120; *Fawcett v. Mount Airy,* 134 N. C., 125. But these and other decisions are also to the effect that, while there is no definite constitutional restraint in reference to indebtedness of this

character, the question continues to be a matter of legislative regulation, and that the limitations and restraints established by the statue-law must always be observed and complied with.

Speaking to this question, in *Webb v. Commissioners, supra,* the Court said: "While there is no constitutional inhibition, however, on the issuance of these bonds, the authorities with us are to the effect that when the charter of a municipality, or general or special legislation applicable to the question, requires or provides that a proposition to incur an indebtedness or issue bonds for a given purpose shall be submitted to the voters of a town for their approval, this will amount to a stautory restriction, and such indebtedness shall not be incurred unless the measure has been sanctioned and approved by the voters, according to the provisions of the statute; and this though such indebtedness is properly classed as a necessary expense." Citing *Robinson v. Goldsboro,* 135 N. C., 382; *Wadsworth v. Concord,* 133 N. C., 587.

Although the framers of our Constitution did not deem it expedient to fix the definite restraint on incurring indebtedness for necessary municipal expenses contained in Article VII, sec. 7, for reasons indicated in *Perry v. Commissioners,* 148 N. C., 521, they were so deeply sensible of the importance of the subject, and of the dangers that might arise from an unlimited power to contract debts, even for necessary purposes, that they incorporated a provision as follows:

"Article VIII, sec. 4. It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations."

We are, therefore, acting in furtherance of this salutary provision of our organic law, as well as applying accepted principles of statutory construction in holding, as stated, that when a statute of the Legislature provides for an election on a proposition of this character, to incur a given indebtedness, even for a necessary expense, and the statute
(150) is still in force, such an act is expressive of a legislative requirement that before the enterprise may be entered upon an election must be held, whether the act be expressed in terms permissive or mandatory, and that any effort of the authorities to proceed without the sanction of popular approval so obtained would be without warrant of law. To hold otherwise would be to declare that an act of our Legislature, deliberately and formally passed, was utterly without significance.

There is nothing in this position that militates against the decisions of our Court on this subject, so far as we have examined. In *Bradshaw v. High Point, supra,* the act providing for a popular vote was held to have been repealed by a subsequent statute. In *Greensboro v. Scott,* 138 N. C., 181, the same fact was in evidence; that the act directing

an election had been, in effect, repealed. And the present Chief Justice, distinguishing the case from that of *Robinson v. Goldsboro, supra,* among other things, said: "In *Robinson v. Goldsboro,* 135 N. C., 382, the act requiring a popular vote had not been abrogated or modified by a subsequent enactment."

In *Fawcett's case, supra,* the commissioners of Mount Airy had been empowered to submit to the voters a proposition to issue bonds to the amount of $50,000 for the purpose of "procuring for the town a system of waterworks and installing an electric plant to furnish the town with water and light." The election was held, the measure approved, and the bonds issued and sold. It was subsequently disclosed that the bonds issued pursuant to this election were not sufficient for the purpose, and the commissioners, acting under the general authority vested in them by the law, issued bonds for the remainder of the cost.

There, as stated, the measure had been approved, and a bond issue for the amount had been issued and disposed of. The force and effect of the act was at an end, and the statute having fixed no limit on the amount, as in *Burgin v. Smith,* 151 N. C., 561, it was held that the question as to residue of the required expenditure was an open proposition to be dealt with by the municipality under its general power to provide for the necessary expenses of the town. In the case at bar, however, the statute providing for a popular election being now in force, this requirement must be complied with before the undertaking may lawfully proceed.

The Court being of opinion that the municipal authorities are thus far without power to issue the bonds, it is not necessary to consider or determine the effect of an excessive tax levy. In *Commissioners v. MacDonald,* 148 N. C., 125, we have held, in effect, that when a bond issue has been otherwise properly made, the validity of such bonds will not be affected by the fact that in a given year the tax rate (151) allowed by the law was insufficient to enable the county to make a present payment thereon; and this principle would seem to accord with the defendant's view as to the effect of the tax levy being excessive. But this has ceased to be of importance, as we have held that the entire enterprise is without warrant of law until the question had been submitted to a vote of the people in the way the statute provides.

We are of opinion, therefore, that the restraining order was properly made perpetual, and the judgment of his Honor to that effect must be affirmed.

Affirmed.

Cited: Highway Commission v. Webb, post, 711; *Trustees v. Webb,* 155 N. C., 388; *Murphy v. Webb,* 156 N. C., 405; *Charlotte v. Trust Co.,* 159 N. C., 392; *Kinston v. Trust Co.,* 69 N. C., 209.

McG. FORD v. JAMES M. MANNING.

(Filed 9 March, 1910.)

1. Townships—Board of Supervisors—Cartways—Proceedings Upon Petition —Lands of Another.

A cartway may be awarded over the lands of another in favor of an individual citizen, when the necessity for it exists, in a manner that is reasonable and just, by proper proceedings upon petition to the township board of supervisors.

2. Same—Meetings.

In proceedings upon petition before the township board of supervisors to lay out a road over the lands of another in favor of an individual citizen, the board may determine the matter upon a call meeting after giving notice to the parties; and the meeting of the board designated by Revisal, sec. 2712, to be on the 1st Saturday in February and August "for the purpose of consulting on the subject of the condition of the roads in their townships," etc., does not confine the board to action in matters pertaining to cartways and like questions to those meetings alone. Revisal, sec. 2715.

3. Townships—Roads—Board of Supervisors—Justices of the Peace—Majority.

Revisal, sec. 2681, constituting the justices of the peace in each township "its board of supervisors," refers to those who are qualified and acting; and in proceedings upon petition to lay off a cartway over the lands of another, etc., where the township is entitled to four justices of the peace and only two have qualified or are acting, the award of those two is valid.

APPEAL from *Guion, J.*, December Term, 1909, of PITT.

Proceedings to obtain and lay off a cartway, heard on appeal from judgment and order of board of commissioners.

(152) The proceedings were instituted before the board of supervisors of the township, on notice duly given and served, and on petition setting forth a statement in part as follows:

"The petition of the undersigned, McG. Ford, of Bethel Township, Pitt County, respectfully showeth to your honorable board that a cartway is necessary from the old homestead of, formerly known as the Betsy Ford place, now owned by him, said McG. Ford, through the lands of James M. Manning to the Bethel and Flat Swamp county road in Pitt County; that your petitioner is now the owner of the tract of land formerly owned by Betsy Ford, deceased; that said tract of land is a part of the Batson Whitehurst tract of land, being the share No. 5 in said division and being the farthest share from any public road; that about thirty years ago there was agreed upon a cartway through said lands mentioned above in said petition, and said cartway remained

open for the use of the public, also for said petitioner, until about 1902, when for some cause unknown to said petitioner the parties in possession of said lands now owned by J. M. Manning obstructed said cartway so as to render it impassable. That the said cartway would be of great usefulness and convenience to your petitioner and to the public, for the following reasons:

"1. That your said petitioner, owning the share No. 5 of Batson Whitehurst division, places his residence about one-half mile from any public road.

"2. Your petitioner is deprived by the obstructing of said cartway of any outlet whatever.

"3. It makes it convenient and a near route for the public living in the immediate section.

"4. Persons over whose lands said cartway may pass have had ten days' notice of the intention of the undersigned to file this petition."

The cartway was laid out by order of the board, as prayed for, and defendant appealed to the board of county commissioners. Defendant appeared before the board of commissioners and moved to dismiss the case for various specified objections to the petition. The board, having approved and confirmed the proceedings, defendant appealed to the Superior Court. The cause having been called for trial, before the jury was impaneled, defendant again moved to dismiss, assigning for cause:

"1. For the reason that it appears upon the face of the order that the supervisors met at another time than that provided for in the statute, that is, other than at the annual meeting provided by the statute. The order bearing date 26 August.

"2. For that it does not appear that a majority of the supervisors were present nor their reasons set out.

"3. That a paper-writing found in the papers is not signed. (153)

"4. That the petition is not sufficient in that it appears to be for a public cartway, and for that it does not appear that petitioner was settled upon the land."

And in this connection, as it appears from the case on appeal, it was admitted: "That this township was entitled to four justices of the peace, and at the time of the order there were but two acting justices in the township, one having resigned and one failing to qualify after his election."

The motion to dismiss overruled, and defendant excepts.

The case was then submitted to the jury, who rendered the following verdict:

"1. Is the cartway proposed by the plaintiff necessary, reasonable and just? Answer: Yes.

"2. If so, what damages is defendant entitled to recover of plaintiff by reason of the said cartway? Answer: $20.

There was judgment on the verdict directing that the cartway be laid off in accordance with law, and defendant excepted and appealed, assigning for error the order overruling his motion to dismiss, as hereinbefore set out.

Skinner & Whedbee for plaintiff.
Jarvis & Blow for defendant.

HOKE, J. The right to award a cartway over the lands of another, in favor of an individual citizen, referred by most of the cases to the police power, when the necessity for it exists and in a manner that is reasonable and just, has been too long established with us to require or permit discussion. *May v. Thigpen,* 107 N. C., 63; *Warlick v. Lowman,* 103 N. C., 122; *Pool v. Trexler,* 76 N. C., 297; *Norfleet v. Cromwell,* 70 N. C., 634.

And while many of the decisions are to the effect that these statutes, being in derogation of common right, should be strictly construed, and the petitioner required to bring himself clearly within the meaning of their terms, there is doubt if some of the cases have not gone too far in applying this principle of construction, and if it is not a more wholesome rule to construe the statute in a way to promote its principal and beneficent purpose. In any event, on perusal of the petition filed in the present case, it appears by fair intendment that the petitioner is both settled upon and cultivating the land, and so comes within the express terms of the law.

Though not directly apposite to any question presented here, we think it well to note that the law on cartways, as it appeared in The Code of 1883, sec. 2056, and on which many of our decisions were ren-
(154) dered, has been amended by subsequent statutes so as to give the owner of standing timber the right to a cartway under specified conditions, these amendments having been brought forward in Revisal of 1905, sec. 2686.

Nor do we think any valid objection can be made to the order because not made at one of the public meetings provided for in the statute, sec. 2712. This section directs that the board of supervisors, at some place in their township, to be agreed upon by themselves or on the appointment of their chairman, shall meet on the first Saturday in February and August, "*for* the *purpose* of *consulting on the subject* of the *condition* of the *roads* in their townships; and once a year, during their August meeting, they shall go over and examine all the roads in their township," etc. These are public meetings required by the law

chiefly for purposes of looking after the public roads, appointing overseers, assigning hands, etc. and these public meetings shall not be omitted; but this requirement in nowise forbids that the board shall meet at other times, and for other purposes, when the well ordering of the township affairs committed to their keeping shall require it. Even in matters pertaining to public roads, the statute clearly contemplates that in certain specified matters the board may act otherwise than at these two public meetings. Thus, in section 2715, with regard to the appointment of overseers, assignment of hands, etc., the statute provides: "The board may at any time alter the sections or allotment, but shall give notice," etc. And in the performance of other duties imposed upon them, and not contemplated by the section, providing for these public meetings, there is nothing in the letter or spirit of the law which prevents their having call meetings on giving notice to parties interested.

There is nothing in this connection which in any way conflicts with a decision of this Court made at the present term in *Wolfenden v. Commissioners, ante,* 83. In that case the statute both fixed the time and designated the work to be done, and it was held to be mandatory. This question, however, has ceased to be of importance, as the Legislature, to remove all doubts upon the subject, has now provided in express terms, "that special meetings of the board may be called." Laws 1909, ch. 364, sec. 2.

On the third question we are of opinion, and so hold, that section 2681, in constituting the justices of the peace of each township "its board of supervisors," the statute refers to those who are qualified and acting justices of the township; and that the powers of such board are not withdrawn or annulled because a given township may, under the general law, be entitled to a larger number of justices, (155) and has not seen proper to avail itself of the privilege.

We make no question of the general principle insisted upon by defendant, that where a deliberative or ministerial body consists of a definite number, in the absence of other specifications, a majority of such number is required for a quorum. This has been held in reference to our Legislature, fixed by the Constitution at a definite number. But we think, as stated, that in establishing the board of supervisors, and providing, as the law does, that the justices of the peace of each township shall constitute its board, the statute refers, as stated, to justices who were qualified and acting; and therefore, the two justices who made the order in the present case were the board of supervisors for Bethel Township, qualified and competent to perform the duties of such board.

This is not only the primary meaning of the language of the statute, and in accord with public convenience, but, if further assurance were required, we are confirmed in this interpretation by the consideration

that in this, as in most other matters of importance coming within the scope of their duties, on appeal taken, the question is to be heard and determined *de novo*.

We think the case has been correctly disposed of by the learned judge who heard the case below, and his rulings and judgment are affirmed.

No error.

Cited: *Gorham v. R. R.*, 158 N. C., 511.

W. A. FINCH ET AL. v. MILLARD SLATER ET AL.

(Filed 9 March, 1910.)

1. Attachment—Motion to Vacate Refused—Appeal and Error—Procedure.

Upon the refusal of the trial court, on special appearance, to grant a motion to vacate an attachment on property for defects in the affidavit, and because of no service of process, an appeal will lie.

2. Attachment—Affidavit Defective—Motion to Vacate—Procedure.

An affidavit for the issuance of a warrant of attachment is fatally defective when merely alleging that defendant is about to remove some of his property from the State, with intent to defraud, etc., without stating the grounds upon which the belief is based, and which does not definitely and distinctly state any fact which would entitle the plaintiff to this process.

3. Attachment—Process—Summons—Service—Motion to Vacate—Procedure.

The summons in the suit must be served either personally or by publication to entitle the plaintiff to a warrant of attachment against the defendant's property; and when this has not been done within the proper time a motion to vacate should be allowed in the lower court. The court may extend the time for serving the summons in its discretion.

(156) APPEAL by defendants from the refusal of *Cooke, J.*, at November Term, 1909, of WILSON, to allow defendants' motion to vacate an attachment on their property.

No counsel for plaintiff.
Daniel & Swindell and J. A. Farmer for defendant.

WALKER, J. This action was brought for the recovery of $500, alleged to be due by the defendant, Millard Slater, to the plaintiffs. A warrant of attachment was issued and levied upon a fund in the hands of W. D. P. Sharp, sheriff. The defendant, through his counsel, entered

a special appearance and moved to dismiss the attachment because of defects in the affidavit and, further, because there had been no service of process, either personally or by publication. The court refused to vacate the attachment, and the defendant excepted and appealed.

It has been settled by decisions of this Court that an appeal will lie in such case. *Sheldon v. Kivett,* 110 N. C., 408; *Fertilizer Co. v. Grubbs,* 114 N. C., 470; *Judd v. Mining Co.,* 120 N. C., 397; *Warlick v. Reynolds,* 151 N. C., 606.

The affidavit upon which the warrant of attachment issued is fatally defective in several respects. It alleges that the defendant is about to remove some of his property from the State with intent to defraud his creditors, without stating grounds upon which this belief is based, and that he is now in the State of Georgia. The affidavit is also defective in that it does not definitely and distinctly state any fact which would entitle the plaintiff to a warrant of attachment. *Judd v. Mining Co., supra.*

It also appears that the defendant has not been served with the summons, either personally or by publication, and no effort seems to have been made by the plaintiffs to bring him before the court by service of process in any form. Our statute requires that publication of the attachment should be made unless the defendant can be personally served with process, and a failure to make such service, either personally or by publication, entitles the defendant to have the warrant of attachment vacated. Revisal, section 766. There are other serious defects in the proceeding, and we think the court erred in not (157) vacating the attachment.

The defendants also moved to dismiss the action because of the failure of the plaintiff to file his complaint or to give a sufficient undertaking for their cost of the suit, in the event that they failed to recover in the action. There are so many irregularities besides those mentioned that we think the court may well have dismissed the action, which it refused to do; but perhaps those defects in the action itself may be remedied in the court below, upon motion. All that we decide is that the court erred in refusing to vacate the attachment upon the defendant's motion, and in this respect, and to this extent, the ruling of the court below is

Reversed.

Cited: Bowman v. Ward, post, 603; *Mills v. Hansell,* 168 N. C., 653; *Mitchell v. Lumber Co.,* 169 N. C., 398.

CLARK MANUFACTURING COMPANY v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 9 March, 1910.)

1. Telegraphs—Messenger—Actual Damages—Contemplation of Parties.

Any damages recoverable beyond the toll paid, for the negligent delay of a telegraph company in the transmission and delivery of a message, must be limited to those fairly considered as necessarily arising, according to the usual course of things, from the breach of the very contract sued upon, or which both parties must have reasonably understood and contemplated, when making the contract, as likely to result from the breach.

2. Same—Nominal Damages.

The plaintiff sued the telegraph company for damages alleged to have resulted from the negligent delay in transmitting or delivering a message sent to it by its commission merchant, to the effect asking it, the sendee, if it would accept a certain price for a certain quantity of cloth on hand, which it manufactured, if an offer could be obtained, to which plaintiff replied, authorizing sale at the price named, provided no better price was obtainable. The damages claimed was the difference between the price suggested and the market price at which plaintiff subsequently sold. There was no notice given to the company, apart from that which the message disclosed, as to the character of damages likely to result from its negligence: *Held*, only nominal damages, or the toll paid for the message, was recoverable, there being nothing upon the faces of the messages to indicate that the reply would make a binding contract of sale, or that the telegram was anything more than a mere trade inquiry.

3. Same—Payment of Toll—No Record Evidence—Procedure.

And there being no evidence that plaintiff paid the toll for the message sued on, the case is remanded to the Superior Court to the end that, if the toll was paid, the plaintiff may recover it.

(158) APPEAL from *W. R. Allen, J.*, at Fall Term, 1909, of WAKE.

Action to recover damages for failure to deliver a telegram within a reasonable time, heard by his Honor upon exceptions to the report of a referee to whom the cause had been referred by consent. The judge overruled all the defendant's exceptions to the report and fully confirmed the same. To this judgment the defendant duly excepted and appealed.

Among other exceptions overruled by the Superior Court is defendant's exception to the 22d finding of the referee, which is as follows:

"22. That the plaintiff, the Clark Manufacturing Company, because of the aforesaid delays in transmitting and delivering the telegrams and messages referred to and set out in findings 5 and 13 above, which delays were caused by the negligence and want of ordinary care on the

part of the defendant, has been damaged in the sum of five hundred and fifty-six dollars and ten cents ($556.10), made up as follows:

Difference between 8½ cents (being amount of *bona fide* offer and 8¼ cents (price at which sold) per yard for 166,000 yards of drill cloth	$415.00
Loss of interest from 21 December, 1905, to 20 February, 1906, on $14,110, the amount for which said cloth would have sold at 8½ cents per yard	141.00
Total	$556.10

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

C. B. Denson and Walter Clark, Jr., for plaintiff.
Womack & Pace and Philip H. Busbee for defendant.

BROWN, J. From the findings of the referee it appears that about 10 o'clock a. m., 21 December, 1905, the Textile Commission Company filed in the office of the defendant, at New York, for transmission to the Clark Manufacturing Company, at Jonesboro, N. C., the following telegram:

NEW YORK, December 21, 1905.

CLARK MANUFACTURING COMPANY,
Jonesboro, N. C.

Will you accept eight one-half all two-fifty drills on hand if we can get offer? Answer.

TEXTILE COMMISSION COMPANY.

This telegram was delivered to the Clark Manufacturing Company at Jonesboro, between 2:40 and 3 o'clock P. M. on (159) the same date. Prior to 3:15 P. M. the Clark Manufacturing Company filed with the defendant at Jonesboro the following message, addressed to the Textile Commission Company at New York:

JONESBORO, N. C., December 21, 1905.

TEXTILE COMMISSION COMPANY,
53 Worth Street, New York City.

Will accept eight half for two-fifty drills if you can do no better. Would like to close Osnaburgs order before cotton advances.

DAVID CLARK.

This telegram was delivered to the Textile Commission Company after 5 o'clock P. M. on same day.

Upon a consideration of this case, and after most careful examination of the full briefs filed by counsel for both parties, we are unanimously of the opinion that the learned judge of the Superior Court

erred in overruling the defendant's exception to the finding of the referee as to the quantum of damage.

Owing to the indefinite and uncertain character of the telegraphic correspondence, we think, upon the great weight of authority, both text-writers and judicial precedents, that the plaintiff is entitled to recover only nominal damage, to wit, the charges paid for the telegram from the Textile Commission Company, in case it has paid them or incurred them.

It seems to be an almost universal principle of the law of damage, imbedded in the jurisprudence of this country and Great Britain, and adopted by this State by unanimous decisions in many cases, that under any contract to transit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as necessarily arising, according to the usual course of things, from the breach of the very contract sued upon, or which *both* parties must reasonably have understood and contemplated, when making the contract, as likely to result from its breach. This principle is recognized in all cases cited by the learned counsel for plaintiff and in hundreds of others in addition.

It is founded upon the rule laid down in the familiar English case of *Hadley v. Baxendale,* 9 Exch., 345, which has been quoted and approved by the Supreme Court of the United States and practically all the other judicial tribunals of this country. *Tel. Co. v. Hall,* 124 U. S., 444; *Primrose v. Telegraph Co.,* 154 U. S., 883; Wood Mayne on Damages, sec. 13, and notes; Joyce on Damages, sec. 1403; Sutherland on Damages, sec. 50. The rule as stated by Joyce is that if the sender of a message does not notify the company of its importance or
(160) of special damages which may result from a breach of the contract, and the message does not, from its language, convey to the company any such knowledge, only such damages may be recovered as could have been reasonably anticipated from the *language* of the message, and there can be no recovery for damages arising out of such special circumstances. Section 1403 and notes citing a great array of decided cases.

The rule is applied by this Court in actions against telegraph companies for negligence in transmitting and delivering messages. *Williams v. Telegraph Co.,* 136 N. C., 84, and case cited. In his well-considered opinion in this case *Mr. Justice Walker* quotes at length from the Supreme Court of Massachusetts an extract showing the importance and inherent justice of this rule.

Applying this established principle to the facts of this case, it is quite clear that the plaintiff is not entitled to recover the special damages claimed.

It is not contended that the defendant had any notice of any special circumstances, or any other knowledge of the nature of the transaction, or of the consequences of delay, other than such as is afforded by the telegram itself.

It is apparent that the message gives no indication of a contract to sell or that one would be entered into immediately upon receipt of the answer, and the answer itself is not a definite acceptance of a proposition to sell, but makes it the duty of plaintiff's factor to endeavor to get a better price.

The telegram to plaintiff does not state that an offer had been made, but plainly implies that up to that date no such offer had been received. This is the construction that the sender intended should be placed upon it by the plaintiff; and the reply shows that it was the construction actually placed upon it by the sendee. In the examination of Meyer, general manager of the Textile Company, who sent the telegram, and who is examined as a witness for plaintiff, he is asked why he sent a misleading telegram, concealing the fact that he had such offer. The answer of the witness has at least one merit, and that is candor. He says: "For the reason that we knew that the offer which we had in hand was full market price for the goods and the best price that it was possible to get, and we worded our telegram as we did for the reason that we did not want the Clark Manufacturing Company to know positively that we had a definite offer, for, as is frequently the case with a mill, when they find you have a good offer, they expect you to get a little more, and in the meantime they sit down between two chairs and we miss the sale." And again in same deposition: "Q.: Do you mean that we shall understand you to (161) say that the telegram to your principal was distinctly meant to conceal from the person the fact that you had an offer for the goods?"

"A.: In the sense that we did not want them to know that we had a firm bid price, yes, acting in the best interest of the mill."

There is some attempt to show that it is the custom of commission houses to send such misleading telegrams to their principals, even when they have a definite bid, to prevent the factories from asking a higher price. But even if such evidence be considered pertinent, there is nothing to show that the defendant's agents had knowledge of such an extraordinary custom obtaining in the cotton-goods trade. We can see no reason why, if this telegram was intended to mislead, and actually did deceive the plaintiff, engaged in the business and supposed to be conversant with its peculiar usuages, it should not also mislead this defendant as to the real purpose for which it was sent.

Giving it the only construction the words are susceptible of, the same obstacle confronts this plaintiff as in *Beatty v. Telegraph Co.*, 52 W. Va., 410, where the Supreme Court of West Virginia says: "But the trouble facing the plaintiff in this case is that there was no final contract between the parties, but only a proposal for a contract, and there can be no contract without both a proposal and its acceptance. The failure of the telegraph company did not cause the breach of a consummate contract; it only prevented one that might or might not have been made." See, also, *Hosiery Co. v. Telegraph Co.*, 123 Ga., 216, and *Wilson v. Telegraph Co.*, 124 Ga., 131.

The offer must be distinct as such and not merely an invitation to enter into negotations upon a certain basis. *Wire Works v. Sorrell*, 142 Mass., 442; *Beaupe v. Telegraph Co.*, 21 Minn., 155, and 24 Am. and Eng. and cases cited. See, also, *Manufacturing Co. v. Filder*, 115 Ga., 408; *Moulton v. Kershaw*, 59 Wis., 316; *Clay v. Telegraph Co.*, 78 Me., 97; *Telegraph Co. v. Connelly*, 2 Tex. Civil Appeals; Thompson Electricity; *Clay v. Telegraph Co.*, 81 Ga., 285; *Walser v. Telegraph Co.*, 114 N. C., 440; *Telegraph Co. v. Way*, 83 Ala., 559.

The text-writers declare that the offer must be one which is intended of itself to create legal relations upon acceptance. 1 Paige on Contracts, sec. 26; Clark on Contracts, sec. 29.

These principles were applied by the Supreme Court of the United States in a case like this, and a recovery for more than nominal damages denied. They were applied by this Court in a unanimous opinion in *Tanning Co. v. Telegraph Co.*, 143 N. C., 376, in
(162) many respects very similar to this, and a recovery of substantial damages denied.

The telegram in this case, as in that, is merely what the books call a "trade inquiry." The recent case of *Williamson v. Telegraph Co.*, 151 N. C., 65, has no application to the facts of this case. The negligence there consisted in a mistake in transmission. In his opinion the learned Chief Justice asks the pertinent question: "Was the message such as would put the defendant on notice of damages resulting as the consequence of an erroneous transmission?" The Court thonght it did. The telegram related to an actual sale of goods and the error consisted in transmitting the word nine instead of ninety. The distinction between the cases is so marked and obvious that we will not discuss it.

The telegram in the case at bar not only failed to disclose on its face anything in the nature of a sale or contract, but was intended to create on the mind of the sendee the contrary impression.

It was calculated to mislead the company as well as the sendee as to the true nature of the transaction the sendee had in hand. When

the sender elects to studiously conceal the true nature of the transaction by misleading words, he thereby puts the telegraph company in ignorance as to the character of the duty imposed upon it or the magnitude of its liability, and the same principle which prevents a recovery in case of cipher messages will prevent it in cases of this character.

"Nothing is more important or just," says *Somerville, J.*, in *Telegraph Co. v. Way,* 83 Ala., 563, "in this view of the subject, than that the law should require the sender at his hazard to disclose the meaning or nature of the message, in order that the company may observe such precautions as may be necessary to guard itself against the risk incident to the duty to be performed." Hale on Damages, p. 291, and cases cited.

There is no evidence in the record that the plaintiff has paid anything on account of the telegraph charges on the delayed message received from the Textile Company. If so, plaintiff would be entitled to recover such sum. That may be inquired into in the Superior Court.

The exception of the defendant to the 22d finding of referee is sustained and the cause remanded, to be proceeded with in accordance with this opinion.

Reversed.

The Chief Justice took no part in the decision of this case.

Cited: *Newsome v. Telegraph Co.,* 153 N. C., 155.

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(163)

FARMERS AND MERCHANTS BANK OF WILLIAMSTON v. GERMANIA LIFE INSURANCE COMPANY.

(Filed 16 March, 1910.)

Evidence, Newly Discovered—Cumulative—New Trial.

The newly discovered evidence relied on for a new trial being cumulative, and the majority of the Court being of opinion with the disposition of the case as reported in 150 N. C., 770, this petition to rehear is dismissed.

HOKE, J., dissenting.

PETITION to rehear. This case tried at Spring Term, 1909, of the Superior Court of MARTIN, and reported in 150 N. C., p. 770.

Harry W. Stubbs, Wheeler Martin, H. A. Gilliam, and W. W. Clark for plaintiff.

John W. Hinsdale and Shepherd & Shepherd for defendant.

BROWN, J. We have considered the petition to rehear this cause with that care which its importance deserves. Although impressed by the learned and well-considered supporting briefs filed by defendants, we are unable to discover that we have overlooked any authority or point called to our attention on the first hearing of the case. An examination of the original briefs discloses that every contention now made (except the newly discovered evidence) was fully presented at that time, and the opinion shows they were given due consideration. Upon reëxamination we still think there was evidence which compelled his Honor to submit the question of notice as to the fraudulent character of the check sued upon to the jury, and that the instructions given were full and correct.

As to the newly discovered evidence, that consists of alleged statements made by F. S. Fagan, cashier, and by one of the directors of the plaintiff bank, Dr. Knight, since the trial of the cause and while it was pending in this court; it is contended that the alleged newly discovered evidence is important in that it goes to show that, outside of any constructive notice which it was claimed the plaintiff had of the limitations upon the authority of Hall under his contract with the defendant, the plaintiff had actual knowledge thereof.

We think that at best the newly discovered evidence is only cumulative in character, consisting of declarations alleged to have been made by plaintiff's witness since the trial to some of defendant's attorneys, and that it is of no great importance.

The check sued on was one drawn by Miss Parham, not by (164) Hall, and in pursuance of express authority given by defendant, as we have held. Any limitations imposed upon Hall's personal authority by his contract with defendant (which the newly discovered evidence is relied upon to fix the plaintiff with knowledge of), it would seem to us not to be decisive of the real question which controlled the Court.

It appears both from the majority and minority opinions that the vital questions were whether Hall and Miss Parham were engaged in a kiting business, and whether or not that fact was known to the plaintiff or could have been known by the exercise of reasonable diligence, and the further fact as to the authority of Miss Parham to draw the check sued on.

Were we triers of the fact, we might have reached a different conclusion, but the jury have found that the plaintiff had no knowledge of any such kiting, and that it could not in the exercise of ordinary care under the circumstances have obtained this knowledge.

We have held and still hold, that taking the evidence of the cashier and the testimony as a whole, the trial judge was not authorized to in-

struct the jury that in any view of it plaintiff was fixed with knowledge of the fraudulent character of the check sued on. The judge charged fully upon this phase of the case, and it was fully presented and carefully considered by this Court when the case was originally heard.

The petition to rehear is

Dismissed.

Mr. JUSTICE MANNING took part in the decision upon this petition and concurs with the majority opinion. Mr. Justice HOKE adheres to his concurrence in the former dissenting opinion of Mr. Justice CONNOR, as presenting his views.

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

(Filed 16 March, 1910.)

1. Corporations—Mortgages—Materials Furnished—Liens.

A mortgage on the property of a corporation or its earnings are not now postponed to a judgment for materials furnished under Revisal; sec. 1131, as the words for "materials furnished" have been omitted therefrom.

2. Corporations—Mortgages—Work on Materials—Liens.

A creditor who has furnished a gas-holder to a lighting corporation for its plant is not entitled to a priority of lien over a prior registered mortgage to secure a bond issue, by reason of work necessarily done in shaping the material into the article and fitting it for its erection, under the terms of its purchase.

3. Corporations—Mortgages—Labor Performed—Interpretation of Statutes.

The preference given by Revisal, 1131, for "labor performed" over prior mortgages of corporations applies only to the laborers employed by the corporation in carrying on its ordinary business, including repairs and upkeep, and does not confer such preference upon contractors who employ labor under a contract to place "betterments" upon the company's property.

4. Mechanics' Liens—Preference—Prior Mortgage—Interpretation of Statutes.

The mechanics' lien, under Revisal, sec 2016, has no preference over a prior registered mortgage.

5. Corporations—Labor Performed—Interpretation of Statutes.

A foreman of a corporation is a laborer and entitled under Revisal, sec. 1131, to any preference for "labor performed" which is given his colaborers whom he supervises and with whom he works.

(165) APPEAL from *Guion, J.*, Fall Term, 1909, of CRAVEN, by S. W. Smallwood and Cruse-Kemper Company.

The facts are stated in the opinion of the Court.

Moore & Dunn for Cruse-Kemper Company.
Simmons, Ward & Allen for S. W. Smallwood.

CLARK, C. J. In June, 1906, S. W. Smallwood sold his gas plant in New Bern to the defendant company, receiving therefor $60,000 in first-mortgage bonds secured upon the property conveyed. In May, 1908, the plaintiff applied for a receiver against said company. Among the debts proven was that of the appellant Cruse-Kemper Company, the facts in regard to whose claim, as found by the judge, are as follows: The Lighting Company contracted with the Cruse-Kemper Company of Philadelphia for a gas-holder for its plant, for the sum of $6,000, delivered and installed in New Bern. The gas-holder was delivered and installed. Sundry payments made by the defendant reduced the indebtedness to the sum of $4,293.84. The contractor paid $1,049.01 for labor in erecting and installing the gas-holder in New Bern, including therein $195 paid the foreman in setting up and erecting said plant, who customarily performs manual labor as well as directs the work of his colaborers, and who was paid by the hour as they were, but at a higher rate per hour.

(166) There was $1,836.64 paid for labor performed in the factory at Ambler, Pa., in making the gas-holder; $1,302.51 was for material and traveling and expenses and $105.68 was for labor performed on the gas-holder at Ambler, Pa., fitting the gas-holder for its erection; but this work was of such nature that it could have been performed in New Bern.

Upon these findings of fact the court adjudged that the defendant was indebted to the Cruse-Kemper Company in the sum of $4,293.84, with interest from 17 April, 1908, of which the sum of $1,049.10 was adjudged to be for work done and labor performed, and as such entitled to payment out of the proceeds of the sale of the plant in preference to the holder of the first-mortgage bonds. From this judgment the Cruse-Kemper Company appealed, assigning as error the refusal of his Honor to adjudge that the $105.68 for work and labor done at Ambler, Pa., was entitled to a preference over the mortgage bonds, and because he held that there was no lien or preference for "material furnished" or for any other item of the indebtedness beyond the $1,049.01 for labor performed in erecting the gas-holder and installing it in New Bern.

Smallwood also appealed, assigning as error that the $1,049.01 for work and labor was held to be a preference over the mortgage bonds, and more especially that the $195 paid the foreman was held to be entitled to preference. Both appeals can be considered together.

This is not a mechanic's lien under Revisal, 2016, for if such it would be entitled to no preference over a prior mortgage as against the mortgagee. It would only be a lien against the mortgagor upon his equity of redemption. The creditor's claim rests upon Revisal, 1131, which provides: "Mortgages of corporations upon their property or earnings, whether in bonds or otherwise, shall not have power to exempt the property or earnings of such corporations from execution for the satisfaction of any judgment obtained in the courts of the State against such corporations for labor performed, nor torts committed by such corporations whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

This section formerly included "material furnished" as well as "labor performed," but the former has been stricken out, and a mortgage is now not postponed to a judgment for materials furnished. *Cheesborough v. Sanatorium,* 134 N. C., 245. The $1,836.64 for labor performed at the factory in Pennsylvania in making the gas-holder was also properly disallowed, as was the $105.68 for labor performed there in fitting up the gas-holder, though this labor might, if the contractor had so chosen, been performed in New Bern. The mere fact that this (167) work could have been done in New Bern does not entitle it to a preference as "labor performed." Even if it had been performed in New Bern, the fact that it could have been more cheaply performed at the factory shows that it was a part of the making of the machine, and therefore properly to be considered as "material furnished." The creditor is not entitled to a preference over the mortgagee for the gas-holder furnished without his consent, whose affixing, by immemorial law, increases, not decreases, the mortgagee's security; but the preference, if any, is only for the labor done for the company in erecting the gas-holder on the premises, not in shaping the material into the article agreed to be furnished. *Bank v. Mfg. Co.,* 96 N. C., 309.

As to Smallwood's appeal, a foreman is a laborer, and the $195 paid him is entitled to any preference for "labor performed" which is given his colaborers whom he supervised and with whom he worked. *Moore v. Industrial Co.,* 138 N. C., 304.

It has been strenuously contended: (1) That the contractor (the Cruse-Kemper Company) having been paid $1,706.16 (reducing the debt to $4,293.84), the mortgage bond holder is entitled to have this sum applied to extinguish the $1,049.10 paid by the contractor, on his prefence for "labor performed," even if it be conceeded that he had a preference therefor over the prior lien of the mortgagee. 30 Cyc., 1250. The contractor did this work and furnished the gas-holder with knowledge of the registered mortgage.

(2) That this section differs in the reason for, and in the language applicable to, the lien given by Revisal, 2016 (which is good only against the corporation and does not affect prior mortgagees); hence, that only the laborer himself can enforce it, and that a contractor who has paid the laborers extinguishes thereby the right to the preference and is not subrogated to the laborer's rights. Under Revisal, 2016, that lien is given to the contractor, and the subcontractor and laborers, upon notice given, are subrogated to the contractor's rights, not he to theirs. *Lester v. Houston,* 101 N. C., 605.

There is great force in both these contentions, but we do not decide them now, because we think that under Revisal, 1131, the preference given for "labor performed" over prior mortgages of corporations is intended to, and does, give such preference only to laborers employed by the corporation in carrying on the ordinary business of the company, including its repairs and up-keep, and does not confer such preference upon contractors who employ labor under a contract to place "betterments" upon the company's property. If it applied to the latter, mortgage bonds of corporations would become very precarious securi-
(168) ties, since the holders could be "improved out of their security." It has greatly affected the value of the stock of corporations that those in control, instead of applying earnings to the payment of dividends on the stock, often place them in betterments, with the intended result that while the stock is increased in intrinsic value the market value declines. Mortgage bonds have been deemed a better investment because not liable to be thus depressed. But if this act was intended to give the cost of "betterments" preference over prior mortgages mortgage bonds will be in nowise safer than stock. We do not think that such was the intention of the Legislature, nor is it a just construction of the words used.

The judgment, so far as it gives a preference to the Cruse-Kemper Company, is reversed. In its appeal, no error. In Smallwood's appeal there is error.

Cited: *Riley v. Sears,* 156 N. C., 268; *Roper v: Ins. Co.,* 161 N. C., 160.

J. O. MATTHEWS v. MRS. SALLIE PETERSON.

(Filed 16 March, 1910.)

1. Judgments—Justices of the Peace—Docketing, Superior Court—Limitations of Actions.

The seven-year statute of limitations of actions brought upon judgments of a justice of the peace is not affected by docketing the judgment in the Superior Court.

2. Appeal and Error—Supreme Court—Newly Discovered Evidence—New Trial—Questions of Law.

When the Supreme Court has determined and certified down its opinion that the statute of limitations has run against the judgment sued on, the granting of a new trial for newly discovered evidence is not discretionary in the Superior Court, it appearing that the newly discovered evidence did not change the legal aspect of the case.

3. New Trial—Newly Discovered Evidence—Diligence.

A plaintiff is not entitled to a new trial for newly discovered evidence when it appears that an allegation in the answer sets forth the fact upon which the new trial is sought, such being sufficient notice to put plaintiff on guard, requiring him, at the former trial, to make due inquiry.

APPEAL by plaintiff from *Guion, J.*, at January Special Term, 1909, of SAMPSON.

The facts are stated in the opinion of the Court.

George E. Butler for plaintiff. (169)
F. R. Cooper and H. L. Stevens for defendant.

WALKER, J. This action was orignially brought for the purpose of selling real estate to pay the debts of the plaintiff's intestate. By consent of the parties, *Judge W. R. Allen* found the facts, which are fully set out in a former appeal in the same case, 150 N. C., 132, and 150 N. C., 134. The court found, among other facts, that Haywood J. Peterson, the plaintiff's intestate, died on 12 July, 1895. This Court held, when the case was before us at a former term, that the plaintiff's cause of action had been barred by the statute of limitations. The plaintiff moved in the Court below, after the certificate had been transmitted from this Court, for a new trlai, upon the ground of newly discovered evidence, and alleged that the plaintiff's intestate did not die on 12 July, 1895, but on 28 July, 1896. *Judge Guion,* before whom the motion was made, stated that if he should state the facts or review the findings of *Judge Allen,* upon additional testimony introduced before him, he would find that the plaintiff's intestate died in July, 1896, and not in July, 1895, but that on the facts already found and upon the additional affidavits

offered by the plaintiff, he had no power to grant a new trial on motion of the plaintiff, and he denied the motion, not in the exercise of any discretion, but as a matter of law. The court thereupon entered judgment according to the certificate of this Court, and the plaintiff excepted and appealed. When his Honor said that he had no power to grant a new trial on the motion of the plaintiff, and when he denied the motion, not in the exercise of his discretion, but as matter of law, we understand him to have decided that, upon plaintiff's own showing when his motion was made before the court, he was not entitled to another trial of the case, and in this view of the law, as applied to the facts now presented to this Court, we concur with the judge below.

If the plaintiff's intestate died on 28 July, 1896, instead of on 12 July, 1895, the action of the plaintiff upon the judgments which were rendered by a justice of the peace on 13 November, 1888, were barred by the statute of limitations. It is true that they were a new *causa litis,* and plaintiff, within seven years after they were rendered, could sue upon them, if they had not been paid. *Daniel v. Laughlin,* 87 N. C., 433. But if the present contention as to the time of the death of the plaintiff's intestate be correct, he failed to bring an action on the judgment within the time limited by the statute, and his cause of action upon the judgments to recover their amount has consequently been barred by the statute.

There can be no doubt as to the expiration of the lien of the
(170) judgments which were docketed in the Superior Court, as more than ten years had elapsed since they were so docketed. By docketing the judgments in the Superior Court, they do not become judgments of that court, as if they had been originally rendered therein, and so as to authorize an action to be brought upon them as judgments of the Superior Court, but they were judgments of that court only for the purpose of imposing a lien upon the real estate of the debtor, or the defendant in the judgments, and for the purpose of having execution issued from that court to enforce their payment.

We may further remark with reference to the expression used by the judge, as to his want of power to grant a new trial, upon the motion of the plaintiff, for newly discovered testimony, that he evidently referred to his want of authority to set aside the judgment and the verdict upon the newly discovered testimony, if it can be called such, which did not change the legal aspect of the case and should not, if believed, reverse the former decision and judgment of the court.

But we do not think the additional testimony offered by the plaintiff, upon his motion to set aside the judgment and verdict and grant a new trial, could be regarded as newly discovered, or that the plaintiff has acted with due diligence in bringing the matter to the attention of the court, even if in other respects he would be entitled to the relief which he now prays.

It was stated in the answer of the defendant that the plaintiff's intestate died on 28 July, 1896, and this was sufficient notice to the plaintiff for the purpose of putting him on his guard and requiring him, at the former trial, to make due inquiry as to the true date of the intestate's death. Indeed, he had the right to introduce, as evidence against the defendants, their answer to the petition, for the purpose of proving that the intestate died in July, 1896, instead of in July, 1895, that is if the difference in the two dates could make any difference in the law of the case, and should change the result which was reached at the former hearing in the Superior Court. We do not think that, if the new evidence is material the plaintiff has brought himself within the rule frequently laid down by this Court and which has now become familiar and elementary, in regard to setting aside a judgment and verdict for newly discovered testimony. He seems to fail at every point.

It was argued before us that, as the defendants had stated in their answer, the death occurred on 28 July, 1896, the question as to the bar of the statute of limitations was not involved in the case, but we have sufficiently disposed of this contention by what we have already said, as, if the death had occurred in July, 1896, instead of July, (171) 1895, the plaintiff's cause is still barred, and judgment of the Superior Court and the decision of this Court were correct.

In any view we can take of the case, as the facts are now presented to us, we are of the opinion that the plaintiff has failed to show himself entitled to the relief which he now demands.

No error.

W. T. DEANS AND R. C. BROWN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 16 March, 1910.)

1. Carriers of Freight—Bills of Lading—Notice of Loss—Thirty Days.

A provision in a bill of lading that the carrier would not be liable if claim for loss in shipment were delayed for more than thirty days after the delivery of the property, is unreasonable and void.

2. Same—Reasonable Time—Limitation of Actions.

Under a bill of lading with a provision that a claim of loss or damage must be made to the carrier promptly after the delivery of the property, with a void provision, in addition, that it must be made in thirty days, it is no error in the trial court to instruct the jury that a delay for more than sixty days before demand made would be unreasonable, as such is not in the nature of a statute of limitation, but the construction of what

is a reasonable time under the contract of the word "promptly." This action arose prior to the adoption of the standard bill of lading by the Interstate Commerce Commission, allowing four months.

APPEAL from *Cooke, J.*, at November Term, 1909, of EDGECOMBE, in an action begun before a justice of the peace.

The plaintiffs sued to recover the value of goods lost in transportation and the statutory penalty for nonpayment of claim in ninety days. The shipment in which the shortage was discovered was received at South Boston, Va., on 11 July, 1906, from the Stebbins-Lawson-Spraggins Company, at that place, to be carried to the plaintiffs at Tarboro. The initial carrier was the Norfolk and Western Railway Company. The claim in writing for the lost goods was filed 17 March, 1907, the value being $139.31. The shipment seems to have been promptly forwarded, and reached Tarboro without apparent delay. The goods were checked up upon arrival and the shortage discovered. The defendant denied liability, because of the unreasonable delay in filing claim. The
(172) bill of lading contained the following provision: "Claims for loss or damage must be made, in writing, to the agent at point of delivery, promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event." His Honor charged the jury that the thirty-day limit of the bill of lading in which to file claim was void, but the plaintiffs must give notice to the carrier of loss of goods from box in a reasonable time, and that if they should find that the plaintiffs gave notice of the loss within sixty days, this would be in reasonable time; but if they should find that notice of the loss was not given to the agent within sixty days by the plaintiffs, then it would be an unreasonable time, and they should answer the issue "No." The jury answered the issue of indebtedness "No," and judgment was rendered for defendant, and plaintiffs appealed to this Court.

W. O. Howard for plaintiffs.
F. S. Spruill and J. L. Bridgers for defendant.

MANNING, J. The only error assigned is the charge of the learned trial judge, which we have quoted in the statement of the case. The stipulation of thirty days as the time limit in which the notice of loss, to be available to plaintiff, should be given, was properly held by the trial judge to be unreasonable and void. *Mfg. Co. v. R. R.*, 128 N. C., 280. In that case this Court said: "We do not think the stipulation under consideration is reasonable, and therefore it cannot be enforced. We deem it proper to state that we are inclined to think that, in analogy to the ruling as to telegraph and express companies, a stipulation requir-

ing a demand to be made within sixty days after notice of loss or damage would be reasonable. *Sherrill v. Tel. Co.*, 109 N. C., 527; *Lewis v. Tel. Co.*, 117 N. C., 436; *Cigar Co. v. Express Co.*, 120 N. C., 348; *Watch Co. v. Express Co.*, 120 N. C., 351." It is obvious from the charge of his Honor that he followed the suggestion of this Court in that case. Striking out the word "thirty," in the stipulation, there is the provision that the claim for loss or damage must be made "promptly," and under the language of this Court, above quoted, a claim for loss or damage would be promptly made if made within sixty days. It is suggested, however, by the learned counsel of the plaintiff that as the thirty-day limit is unreasonable and void, the time is "at large," and is governed by the three year's statute of limitations. This position is met by the cases of Sherrill *v. Tel. Co.*, 109 N. C., 527, and *Cigar Co. v. Express Co.*, 120 N. C., 348. In each of those cases it is distinctly held that these (173) stipulations are "not statutes of limitation restricting the time within which action may be brought." If the plaintiffs had given the notice of their loss within sixty days, their cause of action would not have been barred until three years had elapsed. It may be well to state that in 1908 the Interstate Commerce Commission adopted the standard bill of lading, which is now in force, and that this bill of lading prescribes four months as the time limit in which claim for loss is to be made. This regulation was prescribed, however, two years after the shipment in the present case. We are of the opinion that his Honor committed no error in the instruction complained of, and his judgment is affirmed.

No error.

Cited: Forney v. R. R., 167 N. C., 642; *Culbreth v. R. R.*, 169 N. C., 725; *Phillips v. R. R.*, 172 N. C., 89.

S. S. BIGGS v. DAVID GURGANUS.

(Filed 16 March, 1910.)

1. Pleadings—Amendments—Discretion—Appeal and Error.

Amendments to pleadings are within the discretion of the trial judge, excepting that a new and different cause of action cannot be thus introduced.

2. Processioning — Divisional Line — Paper-writing — Evidence —"Incompetency"—Witness.

In an action involving the location of a divisional line between the parties, a paper in the handwriting of one who is not a witness or a party is incompetent evidence either to corroborate or contradict a witness in the case.

3. Instructions, Special—When Offered—Appeal and Error.

It appearing of record that a request for special instructions had been refused because offered too late, after three speeches had been made, an exception thereto cannot be considered on appeal.

4. Jurors—Taking Paper Evidence—Error Corrected—Instructions—Parties—Court Sittings—Notice.

When it is contended that the divisional line in dispute between the defendant's and the plaintiff's lands should be in accordance with a certain deed, introduced and read by plaintiff, and the jury, without the knowledge of the court, had taken the paper itself into the jury-room, and when called to the judge's attention, after the jury had considered the case for several hours, he instructed them, in the absence of the plaintiff and his attorneys, that they should consider the entire evidence and not the deed alone; that they should not have taken it into the jury room: *Held*, not reversible error, (*a*) if error, it was not attributable to the court; (*b*) he corrected it as soon as discovered; (*c*) the parties must take notice of the sittings of the court, and their absence did not invalidate the proceedings.

(174) APPEAL from *O. H. Allen, J.*, June Term, 1909, of MARTIN, from a judgment in processioning proceedings.

This issue was submitted to the jury without exception: Which is the correct line between the parties, from the figures 1 to 2 and from 2 to 3, or from 1 to C, and from C to D? Answer: From 1 to C, and from C to D.

From the judgment rendered, the plaintiff appealed.

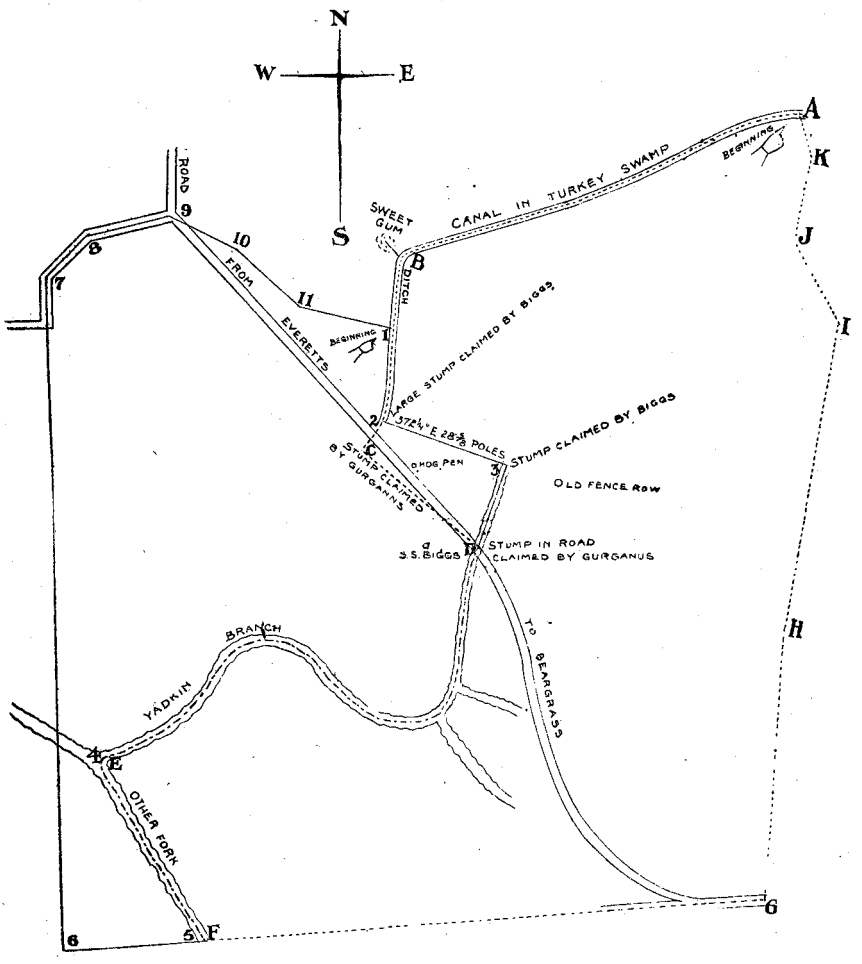
Winston & Everett and A. R. Dunning for plaintiff.
Harry Stubbs and Martin & Critcher for defendant.

BROWN, J. An examination of the record convinces us that the criticisms which have sometimes been made upon processioning proceedings are not merited as to this.

It would be difficult to conduct such a proceeding more in accordance with the letter and spirit of the statute than has been done in the conduct of this by counsel for both parties, and as so conducted it is hard to conceive of a simpler or more expeditious manner of locating and establishing a division line between two tracts of land.

The petitioner sets out his entire boundary and describes the division line as contended for by him. The defendant admits that the petitioner owns the land described, "except that portion embraced in the description of the land as claimed by defendant, and then sets out the boundary line as claimed by him. Thus the controversy arises, as to where the boundary line is, and not what it is. The two boundary lines are delineated on the plat and embodied in the issue. The jury located it as claimed by defendant.

BIGGS *v.* GURGANUS.



Dotted lines show boundaries of a tract claimed by D. Gurganus. Beginning at A and thence running to B; thence to C; thence to D; thence to E; thence to F; thence to G; thence to H; thence to I; thence to J; thence to K; thence to the beginning.

Solid lines show boundaries of a tract claimed by S. S. Biggs. Beginning at 1 and thence running to 2; thence to 3; thence to 4; thence to 5; thence to 6; thence to 7; thence to 8; thence to 9; thence to 10; thence to 11; thence to the beginning.

Scale: 20 poles to the inch.

The record contains seven assignments of error, the last two merely formal.

No. 1, first exception, is allowing defendant to amend answer.

No. 2, second exception, in admitting oral evidence of agreed line.

No. 3, third exception, in not admitting timber deed of defendant.

No. 4, fourth exception, refusal of instructions.

No. 5, fifth exception, instruction to the jury in absence of plaintiff, and the instruction itself.

No. 6, sixth exception, overruling motion for new trial.

No. 7, seventh exception, to the judgment.

(176) The first exception cannot be sustained, as it is well settled that amendments are generally within the sound discretion of the trial judge. There are cases which hold that a new and different cause of action cannot be thus introduced, but they have no application here. We find only one exception in the record to the evidence, and that is assignment of error No. 3.

The record states that this paper-writing was in the hand-writing of Wheeler Martin, but was not signed by any one. We fail to see how it can be competent evidence in any view of this case. The learned counsel for plaintiffs urge in their brief that, "there was no question as to its genuineness. It could not have been prepared for the purpose. It was stronger than had the witness himself written the deed. It was offered only to show that witness was testifying to a fact that could be proven by other evidence than parol testimony." Wheeler Martin was not examined as a witness in the case. Assuming that the paper-writing might under some circumstances be competent to corroborate or contradict him had he been a witness, it is certainly of itself no evidence of title or of the true location of the disputed division line.

The fourth assignment of error cannot be considered, as the record states that "instructions refused because requested too late—after three speeches had been made." It is well settled that special instructions must be in writing and handed up before argument commences. *Craddock v. Barnes,* 142 N. C., 89. Fifth assignment: "As the jury retired, one of their number, without the knowledge of the court, took the deeds that had been introduced in evidence by defendant, which deeds counsel for plaintiff read from during argument and requested the jury to take them and consider carefully in making up their verdict. The jury remained in conference from 2 to past 6 o'clock, appeared in a body in the courtroom, and asked if they must be governed by the deeds introduced in evidence, which counsel agreed they should be. His Honor, in absence of the plaintiff himself and his attorneys, instructed the jury that they should consider the entire evidence and not the deeds alone, and that

they should not take the same with them into the jury-room. The plaintiff excepted to this instruction to the jury."

We see no error in this of which plaintiff can justly complain. If it was erroneous for the jury to have taken defendant's deeds, it is not contended that the judge committed the error. On the contrary, he corrected it as soon as he discovered it, and gave an additional instruction that certainly was not prejudicial to plaintiff.

The fact that plaintiff was not present is immaterial. While it is the privilege of civil suitors and their counsel to be present during trial, it is not obligatory, and their absence will not invalidate the (177) proceedings. They must take notice of the sittings of the court.

Upon reivew of the whole record, we find

No error.

Cited: *Cole v. Seawell, post,* 350; *Pritchett v. R. R.,* 157 N. C., 101; *Holder v. Lumber Co.,* 161 N. C., 178; *Barringer v. Deal,* 164 N. C., 249.

S. McD. TATE v. JUNIUS DAVIS, RECEIVER OF THE BANK OF NEW HANOVER.

(Filed 16 March, 1910.)

Reference—Information for Court—Report Set Aside—Objections and Exceptions.

A referee appointed by the court to look into the demand of a purchaser of land of a receiver of a corporation, that the purchase price paid by him be refunded owing to defective title of the corporation, and to report thereon, does not fall within the provision of the Code of Civil Procedure with reference to hearing and determining issues raised by the pleadings in a civil action, and the court may disaffirm the report of the referee *ex mero motu,* even when no exceptions were regularly filed thereto.

HOKE, J., concurs in result.

APPEAL from *O. H. Allen, J.,* at October Term, 1909, of NEW HANOVER.

Motion in the cause by B. F. Keith to have refunded to him by the above-named receiver $500 paid to the receiver on 22 May, 1902, for a tract of land sold and conveyed to said Keith by said receiver, the title to which has failed.

The application of Keith was referred to a referee. The motion was heard before his Honor, *O. H. Allen,* judge presiding, who overruled the referee, and denied the motion. The petitioner Keith appealed.

Stevens, Beasley & Weeks and Meares & Ruark for Keith.
Rountree & Carr and Thomas W. Davis for receiver.

BROWN, J. The insolvent corporation of which the appellee was appointed receiver had among its assets a claim of title to a tract of land in Bladen County, which was sold and conveyed by the receiver to appellant Keith, who paid for it, received a deed without warranty and took possession. It has subsequently transpired that the bank's title was bad and Keith has lost the land.

The referee found certain facts and reported in favor of
(178) refunding the money. No exceptions were filed to the report, but the judge, upon examination of the evidence, ruled as follows: "The court disapproves the recommendation of the referee, and finds as a fact that said Keith purchased said tract of land from said receiver after a full disclosure by said receiver of his title to same and all facts and claims in regard thereto, especially the claim of John D. Kerr, and with full and complete knowledge of the title and claims to said land, and with notice from said receiver that he bought at his own risk. It is therefore considered and adjudged by the court that the petition be dismissed and that the receiver retain said money, the court in its discretion refusing the prayer of the petitioner."

It is contended that, no exceptions having been regularly filed to the report of the referee, his Honor was without authority to set aside the report.

The reference was not one made under the provisions of the Code of Civil Procedure, where a referee is appointed to hear and determine issues raised by the pleadings in a civil action. It is mere inquiry made at the direction of a chancellor who wishes to inform his conscience as to the justice of a demand made on a fund in his control. He may set aside *ex mero motu* the recommendation of the master or referee and examine into the facts himself.

As to the merits of the case, his Honor's findings appear to have little for the appellant to base his claim upon.

The authority relied upon by his counsel does not fit this case. *Etheridge v. Verney,* 80 N. C., 78. That was a judicial sale, where the decree operated directly upon the land sold, and the court was under a moral obligation to make a good title or else to refund the money, as it had not been paid out. The court had offered the property for sale, and not merely some one's interest in it. At time of his purchase the purchaser did not know of an outstanding claim, but heard of it before confirmation. The court allowed him what it cost to buy in the claim. The sale to Keith was not strictly a judicial sale, but only the closing out of assets of an insolvent bank by a receiver, and partook more of the char-

acter of a sheriff's sale, where only the interest of the execution debtor is sold. *Rutherford v. Green,* 37 N. C., 122.

The findings of the court show conclusively that the receiver did not offer for sale a good and indefeasible title, but only such title as the bank had. It is presumed that the purchaser paid only such price as he thought such title worth, as he knew all the defects before he (179) bought.

It is adjudged that appellant Keith pay the costs of this Court.

Affirmed.

HOKE, J., concurring in result.

Cited: *Whitlock v. Lumber Co., post,* 193.

J. E. PIGFORD ET AL. V. L. V. GRADY ET AL.

(Filed 23 March, 1910.)

1. Wills—Construction.

In construing a will, the intent of the testator is to be gathered from the will itself, uninfluenced by the conditions of his estate at the time of his death.

2. Wills—Specific Legacies—"In Cash."

A designation of the payment of certain sums of money "in cash" to named devisees indicates that the legacies are to be paid in cash generally, and not that they must be paid out of a particular fund.

3. Same—Residuary Clause.

When the testator's estate at the time of his death was insufficient to pay the debts and specific legacies, and consisted chiefly of personal property, the mere fact that these legacies were to be paid "in cash" does not change the character of a residuary clause devising to certain named persons "any and all property, of any and all description, that I may have at my death."

APPEAL from *Guion, J.,* at November Term, 1909, of LENOIR.

This was an action to obtain the construction of a will, heard on appeal from the Clerk of the Superior Court of New Hanover County. E. S. Pigford died 16 January, 1907, in New Hanover County, leaving a last will and testament, which was duly admitted to probate, in the following words:

NORTH CAROLINA—New Hanover County.

I, E. S. Pigford, of above State and county, being of sound mind and feeble health, do make and declare this, my last will and testament:

First. My executors, hereinafter named, shall give my body a decent burial, suitable to the wishes of my friends and relatives, and place a neat tombstone to my grave and pay all the expenses of such as may be necessary, together with my just debts, out of the first moneys (180) which may come into his hands belonging to my estate.

Second. I give and bequeath to my beloved niece, Isabel Pigford, one thousand dollars in cash, and all my jewelry of any and all description, not otherwise bequeathed herein.

Third. I give and bequeath to my beloved niece, Annie Pigford, one thousand dollars in cash.

Fourth. I give and bequeath to my beloved nephew, Elliott Pigford, one hundred and fifty dollars in cash.

Fifth. I bequeath and give to my beloved friend, George W. Chestnutt, my gold watch with my initials thereon engraved.

Sixth. I give and bequeath to my trusted servant, Washington McNeill fifty dollars in cash.

Seventh. I give, bequeath and devise to my beloved brothers, J. E. and T. H. Pigford, to them equally, any and all other property of any and all description, that I may have at my death.

Eighth. I hereby constitute and appoint my trusted friend, George W. Chestnutt, my lawful executor, to all intents and purposes, to execute this my last will and testament, according to the true intent and meaning of the same, and every part and clause thereof, to execute the same without giving bond.

Ninth. I hereby declare all other wills executed by myself void.

In witness whereof I, the said E. S. Pigford, do hereby set my hand and seal, this 13 May, 1905.

E. S. PIGFORD. (SEAL.)

The plaintiffs are the brothers, J. E. and T. H. Pigford. The defendants are the administrator, C. T. Grady, and the legatees mentioned in the second, third, fourth and sixth items. The jewelry and watch bequeathed have been delivered to the proper legatees. The testator did not leave an estate sufficient to pay his debts and the legacies in full. His estate consisted of the jewelry and watch, some cash in banks, building and loan certificates, a horse, buggy, books, library and other articles of personal property. He owned no land. After paying his debts, funeral expenses and providing a neat tombstone, the administrator has paid Isabel Pigford, now Faison, $425; Annie Pigford, $425; Elliott Pigford, $63.75, and Washington McNeill, $21.25. He has yet in hand a balance

for distribution. The contention of the plaintiffs is that the bequest to them in the seventh item is a particular bequest or legacy, and not residuary, and that the money, less the expenses, should be prorated among the plaintiffs and defendants. The clerk ruled against the plaintiffs, and held the seventh item to be a residuary clause, and that the pecuniary legatees should be paid *pro rata* with each other, and, (181) on appeal to the judge, his Honor affirmed the clerk's rulings, and the plaintiffs appealed to this Court.

Stevens, Beasley & Weeks for plaintiffs.

Faison & Wright, A. McL. Graham, and Rountree & Carr for defendants.

MANNING, J. The contention of the plaintiffs is, that the testator's estate being insufficient to pay his debts, the expenses of administration and the pecuniary legacies, there ought to be a proportionate abatement of the pecuniary legacies, in order that there might be some of the "all other" property, bequeathed to them by Item 7, or that by the use of the word "cash" after the number of dollars in each of the pecuniary bequests, the testator's intention was to charge the legacies upon a particular fund, and this fund being exhausted, the general personal estate could not be called upon to make up the deficiency. We do not agree with the plaintiffs in either contention. It is not observable from the will that the testator charged the pecuniary legacies against any particular fund; the word "cash" does not indicate this, but rather emphasizes that the legacies are to be paid in money generally. It may be, as is frequently the case, that if the testator could have foreseen at the date of the will, the condition of his estate at his death—the time when his will would take effect—he might have written it differently. "The question is not what he might possibly have intended, if he had known that case had happened to exist at his death; but what is to be inferred from the will was his intention when he made it." *Ruffin, C. J.*, in *Perry v. Maxwell*, 17 N. C., 487 (499). The testator's estate consisted entirely of personalty, and, in our opinion, the pecuniary legacies are made a charge generally upon his estate; and by Item 7 he disposed of, to the plaintiffs, all his other property not necessary for the payment of these legacies, and that this item is, in effect and by intention, a residuary clause.

Our conclusion, we think, is supported by the following decisions of this Court, and the text-books of accepted authority: *McGuire v. Evans*, 40 N. C., 269; *Fagan v. Jones*, 22 N. C., 69; *Graham v. Graham*, 45 N. C., 291; *Robinson v. McIver*, 63 N. C., 645; *Hill v. Toms*, 87 N. C.,

492; Gardner on Wills, p. 418; 1 Underhill on Wills, sec. 405; 1 Roper on Legacies, pp. 256, 284. In our opinion, therefore, there was no error in the judgment appealed from, and it is

Affirmed.

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(182)

W. E. BAGGETT v. ELI R. WILSON.

(Filed 23 March, 1910.)

Reference—Consent—Findings of the Court—Conclusive.

In passing upon the report of a referee under an order made by consent, directing him to hear and determine all issues and questions of law and fact arising upon the pleadings, the judge may review the findings of fact and law. His rulings upon the facts, when supported by evidence, are conclusive.

APPEAL from *Guion, J.*, at January Special Term of SAMPSON.

Action heard upon exceptions to the report of the referee theretofore appointed in the action, by consent. His Honor, upon the exceptions filed reversed one of the findings of the referee, approved others, and rendered judgment that the plaintiff, W. E. Baggett, the only party plaintiff in interest, take nothing by his action and pay the costs of the action. The plaintiff excepted and appealed.

George E. Butler for plaintiff.
H. A. Grady for defendant.

MANNING, J. The only point presented by this appeal, conceded by the attorneys for both plaintiff and defendant, is whether a judge of the Superior Court can review the findings of fact and law by a referee appointed by consent in an action pending in that court, where the order of reference directs the referee "to hear and determine all issues and questions of law and fact arising upon the pleadings." The precise question has been decided by this Court, and it has been repeatedly ruled that the judge has such power. *Smith v. Hicks,* 108 N. C., 249, in which several cases are cited; *Blalock v. Mfg. Co.,* 110 N. C., 99; *Dunavant v. R. R.,* 122 N. C., 999; *Cummings v. Swepson,* 124 N. C., 579; *Henderson v. McLain,* 146 N. C., 329; sec. 525, Pell's Rev. and cases cited under heading, "Findings of Fact." It is not contended by the plaintiff that there was no evidence to support his Honor's finding of fact reversing the finding of fact of the referee, but that it was contrary to the weight of the evidence. In *Henderson v. Mc-*

Lain, 146 N. C., 329, this Court said: "The rulings of the judge below upon the exceptions to findings of fact are conclusive, there being evidence upon such findings. *Dunnavant v. R. R.,* 122 N. C., 999, and cases there cited." We conclude there was no error in the judgment appealed from, and the same is

Affirmed.

Cited: McGeorge v. Nicola, 173 N. C., 710.

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(183)

E. L. HOBBS ET AL. v. GEORGE W. CASHWELL ET AL.

(Filed 23 March, 1910.)

1. Deeds and Conveyances—Voluntary Gift—Creditors—Judgment Sale—Purchasers—Title—Rights of Donee—Retaining Property Sufficient—Burden of Proof.

The burden of proof is upon those claiming title to lands under a deed of a voluntary donor, the express consideration being $1 and love and affection, to show that the grantor had, at the time of making the deed, retained property "fully sufficient to pay his debts" (Revisal, sec. 962); and where it appears that a judgment had been obtained by the grantor's creditors before making the deed, and that the land had been sold at a judicial sale at the suit of the donor's creditors, the plaintiffs suing to establish title as against the purchaser must show that their donor had complied with the statute in retaining sufficient property, and on conflicting evidence the question is one for the jury.

2. Deeds and Conveyances—Voluntary Gift—Executors and Administrators—Judgments—Estoppels.

While in an action against the administrator of a deceased voluntary donor of lands to set aside the donor's deed in favor of his creditors and to subject the land to the payment of his debts, the donees are not necessary parties, a judgment therein is not an estoppel against their setting up their claim of title in another action brought by them for that purpose, when they were not made parties to the suit against the administrator. Revisal, sec. 73.

3. Executors and Administrators—Debts—Sale of Lands—Rights of Creditors.

A creditor of a deceased person may maintain an action against the administrator to compel him, in proper instances, to proceed to sell his intestate's lands for the payment of his debts.

APPEAL from *Guion, J.,* at January (Special) Term, 1910, of SAMPSON.

The evidence offered at the trial by the plaintiff, the defendants offering no evidence, disclosed the following facts: G. W. Hobbs, the

grandfather of plaintiffs, was, prior to 8 May, 1893, the owner in fee and in possession of several tracts of land in Sampson County; on that day he made a distribution of his lands among his seven children, conveying to them, by separate deeds, certain described tracts of land. The recited consideration in each was $1 and love and affection. He reserved for his wife, Mary, a life estate in all, and for himself a life estate certainly in one hereinafter mentioned, and perhaps in others. All the deeds were not set out. G. W. Hobbs retained no land, other than his life estate mentioned.

(184) The particular deed under which the plaintiffs seek to recover in this action contained the following recitals, premises and habendums: "That whereas said parties of the first part (G. W. Hobbs and wife, Mary Hobbs) are desirous of making provision for said party of the second part (E. W. Hobbs) by reason of their natural love and affection for him, their son: Now, therefore, in consideration of the premises and the further consideration of $1 to them in hand paid, etc., the said parties of the first part do hereby convey to the said party of the second part the following bounded and described tract of land, viz.: (then follows the description) containing 284 acres, more or less, subject to and depending upon the following conditions, qualifications and limitations, viz.: That, first and foremost, the said parties of the first part reserve to and for themselves a life estate in the lands herein described, that is, that this conveyance shall in no way operate to convey possession or right of possession until the death of both the said G. W. Hobbs and wife, Mary Hobbs; and the said parties of the first part have given, granted and conveyed, and by these presents do give, grant and convey unto the said party of the second part, an estate for the term of his natural life in said lands and no longer or further, which is to take effect and operate after the death of both the said G. W. Hobbs and wife, Mary Hobbs, and not until then. And the said parties of the first part do hereby give, grant and convey the remaining estate in said land in fee simple, absolutely and forever, to such of the lawfully begotten issue of the said party of the second part as may be living at the time of his death, to their heirs and assigns forever, to be equally divided between said issue; the same to take effect and operate when the particular estate for life, of the said party of the second part, shall have determined by his death. But should parties of the first part, or either of them, survive the said party of the second part, then upon the death of such party or parties of the first part, by virtue of this conveyance, a fee-simple estate in said land shall vest in such lawfully begotten issue of the party of the second part as may then be living and their heirs and assigns, the same to be equally divided between said issue; which estate the said parties

of the first part do hereby grant and convey to such lawfully begotten issue, their heirs and assigns: to have and to hold unto the said party of the second part such an interest in the aforesaid tract of land as hath been hereby conveyed, and to the lawfully begotten issue of the said party of the second part, as above specified, their heirs and assigns." This deed was duly acknowledged, probated and registered on 9 May, 1893. The plaintiffs are surviving children of E. W. (185) Hobbs and the above deed covers the land in suit. The plaintiffs offered the following court records: Judgment, A. M. Lee against T. M. Ferrell, J. A. Ferrell and G. W. Hobbs, docketed 14 February, 1894, for $926.97, 8 per cent interest from 6 February, 1894, and costs, $6.30 The complaint in the action in which the above judgment was recovered, stating as its cause of action the nonpayment of a note under seal, dated 14 September, 1887, for $778.91. The summons in this action was issued 21 December, 1893. The judgment was rendered by and docketed in the Superior Court of Sampson County. Summons dated 9 April, 1901, in action entitled, "A. M. Lee, for himself and all other creditors of G. W. Hobbs, deceased, who will join in, etc., against W. A. Hobbs, administrator of G. W. Hobbs, W. A. Hobbs and others (giving names), heirs at law of G. W. Hobbs and Mary Hobbs, widow. Some of the defendants accepted service, and service was made upon others by a proper officer. The complaint in that action, duly verified, which, among other things, set forth the judgment in favor of A. M. Lee; the lien of the judgment on the lands; that the judgment was unsatisfied, except that W. A. Hobbs paid $136.23, 14 July, 1899, and the sum of $213 was paid 5 February, 1900; that W. A. Hobbs qualified as administrator of G. W. Hobbs on 8 December, 1899, and "has filed his report saying his father, G. W. Hobbs, died leaving no personal property"; that the administrator, though requested, had refused to file petition to make real estate assets; that G. W. Hobbs, on the days mentioned, conveyed to the defendants in that action, his heirs at law, by deeds of gift, the following described tracts of land (then follows a reference to the recorded deeds to the several defendants and the statement of the acreage in each deed); that at the time said deeds of gift were executed, the grantor was indebted to the plaintiff Lee, and the debt reduced to judgment as aforesaid; the names of the heirs at law are given, and the prayer for sale of the land described for the payment of the debt. It seems that no answer was filed to this complaint.

An order of sale was entered by the court at September Term, 1901, reciting the material allegations of the complaint, and John D. Kerr was appointed commissioner to sell the lands described in the complaint, and he was directed to "sell said lands in separate tracts, accord-

ing to said deeds to said defendants, heirs of G. W. Hobbs, and to pay off the share of each of said heirs in said judgment debt, out of the proceeds of said sale of the part of said land so deeded to each defendant." Thirty days was allowed for the payment of the
(186) said judgment debt, and if not then paid, the commissioner was ordered to advertise and sell the land at the courthouse door in said county of Sampson. The debt not being paid, the commissioner advertised the land for sale by separate tracts, and sold the same on Monday, 16 December, 1901. The advertisement of the sale by the commissioner was offered in evidence. For the land included in this action, Emma J. Hobbs, the mother of plaintiffs and wife of E. W. Hobbs, became the highest bidder, at $1,250. The sale was duly reported by the commissioner and confirmed by the court at May Term, 1902, and commissioner directed to make deeds to the purchaser, the report of commissioner and order of confirmation being offered in evidence.

The commissioner, by direction of Emma J. Hobbs and her husband, executed two deeds for the land purchased by her—one to A. C. Vann, 9 June, 1902, for 66¾ acres, which is not embraced in the present action, and the other to the defendant George W. Cashwell, for the remainder of the tract, both deeds being offered in evidence.

There was evidence that Mrs. Mary Hobbs, the widow of G. W. Hobbs, was dead, and that E. W. Hobbs died in 1907, leaving surviving the plaintiffs as "his lawfully begotten issue."

The defendant Cashwell admitted his possession under his deed. In his answer filed, the defendant denied that plaintiffs were the owners of the lands, they claiming in their complaint under the deed from G. W. Hobbs and wife; asserted title in himself under the creditors' action hereinbefore recited, and that G. W. Hobbs was indebted to A. M. Lee; that the deed of G. W. Hobbs, under which plaintiffs claimed, was a deed of gift; that the land was condemned to be sold to pay said debt and that he is a purchaser thereof; that he mortgaged the same to his codefendant, B. F. Powell.

The plaintiffs alleged in their complaint that they were the owners of the land described, and entitled to possession; that they claim under deed of G. W. Hobbs and wife to E. W. Hobbs, which is referred to and made a part of the complaint; that they are the children of E. W. Hobbs; "that on 9 April, 1901, A. M. Lee and other creditors brought a suit in the nature of a creditors' bill, against W. A. Hobbs, administrator of G. W. Hobbs, and E. W. Hobbs and other heirs at law of G. W. Hobbs, to subject, among other lands, the above described land to the payment of the debts of G. W. Hobbs; that in said action these plaintiffs were not made parties plaintiff or defendants; that in said

suit one J. D. Kerr was appointed commissioner to sell, among other lands, the lands above described and claimed by these plaintiffs; that he did pretend to sell the above-described lands to defend- (187) ant, George W. Cashwell"; that all the debts of G. W. Hobbs were paid without resort to land held by defendant Cashwell; that the sale to him was unnecessary and void, and the deed to him did not divest the title of plaintiffs.

Upon the pleadings, his Honor submitted one issue, to wit: Are the plaintiffs the owners and entitled to the immediate possession of the lands described in article 1 of the complaint?

The defendants, at the close of the evidence, moved for judgment of nonsuit, and, this being refused, moved for a peremptory instruction to the jury to answer the issue "No." This was declined. His Honor thereupon instructed the jury, if the believed the evidence, they should answer the issue "Yes," which was accordingly done. The defendants excepted to these several rulings of his Honor, and from the judgment appealed to this Court.

Faison & Wright for plaintiffs.
J. D. Kerr and C. M. Faircloth for defendant.

MANNING, J., after stating the case: The plaintiffs rest their contention upon the theory that as they were seized of an estate in fee in the *locus in quo,* under the deed of G. W. Hobbs, and being *in esse,* were parties neither by service nor appearance to the action by the creditors of G. W. Hobbs, in which the land was sold and through which defendant claims title, the judgment and the proceedings were, as to them, void and wholly insufficient to divest their estate. In support of this contention and the correctness of his Honor's ruling in their favor, the plaintiffs rely upon the decisions of this Court in *Yarborough v. Moore,* 151 N. C., 116; *Moore v. Lumber Co.,* 150 N. C., 261; *Card v. Finch,* 142 N. C., 140; *Carraway v. Lassiter,* 139 N. C., 145; *Harrison v. Hargrove,* 120 N. C., 96, and the cases cited and approved in them. The principles determined by these cases are too well established to admit of doubt, and yet, conceding to them, as far as they may be applicable to the present case, their fullest influence, we do not think they are decisive of the questions presented by this appeal.

In our opinion, this case is controlled by sections 960 (13 Eliz.) and 962, Rev. 1905. The plaintiffs' title is derived immediately through a deed of gift from their grandfather. The evidence offered by them disclosed that the donor was indebted at that time, and at the same time he disposed of his entire landed estate by deeds of gift to his children; and it tended to show that he left no personal estate; that

his indebtedness could be satisfied only by resort to his lands
(188) held under the deeds of gift. Section 962, Rev., declares that no voluntary gift, by one indebted, shall be deemed void as to creditors, by reason merely of such indebtedness, "if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper." In *McCanless v. Flinchum*, 89 N. C., 373, it is said: "A voluntary deed of land or other property made to a son by a father unable to pay his debts, is void *per se*, as to creditors; indeed, such a deed to any person is void, and such a deed appearing, the court declares it void in law. It is well-settled law in this State, that no voluntary deed can be upheld as against creditors, when the bargainor is unable to pay his debts at the time of the execution of the deed." *Worthey v. Brady*, 91 N. C., 265. It is not required to go to the full length of the above decisions to be convinced of the error in his Honor's rulings. In *Warren v. Makely*, 85 N. C., 12, this Court, speaking through *Smith, C. J.*, said: "The existence of the debt reduced to judgment before the making of the deed of gift and subsequent insolvency of the donor, renders her deed *prima facie* fraudulent and void against the creditors seeking to subject the land to the payment of his debt, and equally so against the defendant purchasing under the execution issued to enforce it, unless, at the time, the debtor retained property, in the words of the act, 'fully sufficient and available' for the satisfaction of her creditors; and *the duty of proving this fact to sustain the conveyance devolved upon the plaintiff.*" In *Creedle v. Carrawan*, 64 N. C., 422, this Court, in referring to a voluntary deed, said: "If its validity depends upon these considerations alone (love and affection and $5), it is a voluntary conveyance, and fraudulent as to debts existing at the time of its execution, *unless* the defendant can show in evidence such a state of facts as will bring it within the exception mentioned in the statute, Rev. Code, ch. 50, sec. 3 (now sec. 962, Rev.). Where the rights of creditors are affected, a voluntary conveyance is presumed in law to be fraudulent, and to rebut the presumption, it is incumbent on the party claiming under such deed to show that it was executed under such circumstances as will meet the requirements of said statute." In *Black v. San-*
(189) *ders*, 46 N. C., 67, *Pearson, J.*, thus speaks for the Court: "Apart from the act of 1840, if there be an existing debt and the debtor

makes a voluntary conveyance, and afterwards becomes insolvent, so that the creditor must lose his money or the donee must give up the property, the latter is required to give way, on the ground that one must be honest before he is permitted to be generous. To effect this, such voluntary conveyance is presumed, as a matter of law, to be fraudulent. *Jones v. Young,* 20 N. C., 353; *Houston v. Bogle,* 32 N. C., 496. The act of 1840 makes an important change in the law and requires the question of fraud to be submitted to the jury as an open question of fact, *in those cases* where, at the time of the conveyance, property *fully sufficient and available* for the satisfaction of all his then creditors is retained by the donor. This is made a condition precedent, in order to bring a case within the operation of the act." While in the case of *Cox v. Wall,* 132 N. C., 732, sec. 961, 27 Eliz., was the particular statute considered by the Court, much of its reasoning is applicable to the section now under consideration. In that case this Court said *inter alia:* "It would appear from these cases that whatever must exist in order to protect the title, must be averred and proved by him who holds that title. The burden is with him." It would seem obvious, therefore, from these authorities, that the burden was upon the plaintiffs, claiming only as voluntary donees under a deed of gift against the defendant claiming through a creditor of their donor, existing at the date of the deed of gift, to show the existence of those facts required by the statute to make their title good. *Clement v. Cozart,* 112 N. C., 412; *Arnett v. Wanett,* 28 N. C., 41.

The next question presented for consideration is the effect to be given to the creditors' action instituted against the administrator and the heirs at law of the deceased debtor. As the plaintiffs were not parties to that action, the proceedings are ineffectual as an adjudication to divest their title, and do not, as to them, constitute an estoppel. *Finch v. Card, supra,* and authorities cited above. The plaintiffs, by the present action, have their "day in court" and an opportunity to establish the validity of their title. If the sale had been made under an execution issued in the lifetime of the judgment debtor, then the purchaser at that sale and the plaintiffs, as voluntary donees, could have settled their title in an action brought by either against the other; they could have had "a fair fight" and the "question be put on its own merits," to quote the apt words of *Pearson, C. J.,* in *Paschal v. Harris,* 74 N. C., 335. But the death of the judgment debtor prevented this somewhat summary method, and the creditor must obtain the satisfaction of his debt through the administrator or executor. *Sawyers v.* (190) *Sawyers,* 93 N. C., 321; *Tuck v. Walker,* 106 N. C., 285; *Webb v. Atkinson,* 124 N. C., 447; *Holden v. Strickland,* 116 N. C., 185. And where the administrator fails to perform this duty—to subject the real

estate of his intestate to the payment of his debts—the creditors may compel him to do so. *Tuck v. Walker, supra; Baker v. Carter,* 127 N. C., 92; *Harrington v. Hatton,* 129 N. C., 146.

The complaint filed by the judgment creditor in his action seems to contain all the averments necessary to invoke the aid of the court in the enforcement of his right to have the lands of his judgment debtor subjected to the payment of his debt. In *Tuck v. Walker, supra,* this Court said: "When it becomes necessary to sell the real estate of a decedent to make assets, The Code, 1446 (now Rev. 1905, sec. 72) provides in explicit terms that the court may decree a sale of 'all real estate that deceased may have conveyed with intent to defraud his creditors, and all rights of entry, rights of action, and all other rights and interests in land, tenements or hereditaments, which he might devise, or by law would descend to him,' and the language has been so construed by this Court. *Mannix v. Ihrie* 70 N. C., 299; *Heck v. Williams,* 79 N. C., 437." Section 73, Rev., provides that no order to sell the real estate shall be granted till the heirs or devisees of the decedent have been made parties. The heirs at law of the decedent were made parties to the action, as shown by the records offered in evidence in this case.

While we have reached the conclusion that the voluntary donees were not necessary parties to the proceeding to subject the lands to payment of the debts of the decedent, we think they were proper parties, and that it would be more consistent with the chief purpose of judicial sales to have had them before the court before the order of sale is made, in order that when the property is sold an undisputed title may be offered and the highest possible price may be obtained for the property. This accords with the trend of modern legislation and judicial opinion. *Crockett v. Bray,* 151 N. C., 615.

As the plaintiffs were not made parties to the creditors' action presented in this case, the judgment was not in any way conclusive upon them or an adjudication upon the validity of their title. Its whole force and effect was to divest whatever title the judgment debtor had in the land, and to place the donees claiming under the voluntary deed from the common source of title, and the defendant—a purchaser at the sale had under order of the court—in the same relative posi-
(191) tions that the plaintiffs would have occupied to the purchaser at a sale under execution, having the right to use the same range of defenses to protect their title derived from the donor. If their title can be established under the law, then the title in the purchaser under the creditors' action will be worthless and his deed will be ordered to be canceled on the record.

The position of the plaintiffs is admittedly that of donees holding under a voluntary conveyance from a donor indebted at the time, and their deed will be valid if property was retained by their donor fully sufficient and available for the satisfaction of his then creditors, the defendants having denied plaintiffs' title to the land. "At an early period in the judicial history of this State," says *Avery, J.*, in *Helms v. Green*, 105 N. C., 251, "it was held that courts of law might hear evidence and allow a jury to pass even incidentally, upon the question whether a deed was void for fraud in the factum or under 13 or 27 Eliz. (The Code, secs. 1545 and 1546), *Logan v. Simmons*, 18 N. C., 16. Hence, in the trial of actions of ejectment, where the question arose whether a deed, relied upon by either of the parties as a part of a chain of title, was executed to hinder, delay or defraud creditors, evidence was heard to attack or sustain such conveyances, though the action was not brought to directly impeach its character. *Lee v. Flanagan*, 29 N. C., 471; *Hardy v. Skinner*, 31 N. C., 191; *Hardy v. Simpson*, 35 N. C., 132; *Black v. Caldwell*, 49 N. C., 150; *Winchester v. Reed*, 53 N. C., 377; Wharton on Evidence, sec. 931."

We think, therefore, that his Honor erred in his rulings, and the questions arising upon the evidence affecting the validity of plaintiffs' title ought to have been submitted to the jury, "with such observations as may be right and proper." There must be a

New trial.

Cited: Aman v. Walker, 165 N. C., 228; *Shuford v. Cook*, 169 N. C., 55.

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(192)

C. M. WHITLOCK v. AUBURN LUMBER COMPANY.

(Filed 23 March, 1910.)

1. Courts—Reference to Inform Court—Equity—Chancellor—Procedure.

A referee appointed by the court to ascertain and report upon matters arising for the court's determination, is not a reference under the Code of Civil Procedure, and the judge, sitting as a chancellor, may adopt the findings of the referee, hear additional evidence, reject such as he may disapprove, determine the matter upon the facts found by himself and adjudge the result thereupon.

2. Corporations, Insolvent—Receiver's Sale—Purchaser's Defective Title—Cost to Perfect—Purchase Money—Interest.

Upon petition of a purchaser at a receiver's sale of an insolvent corporation, setting forth that the title to a certain tramroad, necessary for

the hauling of lumber from the lands purchased, and sold with the land, was, as to certain parts, defective, and that the receiver announced at the sale that he would sell the property, including the tramroad, free from liens or encumbrances, the court referred the matter for a report of the facts, and found and adjudicated from the facts appearing that the receiver made no misrepresentations, that there was no element of fraud, and that the purchaser had not tendered a certain balance of the purchase price, but it had cost him the sum of $20 to perfect his title to the tramway: *Held*, that it was not error to enter judgment that the purchaser pay the balance of the purchase price, less the $20 so paid by him, with interest; and the question as to whether the sale of the property of an insolvent corporation is a judicial sale is not presented.

APPEAL by Thomas B. Pierce from *Guion, J.*; at January Term, 1910, of NEW HANOVER.

This appeal presents the following facts for consideration: The defendant, an insolvent corporation, was placed in the hands of Cameron F. McRae, receiver. Its property consisted of a sawmill plant, timber rights, tramroad, rights of way, etc. During the progress of the litigation an order was made transferring the rights of certain creditors asserting liens upon certain of the company's property to the fund to be derived from the sale by the receiver, and an order of sale was made. Pursuant to said order, the receiver executed the order of sale on 3 October, 1903, when T. B. Pierce became the last and highest bidder for $3,141. The sale was duly reported and confirmed, and the purchaser has paid $2,275.32 of the purchase price, leaving unpaid $865.68. At the sale the receiver announced that, by an order of court, all liens held by creditors against the property had been transferred from the property to the funds to be derived from sale, and that he would sell

(193) the property of the lumber company, including timber, mill plant, buildings, tramroad, etc., free from liens or encumbrances. It is also found as a fact by the referee to whom the matter was referred by the judge, that both the receiver and the purchaser understood and believed that the company owned rights of way over all the lands on which the tramway was located. This tramroad was about six miles in length, running from the mill to the A. C. L. Railroad, and was valuable in getting the lumber from the mill to the railroad. It developed after the sale that the company did not own the right of way across all the lands between its mill and the railroad, and the purchaser, Pierce, was forbidden, two years after his purchase and possession thereunder, to longer use the tramroad on certain lands over which it passed; thereby the tramroad was rendered ineffective for its purpose, and the purchaser hauled a large quantity of lumber to another station, at an increased cost to him. It, however, developed, and this fact is so found by the referee and adopted by the court, that the purchaser acquired the

use of the right of way over the land of one of the contrariant owners for $20, and this sum was allowed the purchaser, Pierce, as a credit on the balance due, and that he acquired the right of way over the land of the only other objecting landowner without the payment of any money or other thing of value. His Honor disallowed the exceptions filed by the purchaser to the findings of the referee, among them a claim for damages for the difference in the cost of hauling the lumber, adopted his findings and gave judgment against the purchaser for the balance, $865.68, less $20 paid as aforesaid, and interest from 10 October, 1903, the day of sale. The purchaser excepted and appealed to this Court.

Meares & Ruark for receiver.
Stevens, Beasley & Weeks for appellant.

MANNING, J., after stating the case: In speaking of the character of the reference in such cases as this, and of the power of the courts over the findings of the referee, this Court said, in *Tate v. Davis, ante,* 177, a case similar to this: "The reference was not one made under the provisions of the Code of Civil Procedure, where a referee is appointed to hear and determine issues raised by the pleadings in a civil action. It is mere inquiry made at the direction of a chancellor who wishes to inform his conscience as to the justice of a demand made on a fund in his control. He may set aside *ex mero motu* the recommendations of the referee or master, and examine into the facts himself." The judge, sitting as a chancellor in such matters, may adopt the findings of the person appointed by him to hear the evidence and report his findings of fact, using the same evidence taken in such hearing, or hearing additional evidence, or the judge may reject such findings as he may disapprove, and determine the matter upon the facts (194) so found by him.

The contention of the appellant is that the sale by the receiver was a judicial sale, and he had the right to assume that he offered a good title—the entire title—as the sale of a less estate or interest was not expressly mentioned in the face of the decree, or clearly implied from the nature of the sale. *Shields v. Allen,* 77 N. C., 375; *Edney v. Edney,* 80 N. C., 81; *Carraway v. Stancill,* 137 N. C., 472. The question whether the sale of the property of an insolvent corporation is a judicial sale, within the comprehension of the principle stated in the three cases above cited, is an interesting question, but we do not think it is presented by this appeal, for, conceding that it is a judicial sale and embraced within the rule stated, it is found by the referee and his findings adopted by the judge, that in the two particulars wherein the purchaser claims he has suffered any loss or inconvenience, to wit, in securing the right of way over the

land of Frederick and over the land of the Carlton heirs, he paid $20 for the former, which was allowed as a credit, and that to acquire the latter cost him nothing. Upon the general question as to the application of the principle stated in the cases cited above, in Smith on Receivership, sec. 34, p. 100, it is said: "As to the title and condition of the property, the rule of *caveat emptor* applies, and the purchaser takes the property subject to all liens or outstanding interests therein." Gluck and Becker Receivers of Corporations, sec. 39, p. 100, sec. 40, p. 117; Alderson on Receivers, p. 817; Beach on Receivers, sec. 73, p. 785; *Larch v. Aultman,* 75 Ind., 162; *Hackensack Water Co. v. DeKay,* 36 N. J. Eq., 548. We will not, however, determine this question.

While the purchaser charges in his petition filed, that he relied upon certain statements made him by the receiver in a conversation about the sale, it is found as a fact that no misrepresentation was made by the receiver, and the findings expressly negative every suggestion of fraud. There is no evidence that the purchaser ever tendered the sum adjudged to be due by him, and he is obliged, therefore, to pay interest. Our conclusion, therefore, is that there is no error in the judgment appealed from, and it is

Affirmed.

(195)

E. L. GAVIN, JR. v. R. H. MATTHEWS ET AL.

(Filed 23 March, 1910.)

Mortgagor and Mortgagee—Default—Foreclosure—Notes in Sets—Maturity.

In an action to foreclose a mortgage upon a stock of goods securing a number of notes given for the purchase price, the mortgage providing that upon failure to pay any of these notes all of them become due and payable, it appeared that two of the notes had passed maturity and one of a later maturity was given to defendant by mistake upon his payment of the one earlier maturing: *Held,* that this was no sufficient defense, and especially unavailable, as by the verdict the plaintiff was charged with the actual value of the goods when taken.

APPEAL from *Guion, J.,* January Special Term, of SAMPSON.

These issues were submitted:

1. Is the plaintiff the owner of and entitled to the possession of the property described in the complaint? Answer: Yes.

2. What was the value of the property at the time of said seizure? Answer: $234.64.

3. Is defendant indebted to plaintiff; if so, in what amount? Answer: $670.20, with interest from 9 September, 1908.

From a judgment for plaintiff defendants appealed.

Faison & Wright and Fowler & Crumpler for plaintiff.
George E. Butler and F. R. Cooper for defendants.

BROWN, J. The plaintiff brings this action to recover possession of a stock of goods sold by him to defendants and described in a mortgage for the purchase money, securing the payment of twenty-six notes dated 3 April, 1908, in the sum of $25 each, except one for $51.55. These notes matured on 1st day of each month, and there is a provision in the mortgage that in case of default on any one note all shall at once become due, and that the plaintiff may at once take possession and foreclose.

According to the plaintiff's evidence, the July and August (1908) notes, both of which matured before the commencement of this action, were not paid, although demanded.

The only defense attempted that we have been able to discover in the record is that the July note was paid, but by mistake defendants received for it from plaintiff the note due 1 August, 1910. There is no evidence or claim that the note due August, 1908, was paid. The right to foreclose the mortgage undoubtedly accrued at once upon such default.

There is no evidence that the foreclosure was improperly or oppressively conducted, or that plaintiff bought at this own sale (196) as in *Smith v. French, post,* and 141 N. C., 1; but if there had been it would not avail anything, as under the form of the second issue the plaintiff is charged with the actual value of the goods when taken.

The whole controversy plainly involves only questions of fact, and they have been settled by the jury. We have been unable to discover any serious question of law presented by this appeal, or, with perfect deference for the views of the learned and able counsel for appellants, to comprehend exactly why it should have been brought to this Court.

No error.

CHAS. HACKLEY PIANO COMPANY v. C. E. KENNEDY AND WIFE.

(Filed 23 March, 1910.)

1. Contracts—Express Warranty—Counterclaim—Breach—Vendor's Rights.

A party relying upon and setting up a written warranty of the quality in the sale of personal property and a counterclaim for damages for its breach, in an action by the seller for the purchase money, is bound by the terms of the warranty, and must comply with them in order to recover.

2. Same.

In an action by the vendor to recover the purchase money of a piano sold under a sales contract containing a warranty of the piano, a counterclaim for damages set up by the vendee for a breach of the warranty cannot be sustained, when it appears that the vendor had repaired the piano, the vendee had examined it and declared it all right, and continuously thereafter asked the vendor's indulgence in making payments under the contract, without complaint of the piano, until after the term of the warranty had expired.

3. Contract Sales—Monthly Rental—Mortgagor and Mortgagee—Foreclosure—Vendee's Rights—Procedure.

In an action upon a sales contract for a piano stipulating for the payment of a monthly rental, it appearing that the writing sued on was essentially a mortgage by its terms and provisions, the provision is void that the vendor retain the monthly payments made as rent, he being entitled only to proper interest on the purchase price. In this case a decree of foreclosure was directed to be entered, requiring the vendee to pay the debt, interest and cost of action, and upon his failure to do so, a sale of the piano was decreed for that purpose, the residue, if any, to be paid him.

(197) APPEAL from *O. H. Allen, J.*, at November Term, 1909, of LENOIR.

This action is brought to recover balance due on a contract for the sale of a piano. The defendants pleaded a counterclaim based upon an alleged breach of a contract of warranty, in writing as follows: "This is to certify that pianoforte style 'S,' mahog. No. 29997, is hereby warranted for the term of five years from the date of its manufacture, and should the instrument with proper care and use prove defective in material or workmanship (the effects of extreme heat, cold or dampness excepted), we agree to put the same in good repair at our manufactory, or replace it with another of the same style, reserving to ourselves the right to elect which we will do."

These issues were submitted:

1. What amount is due the plaintiff upon the contract price? Answer: $111.80.

2. What damage, if any, are the defendants entitled to recover against the plaintiff: Answer: $150.

3. What was the rental value of the piano? Answer: $1.50 per month.

4. Is the plaintiff a corporation? Answer: Yes.

From the judgment rendered, plaintiff appealed.

G. V. Cowper and J. P. Frizzelle for plantiffs.

T. C. Wooten and Aycock & Winston for defendants.

BROWN, J. Although there are twenty-three exceptions in the record, all relating to the second issue, it is apparent from the briefs that there is only one contention presented in the record which we need consider.

The ground upon which the plaintiff relies to defeat the defendant's counterclaim is, that under the terms of the warranty, before they can successfully claim damages for any breach thereof and as a condition precedent, it must appear that defendants have given the plaintiff notice of the alleged breach of warranty and defect in the instrument, and that the plaintiff has had a reasonable opportunity to comply with the terms of the warranty. It is contended that in such respect the defendants have failed to perform the stipulations of the contract upon their part. We have recognized the principle that there can be no implied warranty of quality in the sale of personal property where there is an express warranty, and that where a party sets up and relies upon a written warranty he is bound by its terms and must comply with them. 30 A. & E., 199; *Main v. Griffin,* 141 N. C., 43. We recognize the further principle, applied by us in that case, that a failure by the purchaser to comply with the conditions of the warranty is fatal to a recovery for breach of the warranty in an action on it, or where, as in this case, damages for the breach are pleaded as a counterclaim in an action by (198) the seller for the purchase money.

There is evidence tending to prove that the piano was sold and delivered to defendants upon a sales contract dated 22 May, 1903, for $335; that defendants made monthly payments thereon up to 8 February, 1907, and that there is due the sum of $111.80. It is further in evidence that the defendants kept the piano and used it continuously for four years without notifying plaintiffs of any defect in it. It is insisted that such neglect constitutes a waiver upon the part of defendants of any rights under the warranty.

It has been said, as contended by defendants, that when one purchases goods under a warranty, they need not be returned to the warrantor as soon as the defect is found, unless the contract expressly stipulates to that effect. Biddle's Warranty, sec. 310. But, however this may be, it is immaterial now, for it is admitted in this case that complaint was made in 1907, and that on 25 March of that year the plaintiffs directed defendants to ship the piano at its expense to its factory in Michigan, which was done on 20 June. The plaintiffs elected under the terms of the warranty to repair the instrument, instead of replacing it with another.

On 11 July, 1907, defendants inquired by letter about the piano, and plaintiffs replied: "We are doing a good deal more on the instrument than is necessary, in order to put it in thorough order. We will return it as quickly as possible."

The repaired piano was shipped to defendants on 8 November, 1907, and duly received. At this stage of the case we think the defendants' counterclaim completely breaks down. On 5 December, 1907, defendants acknowledged receipt of piano, pronounced it all right and promised to send check in payment by Christmas. On 17 December, 1907, defendants wrote plaintiffs: "Since writing you of the arrival of our piano we have had opportunity of testing, and, so far as we know, it seems to be in very satisfactory condition. I write to inquire of you if, since the piano has been so thoroughly repaired, you will not extend the guarantee to five years from present time; also, will you not allow for the time you have had it in making the payments, which was five months? If you will do this I will send the check promised at once."

In reply plaintiffs refused to extend the time of warranty, claiming to have fully complied with its terms, and again demanded payment.

On 3 January, 1908, the defendants again wrote plaintiffs, ask-
(199) ing indulgence and promising to pay.

The correspondence is set out in the record and embraces ten other letters than those mentioned, dated at different times from 3 January to 28 September, 1908. In none of these letters is any complaint made as to the condition of the piano, or any notice given to plaintiffs that the repairs were not satisfactory. In all of them the defendants acknowledged their obligation and ask for indulgence, pleading hard times and bad crops.

On 23 September, 1908, after the period of warranty had expired, the plaintiffs, in reply to repeated requests for indulgence and promises to pay, wrote defendants that they had received no payment for a year, and that as much as $25 must be paid, and, if so, further time would be allowed for remaining payments.

Even then defendants made no complaint about the piano, but wrote plaintiffs on 28 September, in reply, as follows: "In reply to yours of the 23d inst., can only repeat, I am not able to pay anything at this time. You said you would turn claim over for collection if I failed to pay $25 by to-day. In fact, you have made such remarks in all your letters, and I have been begging, if you would call it begging, for further indulgence, and am bound to say you have been indulgent and had hoped for further indulgence; but if you cannot grant it, and persist to collect by law, as I have said before, I will take care of myself the very best I can. I cannot afford to lose the amount I have paid."

The genuineness of these letters is admitted, and there is no evidence in the record which contradicts their assertions.

On the contrary, it appears from the oral testimony of defendants that not only was no complaint whatever made to plaintiffs after the piano was repaired and returned, but that after this controversy arose, when

plaintiff voluntarily sent an expert to defendant's residence to examine the piano to see if anything was wrong with it and to repair it, defendants, upon advice of counsel, would not let him examine it, or even enter the defendant's residence.

It is too plain for argument that, upon the written correspondence as well as the other evidence in the case, in any view of it, the defendants accepted the piano when repaired and returned to them as a full compliance with the terms of the written warranty, which expired 23 May, 1908, and that after that date, and after examination and acceptance, they made repeated promises to pay the balance due on the debt.

We are of opinion that in no view of the evidence are defendants entitled to recover upon their counterclaim and that the (200) court below erred in ruling otherwise.

It is plain that this sales contract is essentially a mortgage, and that the relation of mortgagor and mortgagee is created by it. *Puffer v. Lucas,* 112 N. C., 379; *Hamilton v. Highands,* 144 N. C., 280; *Hervey v. Locomotive Co.,* 93 U. S., 664.

It therefore follows that the plaintiff cannot recover a monthly rental for the piano, and that the provision in the contract providing that, in case of failure to pay in full for the instrument, all payments made may be retained by plaintiff for its use, is void. The plaintiff is of course entitled to interest, but not to rent.

The cause is remanded, with directions to enter judgment for the plaintiff upon finding on the first issue.

A decree of foreclosure will be entered requiring the defendant to pay the debt, interest and costs of action, and, if not paid, directing a sale of the piano to pay off the same, including all costs, and the residue, if any, to be paid to defendants. *Puffer v. Lucas, supra.*

The judgment of the Superior Court is

Reversed.

Cited: Mfg. Co. v. Lumber Co., 159 N. C., 511; *Machine Co. v. McKay,* 161 N. C., 586; *Oltman v. Williams,* 167 N. C., 314; *Guano Co. v. Live Stock Co.,* 168 N. C., 447; *Frick v. Boles, ib.,* 657.

H. B. NEWTON AND W. L. PARSLEY ET AL. V. H. A. BROWN ET AL.

(Filed 23 March, 1910.)

1. Injunction—Parties—Strangers—Damages—Evidence.

Upon the dissolution of the defendant's restraining order, evidence of damages sustained by a corporation, not made a party, claimed upon the ground that plaintiff was its president and a stockholder and held the *locus in quo* for it under an express trust, is properly excluded, the issue of title being only between the plaintiffs and defendants, and there being nothing on record to put the obligors on the defendant's bond upon notice of any liability to the corporation.

2. Timber Deeds—Injunction—Measure of Damages—Questions for Jury.

The jury having established the plaintiff's right to cut timber on the *locus in quo* under a timber deed, running for a period of ten years, and a restraining order, withholding such right for a period of several years, being dissolved, it was error for the trial judge to charge the jury that only nominal damages were recoverable by the plaintiff. It was for the jury to say, upon competent evidence, whether the reduction of the term for cutting the timber had caused damage to plaintiff.

(201) APPEAL from *Ward, J.*, at January Special Term, 1910, of PENDER.

Action to recover damages for a trespass upon lands alleged to be owned by plaintiffs. Defendants denied plaintiffs' title and claimed ownership of the lands themselves.

Injunctions prohibiting cutting and removing the timber were issued restraining defendants, and also, at instance of defendants, restraining plaintiffs.

Upon the trial of the action the jury found that McKoy was the owner of all the land described in the complaint, and that Parsley was the owner of the timber on the same. Upon the rendition of the verdict, the plaintiffs moved the court for a retention of the cause on the docket for the assessment of damages accruing to them against the defendants and their sureties by reason of the wrongful issuance of the restraining order; and the court so ordered.

The assessment of damages came on to be heard before *G. W. Ward, J.*, and a jury, at the special January term of the Superior Court of Pender County, and upon said hearing the court ruled that the plaintiff Parsley could only recover nominal damages, and so charged the jury, and judgment was signed as set out in the record, and the plaintiff Parsley appealed.

E. K. Bryan for plaintiffs.

J. T. Bland, Meares & Ruark, Stevens, Beasley & Weeks for defendants.

BROWN, J., after stating the facts: 1. We are of opinion that his Honor did not err in excluding evidence as to damage sustained by the Hilton Lumber Company in its business, claimed to be competent upon the theory that Parsley held the title to the timber as trustee of an express trust for the benefit of the Hilton Lumber Company.

There is no contention that Parsley was trustee of the business of the Hilton Lumber Company, or that this suit was brought for it. He was its president and a stockholder, but occupied no other relation to it. The company was no party to this action and has no *locus standi* which gives it the right to move in this cause for any damages it may have sustained. Parsley does not allege in the complaint that he held the title to the timber in trust for the Hilton Lumber Company. On the contrary, he expressly avers that he owns the timber in his own right, and it was so found by the jury. Consequently, there is nothing in the record which could put the obligors to the defendant's injunction bond upon notice that they assumed any liability to the Hilton Lumber Company (202) or to any one else other than the plaintiffs of record.

The terms of the bond expressly confine the liability of the obligors to such damages as the plaintiffs H. B. Newton and W. L. Parsley may recover.

2. Whether Parsley holds the title to the timber for himself, or under an express trust, he is entitled to recover such damages as his estate and interest in the timber suffered or was diminished in value by the wrongful suing out of writ of injunction.

According to the deed from Newton to Parsley, dated 30 December, 1901, the grantee has an estate in all the timber of certain dimensions growing on the land, which estate expires at the end of ten years. During that period the grantee had certain rights conferred upon him which expired at the end of that time. It appears that the injunction was in force from 3 November, 1903, until the final judgment entered in this cause, a period of several years. It may be that this materially diminished the value of plaintiffs' estate in the timber, and that it would not sell for as much now as it would have done then. If so, it would entitle him to more than merely nominal damages. Without definite evidence upon the subject, it may be assumed that there is more than a nominal difference in an estate for some eight years' standing timber and one which has only two or three years to run. Or it may turn out that timber is worth more now, notwithstanding the brief period remaining for its removal, than plaintiff could have realized for it during the time he was enjoined. If so, he would have sustained no substantial damage. We think his Honor erred in directing a verdict for merely nominal damages.

New trial.

(203)

E. P. JACKSON AND WIFE v. W. S. WILLIAMS.

(Filed 23 March, 1910.)

1. Processioning—Divisional Line—Issues—Nonsuit.

When the parties to processioning preceedings allege adjoining ownership of lands and bring to issue the question of the location of the dividing line alone, and there is conflicting and competent evidence to sustain either contention, an issue of fact as to the true line is presented upon which a motion of nonsuit upon the evidence cannot be granted. Ordinarily, in such proceedings this issue is the only one to be presented.

2. Appeal and Error—"Broadside Exceptions."

A "broadside exception" to the charge cannot be sustained.

APPEAL from *Cooke, J.*, at September Term, 1909, of MARTIN, in a processioning proceeding.

The following issue was submitted to the jury without objection:

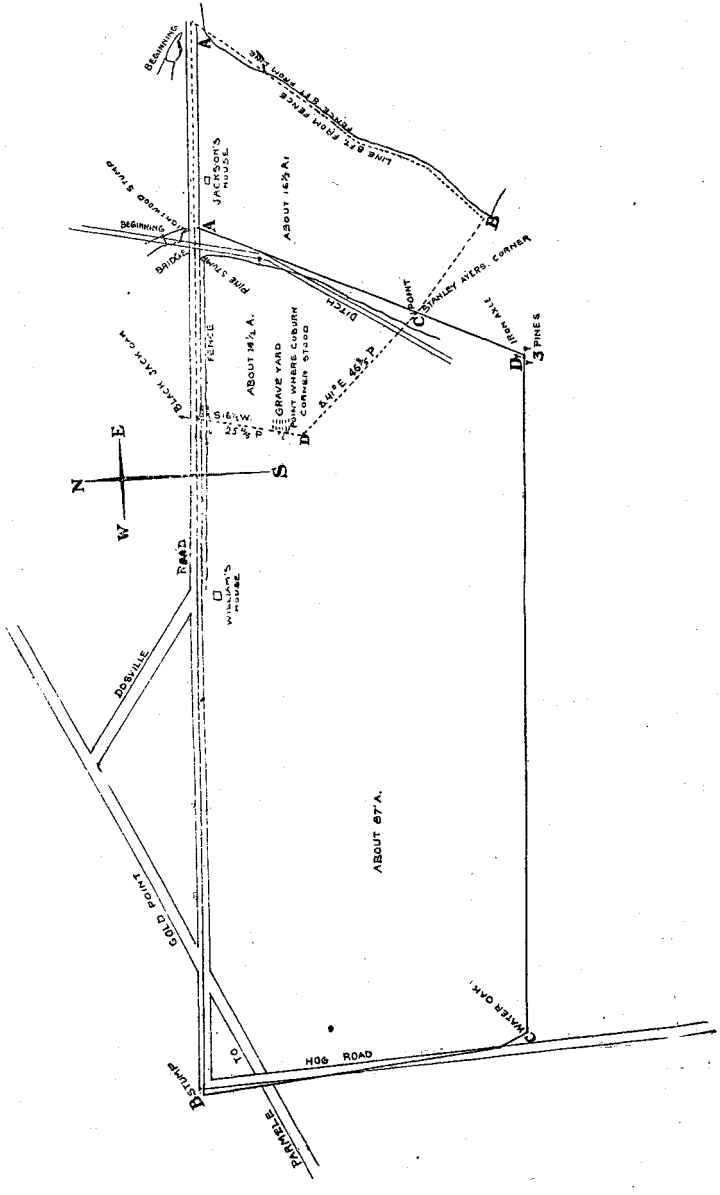
What is the true line between the lands of the plaintiff and those of the defendant? Answer: That the dividing line between E. P. Jackson and wife, plaintiffs, and Seth Williams, defendant, is the dotted line as shown on map from big C to D and E.

Defendant moved for a new trial. Motion overruled. Defendant excepted and appealed from the judgment rendered.

Winston & Everett for plaintiffs.
A. R. Dunning for defendant.

BROWN, J. The learned counsel for defendant assigns error in these words: "The exceptions are hereby grouped, as required by the court: 1. To the refusal of the court to nonsuit. 2. To the charge. 3. To the judgment."

We are not prepared to hold, as contended by defendant, that the practice of nonsuiting as now in vogue in civil actions, and in special proceedings generally, when an issue is raised and they are transferred for trial to the Superior Court, is applicable to a properly constituted processioning proceeding. This proceeding is a peculiar one, and intended to effect an easy and expeditious settlement of the location of disputed boundary lines between adjoining tracts of land, and nothing else. It is not an action of ejectment or of trespass. Only one issue of fact can arise, and that must relate to the location of a boundary line. No execution can be issued upon the judgment for damages or possession. The petitioner is not required to make out a perfect chain of title or to perfect it by long and adverse possession. Simple occupation of the land constitutes sufficient ownership to sustain the proceeding. *Williams v.*



DOTTED LINES REPRESENT CLAIMS OF E. P. JACKSON. SOLID LINES REPRESENT CLAIMS OF SETH WILLIAMS.

(205) *Hughes,* 124 N. C., 3; Rev., secs. 325, 326. Of course, the proceeding may be dismissed for irregularities and defects on its face, as any other legal proceeding may be. But it is not necessary now to discuss or decide whether a technical motion to nonsuit can be properly entertained in this peculiar proceeding. It is sufficient that in this case we hold that his Honor did not err in submitting the location of the line to the jury.

The petitioners set forth what they contend to be the true division line. Both parties refer in their pleadings to the same description of the dividing line. On the one side of this line lies the James Whitfield land (which is owned by the plaintiff), calling for the Newton Coburn line; on the other side of this line is the Newton Coburn land (owned by the defendant), calling for the James Whitfield line. The controversy, then, is at once reduced to the one question, What is the true line between the Newton Coburn land and the James Whitfield land? Or, in other words, whether the line should be as shown by big C to D to E (dotted line), or A (solid line), etc., as set forth in the plat.

The issue was thus brought down to a question of fact, upon which both parties offered pertinent evidence, and as there are no assignments of error based upon exceptions to the evidence, it is needless, if indeed proper, that we discuss its force and effect.

The exception to the charge is what is termed a "broadside exception" and cannot be entertained. *McKinnon v. Morrison,* 104 N. C., 360.

The exception to the judgment is without merit, as the judgment properly followed upon the findings of the jury, and in every particular conforms to the statute.

No error.

Cited: Cole v. Seawell, 152 N. C., 350.

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(206)

W. B. HIGSON AND WIFE v. NORTH RIVER INSURANCE COMPANY.

(Filed 23 March, 1910.)

1. Insurance—Policies—Proof of Loss—Denial of Liability—Waiver.

A denial of liability under its policy by a fire insurance company for a loss occasioned by the burning of the property insured is a waiver of the stipulation in the policy requiring the insured to file with the company, within sixty days, a notice of proof of loss; and the company may not set up a plea that the insured procured the burning of the property, deny liability and avoid payment under its contract, by proving matters relating to this stipulation.

2. Same—Interpretation—Policies, How Construed.

To ascertain the meaning of a contract of insurance the courts will construe the language most strongly against the company; and there being no words of forfeiture in a contract of insurance to that effect, the failure of the insured to file proofs within sixty days after the occurrence of the fire does not have the effect of forfeiture when the company has denied all liability under its contract. (*Gerringer v. Insurance Co.*, 133 N. C., 407, cited and approved.)

3. Same—Arbitration.

The failure to perform a promise in the contract as to arbitration which refers only to the ascertainment of the amount of loss, does not work a forfeiture of the policy, upon the same principles, when the company denies all liability.

4. Insurance—Ownership—Title—Bill of Sale—Evidence.

When an insurance company seeks to avoid liability under its policy for a loss, by denying the insured's ownership of the property, it is competent for the insured to put in evidence a bill of sale thereof made to him, in order to show his title.

5. Pleadings—Inconsistent Pleas—Defenses.

Inconsistent pleas may be made in defense to an action, but the defendant cannot succeed as to both, when one naturally destroys the other.

APPEAL by defendant from *Guion, J.*, at August Term, 1909, of PITT. The facts are stated in the opinion.

Skinner & Whedbee for plaintiff.
Moore & Long for defendant.

WALKER, J. This action was brought to recover the amount of a policy issued by the defendant to the plaintiff, upon a steamboat. The ship was destroyed by fire, and the company denied its liabilty, both before and after the suit was brought, for the reason that the husband of the *feme* plaintiff had caused the boat to be burned in (207) order to secure the insurance. The following issues were submitted to the jury:

1. Was the *feme* plaintiff the owner of the steamer *Isabelle*, described in the pleadings, at the time of her destruction by fire, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff furnish and forward to the defendant proofs of loss of said steamer *Isabelle* within sixty days after the fire which destroyed the same, in accordance with the provisions of the policy set out in the pleadings? Answer: No.

3. Was this action instituted within sixty days after the furnishing of said proofs of loss, if any such were furnished, as provided for in said policy? Answer: No.

4. Prior to the institution of this action, did the the plaintiff tender to or demand of the defendant the submission of the loss, and an ascertainment thereof to arbitration and appraisal, as is provided in said policy? Answer: No.

5. Has the plaintiff complied with the said terms of the policy as conditions of her right to maintain this action? Answer: No.

6. Did the defendant, by its acts and declarations, made and done prior to the institution of this action, waive the duty of the plaintiff to comply with the conditions mentioned in issues numbered 2, 3, 4 and 5? Answer: Yes.

7. Did the defendant, by its acts and declarations and the denials of liability, as set out in the answer verified and filed by it in this cause, waive the duty of the plaintiff to comply with the conditions mentioned in issues numbered 2, 3, 4 and 5? Answer: Yes:

8. In what amount is the defendant company indebted to the plaintiff by reason of the execution of the policy of insurance referred to in the complaint and answer, and the subsequent burning and loss of the said steamer *Isabelle?* Answer: $1,500, with interest from the date of this action.

It will be observed that the defendant did not tender any issue as to the very serious charge made against the plaintiff's husband, even if an affirmative finding upon such an issue would have acquitted the defendant company of liability, without any allegation and finding by the jury of collusion on her part. The sole question presented is whether the failure to give notice of the loss and to file proofs of the same are sufficient to defeat the plaintiff's recovery. The pleadings and the findings of the jury, under a very fair, impartial and clear-cut charge from *Judge Guion,* shows conclusively that this cannot be so, if we are to be guided by the established principles of the law in such cases. The defendant does not come before this Court in a way (208) which entitles it to a favorable consideration of the case in its behalf. Insurance companies should deal honestly and fairly with their patrons, and after they have received the premiums upon the risk undertaken by them, they should not attempt to avoid their responsibility by merely technical defenses, especially when those defenses are absolutely without any substantial merit. Their right to the trust and confidence of the public is necessarily based upon the public confidence in them. If they ask the public to trust them, they must, at least, not show themselves unworthy of this confidence. We must not be understood as condemning the general principle of insurance, as founded upon a false and unsafe confidence, but we do say that the integrity of the company which insures, and upon the faith of which it obtains the patronage of the public, should be sacredly maintained,

otherwise insurance is but a "game of chance," depending for its value to the insured upon the honesty and good management of individuals. We will always hold them to their contract as written in their policies, without adhering too much to the letter, but looking to the substance of their undertaking.

Let us apply these general observations to the facts of this case. It must be conceded that the only defense which the insurance company pleads relates to the failure of the plaintiff, the insured, to file a notice and proof of loss; and yet prior to the bringing of the suit, and by its answer, too, the insurance company denied outright its liability, upon the ground that the husband of the *feme* plaintiff had burned the boat —in other words, had commited an outrageous act of incendiarism. If this invalidated the policy, so that the plaintiff cannot recover upon it, why did not the defendant rely upon it and ask the jury, under instructions from the court, to pass upon an allegation which it deemed so vital in this litigation? But it did not, and preferred to rest its defense upon a technical failure to comply with certain provisions of the policy which did not at all affect the liability of the company, but related altogether to the measure of damages—the quantum of the plaintiff's recovery.

At this stage of the case the defendant is met and his objection answered by *Gerringer v. Ins. Co.,* 133 N. C., 407, wherein the Court, quoting from May on Insurance (4 Ed.), sec. 469, thus states the law: "'A distinct denial of liability and refusal to pay, on the ground that there is no contract, or that there is no liability, is a waiver of the condition requiring proofs of loss. It is equivalent to a declaration that they will not pay, though the proofs be furnished; and to require the presentation of proofs in such case, when it can be of no importance to either party, and the conduct of the party in whose (209) favor the stipulation is made has rendered it practically superfluous, is but an idle formality, the observance of which the law will not require.' The Supreme Court of the United States, in *Ins. Co. v. Pendleton,* 112 U. S., 696, uses the following language: 'The plaintiffs in error further contend that the charge was erroneous in holding that no formal proof of the death of S. H. Pendleton was necessary in this case. On this point the charge was as follows: "As to the proof of loss not being filed, it is conceded that notice of the death was given. If, when that was done, the agents of the company repudiated all liability and informed the parties that the policy had lapsed, then no proof of loss was required by them, and the failure to file them cannot alter the case." We think that there was no error in this instruction. The weight of authority is in favor of the rule that a distinct denial of liability and refusal to pay, on the gronud that there is no contract or that

there is no liability, is a waiver of the condition requiring proof of loss or death. It is equivalent to a declaration that they will not pay, though the proof be furnished.' *Mr. Justice Bradley* further says that, 'The preliminary proof of loss or death required by a policy is intended for the security of the insurers in paying the amount insured. If they refuse to pay at all, and base their refusal upon some distinct ground, without reference to the want or defect of the preliminary proof, the occasion for it ceases and will be deemed to be waived. And this can work no prejudice to the insurers, for in an action on the policy, the plaintiff would be obliged to prove the death of the person whose life was insured, whether the preliminary proofs were exhibited or not.'" The Court says, in *Gerringer's case,* that the clause in the policy requiring proofs of loss to be filed with the company, and forbidding the bringing of any suit upon the policy until sixty days have elapsed after the filing of the proofs, is a continuing one. It does not mean that a failure to file proofs within sixty days after the occurrence of the fire works a forfeiture of the policy. We say now that such an an interpretation of the policy would clearly be against the letter and spirit of the contract, and certainly unjust. The true intent of the parties was, as decided in the case cited, that no suit should be brought until sixty days have elapsed after the filing of the proofs. There are no words of forfeiture annexed to the failure to file proofs of loss. The policy was written by the defendant, and will be construed most strongly against it. If it intended that the plaintiff should lose her in-
(210) surance by failing to file proofs of her loss, it should have said so in plain and unambiguous language. Having failed to do so, we must construe the contract as we find it expressed in the words chosen by the defendant. The case of *Gerringer v. Ins. Co.* is sustained by the great weight of authority. The authorities cited in the opinion of the Court are all-sufficient to support the conclusion we then reached in regard to the question under consideration. We merely add the following: *Ins. Co. v. Edmundson,* 104 Va., 486; *Debbrell v. Ins. Co.,* 110 N. C., 193; *Strauss v. Ins. Co.,* 122 N. C, 64; 19 Cyc., p. 858. sec. B., and cases cited in note 7.

The promise as to arbitration refers only to the ascertainment of the amount of the loss, and falls easily and naturally within the general principle we have stated with reference to the proof of loss. 19 Cyc., 857, sec. 2, note 83; *Jordan v. Ins. Co.,* 151 N. C., 341.

We have carefully examined the exceptions to the evidence and find no real merit in any one of them. It would unnecessarily prolong this opinion to consider them, one by one. We may remark, though, that as the defendant denied the plaintiff's ownership of the boat, it was surely competent to show her title by the bill of sale. Why not?

The other exceptions to the testimony relate to the defendant's denial of liability before this suit was brought. If the agent sent by the company to adjust and settle the loss denied all liability of the company upon the policy, out and out, why was the plaintiff not compelled to prove it? The testimony to show this fact was brought before the court in a competent way, and the fact itself was relevant to the issues evolved from the pleadings.

The motion to nonsuit was, of course, properly overruled. The defendant will not be permitted to "blow hot and cold." It must be fair with the plaintiff and choose upon what plea it will rely. It may set up inconsistent pleas, but this does not mean that it can succeed in the case as to both pleas, when one of its defenses necessarily destroys the other.

We find in the trial of the cause

No error.

Cited: *Millinery Co. v. Ins. Co.*, 160 N. C., 135; *Lowe v. Fidelity Co.*, 170 N. C., 446; *Moore v. Accident Assurance Co.*, 173 N. C., 541.

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(211)

V. A. WHITFIELD ET AL. v. THE ROWLAND LUMBER COMPANY.

(Filed 23 March, 1910.)

1. Timber Deeds—Measurement, Time of.

The measurements for cutting trees given in a timber deed refer to sizes at the date of the deed, unless other intention is expressed.

2. Timber Deeds—Sizes, How Measured—Timber—Square Measurement.

The measurement for cutting given in a timber deed, as "merchantable timber 12 inches square," means wood measurement exclusive of bark and slabs, for timber is not merchantable until these are removed; and it is error for the court to charge that the contract called for timber with bark edges, as such reduces the diameter of the trees sold.

3. Timber Deeds—Larger Sizes—Evidence—Harmless Error.

Evidence that a number of trees cut under a timber deed calling for a measurement of 12 inches were over 27 inches, though irrelevant, is harmless error.

4. Timber Deeds—Sizes—"Rings in Wood"—Evidence.

Testimony of rings in a section of a tree as indicative of years of growth is admissible, it being a question of fact for the jury under the evidence.

5. Evidence—Corroborative—Directions to Hands.

Testimony of defendants' instructions to hands is admissible when corroborative of competent evidence.

6. Timber Deeds—Dimensions—Observation—Evidence.

It is competent for a witness, speaking from his own observation, to testify as to the size of a tree from outside bark to outside bark, that would square 12 inches at the stump, wood measurement.

7. Counsel—Improper Remarks—Court's Discretion.

It is discretionary with the court as to whether it will correct improper remarks of counsel, made in his speech to the jury, at the time, or in his charge.

8. Timber Deeds—Wrongful Cutting—Measure of Damages.

Damages to the land and undergrowth, etc., by reason of the unlawful cutting and removal of trees cut under the size contracted for in a timber deed are recoverable.

9. Timber Deeds—Wrongful Cutting—Damages—Burden of Proof.

When defendant admits he has cut some trees under the size contracted for in his timber deed, the burden is on plaintiff to show his damages arising on that account.

DEFENDANT'S APPEAL.

10. Timber Deeds—Square Measurement—Diameter of Trees—Evidence.

As to the diameter of a tree which squares 12 inches, it is a practical question based on experience and observation, and one on which a qualified witness may testify.

11. Timber Deeds—Wrongful Cutting—Witnesses—Estimate of Damages—Evidence.

Witnesses having long familiarity with the land and who had examined the stumps, may give their estimate as to damages thereto caused by defendant's cutting under the sizes specified in his timber deed.

12. Timber Deeds—Experts Upon the Facts—Estimate of Growth.

Witnesses testifying to the facts and observations upon which they base their opinion, and who are skilled and experienced in timber and mills, may give their opinion as to the rate of growth of pine trees, when this question is involved in the action.

13. Timber Deeds—Oral Agreement—Contracts—Consideration—Statute of Frauds.

Testimony as to an alleged oral agreement made subsequent to the execution of a timber deed, two of the parties being absent and minors, is incompetent. If relied on to convey trees cut under contract size, it is without consideration; and, further, it should be in writing unless explanatory of an ambiguity in the written contract.

14. Timber Deeds—Wrongful Cutting—Measure of Damages.

In an action for damages for cutting trees under the size specified in a timber deed, their measure, if recovery is had, is the value of the trees unlawfully cut, with incidental damages therefrom to the other growth.

WHITFIELD *v.* LUMBER COMPANY.

APPEAL from *O. H. Allen, J.,* at August Term, 1909, of SAMPSON.

Action to recover damages for defendant's alleged cutting of trees on the plaintiff's land under sizes specified in his timber deed. The facts are sufficiently stated in the opinion, taken with reference to the plaintiffs' exceptions, as follows: (The plaintiff's exceptions are set out in the original.) Both sides appealed.

Faison & Wright, Fowler & Crumpler for plaintiff.
H. A. Grady for defendant.

CLARK, C. J. In September, 1892, the husband of V. A. Whitfield and father of the other plaintiffs conveyed to H. L. Pope, trustee, under whom the defendant claims, "all the merchantable pine timber from 12 inches square at the stump and upwards" on the lands described (with one exception therein stated), giving hic 15 years to cut and (213) remove it, and the defendant cut and removed the timber in the spring and summer of 1907. This measurement referred to the date of the deed. *Warren v. Short,* 119 N. C., 42. In 1907 the timber was cut down to 10 and 12 inches in diameter, according to the measurements of a separate committee of plaintiffs and defendant, and the answer admits that some was cut under size. The main controversies were as to the growth of the timber, and the measurement, plaintiffs contending that "merchantable pine timber 12 inches square" meant wood measure, and that the bark-measurement rule of *Hardison v. Lumber Co.,* 136 N. C., 174, does not apply. His Honor held that it did, and from the judgment plaintiffs excepted and appealed.

Exceptions 1, 4, 5, 12 and 14 present this question of measurement. In *Hardison v. Lumber Co.,* 136 N. C., 174 and 175, the Court says "a contract for logs 'squaring' so many inches is an entirely different measurement, for this presupposes the bark, and outer timber except at the four edges, to be cut away." Bark is part of the standing tree to be measured in getting the diameter of a tree or log, but the tree is not merchantable timber until the bark is cut off, and the slabs. The defendant under this deed was entitled only to ton timber that would square 12 inches, September, 1892. The court charged, as a matter of law, excluding all evidence about the matter, that under this contract merchantable timber included the bark, and made the contract provide for timber with bark edges. This was prejudicial, for it reduced the diameter of the trees for which the plaintiff was entitled to recover.

Exception 2 cannot be sustained. In permitting the witness to testify as to the number of trees over 27 inches in diameter the court admitted irrelevant testimony, but it was not prejudical.

Exception 3, for permitting a witness to count the rings in a section of the tree to show the age of the tree, cannot be sustained. Whether

there is one ring for each year's growth is not a matter of law, but of fact, and properly submitted to the jury. Exceptions 7 and 8 as to defendant's instructions to its hands cannot be sustained. It was corroborative. Exceptions 9 and 10, because the witnesses testified as to matters in their observation, cannot be sustained. The evidence was admissible. Its weight was for the jury.

Exception 11. The court did not stop counsel when objection was made during his argument, but corrected the matter in his (214) charge. This rested in the discretion of the court. *S. v. Hill,* 114 N. C., 783; *S. v. Ussery,* 118 N. C., 1177.

Exceptions 12, 13 and 14, for refusing to give plaintiffs' prayers, and for the charge given in lieu thereof, must be sustained. The defendant was entitled to cut only such trees as, on the date of the contract, would have squared 12 inches at the stump. When timber is squared, the bark is cut off, and therefore not to be counted. The plaintiff was also entitled to recover for any damages, if shown, to the land, undergrowth, etc., by reason of the unlawful cutting and removal of trees under the contract size. *Davis v. Wall,* 142 N. C., 451; *Gaskins v. Davis,* 115 N. C., 85.

While the answer, admitted the cutting of some trees under the size specified in the contract, the burden was on the plaintiff to show the number and the amount of damages therefrom.

DEFENDANT'S APPEAL.

CLARK, C. J. Exceptions 1, 9 and 10. It was not error to permit the witness to testify that a tree to square 12 inches should be 19 inches in diameter. It is true that a stick of timber 12 inches square will have a diagonal of 17 inches (very nearly), and that this is a matter of mathematical calculation reached by adding together the square of 2 sides (288 inches) and taking its square root, which is almost exactly 17 inches. But in squaring timber all the bark comes off and, besides, few trees are exactly round, so that the question is a practical one based upon experience and observation.

Exceptions 2, 3 and 4 raise the point, whether witnesses might testify to the damage plaintiffs suffered to their land from the cutting of this timber under size by defendants, giving their estimate from a careful knowledge and investigation, and the ruling of his Honor is sustained by *Wade v. Telephone Co.,* 147 N. C., 222; *Myers v. Charlotte,* 146 N. C., 247; *Davenport v. R. R.,* 148 N. C., 294. Both these witnesses had been familiar with the land for twenty years and had made a careful examination and count of stumps, etc., since the cutting, and so testified.

Exceptions 5 and 6 are because witnesses, skilled and experienced in timber and mills, were allowed to give their opinion as to rate of growth of pine trees on this land and land in the neighborhood. This was allowable (*Myers v. Charlotte,* 146 N. C., 247), and falls within the rule that allows the opinion of witnesses when the facts cannot be learned any other way, the witness being required to state the facts and observations upon which his opinion is based.

Exception 7. The court properly excluded testimony of an (215) alleged subsequent oral agreement as to what had been the growth of the timber between the date of the contract and of the cutting. Not only two of plaintiffs were then minors and another was absent, but if this is relied on to release damages for trees cut under the contract size, it was without consideration, and an oral conveyance of an interest in realty. Rev., 976. There was no latent ambiguity here to be explained, as in *Ward v. Gay,* 137 N. C., 397.

Exception 7 is for rejection of the witness's opinion as to the value of the land before and after the timber was cut. The cutting of part of the timber was lawful and the measure of damages is the value of the trees unlawfully cut, with incidental damages therefrom to the other growth.

Exceptions 9, 10 and 11 are to evidence tending to show the age of trees by the number of rings. As already stated above, in plaintiff's appeal, what weight should be given to such evidence was for the jury. The court could not hold it valueless, as a matter of law.

In plaintiffs' appeal, error.

In defendant's appeal, no error.

Cited: Williams v. Lumber Co., 154 N. C., 311; *Veneer Co. v. Ange,* 165 N. C., 58, 60.

KIRBY WATSON v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 23 March, 1910.)

1. Removal of Causes—Facts Found—Residence—Intent.

Upon motion to remove a cause by a railroad company, upon the ground that it was not brought in the county of plaintiff's residence, etc., the findings of fact of the lower court are conclusive on appeal; and it appearing that plaintiff was injured in defendants' service, under a contract determinable at the will of either, while living in another county, but that he had never intended to change his residence from that of the county in which suit was brought, the motion should be disallowed.

2. Removal of Causes—Residence—Intent—Evidence.

The plaintiff having brought his action for damages against a railroad company for personal injury in the place of his former residence, it is competent for him to testify as to his intent not to change his residence to the county in which he was living in the employment of the defendant at the time of the injury, upon petition by defendant to remove the cause to the county wherein the injury occurred.

3. Removal of Causes—Plaintiff's Residence—Interpretation of Statutes.

The proviso to Revisal, sec. 424, made by ch. 367, Laws 1905, does not affect the bringing of an action in the county where the plaintiff resides, but only prohibits the selection at will of any county, for that purpose, where the defendant had a track, unless the injury occurred, or plaintiff resided, therein.

(216) APPEAL by defendant from *W. R. Allen, J.*, at September Term, 1909, of WAYNE.

The facts are stated in the opinion of the Court.

Aycock & Winston and W. T. Dortch for plaintiff.
W. B. Rodman and J. L. Barham for defendant.

CLARK, C. J. This was a motion to remove this action, which was brought in Wayne, to Rowan County for trial by virtue of the proviso in Rev., 424: "In all actions against railroads the action shall be tried either in the county where the cause of action arose or in the county in which the plaintiff resided at the time the cause of action arose or in some county adjoining the county in which the cause of action arose."

Upon affidavits filed by both parties, his Honor found the facts as follows: "(1) That the parents of the plaintiff, Kirby Watson, are now, and have been for more than twenty years, residents of Wayne County; (2) that the plaintiff was born in Wayne County and lived in said county until January, or February, 1909; (3) that in January or February, 1909, he married in Johnston County, and in March, 1909, he entered the service of the Southern Railway Company at Spencer, Rowan County, as a car repairer under a contract which either party could terminate at will; (4) that after entering into said contract he took his wife to Spencer, and he and his wife lived at Spencer from that time up to the time of the injury complained of; (5) that the plaintiff has not intended to change his residence from Wayne County; (6) that the plaintiff is not now twenty-one years of age; (7) that the cause of action arose in Rowan County; and upon said facts, being of the opinion that the plaintiff is now and was on 6 May, 1909, a resident of Wayne County, it is considered and adjudged that said motion be denied."

The word "residence" has, like the word "fixtures," different shades of meaning in the statutes (*Overman v. Sasser,* 107 N. C., 432), and even in the Constitution, according to its purpose and the context. *Tyler v. Murray,* 57 Md., 441. See cases cited in 7 Words and Phrases, under head "Residence"; also, 24 A. and E. (2 Ed.), 692; 34 Cyc., 1647. Even in our Constitution, the word "reside" has a different meaning in the following articles: Article III, sec. 5: "The Governor shall reside at the seat of the government of this (217) State." Article IV, sec. 2: "Every judge of the Superior Court shall reside in the district for which he is elected." Article VI, sec. 2: "He shall have resided in the State of North Carolina for two years, in the county six months, and in the precinct or other election district in which he offers to vote, four months next preceding the election." And in the statutes, the exact shade of meaning depends somewhat upon whether the enactment concerns Suffrage and Eligibility to office; Attachment and Homestead Exemptions; Publication of Summons or Venue; but they all include the idea of permanence.

Probably the clearest definition is that in *Barney v. Oelrichs,* 138 U. S., 529: "Residence is dwelling in a place for some continuance of time, and is not synonymous with domicil, but means a fixed and permanent abode or dwelling as distinguished from a mere temporary locality of existence; and to entitle one to the character of a 'resident,' there must be a settled, fixed abode, and an intention to remain permanently, or at least for some time, for business or other purposes." To same effect *Coleman v. Territory,* 5 Okl., 201: "Residence indicates permanency of occupation as distinct from lodging or boarding or temporary occupation. 'Residence' indicates the place where a man has his fixed and permanent abode and to which, whenever he is absent, he has the intention of of returning." In *Wright v. Genesee,* 117 Mich., 244, it is said: "Residence means the place where one resides; an abode, a dwelling or habitation. Residence is made up of fact and intention. There must be the fact of abode and the intention of remaining." And in *Silvey v. Lindsay,* 42 Hun. (N. Y.), 120: "A place of residence in the common-law acceptation of the term means a fixed and permanent abode, a dwelling-place for the time being, as contradistinguished from a mere temporary local residence."

The facts found by the judge are conclusive upon us. He found that the plaintiff was living at Spencer from March to May, when the injury occurred, as a car repairer, in the defendant's service, under a contract terminable at the will of either party, and that he had never intended to change his residence from Wayne County. Upon these facts he properly held that the plaintiff retained his residence in Wayne, and

refused the motion to remove. It was competent for the plaintiff to testify to his intent. *Hannon v. Grizzard,* 89 N. C., 122.

The object of the proviso added to Rev., 424, by ch. 367, Laws, 1905, was not to prohibit actions being brought against railroads in the county where the plaintiff resides, but to prohibit the selection of any (218) county where the defendant had its track (the former law), except the county where the cause of action accrued, or an adjoining county.

The judgment refusing to remove the cause is

Affirmed.

Cited: *Fann v. R. R.,* 155 N. C., 140.

LIZZIE B. WELLS AND HUSBAND V. DEMPSON HARRELL AND WIFE.

(Filed 23 March, 1910.)

1. Trespass—Dower—Report of Jury—Omitted Line—Correction by Court.

An action of trespass by the heirs at law upon the widow's dower interest in lands may not be successfully resisted upon the ground that the jury of view awarding the dower inadvertently omitted to copy in their report an outside line required to make the lines close and include the dwelling-house embraced within the dower, the court docket containing data to enable the court on inspection to correct and supply with certainty the omitted line; and in such case no proceedings to correct the docket are required.

2. Same—Mistake of Record—Secondary Evidence.

And it further appearing that the report fully described the dower, but had been lost, and the omission of the line was made in copying it upon the docket, the report is a part of the record, and secondary evidence of its contents is admissible.

APPEAL from *Ward, J.,* at the January Special Term, 1910, of PENDER.

Action to recover damages and restrain defendants from committing trespass, etc., on realty by cutting down timber, etc.

In response to issues submitted, the jury rendered the following verdict:

1. Is the plaintiff the owner of life estate, by reason of dower, in the estate of her former husband in the lands described in the complaint? Answer: Yes.

2. Have the defendants trespassed on same? Answer: Yes.

3. What damages is plaintiff entitled to recover? Answer: Five cents.

4. Have the plaintiffs trespassed upon and injured the inheritance in said land? Answer: No.

5. What damages are defendants entitled to recover therefor? Answer: Not any.

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

J. T. Bland for plaintiffs.
Stevens, Beasley & Weeks for defendant.

HOKE, J. Recovery was resisted in this case by defendants, (219) some of the heirs at law of the former husband, chiefly on the ground that in copying the report of the jury of view awarding the *feme* plaintiff dower, one line had been inadvertently omitted; but the position cannot avail the defendants. On the trial it was made to appear that the dividing line between the widow's dower and the remainder of the home tract was clearly defined and correctly copied, and that the line in question, the omitted line, was an outside line of the home tract, and that its presence was required to make the lines close and include the dwelling-house, etc., embraced within the dower; and it clearly appears on the face of the docket and description, as it stood when the suit was instituted, that its omission was by inadvertence or mistake, and the docket contains sufficient data to enable the court on inspection to correct and supply with certainty the omitted line. In such case no proceedings to correct the docket are required. *Credle v. Hayes,* 88 N. C., 321; *Mizzell v. Simmons,* 79 N. C., 182; *Cooper v. White,* 46 N. C., 389; *Campbell v. McArthur,* 9 N. C., 33.

Apart from this, it was alleged in the complaint and there was evidence offered on the trial to the effect that the report as made by the jury contained the line and correctly described the dower, and same was by inadvertence omitted in copying the report into the docket. It was further made to appear that this report had been lost, and was so at the time of the trial. This being true, our decisions are to the effect that this report is a part of the record, and, being lost, that secondary evidence of its contents could be received and acted on. *Bonds v. Smith,* 106 N. C., 553; *Clifton v. Fort,* 98 N. C., 173.

The questions referred to, however, are hardly presented, for it was shown on the hearing that some time prior to the trial, on notice duly served, the *feme* plaintiff had moved for and obtained an order of the clerk of the Superior Court of Pender County, having jurisdiction of dower proceedings, correcting the description on the docket by in-

serting the omitted line, so that at the time of trial had the docket did contain a full and correct description of the dower.

There has been no error committed which in any way prejudiced defendant, and the judgment in favor of plaintiffs must be affirmed.

No error.

Cited: *Hughes v. Pritchard,* 153 N. C., 25.

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(220)

THOMAS PERRETT v. L. A. BIRD.

(Filed 23 March, 1910.)

1. Deeds and Conveyances—Estates Tail—Fee.

An estate devised to D. "and the lawful heirs of his body lawfully begotten," conveys the fee, under Revisal, sec. 1528.

2. Same—Contingent Remainders—Fees Qualified—Estates.

O. devised his lands to certain of his children, S., D. and J. By item 3 of the will a certain tract was devised to D. and "the lawful heirs of his body lawfully begotten"; by item 9 it was provided that in case of death of either of the children, his portion should revert to the surviving one, with further contingent limitations: *Held,* these items should be construed together, and that the estate devised to D. was not in fee simple, but a base and qualified fee, defeasible on the death of D. without leaving living lineal descendants. Revisal, sec. 1581.

3. Same—Termination.

Under a devise of an estate in fee with a limitation over on the death of the devisee without heir or heirs of the body, the event by which such estate is to be determined will be referred not to the death of the devisor, but to that of the devisees taking such estate.

CONTROVERSY submitted without action and determined before *Cooke, J.,* at February Term, 1910, of SAMPSON.

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

Stevens, Beasley & Weeks for plaintiff.
Faison & Wright for defendant.

HOKE, J. Plaintiff having acquired and holding the estate and interest of David Oates, Jr., in a tract of land, bargained the same to defendant, L. A. Bird, at the contract price of $1,500, and agreed to convey a good title.

Defendant having refused to pay, on the ground that the title held and offered by the plaintiff was not a good one, the present controversy was submitted, pursuant to law, for the purpose of determining the question.

The title offered by plaintiff was alleged and shown to depend upon the proper construction of the will of David Oates, father of David Oates, Jr., bearing date 1873, and in which David Oates, the father, devised certain lands to three of his children, Susan, David, Jr., and Jethro, and the portion devised to David, Jr., and which includes the land in controversy was in terms and in part as follows:

"Item 3. I give and devise unto my beloved son, David Oates, and the lawful heirs of his body lawfully begotten, the other portion of the land I have given to his mother for life, on the west side of (221) the division line running north and south, containing the same number of acres as his brother Jethro W. Oates, five hundred acres, more or less, as it may run out."

And having, as stated, devised certain other lands to his daughter Susan and to another son, Jethro, the will further provides:

"Item 9. It is my desire that in case of the death of either of my three children, Susan, David and Jethro, that their portion of my estate shall revert to the surviving one, and in case they all die without heirs of their bodies lawfully begotten, then it shall go to my oldest children."

Under our statute, Revisal, sec. 1528, and numerous decisions thereon, the estate conveyed under the third item of the will of David Oates, if that item alone applied to the question, would undoubtedly have been a fee simple. *Sessoms v. Sessoms,* 144 N. C., 121; *Jones v. Ragsdale,* 141 N. C., 200; *Wool v. Fleetwood,* 136 N. C., 460. But this item is to be construed in connection with the provisions of item 9 of the will.

A perusal of this item 9 gives clear indication that the last clause, "and in case they all die without heirs of their bodies lawfully begotten," should also be annexed to and control the first clause of this item; this being the clear intent of the devisee, and making the entire item read: "That in case of the death of either of my three children, Susan, David and Jethro, without heirs of their bodies lawfully begotten, their portion of the estate should revert to the survivors; and in case they all die without heirs of their bodies, etc., then over"; and in our opinion, this being the correct interpretation of item 9, a proper construction of the two items taken together requires that the interest conveyed to David Oates, Jr., by the will of his father be declared a base and qualified fee, because defeasible on the death of David Oates, Jr., without lineal descendants living at the time of his death. *Dawson v.*

Ennet, 151 N. C., 543; *Harrell v. Hagan,* 147 N. C., 111; *Sessoms v. Sessoms,* 144 N. C., 121; *Whitfield v. Garris,* 134 N. C., 24, etc., etc.

The significance we have given the words "heirs of their bodies lawfully begotten," etc., as used in item 9 of this will, and as equivalent to "an indefinite succession of lineal descendants who may take by inheritance," will be found approved and sustained in *Harrell v. Hagan, supra,* and authorities there cited. And in the same case, speaking to the time when an estate of this nature will become fixed and absolute, the Court said:

"Under several of the more recent decisions of the Court, the (222) 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 (holders of base or qualified fee), 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.

Applying this principle, it appears that David Oates, Jr., the devisee referred to in item 3 of the will, is now living, a married man, and has several children; and, while these facts disclose that the contingency upon which his estate depends is happily very remote, it still exists, and, this being true, the title offered by his grantee is not at this time a perfect title.

The authorities, or most of them, relied upon by plaintiff as contravening this position, notably as in *Weatherly v. Armfield,* 30 N. C., 25, will be found to apply to instruments bearing date prior to the act of 1827, as embodied in Revisal, sec. 1581. Prior to that act the limitation in this will on the estate of David Oates, Jr., "in case he die without heirs of his body lawfully begotten," would have been held void as being too remote; but this interpretation, operating as it did in many instances to frustrate the evident intention of the testator, the act in question was passed materially affecting the construction which formerly prevailed, and providing as follows:

"Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person shall die, not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: *Provided,* that the rule of construction contained in this section

shall not extend to any deed or will made and executed before 15 January, 1828."

There was error in the ruling that the grantee of David Oates, Jr., has a perfect title to the land bargained to defendant, and the judgment to that effect must be

Reversed.

Cited: *Smith v. Lumber Co.*, 155 N. C., 391; *Vinson v. Wise*, 159 N. C., 655; *Harrington v. Grimes*, 163 N. C., 77; *Rees v. Williams*, 164 N. C., 132; *S. c.* 165 N. C., 208; *Burden v. Lipsitz*, 166 N. C., 525; *O'Neal v. Borders*, 170 N. C., 484.

(223)

MARY LOU KERR v. MARY A. MOSLEY ET AL.

(Filed 23 March, 1910.)

Judgments—Attorney and Client—Fraud—Questions for Jury.

The plaintiff having been forced to pay a judgment obtained against her as surety on an administrator's bond, had the judgment assigned to her. The administrator was removed for wasting the deceased's assets, and plaintiff obtained judgment against the administrator d. b. n. and the distributees, to be paid out of the recovery had upon the first administrator's bond, as representing the entire assets of the estate. Fraud in obtaining this judgment was alleged on the ground that the plaintiff's attorney had generally represented the first administrator, and there was evidence that this attorney had notified this administrator when plaintiff's interests developed, that she was his daughter, and that he would represent her, and for him to get another attorney: *Held*, no error to defendant's prejudice in submitting the case to the jury upon the question of fraud, and the verdict in plaintiff's favor will not be disturbed.

APPEAL from *O. H. Allen, J.*, at August Term, 1909, of SAMPSON.

Action to recover on a judgment rendered in plaintiff's favor, at October Term, 1906, against W. A. Johnston, administrator of W. N. Peden. On issue submitted, the jury rendered the following verdict:

"Was the judgment of October Term, 1906, in controversy, obtained by fraud and collusion? Answer: No."

Judgment on verdict for plaintiff, and defendants appealed.

F. R. Cooper and J. D. Kerr for plaintiff.

Geo. E. Butler and Stevens, Beasley & Weeks for defendants.

HOKE, J. There is no reversible error in the record. On the trial it was made to appear that one D. M. Patrick, guardian of the three Barksdale children, had recovered judgment on one of the guardian bonds against plaintiff, as executor and sole legatee of Mary Johnston, deceased, who had been one of the sureties, in the sum of $985.66; that plaintiff had paid off the judgment and taken an assignment of same to herself as an individual, such assignment being duly entered and in writing. Thereafter, Mary Lou Kerr instituted a suit for contribution against W. A. Johnston, administrator of W. N. Peden, deceased, another surety recovered a judgment for one-half of the amount of the first-mentioned judgment. W. A. Johnston having wasted the assets of his intestate, W. N. Peden, in an action instituted by the distrib-
(224) utees of said intestate recovery was had on the administration bond of Johnston in the sum of $30,000, Johnston, administrator, having been first removed and W. W. Miller, one of defendants, duly appointed administrator *de bonis non* of W. N. Peden. Plaintiff instituted this action on the judgment recovered in her favor against the administrator *de bonis non* and the distributees of W. N. Peden, to obtain payment of same out of the recovery had on the bond of W. A. Johnston, and on avertments that this judgment represented the entire assets of the estate, and the only available source from which satisfaction of her judgment could be secured.

Defendants answered, and the only material issue raised by their pleadings was on allegation of fraud in the procurement of plaintiff's judgment, and this chiefly on the ground that the counsel appearing for Mary Lou Kerr, the plaintiff, was also counsel for W. A. Johnston, as administrator of Peden and defendant.

The decisions of this State fully uphold the position of defendants, that a judgment in an adversary proceeding will not be allowed to stand when it appears that the same attorney represented both plaintiff and defendant in the action. *Molyneux v. Huey,* 81 N. C., 106; *Gooch v. Peebles,* 105 N. C., 411. But the principle does not necessarily obtain when it appears, as in this case, that the father of plaintiff had been the general attorney of Johnston, the administrator, and when it developed in the ordinary course of events that his daughter had a claim against the estate and that he notified the administrator that he intended to appear for her, and that he, the administrator, must get another attorney, and that this was done.

The father, John D. Kerr, speaking to this question, as a witness, testified, among other things, as follows:

"Before W. A. Johnston became administrator of Peden, he talked with me about it, and I advised him not to do it. When he administered I represented him here and Bellamy in Wilmington. I repre-

sented him until the Barksdale matter came up. I notified him I would not appear against my daughter. I notified him to get him another attorney in the suit with my daughter. There was no collusion; my daughter had none. He had full knowledge that I was going to sue for my daughter, and notified him to get other counsel. I notified him that I would represent her in the Barksdale matter and would not represent him. Mr. Butler represented them." And, further: "The matter was fully gone into by Judge Jones."

On this evidence, we think the ruling of the trial court was as favorable as the defendants had a right to ask, in charging the (225) jury "that if John D. Kerr had been the attorney of W. A. Johnston, administrator of W. N. Peden, and took judgment in favor of Mary Lou Kerr against the estate, this was evidence of fraud and collusion to be considered by them in determining the issue submitted to them." The jury under a correct charge have accepted the plaintiff's version of the occurrence, and, this being true, the plaintiff has a clear right to recover on her judgment.

No error.

CAROLINA REAL ESTATE COMPANY v. LULA BLAND ET AL.

(Filed 23 March, 1910.)

Deeds and Conveyances—Heirs—Construction—Intent—Fee Simple.

While the common law was exacting in its requirement that, to make a fee-simple conveyance, the word "heirs" should appear either in the premises or habendum of the deed, our courts construe the instrument more liberally for the intent of the grantor, transposing words and disregarding punctuation when such may reasonably be done. Hence, the words in the conveyance clause in a deed to lands being J. D. P., with warranty to him, "his heirs and assigns," it will be construed as a fee simple. Acts of 1879, ch. 148; Revisal, sec. 946.

APPEAL from *Guion, J.*, January Term, 1910, of PENDER.

Action to determine the title to land, heard on case agreed. From the facts, as stated, it appears that on 1 January, 1850, one Isaac W. West, of Duplin County, N. C., conveyed to one John D. Powers, of New Hanover County, N. C., three tracts of land, properly describing the same, which said deed was duly recorded. The premises of said deed were as follows:

"This indenture, made this 1st day of January, A. D. 1850, between Isaac W. West, of Duplin County, of the first part, and John D. Powers, of New Hanover County, of the second part—Witnesseth:

"That for and in consideration of the sum of $60 in hand paid by the said John D. Powers, the receipt whereof is hereby acknowledged before the signing and sealing of these presents, the said Isaac W. West hath bargained, sold and conveyed, and by these presents doth bargain, sell and convey unto the said John D. Powers three certain tracts of land lying and being in the county of New Hanover and bounded as follows, viz.:"

Then follows a proper description of the three tracts of land, and the deed continues:

"The title to which I, the said Isaac W. West, of the first part,
(226) do warrant and defend against the lawful claims of myself and any other person whatsoever, unto the said John D. Powers, his heirs and assigns.

"In testimony whereof, I have hereunto set my hand and seal, day and date above written."

The plaintiff by mesne conveyance holds the title conveyed in said deed to the grantee therein, John D. Powers. Isaac West, the grantor in said deed, died several years ago, leaving defendant Lula Bland and others, his children and heirs at law; and plaintiff has acquired and holds by quitclaim deeds all of the interests of Isaac West's heirs in said land, except that of defendant Lula Bland; and, upon the facts stated, it was agreed that if the court should be of opinion that the deed in question conveys a fee-simple interest to John D. Powers, judgment should be entered for plaintiff; but if said deed only conveys a life estate to the grantee, then judgment shall be entered in favor of Lula Bland for one undivided sixth of said land.

The court, being of opinion that the deed only conveyed a life estate, entered judgment for defendant, and plaintiff excepted and appealed.

Joseph W. Little for plaintiff.
Faison & Wright for defendant.

HOKE, J., after stating the case: The deed in question bears date in 1850, long prior to the enactment of the statute providing that a deed with or without the word heirs should be construed as a conveyance in fee, "unless such conveyance shall in plain and express words show that the grantor meant to convey an estate of less dignity" Laws 1879, ch. 148; Code, sec. 1280; Revisal, sec. 946), and the rights of these parties will be considered and determined unaffected by that statute.

Speaking, therefore, to the question presented, the Court, in *Smith v. Proctor,* 139 N. C., 314-319, said: "A series of decisions have also established the proposition that whenever the word 'heirs' appeared in an instrument as qualifying the interest of the grantee and indicative of

his estate, whether in the premises, the habendum or the warranty, same would be transposed and inserted in that portion of the deed which would cause same to operate as a conveyance of a fee-simple interest, when such was the purpose of the grantors. In *Vickers v. Leigh,* 104 N. C., 248, it was decided that in a deed conveying the legal estate, although the word 'heirs' did not appear, the deed would be held to convey an estate of inheritance if the same on its face contained conclusive intrinsic evidence that a fee-simple estate was intended to pass, and that the word 'heirs' was omitted from the insrument by (227) ignorance, inadvertence or mistake. This case has since been uniformly upheld and acted on by this Court, where the evidence of intent to convey a fee-simple was of this character, and appeared so clearly from the face of the instrument that the court could see that the words of inheritance were omitted by mistake."

The common law was more exacting in reference to the use of the word "heirs" in order to a fee-simple conveyance, requiring that this word should appear as indicating the estate of the grantee either in the premises or habendum, and it was very generally held that these words when they appeared in the warranty clause alone would not have the effect of enlarging a life estate conveyed in the premises or habendum into a fee. But our Court at an early period commenced to draw away from the strictness of the common-law rule in this respect, and a perusal of a large number of cases bearing upon and controlling the question will fully justify and uphold the above citation from *Smith v. Proctor,* as a correct deduction from the decisions.

Thus, in *Phillips v. Thompson,* 73 N. C., 543, it was held: "A. and B. conveyed certain land to C. D., by deed, containing the following limitation: 'to have and to hold all and singular the aforesaid land and premises, and we do for ourselves, our heirs, executors and administrators, warrant and forever defend against the lawful claim or claims of all persons whatsoever, unto the said C. D., to him, his heirs and assigns forever.' C. D. died, and the bargainors instituted an action to recover the land, alleging that only a life estate passed under the deed; *Held,* that the deed conveyed the fee simple."

And *Settle, J.,* delivering the opinion, said: "This Court, following the well-established rule that the construction of deeds should be favorable and as near the minds and apparent intents of the parties as the rules of law will admit, has sanctioned the transposition of words in a sentence, has in at least two cases given to words no better arranged than they are in this deed the effect of a conveyance in fee. *Armfield v. Walker,* 27 N. C., 580; *Phillips v. Davis,* 69 N. C., 117."

In the next volume, 74 N. C., 155, in *Allen v. Bowen,* the language of the deed was as follows: "A tract or parcel of land lying and being in

the upper end of the Charles Latham tract which we have drawn, agreeable to the division that has been made, and if said division shall not stand, the understanding is that we sell all the right, title and claim that we have in the lands of Langley Respass, Sr., deceased, unto (228) the said William Bowen, Sr., of the second part, and by these presents hath bargained and sold and conveyed our land or right aforesaid, which we do warrant and forever defend. And we, Thomas A. Pritchett and Elizabeth, his wife, doth for themselves, their heirs, executors, administrators and assigns forever, the land to the said William Bowen, his heirs, executors, administrators and assigns forever, clear of all encumbrances whatever." *Held,* that the deed conveyed a fee.

In *Staton v. Mullis,* 92 N. C., 623, it was held: "1. When the habendum and warranty clause of a deed are joined, and the intention to convey a fee is clear, the words of inheritance will be so transposed as to connect them with the conveying terms, so as to secure the intended effect of the deed."

And *Smith, C. J.,* said: "Objection was also taken to the operation of several of the deeds, particularly to that executed in October, 1819, by Vernal Adams to Frederick Staton, and to that by the latter to the plaintiff, as conveying, for want of words of inheritance, a life estate only to the respective grantees. In reference to this construction of the deeds it is only necessary to say that in form they are quite as favorable to a construction which passes an estate in fee as that before the Court in *Allen v. Bowen,* 74 N. C., 155, and equally admit the transfer of the concluding words, 'his heirs and assigns forever,' which follow the clause of warranty, to the operative conveying words of the instrument.

"In *Allen v. Bowen, supra,* the intention is declared to be to 'sell all the right, title and claim' of the grantor in the premises, and the concluding clause is as follows: 'And we, Thomas A. Pritchett and Elizabeth, his wife, do, for themselves, their heirs, executors, administrators and assigns forever, the land to the said William Bowen, *his heirs* executors, administrators, and assigns forever, clear of all encumbrances whatever.' While this was an independent sentence, separated by a period from the preceding operative words, it was transposed and annexed to them, to give the deed effect as a conveyance of the inheritance, in carrying out the manifest intent of the parties to it."

Intimation is also given that the case of *Stell v. Barham,* 87 N. C., 62, a decision much relied on by defendant, has perhaps gone too far in upholding the strictness of the ancient common-law rule of interpretation. And it may be well here to note that in the case of *Allen v.*

Baskerville, 123 N. C., 126, the word "heirs" did not appear in the instrument at all, and so the question we are now discussing was not presented.

Later, in *Bunn v. Wells,* 94 N. C., 67, the Court held: (229)

"1. In the construction of deeds no regard is had to punctuation; but the *intention* of the parties should control, unless in conflict with some rule of law.

"2. A deed containing the following clauses, 'To have and to hold one-half of the said tract of land; and I, the said P. (the bargainor), do warrant and defend the said bargained tract of land unto the said W. (the bargainee), his heirs and assigns, against the lawful claim of any person or persons claiming the same in any manner whatever,' conveys the title to the lands therein described in fee simple to the bargainee."

And *Ashe, J.,* delivering the opinion said:

"In the case of *Parkhurst v. Smith,* Willes 332, *Lord Chief Justice Willes,* on this subject, said, 'The construction of deeds ought to be favorable, and as near to the intent of the parties as possibly may be and as the law will permit. That too much regard is not to be had to the natural and proper signification of words and sentences, to prevent the simple intervention of the parties from taking effect, for the law is not nice in grants, and therefore it doth often transpose words, contrary to their order, to bring them to the intent of the parties.' The rule of construction there laid down by the learned judge has been adopted by this Court and frequently applied in the construction of deeds, notably in the cases of *Phillips v. Davis,* 69 N. C., 117; *Waugh v. Miller,* 75 N. C., 127; *Allen v. Bowen,* 74 N. C., 155; *Phillips v. Thompson,* 73 N. C., 543; *Stell v. Barham,* 87 N. C., 62. Some importance may be attached to the fact that the habendum in the deed for our construction is separated from the clause of warranty by a semicolon, but that can have no effect in controlling the construtions, for it is a rule in reading and construing deeds, 'that no regard is had to punctuation, since no estate ought to depend upon the insertion or omission of a comma or semicolon, and although stops are sometimes used, they are not regarded in the construction or meaning of the instrument.' 3 Wash. on Real Property, 343, and cases cited in the note.

"Then, disregarding the punctuation, we think the proper construction of the deed in this case is that the words 'unto the said Redmond D. Wells, his heirs and assigns,' refer to and control both the warranty and habendum. This construction manifestly affects the intention of the parties, for if only a life estate was intended, why warrant the title to the bargainee and his heirs?"

These, and other decisions of like import, fully justify the principle of construction as broadly stated by *Associate Justice Avery,* delivering

(230) the opinion of the Court in *Anderson v. Logan,* 105 N. C., 266-270, as follows:

"The old established rule was that, in order to create an estate of inheritance, the word 'heirs' must appear either in the premises or the habendum of the deed. 2 Black., 298; *Stell v. Barham,* 87 N. C., 62. The courts, in order to carry out the intent of the grantor, where it could be gathered from the face of the deed, have, in a liberal spirit, construed conveyances as passing an estate of inheritance in all cases where the word 'heirs' was joined as a qualification to the name or designation of the bargainees, even in the clause of warranty or where the covenant of warranty was confused with the premises or habendum, if, by a transposition of it, or by making a parenthesis, or in any way disregarding punctuation, the word 'heirs' could be made to qualify the apt words of conveyance in the premises, or the words 'to have and to hold' in the habendum and tenendum, even though it was made to do double duty as a part of the covenant of warranty. Among the cases falling under this principle are *Staton v. Mullis,* 92 N. C., 623; *Graybeal v. Davis,* 59 N. C., 508; *Hicks v. Bullock,* 96 N. C., 164; *Bunn v. Wells,* 94 N. C., 67; *Ricks v. Pulliam,* 94 N. C., 225; *Phillips v. Thompson,* 73 N. C., 543; *Waugh v. Miller,* 75 N. C., 127; *Allen v. Bowen,* 74 N. C., 155; *Phillips v. Davis,* 69 N. C., 117.

"But where there are no words of conveyance in the instrument, or where the word 'heirs' does not appear in any part of the deed, except in connection with the name of the bargainor, or with some expression, such as 'party of the first part,' used in the clause of warranty, or elsewhere, to designate the grantor, the deed, if executed before the act of 1879 was passed, will be construed as vesting only a life estate in the bargainee." Citing *Batchelor v. Whitaker,* 88 N. C., 350; *Stell v. Barham, supra.*

A statement almost identical with the excerpt from *Smith v. Proctor,* quoted above.

It was suggested for the defendant that in this last case the deed was held to convey only a life estate, and this is true, for the reason that the word "heirs" did not appear as qualifying or decribing the estate of the grantee in any part of the instrument. But in the same volume, *Winborne v. Downing,* 105 N. C., 20, the word "heirs" was used in connection with the name of the grantee, and only in the clause of warranty, and it was held that an estate in fee was conveyed by the deed. And like ruling was made in the subsequent case of *Mitchell v. Mitchell,* 108 N. C., 542. In both of these last cases the deeds were without a habendum, as in our case, making them authorities directly appo-

(231) site to the question presented; the operative words of the deed in this last case being as follows:

"This indenture, etc., witnesseth, that for and in consideration that he, the said Jack E. Mitchell, is to live with me, the said John Mitchell, and take care of me, the said John Mitchell, and my wife, Sally, so long as we both live, and that I, the said John Mitchell, doth give to the said Jack Mitchell all the tract of land whereon I now live at my death, containing 169 acres, and that I, the said John Mitchell, do hereby warrant and defend the right and title of said land to Jack E. Mitchell and his heirs forever against the claims of all persons whatsoever."

Not only does this well-established rule of interpretation obtain with us in actions at law, and on the face of the instrument, but a line of well-considered decisions hold that even when the word "heirs" does not appear in a deed at all, on allegations of mistakes duly made the word "heirs" would be inserted, and the deed construed to be a fee-simple conveyance, if the instrument contained on its face conclusive, intrinsic evidence that a fee-simple estate was intended to pass. This wholesome doctrine announced in *Vickers v. Leigh,* 104 N. C., 248, was referred to with approval in *Smith v. Proctor, supra,* and has been fully affirmed in the recent case of *Bryant v. Eason,* 147 N. C., 284.

These, and other like authorities applied to the language of the present deed require that the same shall be declared a conveyance in fee simple, and fully sustain the view expressed by *Associate Justice Brown,* delivering the opinion of the Court in *Triplett v. Williams,* 149 N. C., 394-396, as follows:

"We concede all that is contended for as to the common-law rule of construction, and that it has been followed in this State. But this doctrine, which regarded the granting clause and the habendum and tenendum as separate and independent portions of the same instrument, each with its special function, is becoming obsolete in this country, and a more liberal and enlightened rule of construction obtains, which looks at the whole instrument without reference to formal divisions, in order to ascertain the intention of the parties, and does not permit antiquated technicalities to override the plainly expressed intention of the grantor, and does not regard as very material the part of the deed in which such intention is manifested."

There was error in the ruling of the court below, and same is

Reversed.

Cited: Boggan v. Somers, post, 394; *Thomas v. Bunch,* 158 N. C., 178; *Jones v. Sanderlin,* 160 N. C., 155; *Cullens v. Cullens,* 161 N. C., 347; *Beacon v. Amos, ib.,* 366; *Brown v. Brown,* 168 N. C., 11; *Mining Co. v. Lumber Co.,* 170 N. C., 276.

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J. M. ARNOLD v. INDEMNITY FIRE INSURANCE COMPANY OF NEW YORK ET AL.

(Filed 31 March, 1910.)

1. Insurance, Fire—"Iron-safe Clause"—Substantial Compliance.

The provisions of the "iron-safe clause" of a policy of fire insurance are for the general purpose of furnishing data by which to ascertain the amount of goods on hand at the time of the fire, and estimating with reasonable correctness the amount of the loss, and a substantial compliance by the insured therewith in keeping a set of books, and also of "locking them securely in a fireproof safe at night, etc.," is sufficient.

2. Same.

It is a substantial compliance with the "iron-safe clause" of a policy of fire insurance for the insured to produce after the fire an inventory made since the issuance of the policy, with a ledger and day-book, which had been kept in the iron safe, and a bank book kept in a place not exposed to the fire which destroyed the building, which, taken together, afforded data for a plain and concise statement of the business dealings of the insured for the period covered by the policy, and from which the amount of his loss could reasonably be ascertained; and a correct set of books, as stipulated for in this clause of the policy, refers to such as are usually kept by those conducting business of a like character of that of the insured, affording such information, and not necessarily that only which an expert would call exact.

3. Same—Inventory Itemized.

While an item of inventory of a stock of goods, required by the iron-safe clause in a policy of fire insurance reading, for example, "Harness, robes, collars, horse blankets, $1,250," is not such a "detailed, itemized statement" as to meet the requirements, the inventory should not be entirely set aside and a forfeiture declared on that account, when the much larger proportion of the amount of the inventory, and the articles of chiefest value, which fixed the general character of the business, were set out, itemized, and valued.

4. Insurance, Fire—Inventory—Estimate of Values—Evidence, Corroborative.

Under a nonwaiver agreement the adjusters of an insurance company and the insured made an estimate of insured's loss of buggies, etc., covered by the policy, by going over the debris left by the fire and counting the irons and gearings. Subsequently, the inventory which it was thought had been destroyed was found in the iron safe, and the estimated value and the amount of the inventory approximated each other: *Held*, the estimate of value was not relevant as tending to show compliance with the iron-safe clause, but afforded strong confirmatory proof as to the correctness of the inventory, which was produced and relied on.

5. Insurance, Fire—Inventory—"Iron-safe Clause"—Inadvertence—Substantial Compliance.

An inventory of a stock of goods inadvertently left on insured's desk at his place of business and not put into the iron safe, and which was destroyed by the fire of his store and stock of goods, does not of itself, as a matter of law, affect the insured's substantial compliance with the "iron-safe clause" of his policy, when there is no evidence of willfulness or design, or that its absence was of importance in ascertaining the extent of the damages.

6. Insurance, Fire—"Last Inventory"—Interpretation of Statutes.

"The last preceding inventory" required by the "iron-safe clause" in a policy of fire insurance refers and is confined to inventories taken under the contract of insurance and after it was entered into.

APPEAL from *Guion, J.*, at Fall Term, 1909, of CRAVEN. (233)

Action to recover on three insurance policies. The policies in three different companies bearing date 23 October, 1906, contained an agreement to indemnify plaintiff in different sums for one year against loss by fire, etc., "on his stock of carriages, buggies, wagons and other vehicles, also harness, robes, whips and saddlery, stable utensils and supplies, including medicines, feed, hay, grain, and on office furniture and fixtures, including iron safe, stationery and signs, all while contained in the two-story brick metal-roof building and frame extension and additions, situated west side of Middle Street, No. 122½, New Bern, N. C."

Three suits were instituted, but, as the policies all contained the same stipulations, and recovery on each depended on the same state of facts, the actions were consolidated by order of court and tried together, and no objection to this course was made or noted.

It was proved that the property insured was destroyed by fire on the night of 2 April, 1907, and defendants resisted recovery chiefly by reason of alleged violation of the stipulations in the policy, very generally known as the iron-safe clause, and there was evidence on the part of plaintiff tending to show substantial compliance with its requirements and evidence *contra* on the part of the defendants. Among other things, and as relevant to this attempted defense, the court charged the jury as follows:

"(I charge you that the alleged inventory offered upon the part of the plaintiff in this case purporting to have been made by him in February preceding the fire, in a book produced and offered in evidence before you, and called, as I recollect, 'Exhibit B' is a substantial compliance with that form that is required to be kept by him under the terms and provisions of the iron-safe clause.) (234)

"Each defendant excepts to part in above parenthesis.

"He is required under the terms and provisions of this iron-safe clause to keep a set of books which clearly and plainly present a complete record of the business transactions, including his purchases, sales and shipments, both for cash and credit, as set out in this clause. A ledger is offered in evidence before you—a book termed a ledger—by the plaintiff, which has been exhibited to you and is part of the evidence in the case; also, a book is offered by him in evidence which is termed the blotter; and likewise an inventory, and these are a part of the evidence in this case. The plaintiff contends that in addition thereto he kept a bank book in which the cash transactions appear, and that every cash sale was entered upon his bank book, which he likewise contends is a part of the set of books which were kept by him in his business transactions.

"(I therefore charge you that if you shall find by the greater weight of all the evidence, and the burden is upon the plaintiff in this case to satisfy you by the greater weight, the preponderance of evidence, that he did comply with the terms and provisions of this clause, that he kept a set of books called an inventory book, that it was made up by him during the month of February, 1907; that he kept a ledger, offered in evidence before you, in which he stated was kept a record of the credit sales made by him and the entries thereon; that he kept a blotter, in which his cash sales were made other than his credit sales, and entered by him, and that he kept a bank book, in which other than the sales upon the blotter and credit sales as evidenced upon the ledger were placed as cash deposited by him from sales in the bank. If you shall further find that such books and inventories so compiled were kept securely locked in a fireproof safe at night and kept in such safe at all times when the building in which the goods were kept was not kept open for business; and if you further find that these books, such as the ledger, blotter and inventories, were required to be produced by the defendants, and when so required the plaintiff did so produce such books and inventories on inquiry of the company, I charge you that that would be a substantial compliance with the requirements of the iron-safe clause as to keeping a set of books and producing them on demand; therefore, if you find from the greater weight of the evidence, the burden being upon the plaintiff to satisfy you that he kept a set of books, and that they were produced for inspection on demand of the companies, then it is your duty to
(235) answer the first issue 'Yes.')"

And further:

"(If the plaintiff has satisfied you by the greater weight of the evidence that he kept a set of books that clearly and plainly presented his sales, purchases and shipments, both for cash and credit; that he kept inventories as required by the terms of the policies; that his books and papers

were kept in an iron safe, fireproof; if you find that he acted in all respects in compliance with the iron-safe clause, your answer to the first issue will be 'Yes'), and you will proceed to the second issue."

This bank book referred to, as its name imports, containing a statement of cash deposited with the bank, arising from some of the sales by plaintiff in his business, does not seem to have been kept with the other books in the safe or in the store, but was cared for under the provision in the iron safe clause; "or failing in this (keeping books in an iron safe) the insured will keep such books and inventories in some place not exposed to a fire which would destroy the building."

Under the charge and the issues submitted the jury rendered the following verdict:

"1. Did the plaintiff comply with the terms and provisions of the policies declared on in the complaint? Answer: Yes.

"2. If so, what damage, if any, is the plaintiff entitled to recover? Answer: Give $3,500, without interest."

Judgment on verdict for plaintiff, and defendants excepted and appealed.

Moore & Dunn and W. D. McIver for plaintiff.
Simmons, Ward & Allen, D. L. Ward, and W. H. Pace for defendant.

HOKE, J., after stating the case: The policies sued on express the stipulations, commonly known as the iron-safe clause, as follows: "The following covenant and warranty is hereby made a part of the policy: 1st. The assured shall take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date; and upon demand of the assured, the unearned premium from such date shall be returned. 2d. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in first section of this clause, and during the continuance of this policy. The assured will keep such books and inven- (236) tory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building."

The general purpose of these provisions is to "furnish data by which to ascertain the amount of goods on hand at the time of the fire, and

estimate with reasonable correctness the amount of the loss," and it is held by the greater weight of authority that a substantial compliance on the part of the insured is all that should be required. *Coggins v. Ins. Co.,* 144 N. C., 7; *Ins. Co. v. Kearney,* 180 U. S., 132, affirming decision of C. C. A., 94 Fed., 314; *Ins. Co. v. Redding,* 68 Fed., 708; *Malin v. Ins. Co.,* 105 Mo. App., 625; *Ins. Co. v. Kemendo,* 94 Tex., 367; *Brown v. Ins. Co.,* 89 Tex., 590; *Fire Assn. v. Short,* 100 Ill. App., 553; *Ins. Co. v. Jears,* 60 Neb., 338, *S. c.,* with elaborate note in 51 L. R. A., 698; 2 Cooley Insurance, 1817-18; Clement Insurance, 266.

In Clement on Insurance, *supra,* the author says: "Where the insured in good faith has shown by his acts a disposition or intent to comply with the clause, and endeavored to meet its requirements, but is prevented from literal and exact compliance by accident or misfortune, without fault or fraud, the tendency and weight of modern authority is in favor of the rule or doctrine of substantial performance."

And in Cooley, *supra:* "On the theory that the iron-safe clause is a promissory warranty, and therefore governed by the rules that usually obtain in the case of warranties, it has been held in some jurisdictions that strict compliance with the terms of the clause is necessary." Citing *Assur. Co. v. Altheimer,* 58 Ark., 565, and *Goldman v. Ins. Co.,* 48 La. Ann., 223, and others.

"It is to be noted, however, that in the *Altheimer case* there was in fact a strict compliance, and in the *Goldman case* there was not even a substantial compliance. The rule of strict compliance seems to have been modified in later decisions in Illinois, *Fire Assn. v. Short,* 100 Ill., 553, and has been overruled in Texas, *Brown v. Palatine Ins. Co.,* 89 Tex., 590.

"On the other hand, on the theory that, though the iron-safe clause may be a promissory warranty, it is in effect a condition subse-
(237) quent, which should be construed strictly against the right of forfeiture, *McNutt v. Ins. Co.* (Tenn. Ch. App.), 45 S. W., 61, it has been held in other jurisdictions and by the weight of authority that a substantial compliance with the terms of the clause is sufficient." Citing a large number of authorities.

In the case at bar it appears that the insurance policies were taken out on or about 23 October, 1905; that before application was made or the question of insurance mooted, and within a year of taking out the policies, plaintiff had made an inventory of his stock, stated in detail and aggregating about $5,000 in value, and a copy of same was in the store at the time of the fire; but, having been left on the desk, was destroyed. That on or about 17 February, 1907, about six weeks before the fire on 2 April, plaintiff had taken another inventory, giving a detailed statement of a larger portion of the stock on hand covered by the policies,

and a description and itemized valuation of the principal articles in which he was dealing—carriages, wagons and other vehicles—and amounting in value to $5,303.50, an excerpt from the paper, by way of illustration, being as follows:

3 rubber-tire buggies	$98.00	$294.00
6 top buggies	46.85	281.10
8 open buggies	36.00	288.00
1 rubber-tire carriage		165.00
1 six-seat carriage		150.00

and so on, showing a large number of vehicles, wagons, etc., described in detail, and valued by items as stated. Plaintiff also kept a ledger and day-book, or blotter, purporting to be a statement of business dealings, and a bank book, which he said showed some additional cash sales made in his business and testified that these books contained an entire record of his business since the inventory of 17 February, to the fire, and for the time covered by them. The inventory of 17 February, and the ledger and day-book were kept in the safe, and procured therefrom soon after the fire. The inventory, with some other papers, by reason of the heat, having stuck to the wood partition in the safe, was not found as soon as the day book and ledger; but the evidence was satisfactory, and under the charge the jury have found that all these books were procured from the safe after the fire; and the bank book was also produced, having, it seems, been kept with the plaintiff, and coming under the provision, "that if not kept in the safe, in some place not exposed to a fire which would destroy the building." On the evidence, and applying the principles declared and sustained in the authorities above cited, we think the learned judge correctly ruled that the inventory was a substantial (238) compliance with that feature of the iron-safe clause, and in charging the jury, in substance, that if plaintiff kept such an inventory in his safe, and also a ledger and day-book, producing same when required, and that these books, together with a bank book, afforded a plain and clear statement of plaintiff's business dealings for the period covered by the policy, this would be a substantial compliance with the stipulations of the iron-safe clause, and the first issue should be answered "Yes."

It was chiefly contended before us that the inventory was defective by reason of the following item appearing in the same: "Harness, robes, collars and horse blankets, $1,250." Such an item in itself does not come within any proper or approved definition of an inventory said to be "a detailed, and itemized statement of the articles composing the stock, with the value of each." *Roberts v. Ins. Co.*, 19 Tex. Civ. App., 344, approved in *Coggins v. Ins. Co., supra.* And, if this had been the gen-

eral character of the inventory relied on, or the greater portion and controlling feature of it, the objection would have to be sustained. But, as heretofore stated, much the larger proportion of the amount, and the articles of chiefest value and which fixed the general character of the business, were set out, itemized and valued; and in a case of this character we are of opinion that such an inventory should not be entirely set aside and a forfeiture declared because a single item of inventory of the kind referred to was not in strict compliance with the contract.

In *Assurance Co. v. Redding, supra,* the required books and data were produced, except a cash sales book covering a period of twenty-one days before the fire, which had been inadvertently left out. *Held,* that the promissory warranty was a condition subsequent, and that the evidence justified a finding of substantial compliance.

In *Brown v. Palatine Co.,* 89 Tex., 590, *supra,* the blotter containing the cash sales of the day before the fire had been left out of the safe for the purpose of transferring the entries later to more substantial books, and was destroyed. All other books were produced, and it was held a substantial compliance. In this case the digest, relevant to the present inquiry, is as follows:

"(1) It will not be presumed that the parties intended to prescribe that which was practically impossible, such as absolute accuracy in the keeping of the books. A substantial compliance would suffice in such case and the contract be construed as requiring no more than could (239) be reasonably expected of the insured.

"(2) The purpose of such warranty will be considered in construing the language and determining whether its intent and meaning had been complied with in keeping the books.

"(3) Books so kept as to enable the insurer with reasonable certainty to arrive at the amount of loss should be held a compliance with the contract.

"(4) Whether the books so kept and produced by insured were a substantial compliance with the warranty, being a question of fact determined in the affirmative by the trial court, the Court of Civil Appeals, not finding the facts otherwise, improperly held that the failure to enter the sales of the last day upon the books worked a forfeiture as a matter of law."

Like comment, sustained by the same and similar authorities, may be made in reference to another item in the inventory, as follows: "Sloan's medicine, oil, whips, summer robes, lots of different kinds of medicines and second-hand harness, $775."

We are confirmed in the view we have expressed as to the effect of these two items of the inventory on the validity of plaintiff's claim by the fact that nothing appears in the record to raise serious question as to

the *bona fides* of this loss or the correctness of the inventory produced. On the contrary, the evidence discloses that this inventory of date about six weeks before the fire was made in part with a view of selling out plaintiff's business to one J. H. Neal, and the negotiation was being conducted for Neal by one Gus Ipock, and both of these witnesses testified that they had examined the stock in reference to the contemplated trade, and their estimate was that the value was something near $5,000; that there was a large quantity of new harness on hand and second-hand harness, also robes, etc.; that they had no dissatisfaction with the amount of the inventory taken and exhibited to them, and the purchase was delayed only by reason of the fact that plaintiff required the entire payment in cash. Again, after the fire, the adjuster of the companies and the plaintiff, not then knowing that the inventory would be found, under a nonwaiver agreement made an estimate of the property destroyed by going over the débris and determining the number of the vehicles and the amount of property destroyed by counting the irons and gearing left by the fire, and in an estimate so made by them, put in evidence as Exhibit A, the amount very nearly approximated that contained in the Inventory B, when it was afterwards found to be in the safe. While, in reference to the estimate marked Exhibit A, the judge below properly held that it was not relevant as tending to show compliance with the stipulations of the "iron-safe clause," it (240) afforded strong confirmatory proof as to the correctness of the inventory which was produced and relied upon.

It was further contended for the defendant that only one inventory was produced, whereas a specification of the iron-safe clause required that this and the "last preceding inventory" should also be kept; the language of the stipulation being: "That the assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, etc." As heretofore stated, it appeared that the last inventory, being the one kept in the safe, had been taken on or about 15 February, 1907, six weeks before the fire. The plaintiff, a witness in his own behalf, testified that the preceding inventory had been taken about a year before, which would be eight or nine months before the policies were issued, being the one taken when plaintiff purchased the business. This had been left on plaintiff's desk, and was destroyed in the fire. The evidence tended to show that this was a mere inadvertence, and under the authorities cited, *Assurance Co. v. Redding, supra; Malin v. Ins. Co.,* 105 Mo. App., *supra,* and others of like import, even though the policy referred to this as the "last preceding inventory," in the absence of any evidence of willfulness or design, or that its absence was of some importance, such circumstances would not, as a matter of law, affect the result or require a

verdict against substantial compliance; and we are inclined to the opinion, too, that under recognized principles of interpretation, this stipulation for keeping the "last preceding inventory," by fair intendment refers and is confined to inventories taken under the contract of insurance and after it was entered into. The only other inventory which had been taken in this case was one made long before the policies were issued, and before the treaty concerning them was entered upon. There is nothing in the terms of the policy which expressly requires that such an inventory so taken shall be kept, and it is a well-established rule of construction in these policies that questions of doubtful import should be resolved against the company.

Thus, in *Ins. Co. v. Kearney, supra, Associate Justice Harlan,* for the Court, said: "To the general rule there is an apparent exception in the case of contracts of insurance, namely, that where a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer. This exception rests upon the ground that the company's attorneys, officers or agents prepared the policy, and it is its language that must be inter-
(241) preted." Citing *Bank v. Ins. Co.,* 95 U. S., 673, 678-9; *Moulor v. Ins. Co.,* 111 U. S., 333-341.

In *Fire Assn. v. Short,* 100 Ill. App., *supra,* it was held: "5. A condition that would defeat an insurance policy must be expressed, or so clearly implied that it cannot be miscontrued. Insurance companies write and sign their policies, and where there are doubtful constructions they will be held against the insurer. Policies must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim for indemnity."

And our own decisions are to the same effect. *Bank v. Fidelity Dep. Co.,* 128 N. C., 366.

Speaking generally as to the questions presented in this appeal, in Cooley's Insurance Briefs, page 1823, it is said: "So, where the insured was in business in a little country town in Florida, and his books, kept in most primitive style, were far from being what a good accountant would consider a complete set of books (*Assurance Co. v. Redding,* 68 Fed., 708; 15 C. C. A., 619; 30 U. S. App., 442), the Court held that, if the insured kept a set of books which were as good as ordinarily kept in such a store and business, and exercised good faith in the matter, his policy was not avoided merely by the fact that the books were not what an expert would consider a complete set of books. If his books were kept in the manner customary with merchants (*Jones v. Ins. Co.,* C. C., 38 Fed., 19), and as elaborate and complete as is usually the case in stores of like character (*Burnett v. Ins. Co.,* 68 Mo. App., 343), it is sufficient. Whether the books are sufficient within these principles, is a question for

the jury (*Assur. Co. v. Altheimer,* 58 Ark., 565); and an expert cannot testify, in regard to a particular set of books, that he never saw anything like it before (*Morris v. Ins. Co.,* 106 Ga., 461)."

We are of opinion that this case has been correctly tried, that no reversible error appears in the record, and the judgment rendered should be affirmed.

No error.

(242)

WILLIAM E. WORTH v. KNICKERBOCKER TRUST COMPANY ET AL.

(Filed 31 March, 1910.)

1. Pleadings—Demurrer—Misjoinder—Parties.

When the complaint sufficiently alleges that the plaintiff was induced by defendants' fraudulent representations as to certain facts and concealment of others, to subscribe to the stock of a corporation to be formed for certain specified purposes; that he had paid in a material part of his subscription, the balance to be paid in certain amounts upon notice, and that, without plaintiff's knowledge, by the forming of an unlawful combination the corporation was being dominated and controlled by the defendants to their own personal advantage and profit and to the destruction or serious impairment of plaintiff's subscription therein, with averment that the defendants either originally or afterwards knowingly entered upon the scheme and enterprise complained of as partners therein, a demurrer for improper joinder of parties is bad.

2. Pleadings—Demurrer—Misjoinder — Causes — Cancellation of Contract—Damages.

And when the complaint states two causes of action growing out of the injuries to plaintiff's interest in the corporation caused by this unlawful combination, the first asking that plaintiff's agreement to take the stock be delivered up and canceled, and the second for damages arising by the way of profits lost to the plaintiff, both by reason of defendants' breach of contract, a demurrer on the ground of inconsistency of the two causes of action is bad, as both proceed upon the theory of the disaffirmance of the contract, leaving the rule for the admeasurement of damages to be laid down by the trial judge in case a cause of action is therein established in plaintiff's favor, and on the facts as they may properly develop.

3. Pleadings—Demurrer—Unnecessary Parties—Procedure.

The joinder of unnecessary parties plaintiff or defendant is not good cause for demurrer, the remedy being by motion to strike out unnecessary parties, or the question may be dealt with in making disposition of the cost; and hence, in an action to annul a contract for the purchase of stock in a corporation by reason of fraud or conspiracy, or the forming of an unlawful combination by the principal defendants against the rights of plaintiff, and to his substantial injury, the joinder of others as parties

defendant by reason of an indebtedness to them alleged and levied on, owed by the principal defendants, is an irregularity, and a demurrer on that account is bad.

4. Injunction—Federal Court—Jurisdiction—Lower Court—Procedure.

A motion made by plaintiff in the Supreme Court on appeal to restrain the prosecution of an action brought by a defendant in the Federal Court upon the same subject matter, will not be considered, the cause for the purpose of motions of this character remaining in the lower court, and the relief should be sought there.

BROWN, J., dissenting; WALKER, J., concurring in the dissenting opinion.

(243) APPEAL from *O. H. Allen, J.*, at December Term, 1909, of NEW HANOVER.

Action heard on general demurrer to complaint. There was a judgment overruling the demurrers and allowing the defendants to answer, and some of the defendants excepted and appealed.

E. K. Bryan and J. D. Bellamy for plaintiff.
Davis & Davis for defendant.

HOKE, J. This cause was before us on an appeal at the last term, from an order denying a motion by defendants to discharge an attachment and dismiss the action. On that appeal the Court held that a cause of action was stated in the affidavits, and one in which an attachment would lie. See 151 N. C., 192. The opinion having been certified down and the complaint formally filed, some of the principal defendants filed general demurrers thereto, assigning for cause that there was a misjoinder of causes of action, and a misjoinder also as to the principal parties defendant therein; but the Court is of opinion that neither position can be sustained.

The complaint professes to state two causes of action. In the first: That by reason of misrepresentation of certain material facts, and concealment of others, plaintiff was induced to subscribe $45,000 to an undertaking to develop certain waterpowers on the Yadkin River, and by means of a corporation to be formed under the style and title of The Rockingham Power Company, and had paid $9,000 on his said subscription, the remainder to be payable on specified notice; that at the time of the subscription so obtained, and without plaintiff's knowledge, some of the principal defendants had formed a voting trust, forbidden by the law, 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 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 orignally, or had entered upon it afterwards and knowingly participated in its plans and purposes"; (244) and that said defendants, in pursuance of this unlawful scheme and purpose, had succeeded in rendering The Rockingham Power Company insolvent, to the destruction or serious impairment of plaintiff's subscription and interest therein. (See fuller statement in former appeal.)

The latter portion of the complaint, styled a second cause of action, reaffirms, in substance, the same state of facts, and contains an averment: "That by reason of the wrongful and unlawful conduct of the said defendants, plaintiff has a right to treat the said contract as broken, and have said agreement delivered up and canceled," etc.

There were allegations in both the first and second causes of action, that all the principal defendants had taken part in the wrongful and unlawful conduct, either originally or had entered upon it afterwards, and knowingly aided and abetted the combination and scheme complained of. Further allegation is added that said principal defendants were partners in the scheme and enterprise complained of. It will be noted that the alleged two causes of action grow out of the same transaction, and that they both affect the same interest of all the principal parties defendant, and, when this is true, our decisions are to the effect that the joinder of the two is permissible and proper. *Howell v. Fuller,* 151 N. C., 315; *Hawk v. Lumber Co.,* 145 N. C., 48; *Fisher v. Trust Co.,* 138 N. C., 224; *King v. Farmer,* 88 N. C., 22; *Young v. Young,* 81 N. C., 91.

Even if the two causes of action were to some extent inconsistent, there is authority to the effect that the complaint is not always on that account demurrable. *Hardin v. Boyd,* 113 U. S., 756.

In that case *Associate Justice Harlan,* speaking to the question presented on facts not dissimilar, said: "It is a well-settled rule that the complainant, if not certain as to the specific relief to which he is entitled, may frame his prayer in the alternative, so that if one kind of relief is denied, another may be granted; the relief of each kind, being consistent with the case made by the bill. *Terry v. Rosell,* 32 Ark., 478; *Colton v. Ross,* 2 Paige, 396; *Lloyd v. Brewster,* 4 Paige, 537, 540; *Lingan v. Henderson,* 1 Bland, 236, 252; *Memphis v. Clark,* 1 Sm. & Marsh, 221, 236. Under the liberal rules of chancery practice which now obtain, there is no sound reason why the original bill in this case might not have been framed with a prayer for the cancellation of the contract upon the ground of fraud, and an accounting between the parties, and, in the

(245) alternative, for a decree which, without disturbing the contract, would give a lien on the lands for unpaid purchase money.

The matters in question arose out of one transaction, and were so directly connected with each other that they could well have been incorporated in one suit involving the determination of the rights of the parties with respect to the lands. The amendment had no other effect than to make the bill read just as it might have been originally prepared consistently with the established rules of equity practice."

According to our view, however, the two causes of action are not inconsistent, both proceeding as they do on the theory of a disaffirmance of the contract. The fact that in the prayer for relief damages are demanded, that is, profits lost by reason of the breach, does not affect the statement of the cause of action as embodied in the complaint. The proper rule as to the admeasurement of damages is to be laid down by the trial judge in case a cause of action is established in plaintiff's favor, and on the facts as they may be then developed, and as stated in the complaint. Nor is the demurrer for misjoinder of parties borne out by the facts. A perusal of the complaint will disclose that responsibility for the wrongful conduct complained of is alleged against all of the principal defendants, and, therefore, the position taken in the demurrer in this respect cannot be sustained.

It will be observed that we speak throughout of the principal defendants, and for the reason that there are several parties defendant whose only interest in this litigation, so far as now appears, arises from the fact that an indebtedness from them to some of the principal defendants has been levied on by an attachment issued in the cause, and they have, it seems, for this reason alone been named in the summons, and served with original process. This is irregular, but our decisions are to the effect that the joinder of unnecessary parties plaintiff or defendant is not good cause for demurrer. "That there is a defect of parties plaintiff or defendant" is the language of our statute, and numerous decisions with us have given the interpretation that the joinder of *too many parties* does not come within the statute. See Clark's Code (3 Ed.), pp. 209-215, and authorities cited.

The remedy is by motion to strike out the unnecessary parties, or it may be dealt with in making disposition of the costs.

Plaintiff moves in this Court for an order restraining the defendant, the Knickerbocker Trust Company, from prosecuting an action instituted by that corporation against the plaintiff, in the United States Circuit Court for the Eastern District of North Carolina, on 28

(246) January, 1910, to recover the balance alleged to be due on the subscription of plaintiff to the enterprise afterwards known as

The Rockingham Power Company, referred to and made the subject-matter of litigation in the suit at bar.

Without discussion of the right of a court having, and having first acquired, jurisdiction of a cause and the parties, to protect the integrity of the procedure by orders operating *in personam* on the parties litigant, we deem it best only to say that, according to our decisions, and on the facts presented in this case, the cause for the purposes of motions of this character remains in the court below, and the plaintiff must proceed there to obtain the relief to which he may be entitled. *Herring v. Pugh,* 126 N. C., 852. The motion referred to will, therefore, be dismissed without prejudice.

We have had great doubt if the allegations of the complaint as against the Knickerbocker Trust Company are sufficiently definite to constitute a cause of action against that company, but as it is said to be a part of the land syndicate in one portion of the complaint and in another that it had aided and furthered the schemes and plans of its principal codefendants, and again that it is in partnership with such defendants, we have concluded on these allegations, while they are not very precise or direct, to overrule the demurrer as to that company, also, and let the cause come to an issue as between the principal parties litigant.

There was no error in overruling the demurrer and allowing defendants to answer over.

Affirmed.

BROWN, J., *dissenting:* I am of opinion that the Court should order a repleader in this case and that the plaintiff should be required to set out in a plain and concise manner the only cause of action attempted to be set out in the complaint.

Eliminating unnecessary allegations, and much that is evidential, the only cause of action set out in the complaint is based upon the theory that the plaintiff was induced by false and fraudulent representations of certain of the defendants to subscribe to the stocks and bonds of the power company.

The facts upon which plaintiffs base this charge should be succinctly stated. *Mottu v. Davis,* 151 N. C., 237.

As the complaint contains a defective statement of a cause of action, I think there should be a repleader.

As to those defendants, Mrs. Bridgers and others, who are "garnisheed in attachment" and have no interest in the contro- (247) versy, they have been improperly made parties defendant and should be eliminated.

Mr. Justice WALKER concurs in this opinion.

Cited: Withrow v. R. R., 159 N. C., 225.

JOHN KISSENGER ET AL. v. THOMAS FITZGERALD ET ALS., RECEIVERS OF THE NORFOLK AND SOUTHERN RAILWAY COMPANY.

(Filed 31 March, 1910.)

1. Corporations—Receivers—Parties—Process.

An action against the receivers of a railroad company for injuries to a shipment of goods alleged to have been caused by the company's negligence is, in effect, an action against the company.

2. Same—Order of Court.

When the complaint alleges a cause of action against an insolvent railroad company in the hands of receivers as defendants, and the summons has been issued against the receivers as defendants, and it appears that the cause had been prosecuted to final judgment against the corporation under an order obtained from the Federal Court on special petition that the plaintiff be allowed to do so, the fact that the name of the corporation does not appear in the summons is not of the substance and should not be allowed to affect the validity of the judgment.

3. Carriers of Goods—Bill of Lading—Restricting Liability—Live Stock—Valuable Horse.

When under instructions from the shipper of a valuable race horse, who was unaware that there were several rate classifications of such animals, to ship by the usual classification, the agent of the railroad company made a freight rate in accordance with ordinary live-stock bill of lading which limited the recovery to a maximum amount of $100, but which restriction was not incorporated into the bill of lading used and of which nothing was said to the shipper, the question as to whether the recovery should be restricted to the maximum of $100 under the bill of lading customarily used for a shipment of live stock is not presented, as that character of bill of lading was neither used nor referred to; and, if otherwise, the restriction would be void under *Stringfield v. R. R.*, *ante*, 125.

4. Same—Notice Implied.

The fact that the agent of a railroad company issuing a bill of lading for the shipment of a valuable race horse, knew that the animal was shipped for racing purposes, and had seen it "go round the race track," is sufficient to put him upon notice that the value of the animal exceeded the average value of $100 contained as a restriction of its liability for damages in its ordinary live-stock bill of lading.

5. Carriers of Freight—Interstate Commerce—Discrimination—Knowledge of Shipper—Fraud.

One who ships a horse and pays the freight charged by the carrier's agent in ignorance of the various classifications of freight rates on horses, and who does not know that the agent, in order to give the rate charged, had put a lower value upon the animal than its actual value, cannot be held guilty of "knowingly and willfully committing a fraud, and of a

criminal offense against the United States statutes, in obtaining a preference, by reason that the rate of freight charged by the agent was less than the schedule of rates published by the carrier under the Federal statutes relating to interstate commerce.

6. Carriers of Freight—Interstate Commerce—Bill of Lading—Live Stock—Discriminative Rate—Valid Contract.

A rate of freight on an interstate shipment forbidden by the United States statutes as a discrimination, and which is set out in the bill of lading, does not render the contract of carriage void, but the forbidden rate may be set aside: *Hence*, when the stipulation in a bill of lading unlawfully restricts the recovery of a valuable horse to the average value of such animals, the shipper is not thereby prevented from recovering the actual damages he has sustained by the carrier's negligence in transporting the animal.

7. Same—Restricting Liability—State's Policy—Void Stipulations.

And in such interstate shipments, there being no regulation by Congress or the Interstate Commerce Commission affecting the policy of this State that common carriers may not contract against loss or damage occasioned by their negligence, any stipulation in the bill of lading to that effect cannot be enforced here.

APPEAL from *Ward, J.*, at Fall Term, 1909, of WASHINGTON. (248)

The suit was to recover damages for injuries to a certain horse, owned by plaintiffs and shipped over defendant road in June, 1908, from Roper, N. C., to Norfolk, Va. There was evidence tending to show that the horse, a race horse and valuable animal, was shipped over defendant road at the time stated, and was greatly injured by reason of negligence on the part of the railroad company or its agents having charge of the shipment.

The judge, among other things, charged the jury as follows: "If you find that when the plaintiffs shipped the horse defendant's agent had known that the horse was a race horse, and was valuable, and that he was being shipped for the purpose of racing, and you find that plaintiffs knew nothing about the valuation in the classification, the plaintiffs would be entitled to recover damages sustained on account of the negligence of defendant, which would be the difference in value before and after he was hurt." To this charge the defendants excepted.

And further: "That if the horse was injured while in the possession of the defendants, this fact alone is evidence of negligence. (249) Proof of injury makes it a *prima facie* case of negligence to carry the case to the jury, and after having heard such evidence as the defendants offered tending to show how the injury occurred, it is for the jury to say whether it was due to the negligence of the defendant or to other causes for which the defendants are not responsible." To this charge the defendant excepted.

The jury rendered the following verdict:

"1. Was the plaintiff's horse injured by the negligence of the Norfolk and Southern Railway Company, as alleged in the complaint? Answer: Yes.

"2. What damage, if any, has the plaintiff sustained by reason of such negligence? Answer: $850."

Judgment on the verdict against the railroad company, and defendant excepted and appealed.

Ward & Grimes for plaintiff.
A. O. Gaylord for defendant.

HOKE, J., after stating the case: The injury complained of occurred in June, 1908, and in July following defendant company was placed in the hands of receivers in proceedings duly instituted in the Circuit Court of the United States for the Eastern District of North Carolina, and so remained at the time of action instituted and judgment entered; and it is claimed by defendants that no recovery should have been allowed against the company, because it was not named in the summons. The order of the Federal Court vested in the receivers the property and franchise of the Norfolk and Southern Railway Company, and the statute of this State applicable, Revisal, sec. 1224, provides:

"All the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto"; and it would seem that under and by virtue of these provisions the receivers were properly named as defendants in the summons.

Without deciding this question, however, an order of the Federal Court, on petition specially presented, permits plaintiff to prosecute to final judgment the said suit against the Norfolk and Southern Railway Company. The complaint states a cause of action against the company, and on defense duly made, and after full inquiry, the verdict so establishes the validity of plaintiff's claim; and, this being true, we think the failure to formally name the company in the summons is not
(250) of the substance, and should be cured now by amendment, even if required.

We have held in several cases that on claims of this character an action against receivers of an insolvent corporation was in effect an action against the company. *Grady v. R. R.*, 116 N. C., 952; *Farris v. R. R.*, 115 N. C., 600.

It was chiefly urged for error on the argument before us that a recovery by plaintiff should be restricted to $100, a maximum valuation on a live-

stock contract on file in the company's office at the time the shipment was made, and filed in the record as "Exhibit D." Even if such a restriction appeared in the bill of lading, or as a stipulation in the contract of shipment, we have held at the present term that on the facts relevant to this valuation it would not avail to limit a recovery for an injury due to the negligence of the company. *Stringfield v. R. R., ante,* 25. But this question as we view it, is in no way presented, for there is no restriction whatever in the bill of lading under which the horse was shipped, nor does it contain any reference to the classification which defendant contends should limit its liability. On the contrary, there was evidence on the part of plaintiff that he was not aware "that there were two or three rates on horses, and that he said nothing about the value of the horse at the time of shipment, and the agent did not ask him about it." And, while the agent, as witness for defendant, testified that at the time of shipment he asked plaintiff what value he was going to place on the horse, and received the reply, "The usual valuation," he further made statement on cross-examination as follows:

"Mr. Roper had never told me he was a race horse and never told me anything of his value, and I knew nothing of his value. I knew he was a race horse, and I had seen him go around the track. I knew he was being sent off for the purpose of racing. At the time Mr. Roper said that he would ship him at the usual classification, I did not tell him what it was. I did not mention a $100 rate on him, nor did he (Roper) say anything about the value of the horse to me."

Thus showing, not only the value was in no way restricted, but that the agent was aware of facts calculated to put a reasonably prudent person on notice that the animal shipped was much above the average in value.

While the position is not presented in the record, nor in the printed briefs, it was further contended for defendant on the oral argument that where it appeared that a horse or other property was shipped and freight paid on a lower valuation to allow a recovery on the basis of a higher valuation would, in effect and by indirection, be giving a preference in freight rates, contrary to the provisions of chapter 3591, (251) sec. 2, Laws of U. S., 1906, 1st Session, Public Laws, U. S., Vol. 34, Part I, pp. 584-587, requiring common carriers to publish a schedule of freight rates and make their charges accordingly; and for plaintiff to insist on such a recovery, after having ascertained the published rates at which his property had been in fact shipped, would make him guilty of a criminal offense, under section 10 of the Interstate Commerce Act, as amended by act of 2 March, 1889, making it a fraud and misdemeanor for a shipper to obtain a preference in freight rates by "knowingly and willfully" making a shipment under "a false billing,

false weighing, false representations of contents of a package, etc., or by any other device or means, whether with or without the consent or cognizance of the carrier, its agents," etc.

Just how a shipper, innocent at the time and entirely ignorant of any classification or difference in rating, who ships a horse and pays the freight charged by the agent, without being informed of the valuation made or without knowing that any special valuation was made, should be held guilty of "knowingly and willfully" committing a fraud and a criminal offense because he institutes an action for recovery for injuries done to the property by the carrier's negligence, and seeks to recover on the basis of its true value, we are utterly unable to perceive. To state the proposition is to answer it, and we would not have referred to it but for the fact that it was earnestly urged before us, and a circular-letter purporting to be from the Interstate Commerce Commission was exhibited which apparently gave it some countenance. See *U. S. v. R. R.*, 43 Fed., 26-30, where *Blodgett, J.*, delivering the opinion, said: "If the agents and employees of a railroad, of whatever rank, make an unlawful contract, or if they knowingly aid and abet in the execution of an unlawful contract which is made an offense under the interstate commerce act, they undoubtedly subject themselves to its penalties; but the proof, as in all criminal cases, must be clear and leave no reasonable ground for doubt as to their guilt and of their knowledge that they were engaged in consummating an illegal act."

Nor we do think the position can be at all sustained, that recovery is forbidden by the statute of 1896, because indirectly giving a preference in rating forbidden by the law. That statute, ch. 3591, Laws 1896, 1st Session, enacted chiefly for the purpose of preventing discrimination in freight rates, and affording further facilities for its discovery, among other things, in section 2, requires common carriers, subject to its provisions, to file and publish a schedule of freight rates, and forbids
(252) that any contract shall be entered into between a shipper and carrier containing an agreement for a freight charge lower than the published rates while the same are in force. In several decisions of the Supreme Court of the United States, construing this section and another not dissimilar, in acts of 2 March, 1889, ch. 382-25, Statutes U. S., 855, it has been held that, notwithstanding a contract between the shipper and carrier contained an agreement for a less sum than that of the published rates, the carrier had a right to demand and collect according to the published rate, and to withhold the goods till such amount was paid, and this though the shipper may not have known that the agreement was for a less rate than that allowed by law. *R. R. v. Mugg*, 202 U. S., 242; *R. R. v. Heffler*, 158 U. S., 98.

In *R. R. v. Mugg, supra*, the questions decided are thus stated by the reporter:

"1. One obtaining from a common carrier transportation of goods from one State to another at a rate specified in the bill of lading, less than the schedule rate published and approved and in force at the time, whether he does or does not know the rate is less than schedule rate, is not entitled to recover the goods, or damages for their detention, upon tendering less than the published charges.

"2. Whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the interstate commerce law, the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee become entitled to the goods, only by payment or tender of such amount."

It would seem from this and other similar cases, not that the contract of carriage was held void, but that the forbidden rate was set aside; and it may be that the carrier under the principle indicated might have demanded payment of a greater amount of freight, but there is nothing in these decisions, as we understand them, nor is there any recognized principle which would sustain the position that where there had been no *agreement* for a lesser rate, and when it appeared that the shipper had not knowingly obtained or received any advantage in the contract of shipment, that such shipper or the party aggrieved could not recover damages for negligent injury to his property on the part of the carrier.

It is the settled policy of this State that common carriers may not contract against loss or damage occasioned by their negligence; and it has been held by the Supreme Court of the United States that, unless and until there is some valid regulation by Congress or the Interstate Commerce Commission directly affecting the matter, a (253) State has the right to establish such a policy and enforce it in refernce to interstate shipments. *R. R. v. Hughes,* 191 U. S., 477. And, on the facts of this case, we are of opinion that thus far no such interfering stipulation has been shown, and the plaintiff's recovery must be sustained. *Latta v. R. R.,* 172 Fed., 850.

The charge of his Honor as to the burden of proof, excepted to by defendant, is in accord with several decisions of this Court on that subject. *Harper v. Express Co.,* 144 N. C., 639; *Meredith v. R. R.,* 137 N. C., 479; *Mitchell v. R. R.,* 124 N. C., 236.

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

No error.

BROWN, J., concurs in result.

Cited: *Hollowell v. R. R.,* 153 N. C., 21; *Harden v. R. R.,* 157 N. C., 247; *Mule Co. v. R. R.,* 160 N. C., 224; *Horse Exchange v. R. R.,* 171 N. C., 72.

V. O. PARKER v. RALEIGH SAVINGS BANK.

(Filed 31 March, 1910.)

Feigned Issues—State Bonds—Bank's Surplus—Taxation—Fraud—Corporation Commission—Procedure.

This cause, submitted on case agreed, was for damages alleged for refusal of defendant bank to fulfill its contract of purchase from the plaintiff of certain State's bonds issued under chapter 150, Laws 1909, the plaintiff having represented, as an inducement for the sale, that the bank could carry the bonds in its surplus without increasing the taxes on its stock in the hands of its shareholders: *Held*, (1) a "feigned issue" only was raised, upon which the courts will not pass, and the proper manner in which to have the question passed upon by the courts is through an assessment made by the Corporation Commission, as only in this manner will the State be represented to protect its own interests in the question of taxation; (2) that the allegation of fraud in inducing the sale rested upon the construction of a statute accessible to all parties, and as the defendant could investigate the matter, no real issue of fraud was presented.

WALKER, J., dissenting.

APPEAL from *O. H. Allen, J.*, at February Term, 1909, of WAKE.

Action heard upon an agreed statement of facts, substantially as follows: Plaintiff contracted to sell to the defendant ten bonds of (254) the State of North Carolina, par value $1,000 each, issued in pursuance of chapter 150, Public Laws 1909, for the price of $10,550.

The bank refused to take and pay the bonds, alleging that the plaintiff stated to the defendant at the time said agreement to purchase was entered into that the said bonds could be carried by the defendant as part of its surplus, and that the tax value of the shares of stock held by the shareholders of the defendant bank would not be increased by virtue of the defendant owning said bonds, and defendant stated to plaintiff at the time that it would purchase said bonds upon this representation of the plaintiff, and the said representation was a part of the inducement for the defendant to enter into said agreement to purchase said bonds and become part of the consideration for said agreement. This is admitted by plaintiff in the "case agreed."

In the answer of the defendant it is charged that such allegations were false and untrue, but there is no averment or finding which charges plaintiff with intentional deceit and fraud.

The plaintiff asks for $250 damages for breach of contract, the admitted difference between the market and contract price of the bonds. The Superior Court rendered the following judgment upon the "facts agreed": "The court being of the opinion that the holding of the bonds

as stated in the complaint would not increase the tax value of the shares of stock held by the stockholders, and the court being of the further opinion that an increase of the tax value of the shares of stock held by shareholders of the defendant company by virtue of defendant company holding said bonds as a part of its surplus, would be an illegal tax on said bonds and the income and coupons accruing thereon; it is therefore ordered and adjudged that the plaintiff recover of the defendant the sum of $250 and the cost of this action, to be taxed by the clerk."

From the judgment rendered the defendant appealed.

W. H. Pace for plaintiff.
Murray Allen for defendant.

BROWN, J. The object of this "friendly suit" is evidently to procure a contruction of section 4 of ch. 150, Laws of 1909, which is as follows: "The said bonds and coupons shall be exempt from all State, county or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other (255) corporation."

No one disputes the proposition that our State bonds are all exempt from direct or income taxation in the hands of an individual or corporation, but it is contended that when the Corporation Commission comes to determine the taxation value of a share of stock owned by a stockholder in a bank or other corporation, in case it finds that any portion of its surplus assets, over and above the amount of its capital stock, is invested in this particular issue of bonds, under the terms of the act, the commission must deduct them from such assets. It is contended that the words, "nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation," are not to be found in any other legislation authorizing the issue of bonds, and that the General Assembly inserted them in the act of 1909 for the purpose of creating a home market for the bonds and to largely enhance their value.

In view of the fact that there are several millions more of these bonds to be shortly issued, we would be glad to decide this important question now, but regret that we are unable to do so in the form presented.

With perfect respect and deference for the learned counsel, as well as for the parties, this is evidently a "suit made to order," arising not out of a real controversy between the parties litigant, but instituted solely for the purpose of obtaining the opinion of the Court upon a "feigned issue."

In *Blake v. Askew*, 76 N. C., 327, such an issue was presented to this Court to test the validity of State bonds. The Court dismissed the action as a feigned issue, holding that the State's interest could not be put in jeopardy by such a proceeding when the State was not represented by any of her agencies.

In this action both the interests of the State and of the stockholders of defendant bank are directly affected, and should not be passed upon in a feigned suit, when neither is represented.

The "false representations" set up by defendant in avoidance of the alleged contract constitute no false representation of a fact, but amount to nothing more than an expression of plaintiff's opinion upon what is a question of law. The only foundation for such opinion is the act of the General Assembly, which the bank officials could easily examine and form their own opinion.

(256) Under our laws the Corporation Commission is the official body whose duty it is first to pass on this question and to promulgate their decision so that all persons affected by it may learn of it.

According to our method of bank taxation, Laws 1909, the property of banking corporations (except real estate and articles of personalty, such as safes, furniture, and the like, is taxed through its shareholders by taxes levied upon its stock in the hands of its owners. The Corporation Commission is the agency of the State now charged with the duty of assessing the value of such shares and certifying it and the names of the owners to the different counties where they reside. Upon this assessed valuation the cashier, for convenience, remits the State tax on each share for the stockholder direct to the State Treasurer, and the stockholder pays the county and municipal taxes where he resides. Laws 1909, p. 703, sec. 33. The valuation of bank stock is based by the commission upon the estimated value of shares as reported by the officials of the bank, and also upon other sources of information pointed out in the statute.

If the Corporation Commission, when it comes to determine the value of the stock corporations, shall decide to include in the surplus such bonds of this issue as the corporation may own, and thereby increase the value of its shares of stock in the hands of its stockholders, they, as well as the bank, in their behalf may contest the matter in the courts of the State with the Corporation Commission by appeal under Rev., sec. 1074, or by injunction proceedings, as they may be advised. In such proceeding the interests of the State are represented by the commission and that of all its stockholders by the bank, as well as a shareholder in connection with it. As this is an important question, we do not doubt that the Corporation Commission will facilitate a speedy settlement of it.

This action is dismissed. Let each party pay half the costs, both of this and the Superior Court.

Dismissed.

WALKER, J., *dissenting:* While I always hesitate to disagree with my brethren, it seems so very plain to me that the question which the parties intended to raise in the case is clearly presented for decision, and that the case agreed has been submitted to us in good faith, that I am compelled to enter my dissent. The bonds were offered for sale upon the distinct understanding and agreement that they would be nontaxable, and this, it is expressly stated, was an inducement to the making of the contract of sale, and a part of the consideration. In other words, the parties have substantially agreed that the defendant would not have purchased the bonds if they are taxable under the laws of (257) this State—and for a very good reason, which is, that the supposed exemption from taxation related to the value of the bonds as commercial securities, and the price agreed to be paid was based upon the understanding of the parties, at the time of the sale, that they would be untaxable while held by the defendant, who did not buy them for the purpose of speculation or with the intention of reselling them, but as a permanent investment. How it can be said that this is a feigned issue —a mere fishing for the opinion of the Court, or "a case made to order"— I confess my inability to understand. Every term of the Court we pass upon questions of title, where the parties, at the time of making their contracts, know of the alleged defect in the title and make the contracts with a view of obtaining the opinion of this Court as to the validity of the title. In those cases they are unable to decide as to the law, as the parties are unable to do in this case, without the aid of this Court. The question involved in those cases may have related to the validity of a lien, as, for example, a lien for taxes assessed upon land. In order to determine whether the vendee should be required to take the land and pay the purchase money, would we hesitate to pass upon the question as to the validity of the tax, or its effect as a lien upon the land? Of course not. But it is said that this is an important matter, in which the State has a vital interest. Admit this to be true: the State is not bound by our decision, and, besides, we decide many cases here which may indirectly and vitally affect the interests of the State and also of individuals, but they cannot be said, for that reason, to be necessary, or even proper parties. They are affected by our decision only as a precedent, and not as an adjudication against them. Suppose the question presented in this case had been whether or not the bonds were valid, would we deny to the parties a hearing and a decision? It would seem that such a course would be contrary to all precedent, and the State

would no more be a necessary or proper party than would a person *non compos mentis,* who had executed a bond, be a necessary party in a suit strictly between third parties, if its validity, on account of his incapacity, were assailed. If we would decide a case as to the validity of the bonds, why not a case involving a question which affects their value, and was considered by the parties, according to the case agreed, in fixing the price? I express no opinion upon the merits of the case, but I do think that the parties are entitled to a decision from us upon the question they have stated in their case agreed.

Cited: *Kistler v. R. R.,* 164 N. C., 366; *S. c.,* 170 N. C., 667.

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(258)

IN RE THE WILL OF W. I. HERRING.

(Filed 31 March, 1910.)

1. Issues—Form and Number Submitted—Discretion of Court.

The number and form of issues is in the discretion of the court, and if every phase of the contention could have been and was presented under the issues submitted they will be sustained on appeal; and when the judge accordingly adds other issues tending to elucidate the case after it has been submitted, in addition to the usual issue, it is not error, but in the line of his duty. Revisal, sec, 614.

2. Wills—Witnesses—Signed—Presence of Testator.

It is not necessary to the validity of a will that the maker should sign his name thereto in the presence of the witnesses, and thus acknowledge his signature. This latter may be done by the testator's acts and conduct as well as by his words.

3. Same—Questions for Jury.

When there is evidence that the testator's attorney wrote the paper, probated as the last will and testament, submitted it to the testator, who approved it and sent the attorney to procure the witnesses, who soon after came and signed same as witnesses near the name of the testator appearing thereon, while it was upon a table near which the testator sat looking on, the attorney remarking at the time to the witnesses and to the testator, "I have brought the witnesses to the will," it is sufficient upon the question of acknowledgment to take the case to the jury.

4. Wills—Witnesses—Request—Attorney and Client—Agency.

When an attorney is sent out by the testator to procure witnesses to his will, who appear before the testator and sign it, it is not necessary to the validity of the will that the testator personally request the witnesses to sign, if the attorney, acting under the instruction of the testator, had so requested them previously to their appearing for the purpose.

5. Issues—No Evidence as to One—Instructions.

Upon the question of *devisavit vel non*, issues were properly submitted, (1) as to whether the testator signed the will according to law; (2) as to the mental capacity of the testator to make a will. There was a third issue as to fraud and undue influence, upon which there was no sufficient evidence, and a fourth issue as to whether the paper-writing, etc., was the last will and testament: *Held*, no error for the judge to charge that if the first two issues were answered "Yes," to answer the third issue "No," and then to answer the fourth issue "Yes."

6. Wills—Acknowledgment—In Hearing of Witness.

A prayer for instruction, in proceedings to *caveat* a will, that it was necessary to a valid acknowledgment of a will that each of the witnesses should hear it, is properly refused. Revisal, sec. 3113.

BROWN, J., concurring in result; WALKER, J., concurs in the concurring opinion.

APPEAL from *W. R. Allen, J.*, at June Term, 1909, of LENOIR. (259)

The facts are stated in the opinion.

Rouse & Land, Aycock & Winston, Rountree & Carr, and Wooten & Wooten for caveators.

Simmons, Ward & Allen, and Varser & Dawson, contra.

CLARK, C. J. This is an issue of *devisavit vel non*. The grounds alleged by the caveators, as set out in their brief, were non-execution, mental incapacity and undue influence. The court at first submitted one issue: "Is the paper-writing propounded by T. J. Herring and others, and every part thereof, the last will and testament of William I. Herring, deceased?"

After the case had been submitted to the jury the court of its own motion added the following three issues:

1. Was the paper-writing offered for probate as the last will and testament of W. I. Herring, signed and executed according to law?

2. If so, did the said Herring have the mental capacity to make a will?

3. If so, was the execution of said paper-writing procured by undue influence?

To the addition of these issues the caveators excepted.

It is settled by numerous and uniform decisions that "the number and form of issues rest in the discretion of the court, if every phase of the contention could have been and was presented." *Patterson v. Mills*, 121 N. C., 266; *Rittenhouse v. R. R.*, 120 N. C., 544; *Humphrey v. Church*, 109 N. C., 132; *Denmark v. R. R.*, 107 N. C., 185. In *Deaver v. Dea-*

ver, 137 N. C., 246, *Walker, J.,* thus sums up the result of our decisions: "It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy and each party has a fair opportunity to present his version of the facts and his view of the law, so that the case, as to all parties, can be tried on the merits. *Warehouse Co. v. Ozment,* 132 N. C., 839." This has been followed in numerous cases since, among them *Lance v. Rumbough,* 150 N. C., 25; *Bank v. Ins. Co., ib.,* 775. The issue first submitted is the usual one in such cases, but is not required by any statute or rule of practice, and the presiding judge was within the scope, not only of his authority, but of his duty, in submitting the additional issues, if he thought it would tend to make easier to the jury the elucidation of the facts. Rev., 614; *R. R. v. Stroud,* 132 N. C., 416; *Springs v. Scott, ib.,* 551.

(260) It was in evidence that G. E. Kornegay and W. D. Raynor subscribed their names as witnesses in the immediate presence of the testator and of each other, but that he did not sign it in their presence. His Honor properly instructed the jury that it was "Necessary that he should either sign his name in the presence of witnesses or should acknowledge his signature thereto in their presence. If from the evidence in this case you do not find that he signed it or did not acknowledge it in their presence, then you should find that the paper-writing is not the last will and testament of W. I. Herring. It is not necessary, however, that this acknowledgment be made in words. The maker of a will can make an acknowledgment of his signature by acts and conduct as well as by words, and if you find that there was such acknowledgment, that will be sufficient acknowledgment under the law. It must also be witnessed in the presence of the party making the will, and he must either see the witnesses sign it or he must be in a position to see them sign it, and to see if they are signing the paper-writing that he signed. If you find from the greater weight of the evidence in this case that witnesses were in his presence, and if you further find that he was in a position that he could see them sign it and know that they were signing the paper-writing which he had signed, that would be a sufficient signing in the presence of the party making the will. They must also sign as witnesses at his request. It is not necessary, however, that he should make the request himself. If he authorizes some one else to get witnesses, and ask them to sign, then the party that he sends out will act as agent, and a request made by said person would be the request of the party signing the will." This is a clear and accurate statement of the law applicable. *Burney v. Allen,* 125 N. C., 314.

G. E. Kornegay testified that he signed the paper-writing as a witness; that Mr. Isler came to his store and asked him to go to his law

office for the purpose of witnessing the will of Mr. W. I. Herring; that he went up to the office, and the other subscribing witness, Mr. Raynor, Mr. Herring and Mr. Isler, were present; that Mr. Herring acknowledged that he had signed the paper-writing, and he signed it in his presence; that Mr. Herring was just in front of him, across the table, and saw him sign.

Mr. W. D. Raynor testified that Mr. Isler came to him and asked him to go to his office to witness Mr. W. I. Herring's will; that he went there and found Mr. G. E. Kornegay there, Mr. Herring and Mr. Isler; that Mr. Herring was sitting in front of him, on the other side of the desk, and saw him when he signed the paper-writing as a witness; that Mr. Herring, Mr. Kornegay, Mr. Isler and himself were all present in the room at the time, but that, so far as he could remember, (261) nothing was said at that time as to what the paper was.

Mr. Isler testified that Mr. Herring came to him to write his will; that he took a memorandum of its provisions; that he wrote it; that Mr. Herring came again and took the paper-writing with him to examine it; that he afterwards brought it back and he said it was all right; that Mr. Herring asked him to get the witnesses, and he got Mr. Kornegay and Mr. Raynor to come to his office for that purpose; that after they came he said to them, and said to Mr. Herring, "I have brought witnesses to the will," and that Mr. Herring said, in the presence of Kornegay and Raynor, that it was his will.

His Honor arrayed the contentions of both parties and charged the law correctly, as above stated. The jury found in response to the first and second issues that the paper-writing was signed and executed according to law, and that Herring had mental capacity to make a will. His Honor further instructed the jury that if it should answer these two issues "Yes," they should answer the third issue "No." This was correct, for there was no evidence of undue influence in procuring the execution of the will fit to go to the jury. His Honor also correctly told the jury that if they answered the first and second issues "Yes," to answer the fourth or original issue "Yes," this being the result necessarily of the finding upon the other three issues.

The caveators insist strenuously that the court should have given their sixth prayer for instructions: "An acknowledgment, in order to be effective, must be in such a manner as to enable each of the witnesses to hear it, and, moreover, it must be actually heard by each of the witnesses, else it is no acknowledgment as to the one who does not hear it."

The next two exceptions are for a refusal to give two other prayers to same effect, with some variation in the language, but to the same purport, that the acknowledgement must be actually heard by both witnesses.

Our statute makes no such requirement. Rev., 3113. It simply provides that the will must be signed by the testator, or by some one in his presence and by his direction, "and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest of the said estate, except as hereinafter provided." There is no requirement that the testator shall sign in the presence of the witnesses nor acknowledge it in their presence. As his Honor told the jury, the acknowledgment need not be made in words, but the jury can find that there was an acknowledgment as an inference from his acts
(262) and words. Mr. Isler testified that he requested the witnesses to go to his office and sign this paper, acting for Mr. Herring, and he was corroborated by both witnesses. If the jury believed this evidence, the witnesses signed at the request of Mr. Herring and in his presence. There was not one scintilla of evidence that another paper had been surreptitiously substituted for the will before it was subscribed by the witnesses, or denying the genuineness of Herring's signature. It was not error to refuse the charge upon a supposition not sustained by any evidence. *In re Burns' Will,* 121 N. C., 336.

There are other exceptions, but they require no discussion. In the interesting supplementary brief filed by Mr. Rountree he demonstrates by citations from authorities upon the civil law and the common law, and, also, by reference to the Code of Napoleon, that the power to devise property by a last will and testament exists only by statute law, which must therefore be strictly followed, and that such right may at any time be modified or abrogated. This Court has heretofore expressed the same conclusion, *Hodges v. Lipscomb,* 128 N. C., 57.

No error.

BROWN, J., *concurring:* I assent fully to the opinion of the Court, but desire to express my views more at length upon the principal question relating to the sufficiency of the evidence as to the execution of the will. The will is attested by two witnesses, George E. Kornegay and W. D. Raynor, both of whom were examined on the trial.

There is no question made as to the sufficiency of Kornegay's evidence, who testified to every essential fact, and particularly to the actual acknowledgment in words by the testator of his signature to the will. But it is contended that according to the testimony of the other witness, Raynor, he did not see the testator sign, nor was there any acknowledgment of his signature. According to Raynor's evidence, there was no acknowledgment in words.

Assuming that every fact essential to be proven in order to establish the legal execution of a will must be testified to by both of the subscribing witnesses, if they are living and examined on the trial of an issue of

devisavit vel non, I think the requirements of the statute have been substantially met. I think that the sufficiency of the acknowledgment of execution made to the witnesses to the will does not depend upon the words used by the testator. If that were not true, a dumb person must always sign in their presence and could not acknowledge his own signature.

Following the ancient aphorism, that acts sometimes speak (263) louder than words, I think that the acknowledgment may be manifested by the conduct of the testator as well as by his language, and that anything which amounts in common understanding and fair construction to an acknowledgment that the instrument is his will or the signature is his signature, is sufficient to go to the jury as legal evidence of an acknowledgment, although the witness did not see the testator affix his name to the paper.

Of course, this is governed generally by local statutes, but our statute is framed upon the English statute of frauds, as are the statutes of many other States of this Union.

While this Court has long since declared that each witness must depose to the signing or acknowledgment and to every other material fact necessary to prove execution (*Elbeck v. Granbery,* 3 N. C., 233), it has not, so far as I can find, defined how an acknowledgment can be made other than by the words of the testator. It was said, in the above case, that if the paper lie at a distance on a table he may acknowledge it without seeing it, although, as subsequently held, he must be in a position to see the paper-writing itself at the time the witnesses affix their signatures to it. *Graham v. Graham,* 32 N. C., 219; *Burney v. Allen,* 125 N. C., 315.

In States, like ours, where the statute is similar to the statute of frauds, the decisions of the English courts are justly esteemed as authority, and they hold that an acknowledgment of a will may be manifested by the acts and conduct of the testator and the circumstances surrounding him at the time the witnesses attest the same, and that the express, verbal acknowledgment by the testator of a visibly apparent signature is unnecessary.

In *Blake v. Knight,* 7 Eng. Eccles. (3 Curt.), 515, it is held "that positive affirmative evidence, by the subscribing witnesses, of the fact of signing or the acknowledgment of the signature by the testator in their presence, is not absolutely essential to the validity of a will; that the court may presume due execution by a testator upon the circumstances." In *Keigwin v. Keigwin,* same volume of Reports, p. 519, *Sir Herbert Jenner Fust* says: "The question comes to this, whether this will has been duly executed according to the requisites of the statute. The deceased did produce this paper, having her signature affixed to it at the

time, to the two witnesses present at the same time, and the two witnesses did attest it in her presence. Was this a sufficient acknowledgment? I am clearly of opinion that it was. It is not necessary that the party should say in express terms, 'That is my signature'; it is suffi-
(264) cient if it clearly appears that the signature was existent on the will when she produced it to the witnesses, when they did, at her request, subscribe the will. On these circumstances I hold that this paper has been sufficiently executed." See, also, *Ellis v. Smith,* 1 Vesey, Jr., 11.

The English cases are numerous and sustain the position that acknowledgment of the testator's signature, existent on the will at time of attestation, may be inferred from circumstances. They are collected in 30 Am. and Eng., p. 589, note 7.

This rule is supported by reputable authority in this country. *Nickerson v. Buck,* 66 Mass., 332, in which it is held that an acknowledgment may be by acts as well as by words. The Court says: "But the adjudicated cases go further, and hold that the actual signature by the testator may be made known to the witness in other modes than by an express declaration to the witness that the will is his. Any act or declaration that carries by implication an averment of such fact is equally effectual."

In Illinois it is held that the statute does not require that acknowledgment that the instrument is his will be made by the testator in words or by means of language; any act which indicates the same thing with unmistakable certainty will answer as well. *Allison v. Allison,* 46 Ill., 61; *Turner v. Cook,* 36 Ind., 129; *Dewey v. Dewey,* 35 Am. Dec., 367; *Canada's Appeal,* 47 Conn., 461; *Hogan v. Grovenor,* 43 Am. Dec., 415. In this last case the Supreme Judicial Court of Massachusetts says: "The tendency of the later cases, both in England and this country, has been to give the words of the statute their simple meaning: that a signing by the witnesses, in the testator's presence, to a paper acknowledged by him, in some satisfactory manner, to be his, is a sufficient compliance with the terms of the statute. It meets its provisions, it identifies the paper executed, it shows it to be his."

Other American cases are cited in 30 Am. and Eng., p. 590.

There is one case only, so far as I can discover, which tends to support the contention of the caveators upon this proposition, and that is *Luper v. Werts,* 19 Oregon, 122, which holds that the acknowledgment cannot be inferred from the mere silence of the testator. I am not prepared to say that it always can. It should depend upon all the circumstances. But the force of that case is not only weakened by a very strong dissenting opinion, but the decision appears to be clearly based upon the Oregon Code, which defines a subscribing witness to be "one

who sees a writing executed, or *hears* it acknowledged, and at the request of the party thereupon signs his name as a witness." (265) Nevertheless, *Lord, J.,* dissenting, says, with great force: "When I see a man's name to a paper document, and he is present, and no one else except the scrivener, and I am there to witness it, and, when I do so, he looks on, but says nothing, is not his acquiesence, under the circumstances, an acknowledgment to me that the will and signature are his own?"

The opinion of the Court, nevertheless, recognizes the rule as I have stated it, that the acknowledgment may be manifested by acts and circumstances as well as words; but thinks the doctrine of inferential evidence has been extended too far by the Massachusetts Court.

In considering this question, it must be borne in mind that all the evidence of the circumstances surrounding the testator need not come exclusively from the attesting witnesses, although certain essential facts must.

In declaring what the attesting witnesses need not prove, *Lord Mansfield* said, in *Wyndham v. Chetwynd,* 1 Burr., 421: "Suppose the witnesses to be honest, how little need they know? They do not know the contents; they need not be together; they need not see the testator sign; if he acknowledges his hand it is sufficient; they need not know it is a will."

To which I may add that, under our law, they need not testify that they signed at the request of the testator. That is presumed when they sign in his presence a paper-writing which the testator has signed as his will and knows to be such.

The evidence in this case, other than Raynor's, if believed, proves conclusively that Mr. Isler had written the will at the testator's request and left it open on the desk by which testator was sitting and where he had evidently just signed it. Isler stepped out to get wtnesses to the will, and told Raynor why he wanted him. Raynor returned with Isler, and he and Kornegay signed as attesting witnesses. The signature of the testator, according to Raynor's evidence, was plainly visible to witnesses, both of whom signed their own names at end of attestation clause, immediately under and close to the signature of the testator, who at the very time was sitting by the desk plainly observing both the paper and the witnesses, perfectly conscious of what they were doing.

Raynor testifies that he signed "as a witness, as I understand, to his (Herring's) will." He states further, that "Mr. Herring saw us sign it." There cannot be a doubt that the testator knew that the two witnesses were attesting his will, which he had already signed. He not only was close by and saw them engaged in the act, but knew the

purpose of it. In fact, they were signing at his request, for where persons are requested to witness a will by one who has drafted such (266) will in testator's presence, and with his knowledge, as subscribing witnesses, they must be deemed to have done so at the testator's request. *Peck v. Cary,* 84 Am. Dec., 220, and note; *Allison v. Allison,* 92 Am. Dec., 239, note 1; Underhill on Wills, p. 262.

The primary reason for the presence of witnesses and their attestation in the presence of the testator is to prevent a fraud upon him, and to enable a witness to testify that the testator had put his signature upon the identical paper-writing to which the witness affixed his. Under the circumstances under which this will was executed and attested, and in the manner in which it was done, no fraud could well have been perpetrated.

Mr. Justice WALKER concurs in this opinion.

Cited: *Wilson v. Taylor,* 154 N. C., 215; *McLeod v. Jones,* 159 N. C., 76; *Ripley v. Armstrong, ib.,* 159; *Watson v. Hinson,* 162 N. C., 77; *In re Broach,* 172 N. C., 522.

D. A. McLEAN ET AL. v. J. A. LEITCH ET AL.

(Filed 31 March, 1910.)

Partition of Lands—Sale—Conversion—Deeds and Conveyances—Registration.

In a sale of lands in proceedings for partition, the conversion from realty to personalty does not take place until the land is sold and the sale confirmed by the court. Therefore, an unregistered deed made by some of the cotenants of their interest in the lands held in common, is not good as against a subsequently made and registered deed by the same grantors of the same interest, to another, after the decree of sale for partition, but before the sale was confirmed. Revisal, sec. 980.

APPEAL by I. P. and J. L. McLean, from *Lyon, J.,* at December Term, 1909, of ROBESON.

This was a motion in a special proceeding. Pending the proceeding and after order of sale, certain of the cotenants conveyed for value their several interests to A. D. McLean. He did not have his deeds recorded nor did he then become a party to the proceedings. The proceedings pended for several years thereafter, the order of sale was attempted to be executed, but no order of confirmation was made. Subsequently, some of the parties who had conveyed their interests to A. D. McLean, conveyed the same interests for value to I. P. and J. L.

McLean, who had their deeds recorded. Both purchasers were made parties to the proceedings, a resale was ordered and was executed, the report was confirmed, the purchase money was paid and deed made; and the contest is now over the fund to be distributed to the interest claimed by A. D. McLean and I. P. and J. L. McLean. His (267) Honor, on appeal, held that A. D. McLean was entitled to the fund, and gave judgment accordingly. I. P. and J. L. McLean excepted and appealed to this Court.

McNeill & McNeill for appellee.
B. F. McLean for appellants.

MANNING, J. The sole question presented by this appeal is whether realty, petitioned to be sold for partition by tenants in common, is converted into money when the order of sale is made, and passes as personalty, or whether it retains its character as realty until sale is actually made and the proceeds received. Section 2516, Rev., clearly provides that as to infants, married women and the classes therein mentioned, the money is realty and goes to the real representatives, and it has been so construed by this Court. *Hall v. Short,* 81 N. C., 273; *Dudley v. Winfield,* 45 N. C., 91; *Bateman v. Latham,* 56 N. C., 35; *Allison v. Robinson,* 78 N. C., 222. This rule rests upon the principle, that during disability neither the married woman, nor infant, nor lunatic, can exercise the right of election to take their respective interests as money, and therefore the proceeds will be held in their unconverted character as realty until such election can be legally made.

In determining the time when the interests of adults, not under any disability, are converted from realty to personalty, we have no statutory declaration or express decision of this Court. We think, however, as to them, the conversion takes place only when the land is sold and the sale confirmed by the court, and not when the decree of sale is made.

Up to the time of confirmation of the sale, the land remains realty and the several tenants in common must convey their interests as land and with the formalties of conveyances of real estate, that they may be binding and effective. Such conveyances, as all other conveyances of land, must be registered, and will be valid to pass title against subsequent purchasers for value only from the registration thereof. Sec. 980, Rev. In Cyc., 845, it is said: "No conversion takes place by virtue of proceedings in partiton before sale or allotment and acceptance of the purparts. Until then, the interests of the several owners retain all the qualities of real estate." In *Smith v. Smith,* 174 Ill., 52, the Court says: "When partition is among the heirs of a deceased ancestor, the

purpose of the sale is the distribution of the proceeds among the owners of the undivided interest in the land. Such proceeds, therefore, remain impressed with the character of real estate for the purpose of dstribution." To the same effect is *Jenkins v. Simms,*
(268) 45 Md., 532. In *Wentz' appeal,* 126 Pa. St., 541, that Court held:
"The money derived from a sale of lands in partition proceedings is never real estate, any more in law than in fact, but for certain purpose and within a certain limit it is to be treated as real estate; that purpose is to preserve the quality of the estate, so that it will vest in the persons who would have been entitled to it had it remained unconverted, and the limit is the first transmission." In Freeman on Cotenancy and Partition, sec. 464, the author says: "If pending a partition suit between cotenants, who do not hold with benefit of survivorship, one of them die, the action thereby becomes defective, and cannot properly proceed until the successors in interest of the deceased are brought before the court. By his death his heirs have become cotenants in his stead, and their rights as such cannot be litigated in their absence."

In 7 A. & E. Enc. (2 Ed.), p. 473, the writer says the decisions are conflicting as to the time of conversion, "some holding that the conversion dates from the order of sale, though there has been no sale; whereas other courts hold that there is no conversion before actual sale and compliance by the purchasers with the terms of sale."

As under the decisions of this Court (*Joyner v. Futrell,* 136 N. C., 301, where many cases are cited) the contract between the purchaser and the court, through its commissioner to sell, becomes a completed contract upon confirmation of the sale—which is the act of acceptance—we hold that the conversion as to parties *sui juris* then takes place and is complete, and the proceeds of the sale become, at that time, impressed as personalty, with the qualities of personalty.

Applying the conclusion we have reached to the present case, we think his Honor's ruling erroneous. The deeds to A. D. McLean not being registered before the deeds to I. P. and J. L. McLean were registered, they were not valid to pass the title as against these subsequent purchasers for value, and these conveyances having been made before conversion had taken place, the interests of the cotenants could pass only by conveyances executed as deeds of real estate and for the vendee, as a protection of his title under the statute, registration is necessary. His Honor should have held, therefore, that the appellants were entitled to the shares of the tenants in common, whose interests had been conveyed to them in preference to the appellee, A. D. McLean.

The judgment is

Reversed.

(269)

G. W. SUMRELL AND H. H. McCOY v. A. C. L. RAILROAD.

(Filed 31 March, 1910.)

1. Carriers of Goods—Bill of Lading—Presumption—Good Order.

A bill of lading given by the carrier for a shipment of goods raises a presumption that they were delivered for shipment in good order.

2. Penalty Statutes—Carriers of Goods—Refusal to Accept—Amount of Claim—Recovery.

In an action for the statutory penalty for failure of a carrier to pay damages within the time specified on a shipment of goods caused by its negligence, Revisal, sec. 2634, it is for the jury to say whether the amount recoverable is that for which the claim has been filed, when there is conflicting evidence.

APPEAL by defendant from *O. H. Allen, J.*, at November Term, 1909, of LENOIR.

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

E. R. Wooten for plaintiff.
Rouse & Land for defendant.

CLARK, C. J. This was an action begun before a justice of the peace to recover 98 cents for damages to goods shipped to plaintiffs over the defendant's road, together with the penalty of $50 given by Rev., 2634, for failure to adjust and pay the claim for such damages within sixty days after it was filed.

It was in evidence that plaintiff's claim for 98 cents damages was filed with the defendant 22 April, 1908, and was allowed and paid by it, but to another party, 8 May following. This party subsequently refunded the 98 cents to the defendant. The plaintiff not being paid, brought this action 15 April, 1909. The jury found the damages to be 98 cents, and the filing of the claim for that amount at the date stated and nonpayment to the plaintiff not being controverted, the court entered judgment for $50.98 as provided by Rev., 2634.

The court properly refused defendant's prayer for a nonsuit, and also to charge that there was no evidence that the goods were delivered in good order to the defendant. The bill of lading raised the presumption. *Mitchell v. R. R.*, 124 N. C., 239; *Mfg. Co. v. R. R.*, 128 N. C., 284. The bill of lading was filed by the plaintiff with its claim, and, being in the defendant's possession, it devolved upon it to introduce it in evidence, if desired. The plaintiff testified "98 cents was the damage to the olives, the whole case of olives." There was no direct evidence to contradict this. The defendant relied upon the fact

that the itemized bill from the vendors filed with the plaintiff's (270) claim for damages (which claim was for 98 cents) set out that the cost price of one dozen bottles olives in Norfolk was $2.15, with 10 per cent off, and plaintiff only claimed that six bottles were lost. The defendant therefore asked the court to charge, "If the jury believe the evidence, the value of the goods lost or damaged was 97 cents."

It does not appear who paid the freight, nor whether the bottles were all of the same size, nor whether the value at destination was the same as in Norfolk. The only direct testimony was that of the plaintiff, who testified that "98 cents was the damage to the olives, the whole case," and he relies, as corroboration, on the fact that he filed his claim for 98 cents, and that the defendant did not contest that being the correct amount, but paid the 98 cents to another party. Whether the damage was 98 cents or 97 cents was therefore for the jury, and his Honor correctly "left it to the jury to say, from all the evidence, what was the amount of the damages." The jury, after argument from both sides, and upon the evidence, found that it was 98 cents. This finding, being for the "full amount of the claim," entitles the plaintiff to recover the penalty, and we cannot say there was no evidence to support the finding.

This seems to be a hard case, but the plaintiff's counsel reminds us that the statute was passed on account of the large number of small claims of this kind which, while aggregating large sums, were each too small to be sued on, and hence usually went unpaid. We do not know the facts surrounding this case. Upon the issues found, the judgment was correct.

No error.

HICKSON LUMBER COMPANY ET AL. v. GAY LUMBER COMPANY.

(Filed 31 March, 1910.)

1. Corporation—Insolvency—Receivers—Fund—Costs—Lowest Lien.

The effect of taxing court cost and compensation of the receiver of an insolvent corporation against the fund is to tax the whole sum against the holder of the lowest lien, and to pay prior liens in full if the fund be sufficient.

2. Same—Appeal and Error—Former Appeal—Parties Bound.

When upon a former appeal from an order of the lower court prorating the cost among claimants to a fund in the hands of the receiver of an insolvent corporation, the Supreme Court reversed the order and taxed the cost against the fund, the present appellant, who did not appeal from the order of the lower court, and who holds the least priority of lien, is bound

by the decision in the former appeal, as therein he was virtually the appellee, the matter being between the litigants, and concerning them only.

APPEAL by plaintiffs from *Guion, J.,* at January Special (271) Term, 1910, of SAMPSON.

The facts are stated in the opinion of the Court.

N. J. Rouse and Rountree & Carr for plaintiffs.

E. M. Land, G. V. Cowper, and Simmons, Ward & Allen for receivers.

CLARK, C. J. At June Term, 1908, of LENOIR, *Neal,* J., made an order in this cause apportioning the costs and the compensation of the receiver by prorating the amount among all the claimants to the fund. On appeal, this was held to be an error, and that these amounts should be taxed against the fund. *Lumber Co. v. Lumber Co.,* 150 N. C., 281. The effect is to tax the whole sum against the holder of the lowest lien, and to pay the prior liens in full.

The appellant, the Hickson Lumber Company, which holds the lien of least priority, contends that as it did not appeal, the amount of the judgment against it at the June Term, 1908, cannot be affected. But the very nature of the exception in the former appeal called in question the correctness of prorating the costs and other expenses of this litigation, and the present appellant was therefore virtually the appellee in that appeal. It was not necessary, nor proper, that the receiver and those entitled to the other costs in the case should have appealed. *Bank v. Bank,* 127 N. C., 435; *Straus v. Loan Assn.,* 118 N. C., 563. They had a prior lien on the fund, and how the payment of the remainder of the fund should be apportioned was a matter between the litigants, and concerned them only.

The court below has properly adjudged that the payment of the costs and receiver's fees should come out of the fund, *i. e.,* be paid out of the sum coming to the lienholders of the lowest priority, and that as there has been overpayment to them, the deficiency shall be collected out of the refunding bond given by the appellant.

Affirmed.

(272)

THE AUDIT COMPANY v. J. A. TAYLOR.

(Filed 31 March, 1910.)

1. Contracts—Guaranty—Failure of Consideration—False Representations.

In an action to recover upon contract for the installing a system of accounts or bookkeeping for defendant's business, the answer alleged that the plaintiff guaranteed the system to be more economical and better than the one defendant had been using, which after a fair trial defendant found not to be as good or as economical, and this the defendant could not have previously ascertained: *Held,* answer sufficient, for its sets up a total want of consideration and a breach of guarantee; and the allegations of representations knowingly and falsely and fraudulently made are not necessary.

2. Same—Harmless Error.

A complete defense to an action upon contract being a want of consideration and a breach of guarantee, it is not error to plaintiff's prejudice for the court to impose on defendant the additional burden of proving that representations made by plaintiff to induce the contract were falsely and fraudulently made.

3. Judgments—Non Obstante—Plaintiff's Motion—Confession and Avoidance.

Plaintiff's motion for judgment *non obstante veredicto* is applicable only where the defense is in the nature of a plea of confession and avoidance, and the jury find the fact for the defendant, but in law it is an insufficient defense.

4. Contracts, Written—Failure of Consideration—Parol Evidence.

When the writing contains only a part of the contract, the other part may be shown by parol, when not within the statute of frauds.

APPEAL by plaintiff from *O. H. Allen, J.,* at October Term, 1909, of NEW HANOVER.

The facts are stated in the opinion of the Court.

Kellum & Loughlin for plaintiff.
Rountree & Carr for defendant.

CLARK, C. J. The plaintiff seeks to recover of the defendant the sum of $413.81 and interest, due under a contract for installing a system of accounts or bookkeeping for the wholesale grocery business of the defendant.

The plaintiff alleged the execution of the contract, the performance of the services thereunder, and the amount due. The defendant admitted the execution of the contract, and at the trial admitted that if anything was due it was the sum of $413.81; but he denied that anything was due, alleging that the contract was procured by the plaintiff

and entered into by defendant upon the distinct representation (273) that the proposed system of bookkeeping would be much more efficient and could be operated with no greater clerical force and more economically than the system the defendant was then using; that he did not know and could not know whether the proposed system would be as economical and efficient as it was represented, and that he entered into the contract in reliance upon the truth of the representations as to the economy and efficiency of the proposed system. Defendant alleges, further, that after giving the system a fair trial for about three months, he learned that it was more expensive and less efficient than his old system, and that he was compelled to discard the system entirely; and that he is advised that the contract is not binding because it was obtained by fraud or mistake, and the system did not come up to the representation or guarantee of plaintiff.

The last paragraph is the only reference made to fraud, and it is insufficient, as the plaintiff contends, to set up that defense, for it fails to allege that the representations were falsely and fraudulently made or that they were known by the plaintiff's agent to be false, or were made with reckless disregard of their truth or falsity, or that they were made with intent to deceive. *Cash Register Co. v. Townsend,* 137 N. C., 652.

The court charged the jury, among other things: "If the plaintiff assured the defendant that the system of bookkeeping which he proposed to install could be worked by defendant's then present office force, and with no greater expense, and that this representation was untrue in fact and falsely and fraudulently made, and that the defendant did not know that it was untrue, and had no means of ascertaining the truth until after the contract was made, and that if you further believe that the defendant gave the system a full and fair trial, and it could not be worked without additional expense, then plaintiff is not entitled to recover," to which the plaintiff excepted. The jury found in response to the issue that the defendant was not indebted to the plaintiff.

If the court had left out this charge the words "and falsely and fraudulently made," the instruction would have been correct. In adding those words, the court placed upon the defendant an unnecessary burden; but the plaintiff cannot complain of that.

The plaintiff relies upon *Cash Register Co. v. Townsend,* 137 N. C., 652, and properly insists that the answer is not a sufficient plea of fraud.

This is not the case of a sale of personal property. The answer (274) alleges a sufficient defense in setting up a total want of consideration and breach of guarantee, and the jury found the defense good. The plaintiff cannot complain that the jury further found, under

the charge, that the representations were "falsely and fraudulently made" over and above the other matters stated in the charge above, which amounted to an allegation of a total want of consideration and breach of warranty.

The court below properly overruled the motion for judgment *non obstante veredicto.* That is applicable only where the defense set up is in the nature of a plea of confession and avoidance, and the jury find the fact with the defendant, but in law it is an insufficient defense. *Cotton Mills v. Abernethy,* 115 N. C., 403. Here the writing contained only a part of the contract, and it was competent to show the other part by parol evidence. *Cumming v. Barber,* 99 N. C., 332; *Nissen v. Mining Co.,* 104 N. C., 309. The failure of consideration was necesarily shown by parol. *Jones v. Rhea,* 122 N. C., 721.

The controversy is chiefly over the facts set up by the answer, and the jury have found them in favor of the defendant.

No error.

Cited: Unitype Co. v. Ashcraft, 155 N. C., 68; *Robertson v. Halton,* 156 N. C., 220; *Palmer v. Lowder,* 167 N. C., 333.

JOHN UNDERWOOD v. GERMANIA LIFE INSURANCE COMPANY.

(Filed 31 March, 1910.)

1. Insurance—Principal and Agent—Loan to Agent—Principal's Liability—Consideration.

Checks of an insurance company signed by one agent, payable to another, and by him indorsed to one who knowingly advanced money, at the time, to the latter to enable him to remit to the company amount due it by him as such agent, may not be collected by suit of the indorsee against the company, there being a failure of consideration moving to the company.

2. Insurance—Principal and Agent—Scope of Authority—Evidence—Hearsay—Statement of Vice-President.

Hearsay evidence of a statement of a vice-president of an insurance company that its agent had authority to borrow money in its behalf is incompetent; and, not being within the usual scope of such agencies, it must be shown by direct evidence.

APPEAL by plaintiff from *Lyon, J.,* at October Term, 1909, of CUMBERLAND.

The facts are stated in the opinion of the Court.

Cook and Davis for plaintiff. (275)
Q. K. Nimocks and John W. Hinsdale for defendant.

CLARK, C. J. This is an action on two checks, for $500 each, drawn by the cashier of the Memphis agency of the defendant company in favor of R. B. Hall, its manager for North Carolina and Tennessee, and indorsed by him to the plaintiff. The plaintiff testified that Hall "told me he had to get off a balance to his life insurance company, and if I would arrange to let him have $1,000 he would return it to me." No other consideration was shown. The plaintiff was a local agent of defendant company at Fayetteville, N. C.

In brief, the manager of the defendant company, unable to remit the balance due by him to his company, borrowed $1,000 of the plaintiff, and afterwards indorsed to the plaintiff the company's check which he had caused a local agency to draw in his favor for the amount. If this was the transaction, there is no shadow of a consideration to the company for the two checks. There is no evidence that the company owed Hall the $1,000 for which these checks were drawn.

The loan was a personal debt of Hall, and the plaintiff knew the money was to be used to square Hall with his company, and he knew that Hall had no right to repay him with the company's check. His Honor properly nonsuited the plaintiff. The money, on plaintiff's own testimony, was not borrowed in the name or on the responsibility of the company, besides there is no evidence that it was within the scope of his agency to borrow money for the company, and certainly without express authority this was not within the function of an insurance agent. It was not error to reject hearsay evidence of the subsequent statement of a vice president of the company to prove such authority. If the agency had such unusual scope it should have been shown by direct evidence.

There is no evidence that any part of this $1,000 was ever sent the company, though if the money had been sent to the company by Hall to make good his balance this would not have created any indebtedness by the company to repay the plaintiff the money borrowed from him by Hall. What benefit could it be to the company to receive what Hall owed it, if thereby it became indebted to the plaintiff in that amount? There is no evidence that the company, if it received the money, knew that Hall had borrowed it of the plaintiff.

There is no evidence of ratification by the company and Hall had no authority to give the company's check for his individual liability. *Barnhardt v. Star Mills,* 123 N. C., 431; *Sprinkle v. Indemnity Co.,* 124 N. C., 410. The other exceptions require no discussion. (276)

The judgment of nonsuit is

Affirmed.

CORA E. WYATT AND L. R. WYATT v. W. S. WILSON AND A. H. MARTIN.

(Filed 31 March, 1910.)

Judgment, Tender of—Court Costs—Insufficiency of Tender.

In a justice's court judgment was rendered against two defendants, from which one only appealed, and, pending the appeal, tendered in cash as a satisfaction of the judgment as to himself a less sum than the amount of the justice's judgment, but more than that ultimately rendered in the Superior Court against him. Assuming that such an offer of compromise of this case under Revisal, sec. 860, can be made, it was not made in behalf of both defendants, not commensurate with plaintiff's right of judgment against both, and insufficient to tax plaintiff with cost in the Superior Court.

APPEAL by defendant Wilson from *W. R. Allen, J.*, at October Term, 1909, of WAKE.

The facts are stated in the opinion of the Court.

Holding & Bunn for plaintiffs.
Jones & Bailey for defendants.

WALKER, J. This action was brought in a court of a justice of the peace, by the plaintiffs against the defendants, W. S. Wilson and A. H. Martin, trading as the Wilson Lumber Company, to recover the sum of $117.85, which the plaintiffs allege was the balance due for rent of a house and lot. The justice, after hearing the case, rendered judgment in favor of the plaintiffs and against the defendants, W. S. Wilson and A. H. Martin, for the sum of $106.09, and the defendant W. S. Wilson appealed to the Superior Court and paid the justice's fees for the return of the appeal, but before said appeal was perfected the defendant W. S. Wilson, by his attorney, tendered in writing to the plaintiffs the sum of $100.25 in cash and the amount of the costs in the justice's court, which tender was offered in full settlement of the judgment recovered by plaintiffs against both the defendants. This tender the plaintiffs refused. The defendant A. H. Martin did not appeal from the judgment of the justice, and made no tender of any kind. The appeal taken by
(277) the defendant Wilson was duly docketed in the Superior Court and the action was tried, as against him, at October Term, 1909. The jury, under the evidence and the instructions of the judge, rendered a verdict for the plaintiffs upon the issue submitted to them, as to the amount of the indebtedness, for the sum of $90, with interest on the same from 1 January, 1908, which amount is, of course, less than the tender made by the defendant W. S. Wilson, as above stated. A. H. Martin did not appear in person, or by counsel, in the Superior Court, but the action

was tried against Wilson alone. After the jury had rendered their verdict the defendant W. S. Wilson, by his counsel, tendered a judgment in favor of the plaintiffs and against the defendant W. S. Wilson for the said amount of $90 and the costs which had accrued in the justice's court, but taxed the plaintiffs with the costs of the Superior Court. The plaintiffs objected to said judgment, and tendered a judgment for the amount of the verdict with the costs of both courts, and their judgment was signed by the presiding judge and entered on the record. The defendant W. S. Wilson excepted to said judgment and appealed to this Court.

Assuming that an offer of compromise can be made in a case of this kind, under Revisal, sec. 860, the tender must be of a judgment against all the defendants, and must be made in behalf of all of them, and this construction of the statute is strikingly illustrated by the facts of this case. If the plaintiffs had been required to accept the tender of judgment made by the defendant, they would have lost the difference between the amount of such tender and the amount of the judgment they had recovered against Martin, who did not appeal. The defendant Wilson did not tender a judgment at all, but so much money in cash, which was less than the judgment recovered in the justice's court. The tender was clearly not in accordance with the said section. It was said in *Williamson v. Canal Co.*, 84 N. C., 630, that "a plaintiff's right is to have judgment upon the submitted offer in the pending action, and consequently against all whom he has sued, and unless the offer is commensurate with this right, it is unavailing under the act." This case seems to be directly in point and fully answers the contention of the defendant W. S. Wilson, who has appealed from the judgment rendered in the court below.

No error.

(278)

BANK OF SAMPSON v. A. M. BARBREY ET AL.

(Filed 31 March, 1910.)

Contracts—Territorial Rights—Fraud—Vendor and Vendee—Third Persons.

The facts of this case being substantially the same as those in *Bank v. Hatcher*, 151 N. C., 359, excepting that the note for territorial rights for the sale of the commodity was made direct to the bank and not to the vendor, without sufficient evidence that the bank was interested in the sale, or was a copartner with the vendor, the decision in that case controls this appeal.

APPEAL from *Guion, J.*, at January Term, 1910, of SAMPSON.

Action on a note. The execution of the note dated 25 May, 1907, payable to plaintiff for $288, was admitted, and also payment of $144 on 12 September, 1907. The defendants pleaded a counterclaim. At close of all the evidence the court then sustained a motion to nonsuit defendants upon counterclaim, upon the ground that there was no sufficient evidence to support it. Defendants excepted, and appealed from verdict and judgment rendered.

Faison & Wright and F. R. Cooper for plaintiff.
George E. Butler and J. D. Kerr for defendants.

BROWN, J. We are of opinion that his Honor did not err in sustaining the motion to dismiss the counterclaim. This case is substantially the same as *Bank v. Hatcher,* 151 N. C., 359, except that there the note is payable directly to the bank and that the note is executed by a *feme covert* and her husband, and a specific charge is made upon her personal property, the title to which is assigned as security.

We find no sufficient evidence that the bank was a copartner or interested with Lowthrop in the sale of the territorial rights for the vending of the safety locks.

It further appears that defendants sold the locks all during the spring and summer of 1907, and made no complaint to Lowthrop, and voluntarily paid $144 on the note to the bank on 12 September, 1907.

It would seem that this is a stronger case for plaintiff than *Bank v. Hatcher.*

No error.

(279)

W. J. OLIVE AND G. L. COLLIER v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 31 March, 1910.)

1. Carriers of Freight—Penalty Statutes—Refusal to Accept Freight—Interpretation of Statutes.

Revisal, sec. 2631, imposing a penalty upon the carrier refusing to accept freight for shipment, provides that the tender be made at a regular station and that the articles tendered be of the nature and kind received by the carrier for transportation, and it is necessary in an action for the penalty to show that the character of the shipment and place of tender are such as fall within its provisions.

2. Pleadings—Demurrer—Measure of Damages.

A demurrer to the complaint cannot be sustained when under the allegations the plaintiff is entitled to some damages, but the measure of damages cannot be considered upon demurrer.

3. Pleadings — Demurrer — Penalty, Statutes — Some Damages — Interstate Shipments—Refusal to Accept.

The complaint in an action for damages alleged by failure of carrier to accept a tender of an interstate shipment, and for the penalty under Revisal, sec. 2631, sufficiently alleging a ground for the recovery of nominal damages at least, the question of whether the statutory penalty may be imposed upon an interstate shipment does not arise upon defendant's appeal from an order of the trial judge overruling a demurrer to the complaint defendant had interposed.

4. Pleadings—Demurrer Overruled—Costs—Procedure—Answer Over.

It is error to tax defendant with costs upon overruling its demurrer to the complaint, when there is no suggestion of its being frivolous. In such case the judgment should be that defendant answer over.

APPEAL from *Lyon, J.*, at October Term, 1909, of CUMBERLAND.

Action to recover penalty of the defendant carrier for refusal to receive, for shipment, lumber tendered by the plaintiffs to defendant's agent at Wade, N. C., for shipment to Henderson-Jarrett Company at Norfolk, Va., and refusing to issue a bill of lading for the same, after due demand by the plaintiffs, and for damages suffered in consequence of such refusal.

The cause coming on to be heard on demurrer, the demurrer was overruled, and defendant appealed.

Q. K. Nimocks for plaintiff. (280)
Rose & Rose for defendant.

BROWN, J. 1. The allegations of the complaint could be made a little more definite as to the exact place where the tender of the lumber was made, but in their present form we think they state a cause of action which, if established, would entitle plaintiffs to recover something.

It is manifest from an examination of section 2631 of the Revisal, under which this action is brought, that the exact place of tender is very material in determining the liability of the carrier. Under the language of the statute the carrier is required to receive at *"a regular station"* only "all articles of the nature and kind received by such company for transportation." The carrier is not required to receive them when tendered elsewhere, except in the case of loaded cars (loaded by the shipper), which may be tendered "at a sidetrack or any warehouse connected with the railroad by a siding."

Of course, the plaintiffs cannot recover, on this complaint, for a failure to furnish cars under section 2634 of the Revisal, as they do not set out any allegations of fact coming within the terms of that section, or base their claim upon it.

The gravamen of their complaint and the cause of action, as stated, is that they tendered to defendant at Wade, N. C., a certain quantity of loose lumber for shipment to Henderson-Jarrett Company, Norfolk, Va., which the defendant wrongfully and unlawfully refused to receive and issue a bill of lading for. We infer from this that Wade, N. C., is a regular station of the defendant and that loose lumber (not loaded by the shipper in cars) is an article of the nature and kind usually received by railroads for transportation. But these facts can be best determined upon the trial.

2. The question of the measure of damage cannot be considered upon demurrer. If the allegations of the complaint be sustained the plaintiffs will be entitled to recover some damage, if only nominal. The true measure of damage can best be determined when all the facts are before the court.

3. Whether this transaction comes within the purview of the interstate commerce law, so as to relieve the defendant from a penalty for refusal to receive the lumber for shipment to Norfolk, Va., need not be discussed. In any event, the plaintiffs would be entitled to recover their actual damages, whether they could recover the penalty or not. But the writer regards the question as settled by this Court in the recent case of *Lumber Co. v. R. R.*, 151 N. C., 23.

We notice in the judgment that the demurrer is overruled and
(281) the defendant taxed with all the costs. There being no contention that the demurrer is frivolous, the judgment should have been that the defendant answer over.

As modified, the judgment is

Affirmed.

Cited: Tilley v. R. R., 162 N. C., 39.

W. M. MERRITT v. ATLANTIC COAST LINE RAILROAD.

(Filed 31 March, 1910.)

Penalty Statutes—Interpretation—Railroads—"Jim Crow Car"—Separate Accommodations—Direction of Conductor.

When a railroad company has fully and in good faith complied with the statute requiring it to furnish equal and separate accommodations on its train for the white and colored races, no penalties thereunder may be recovered by reason of the conductor merely directing a few white passengers to take the coach set apart for the colored people, and under evidence establishing these facts defendant's motion for nonsuit should be granted. Revisal, secs. 2619, 2321, 2622.

CLARK, C. J., dissenting.

MERRITT *v.* R. R.

APPEAL from *Guion, J.*, at January Term, 1910, of SAMPSON.

Action to recover a penalty for violation of what is commonly called the Jim Crow car law, embodied in Revisal of 1905, secs. 2619 to 2622, inclusive. The following is the evidence of the plaintiff:

"On Wednesday morning, 29 December, 1908, we went to Ivanhoe, a station on defendant's railroad. There were four of us, all white, and we bought tickets at Ivanhoe for Tomahawk, the nearest station to our homes. We paid 25 cents for each ticket, and the distance was about ten miles. When the train came we started towards the steps of the white war. We got on steps of white car and started to go in white coach, and the conductor told us to go into the other car. We went in and found a few colored folks, and they told us we were in the wrong car. We then went out and started to go into the white coach, but the conductor told us to go back into the colored car. There was ample room for us in the white coach, but when the conductor told us to go into the other car we went. He didn't use any threats or do anything to make us go in, except to say, 'Go in that car,' pointing to the car for colored people with his hand. He did not use any force."

J. H. Boney testified for plaintiff: "I was with Merrit. All of us had tickets. We started to go up white steps, and conductor said, 'Go on in the other car.' We then went into the colored car, and some negroes in there told us we were in the wrong car, and we started (282) out to go into the white coach, when the conductor waved his hand and said, 'Go on back in the other car.' We went back. When the conductor came to take up our tickets I asked him why he put us in the colored car, and he said, 'You want to keep your baggage with you, don't you?' I said I usually kept it. My baggage was rafting gear, axe, etc., in a tow sack. There was plenty of room in the white car, and there was plenty of room in the colored car. The railroad had provided separate cars for the two races, but we are white men, and the conductor ordered us to go into the colored car. He did not cuss or abuse us, and did nothing except to tell us to go into the car for the colored race. There was a coach for the whites with plenty of room, but the conductor told us to ride in the colored car."

The plaintiff here rested, and the defendant moved for judgment as of nonsuit, under the Hinsdale Act. Motion overruled, and defendant excepted.

From a verdict and judgment for the plaintiff the defendant appealed.

No counsel for plaintiff.

F. R. Cooper for defendant.

BROWN, J., after stating the case: We are of opinion that the plaintiff is not entitled to recover the penalty denounced by section 2622 of the Revisal for failure to provide separate cars.

Where the carrier has obeyed the law and provided separate cars for the white and colored passengers which afford equal accommodations, no statutory penalty is incurred if the individual passenger is directed by a train hand or conductor into the wrong car.

This is manifest from the language of the statutes. Omitting superfluities, section 2619 reads as follows: "All railroad companies shall provide separate but equal accommodations for the white and colored races on all trains carrying passengers.

"Such accommodations may be furnished by railroad companies either by separate passenger cars or by compartments in passenger cars, which shall be provided by the railroad under the supervision and direction of the Corporation Commission."

Section 2320 provides that the commission may exempt certain roads and trains. Section 2321 provides when the two races may be put in the same coach, and section 2622 imposes a penalty for failing to provide separate cars.

Upon the testimony of the plaintiff it appears that the defend-
(283) ant had complied fully and in good faith with the statutes cited, and furnished equal and separate accommodations on its train for the white and colored races.

Assuming, as contended by plaintiff, that the conductor erred in showing plaintiff into the colored car, because he had his rafting gear with him, that does not alter the admitted fact that so far as the carrier is concerned it had complied in good faith with the law and provided separate cars and equal accomodations for the two races. That being so, no statutory penalty is incurred.

That our construction is right is manifest from that portion of the law which provides that the separate cars and accommodations, for failure to supply which the penalty is given, must be furnished by the carrier under the direction and supervision of the Corporation Commission.

As said by the Federal Court, the equipment is the required thing, the failure to furnish which brings on the penalty, and not the management of the equipment by the employees. *U. S. v. R. R.*, 156 Fed., 183. That was an action brought by the Government for the penalty imposed by the safety-appliance act of 2 March, 1893. The Circuit Court held that the penalties were incurred by a failure to furnish the appliances, and not because improperly managed by the company's employees after being furnished.

The motion to nonsuit is sustained.

Reversed and dismissed.

CLARK, C. J., *dissenting:* It is the inherent power of the people of this State to declare their public policy through enactments of the Legislature, unless that body is restrained by some provision of the Constitution of the State or of the United States. That is not the case with the requirement of separate cars for the two races, for such legislation, when it requires, as our statute does (Rev., 2619), "equal accommodations" for both races, has been held constitutional by both the State and Federal courts. *Plessy v. Ferguson,* 163 U. S., 537; *R. R. v. Kentucky,* 179 U. S., 388. The sole power and duty of the courts, therefore, is to so construe the law as to effectuate the intention of the legislature.

The object of this statute was to provide separate accommodations for *all* white men, not for *some* white men. It is beyond controversy that on this occasion such accommodations were not "provided" for these four white men, but were denied to them. If there had been only one white man thus humiliated by being forced to ride, against his will, in the car "provided" for the other race, the statute was disregarded and the penalty incurred. The inmates of the colored car also had their rights violated by being forced to allow four white men to (284) ride in that car contrary to law, and against their objection.

The bag of rafting gear should have been put in the baggage car. If it was not proper to admit it into the white car where these four men had a right to ride, it was far more improper to have it put in the colored car where these men were prohibited by the law to ride, for the statute requires "equal accommodations," and if the tackle was not proper for one car it was not proper for the other.

The conductor is in complete charge of the train. For the time being he is the *Alter Ego* of the company, its only visible and, indeed, sole representative. The company, it seems, did provide a car for some white men that day. But it did not provide for these four white men, when, through its representative, its conductor, it refused to let them ride therein and forced them to ride among the members of the other race, in the car which should have admitted only members of that race. The discrimination against them was all the more cruel when all other white men had a car provided for them. "Providing" a car for other white men was no benefit to these four white men, nor a compliance with the law, so far as they were concerned.

The statute is a delusion if the conductor can, acting for the company, exclude any white men he thinks proper and put them in the colored car. If he can, at will, require white men to ride in the colored car, he can at will permit colored men to ride in the white car. It would be equally as good a defense in such case to say, as in this, that there was a separate car "provided" for each race. If this is "providing" a car for each race, then the company, acting through its conductor, is supreme, and not the

statute. But if the statute confers rights, the conductor cannot thus suspend or nullify it.

Whatever the company may have provided for other white men that day, it certainly did not provide room in the white car for these four white men, and thereby it incurred the penalty provided by the statute.

These were men in the humbler walks of life and laborers. But the statute is meant as much, if not more, for them than for others better dressed, perhaps, whom an arbitrary conductor would hardly dare, or might not be able, to force to ride with the colored people. The evidence is that these white men tried to go into the white car where there was plenty of room, but the conductor ordered them into the other car. They had to obey. The colored men objected (as they had a right (285) to do) to these white men riding in that car. They then again started into the white car and the conductor ordered them "to go back" and ride among the negroes. They refrained from any difficulty with him and have appealed to the courts of their State.

The conductor having denied them the right given them by the statute, they have asked that the courts, in this case, shall decide, once for all, that the guarantee to all white men, however humble, of the right to ride on the train among those of their own race, shall be enforced.

If the conductor can deny that right to these men and compel them to ride among negroes, any other conductor can arbitrarily compel any other white men at any other time to do the same. A law which depends for its suspension, or operation, upon the arbitrary will or humor of an individual is a nullity. This certainly was not the intent of the Legislature in passing this statute.

The provision that such cars shall be furnished "under the direction and supervision of the Corporation Commission" is merely a repetition of the general law putting all matters concerning railroads, steamboats and telegraph and telephone companies under their general direction and supervision. It was never meant thereby that the Corporation Commission was empowered to repeal, suspend or set aside any express requirement, such as this, enjoined upon common carriers by a statute, and enforcible through the courts by a penalty. If they had exempted this road under Rev., 2620, the burden of proving the exemption was on the defendant, and there was no evidence to show it, nor is it even alleged. The statute was set aside by the defendant, through its conductor, and not by the Corporation Commission.

The penalty for violation of this requirement is given by Rev., 2622, to "*any passenger . . . who has been furnished accommodations on such railroad train or steamboat, . . . with a person of a different race,* in violation of law." The plaintiff has brought himself squarely within both the spirit and terms of the statute, and he is entitled to

recover, both on his own account and as a protection to all other white men who otherwise will be absolutely subject to the arbitrary conduct of any conductor who may choose to order them to ride among the negroes, as the conductor here did.

Judge Guion properly refused to nonsuit the plaintiff. The issue, submitted without objection, was, "Did the defendant fail and refuse to furnish accommodation to the plaintiff in a compartment or car set apart and intended for the whites, as alleged in the com- (286) plaint?"

The jury having answered "Yes," the judge rendered judgment for the penalty of $100, as provided by Rev., 2622.

In my judgment, it is not lawful in North Carolina for a railroad company, through its conductor, to compel white men to ride in the car provided for the colored race, especially under the facts of this case, when both the white men and the negroes objected to it and there was plenty of room in the car for whites. The only ground intimated is that they were laborers with a bag of tools; but the bag of tools, if objectionable, should have been sent to the baggage car, without humiliating the men by compelling them to ride with the negroes.

W. P. HARDY v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 6 April, 1910.)

1. Insurance, Life—Insurable Interest—Uncle.

The relationship of uncle and nephew does not of itself create an insurable interest of one in the life of the other.

2. Insurance, Life—Insurable Interest—Valid at Inception—Assignment—Valid.

A policy of life insurance taken by the insurant on his own life for the benefit of himself, or his estate generally, the policy being in good faith and valid at its inception, may, with the assent of the company, be assigned to one not having an insurable interest in the life of the insured when the assignment is made in good faith, and not as a mere cloak or cover for a wagering transaction.

APPEAL from *W. R. Allen, J.*, at Fall Term, 1910, of LENOIR.

Heard on demurrer. From the complaint it appeared:

"2. That on or about 19 October, 1904, Parrott M. Hardy, the uncle of the plaintiff, insured his life in the defendant company, and the said defendant company, in consideration of the stipulations set out in its contract of insurance, herein mentioned, did issue to the said Parrott M.

Hardy three certain policies on his life, in the sum of $1,000 each, each being made payable to the executors, administrators or assigns of the said Parrott M. Hardy, and the said policies being numbers 62845, 62846 and 63215, which policies are herewith deposited in court with this complaint.

"3. That on 31 October, 1904, the said Parrott M. Hardy duly (287) transferred and assigned two of the above named policies of insurance, being Nos. 62845 and 62846, to the plaintiff, which said transfers were made at the request and desire of said Parrott M. Hardy, who was assured by the defendant's agent that such assignments under the existing facts were valid and binding, and which assignments were made under the direction and with the assent and approval of the defendant company.

"4. That on 19 December, 1904, the said Parrott M. Hardy duly assigned and transferred the policy of insurance, being No. 63215, above mentioned, to the plaintiff, which said transfer was made at the request and desire of the said Parrott M. Hardy, who was assured by the defendant's agent that such assignment, under the existing facts, was valid and binding, and which assignment was made under the direction and with the assent and approval of the defendant company.

"5. That on 8 April, 1908, the said Parrott M. Hardy died, and soon thereafter proper proofs of his death were furnished to the defendant company.

"6. That at the time of the issuing of the above-mentioned policies the plaintiff knew nothing about the transactions and was in no way connected with the same, but at the said time, as well as at the time of the transfer hereinbefore mentioned, and until the death of the said Parrott M. Hardy, the plaintiff had a valuable and insurable interest in the life of the said Parrott M. Hardy, in that not only did the relationship of uncle and nephew exist between them, but also there was actually a deep affection between them, and a mutual understanding that each should call on the other in time of need or distress, all of which was actually done; and especially did the said Parrott M. Hardy look to and rely upon the plaintiff for at least twelve years immediately preceding his death, to aid and assist him in a pecuniary way, the relationship of debtor and creditor having existed between them in a large extent continuously during said time. And the said plaintiff having during said time run risk and hazard in his business, in order to be of continual assistance and help to the said Parrott M. Hardy, his uncle. That further, in the time of sickness and distress of the said Parrott M. Hardy, and especially during the last years of his life, he looked to the plaintiff for help and attention, which, owing to the relationship herein set out, was continuously administered by the plaintiff.

"7. That the defendant is now due the plaintiff, upon the said policies, the sum of $3,000 and interest on the same, for which demand has been duly made and payment refused by the defendant."

By leave of court, T. W. Mewborn, as administrator of Parrott M. Hardy, the insured, was allowed to interplead, and filed a (288) petition claiming the amount due on the policies. This petition admitted that the policies were taken out by Parrott M. Hardy, deceased; that they were valid at their inception, and had been assigned to plaintiff; but averred that plaintiff, as assignee, should not be allowed recovery on the policies, for the reason that the assignee, at the time of assignment made, had no insurable interest in the life of the insured.

The company demurred to the complaint, and later also to the petition, on the ground that at the time of the alleged assignment the plaintiff had no insurable interest in the life of the insured; the relationship between them being only that of uncle and nephew, and the additional facts set forth in item 6 of the complaint not creating such insurable interest; that the attempted assignment, therefore, had the effect of avoiding the policy *in toto*, and that no recovery thereon could be had in favor of either the plaintiff or petitioner.

There was judgment overruling the demurrer, and the company excepted and appealed.

G. V. Cowper and J. Paul Frizzelle for plaintiff.
Rouse & Land and W. C. Munroe for defendant.
Loftin & Varser for interpleader.

HOKE, J., after stating the case: It is very generally held that the relationship of uncle and nephew does not of itself create an insurable interest in favor of either. *Corson, exr. of McLean,* 113 Pa. St., 438; *Singleton v. Ins. Co.,* 66 Mo., 63; *Dood Co. v. Green, guardian,* 131 Ga., 568. And we are not called on to determine whether the additional facts set forth in section 6 of the complaint would bring about such an interest, for the reason that, on the facts as they appear, we are of opinion that if the assignment is otherwise valid, plaintiff has a right to recover the proceeds of the policies, whether at the time of the assignment he had an insurable interest in the life of the deceased or not.

It is accepted doctrine here, and elsewhere, that in order to a valid policy of life insurance there must have existed an insurable interest at the time the contract is entered into, but the question whether such a policy, valid at its inception, can be assigned to one who has no insurable interest, has been very much discussed in the courts, and on this there is some conflict in the cases. We consider it, however, as established by the great weight of authority that where an insurant makes a contract with

a company, taking out a policy on his own life for the benefit of himself or for his estate generally, or for the benefit of another, the
(289) policy being in good faith and valid at its inception, the same may, with the assent of the company, be assigned to one not having an insurable interest in the life of the insured; provided this assignment is in good faith, and not a mere cloak or cover for a wagering transaction.

Decided intimation in favor of this general principle was given by this Court in the recent case of *Pollock v. Household of Ruth,* 150 N. C., 211, and the position will be found sustained by a large number of authoritative and well-considered decisions and by text-writers of approved excellence. *Ins. Co. v. Armstrong,* 117 U. S., 591; *Ins. Co. v. Schafer,* 94 U. S., 457; *Crosswell v. Association,* 52 S. C., 103; *Rylander v. Allen,* 125 Ga., 206; annotated in 5 A. & E. Anno Cases, 355; *Murphey v. Redd,* 64 Mississippi, 614; *Brown v. Ins. Co.,* 172 Mass., 498; *Ins. Co. v. Allen,* 138 Mass., 24; *Steinback v. Diepenbrock,* 158 N. Y., 24; *Chamberlain v. Butler,* 61 Neb., 730; *Moore v. Guarantee Fund,* 178 Ill., 202; *Prudential Co. v. Liersch,* 122 Mich., 436; 1 Cooley Ins., 262 *et seq.;* Vance on Ins., 1, 140 *et seq.*

To quote from some of the cases referred to, in *Steinback v. Diepenbrock, supra,* it was held: "That one having no insurable interest in the life of another may acquire by assignment a valid policy upon his life and enforce it to the full amount."

And in *Murphey v. Redd, supra:* "The holder of a valid policy of insurance on his own life, payable to himself or his legal representatives, may assign the same for a valuable consideration, as he may any other chose in action, if there is nothing in the terms of the policy to prevent the assignment, and the assignee or purchaser of such policy, transferred according to its terms, is entitled to the proceeds of the same when due, notwithstanding he may have no insurable interest in the life of the insured.'

In several cases, where the opinion apparently upholds the contrary view, it will be found that the cause was correctly decided and sustainable on the ground that the policy, though taken out in the name of the insured, was procured in pursuance of a scheme and purpose to assign to one having no insurable interest, and that the proposed assignee was cognizant of the arrangement and took part in it. This was true in the case of *Warnock v. Davis,* 104 U. S., 775, and also in *Cammack v. Lewis,* 94 U. S., 643. In both of these cases the assignees were parties to the arrangement by which the policies were procured and assigned, and having no insurable interest in the life of the insured, the facts disclosed, as far as the assignments were concerned, a clear case
(290) of wagering contract on the duration of a human life, forbidden

by the law, and the assignments were not allowed to stand. Accordingly, we find the same high court, in *Ins. Co. v. Armstrong, supra,* under a different state of facts, deciding the general principle:

"That a policy of life insurance, without restrictive words, is assignable by the assured for a valuable consideration equally with any other chose in action, where the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies, and payment thereof may be enforced for the benefit of the assignee, and, under the procedure of many States, in his name."

Undoubtedly, however, there are decisions which directly hold that a life insurance policy, though valid at its inception, may not be assigned to persons having no insurable interest in the life of the insured; and North Carolina has been referred to as upholding this view both in textbooks and in decisions of other courts. If this is a correct interpretation of our cases on this subject, we would not hesitate to hold that they were not well decided; but, while some of them certainly give color to this view, we think that a more careful consideration of our decisions will disclose that in all of them, where the contract was declared void or set aside, it appeared that the assignment of the policy to one having no insurable interest was made in pursuance of a preconceived purpose, and that the assignee had suggested the arrangement or been a party to it.

In *Hinton v. Ins. Co.,* 135 N. C., 314, this was expressly made the basis of the decision. In *Powell v. Dewey,* 123 N. C., 103—and this is the case which more nearly justifies the statement that the courts of our State have decided against assignments of this character—it appears, we think, by fair intendment, that the partner and assignee having no insurable interest was cognizant of the scheme and took part in it. In that case the insured and the assignee were partners and associates in the insurance business, "and without any averment or claim of any indebtedness on the part of insured, or that he was to furnish any labor, skilled or otherwise, as his contribution in lieu of money, procured a policy for the benefit of his copartner, and immediately assigned the same to such copartner, the assignee paying all premiums thereon." And the judge, in delivering the opinion, states as the *ratio decidendi:* "In the case before us, at the very time the policy was issued in which the life of the plaintiff was insured, there was an assignment of the policy to the beneficiary, who paid the first and all the premiums."

Here, as stated, we think it clearly appears that the taking out of the policy and its assignment was a part of one and the same (291) transaction, and the Court holding that one partner, without more, had no insurable interest in the life of the other, declared the entire policy void. True, the opinion may be somewhat misleading in giving too much weight to the payment of the "first and all the premiums,"

apparently making this fact determinative, whereas, it is only evidential on the question of good faith (*Rylander v. Allen,* 125 Ga., 206, *supra*), but the decision was made to rest on the fact that this was a transaction between these two insurance agents, in which they both took part, and that the taking out of the policy and the assignment, as stated, was one and the same transaction.

In *College v. Ins. Co.,* 113 N. C., 244, the assignee was one of the contracting parties, and the policy taken out for its benefit was clearly a wagering policy. And so in *Burbage v. Windley,* 108 N. C., 357, the contract of insurance was made directly with the company by one having no insurable interest in the life of the insured, and was against public policy. In *Albert v. Ins. Co.,* 122 N. C., 92, also referred to and to some extent relied upon by defendant, the decision was in favor of the validity of a policy taken out by an insurant in favor of one having no insurable interest, and the case is not an authority in favor of defendant's position.

In his learned and well-considered opinion in *Crosswell v. Ins. Co.,* 52 S. C., *supra,* the present Chief Justice of that State, speaking to the suggestion sometimes made in support of the view that these assignments are necessarily invalid, "That the same reasons which condemn a policy procured by one without an insurable interest in the life of an insured, should also condemn an assignment to one without such interest," quotes with approval from May on Insurance, as follows:

"On this point we quote from May on Insurance (Ed. 1891), sec. 398A, which is in brackets, showing that it is new matter: 'Indeed, the doctrine that the assignment of a policy to one without interest in the life is as objectionable as the taking out of a policy without interest, does not seem good sense. If this be so, it is difficult to understand how the designation of a beneficiary outside of those having an insurable interest in the life can be upheld. There seems to be a clear distinction between cases in which the policy is procured by the insured *bona fide* of his own motion, and cases in which it is procured by another. It is a very different thing to allow a man to create voluntarily an interest in his termination, and to allow some one else to do so at their will. The true line is the activity and responsibility of the assured, and
(292) not the interest of the person entitled to the funds. It is well established that a man may take out a policy on his own life payable to any person he pleases, and it is drawing a distinction without a difference to hold that he cannot take out a policy and afterwards transfer its benefits. An assignment by the beneficiary, or by an assignee, unless with the consent of the "life," is, however, a very different matter, and involves what seems to be the real evil that the law is blunderingly seeking to exclude, viz., the obtaining by B of insurance on the life of A, in contradistinction to its obtainment by A for B's benefit.'"

And in Vance on Insurance, p. 140 *et seq.,* the rule is thus stated: "That on principle, and according to the clear weight of authority, an assignment of a life policy to one having no insurable interest therein is perfectly valid, if made in good faith, and not as a cover for fraudulent speculation in life."

And, referring to the opinions of *Warnock v. Davis,* 104 U. S., 775, and *Cammack v. Lewis,* 82 U. S., 643, and to the subject generally, the author says: "These confusing influences have further been aided and abetted by a catch phrase, which, however, does not state the issue fairly, to the effect that the law will not allow a person to procure by assignment, insurance that he could not procure directly. A fair statement of the issue is found in the postulate that the law will allow the insured to designate a beneficiary under the policy as well by assignment as by original nomination.

"The true principle governing the question may be derived from the statement of some generally accepted rules of law:

"(1) A person insuring his own life may designate any person whatever as beneficiary, irrespective of insurable interest in that beneficiary.

"(2) The law requires an insurable interest only at the inception of the policy, as evidence of good faith. The presence of such interest at any subsequent period is wholly immaterial.

"(3) Life insurance, though based on the theory of indemnity at its inception, is not a contract of indemnity, but chiefly of investment. As a chose in action it has at any time after its issue a recognized value, termed the 'reserve value.'

"Hence we conclude that a policy of life insurance, validly issued to one having an insurable interest, becomes in his hands a valuable chose in action, which should be assignable as any other property right, unless such assignment be opposed to some clear rule of public policy."

This, we think, correctly states the true doctrine, and applied to the facts admitted fully justifies the court below in overruling (293) defendant's dmeurrer, and the judgment to that effect is

Affirmed.

Cited: *S. c.,* 154 N. C., 430; *Johnson v. Ins. Co.,* 157 N. C., 108.

JOHN L. BRIDGERS v. THE FIRST NATIONAL BANK ET ALS.

(Filed 6 April, 1910.)

1. Corporations—"Voting Trusts"—Public Policy—Void.

A "voting-trust" agreement which, under certain conditions respecting the sale of stock, giving the trustees option of purchase at the book value, etc., provides for the transfer of the controlling vote of the shares of stock in a National bank to its president, vice president and cashier, for a term of fifteen years, in order to control the management of the bank for that period, is held void as against the public policy of this State, there being no controlling decisions of the United States courts on the subject.

2. Corporations—"National Banks"—Trusts and Trustees—Officers—Proxies—Void.

A "voting trust" of a majority stock vote in the shares of a National banking corporation, naming the president, vice president, and cashier as trustees, is directly violative of the provisions of the United States Revised Statutes, sec. 5144, prohibiting these officers to vote as proxies; and, also, of Revisal, sec. 1184, relating to the election of officers by the stockholders present in person or by proxy, and that no proxy may be voted more that three years from its date.

BROWN, J., dissenting.

APPEAL from *Cooke, J.*, heard at chambers, in VANCE, 8 October, 1909, by consent, in an action instituted in EDGECOMBE.

On motion his Honor continued the restraining order and enjoined the defendants from putting the agreement hereinafter stated into effect, or taking any action thereunder. It was admitted that the First National Bank of Tarboro was duly organized under the National banking act, and was conducting a general banking business as authorized by law; that plaintiff is a stockholder in the bank; that the defendant Holderness is president, Johnson vice president and Pennington cashier of the bank; that the bank was organized in the fall of 1906, and the above named have been its officers since its organization; that the stock in the bank is held by many persons, distributed among the business men of Tarboro; that its business has been well managed and the bank (294) has been prosperous; that on 2 March, 1909, certain Stockholders of the bank, among them the defendants, anticipating that one Henry Clark Bridgers was attempting to acquire the control of the stock in the bank, entered into the following agreement:

Memorandum of an agreement made this 2 March, 1909, between certain stockholders of the First National Bank of Tarboro, hereinafter specifically named and designated, and George A. Holderness, C. A. Johnson and Ed. Pennington, trutees and attorneys with power:

"Whereas the First National Bank of Tarboro, a National bank organized under the banking laws of the United States of America, is engaged in conducting and carrying on the business of a National bank at Tarboro, N. C.; and

"Whereas the management, direction and control of said institution has at all times to this date been satisfactory to the undersigned and in conformity with the laws of the United States and State of North Carolina; and

"Whereas, we, the following, represent and own the number of shares in bank, certificate number or numbers, which are set opposite our names, viz. (reciting names, certificate numbers, and numbers of shares of the subscribers, amounting to 269 shares out of a total of 500);

"Whereas we and each of us desire to have for a period of fifteen (15) years from and after the date of this instrument the continuance of the conditions above set out, and to assure ourselves and each other that these conditions and this *régime* will not be disturbed or affected by the act of any one of us, except as hereinafter provided for; and

"Whereas, in order to effect our purpose here and guarantee each to the other good faith in the performance of the conditions and agreement hereof, we and each of us have agreed to transfer our respective shares of stock to George A. Holderness, C. A. Johnson and Ed. Pennington, trustees named above, for the purposes and with the objects and intents herein declared:

"Now, therefore, this agreement witnesseth: That we (reciting names, certificate numbers and numbers of shares held by each subscriber) *do hereby sell, set over, assign and pledge* our respective shares of stock as named and described above to the said George A. Holderness, C. A. Johnson and Ed. Pennington, and their successors, on this special trust and for the uses following, to wit:

"First. The said trustees herein named are hereby given and clothed with the full power and authority during and for the term of fifteen (15) years next succeeding, upon the execution and delivery of this agreement, to vote said shares and certificates of stock at all stockholders' meetings, and for that purpose and to that end we (295) and each of us do hereby appoint, name and designate the said George A. Holderness, C. A. Johnson and Ed. Pennington, and their successors, our true and lawful attorneys, for us and in our names during said period, to vote said stock and fully represent us in all meetings, whether regular or called, of the stockholders, giving and granting unto our said attorneys full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done

in and about the premises, as fully to all intents and purposes as we might or could do if personally present.

"Second. In the event that any of the stockholders hereto signing shall desire to pledge his stock as collateral for a loan or to sell and assign the same absolutely, then and in that event we do hereby bind ourselves and agree to give and do hereby give to said trustees above named and appointed, and to their successors, *the right, option and privilege, if they shall so elect and desire,* to sell for us and in our names and to transfer upon the books of the company the certificate or certificates of stock held by us, to such purchaser or purchasers as they or their successors shall furnish or procure: *Provided, always,* that the price by said trustees to be had and obtained for said certificate of stock shall be the book value of the same at the time said sale, pledge or transfer is atempted to be made, said trustees agreeing to take same at book value. For that purpose and to that end we do further appoint said trustees and their successors for a like period of fifteen (15) years our lawful attorneys, for us and in our names, to sell, transfer upon the books and deliver our said stock, receive for our use and benefit the price thereof, and to do all other acts and things in the premises that may be necessary to fully and legally effectuate and carry out the purpose hereof.

"Third. Contemporaneously with the signing, sealing and delivery of these presents the several shares of stock subscribed above and hereby transferred are to be assigned and transferred in blank, according to form on the back of each certificate or certificates, and delivered into the custody of said trustees, who, at the time that the said stock is delivered to them, shall execute and deliver to the persons transferring and surrendering the same, receipts showing the serial number, certificate and number of shares so transferred and delivered to them by each person.

"Fourth. If a vacancy shall occur during the term of fifteen (15) years herein fixed in the board or number of trustees herein named, either by death, resignation or the removal from the State of (296) either one of the three named, then the trustee or trustees remaining shall have and they are hereby clothed with full power and authority to fill the vacancy or vacancies so caused, by appointing in the stead and place of the trustees or trustee so dying, resigning or removing the other trustees or trustee to succeed to the rights, powers, trusts and responsibilities herein given, imposed and declared in favor of the said Holderness, Johnson and Pennington, and such successor or successors are hereby given like power with the original trustees herein named, and will hold the shares of stock hereby transferred in like plight and condition as do the three original trustees herein named.

"Fifth. That this agreement shall be binding and obligatory upon each and every of the subscribers hereto, and the said stock hereby undertaken to be transferred and delivered to the trustees shall remain in their custody and possession under the conditions and for the purpose herein declared for a period of fifteen (15) years from and after the date of this instrument: *Provided, nevertheless,* that the said agreement may be earlier rescinded and made nugatory by the unamious vote and agreement of the several signers thereof.

"In witness whereof, the above-named stockholders have hereunto set their hands and affixed their several seals, this the day and year written above." (Signed under seal.)

"We do hereby accept the certificates of stock transferred to us, upon the trusts, terms and provisions set forth in the above paper-writing.

"GEO. A. HOLDERNESS,
"C. A. JOHNSON,
"ED. PENNINGTON,
"Trustees and Attorneys in Fact."

It is further admitted that the trustees executed to each of the subscribers to said agreement a receipt or certificate in the following words:

"Received of.....Certificate No.....for.....shares of stock in the First National Bank of Tarboro, the same being assigned, transferred and delivered to us and held by us, under and according to the terms and provisions of an agreement made the second day of March, 1909, between certain of the stockholders of said bank and the undersigned. This the.....of March, 1909."

The plaintiff alleged that the "said agreement is in violation of his rights and the rights of the other stockholders, and is in law void and of no effect, in that it seeks, in advance of the meeting of the stockholders, to fix the control of the stock of the bank, so that no argument, reason or persuasion on the part of the minority stockholders can or shall have any effect in any of the meetings of said stockholders," (297) etc.

The defendants allege the following as the intent, purpose and justification of said agreement: "4. That the only object and purpose of the said paper-writing were, first, as long as the stock represented in and by said paper-writing remained the property of him who signed the agreement, to hold together enough of the stock to protect the bank and the stockholders thereof against injurious, menacing and sinister designs of the said H. C. Bridgers, and to assure the continued prosperity, welfare and success of the institution; and, second, that whenever any owner of any share of said stock should desire to pledge the same as collateral for

a loan, or to sell and assign the same absolutely, then to give to the trustees and attorneys named and appointed, and to their successors, the right, option and privilege to sell for said stockholder and in his name to transfer upon the books of the bank, the certificate or certificates of stock held by him to such purchaser or purchasers as said trustees and attorneys, or their successors, should furnish and procure, with the express provision, always, that the price by said trustees to be had and obtained for said certificates of stock should be the book value of the trustees agreeing to take the stock at its book value.

"In respect of its first primary object of the agreement, these defendants say that each and every one who signed the said agreement, at the time of signing the same, were fully informed and knew, and these defendants knew, that the effect of the said agreement, so far as it attempted to clothe the trustees named with the power to vote the stock at corporate meetings, was but a simple voting pool, the legal effect of which was to empower said trustees to vote the shares of stock deposited with them at all meetings of the stockholders of the said bank, only when the beneficial owner thereof should fail to attend and demand the right to vote the same in person, it being perfectly understood at the time that the trustees named in said paper, at any meeting at which any subcriber to said paper should be present, if the stock of such subscriber were not voted personally, it should be voted by the trustees as said stockholder desired and directed, and that only in the event of the failure of said stockholder to attend a meeting and vote in person, or to attend the meeting and direct the trustees how to vote, should the trustee vote said stock according to their judgment and opinion. And these defendants solemly aver that all of the parties to said agreement were so informed
(298) and so understood the same, before subscribing their names thereto, and subscribed the same expressly upon such agreement.

"In respect to the second object sought to be accomplished, to wit, that of giving a primary right of option to said trustees, these defendants say recognizing the fact that so long as the owner of a share of stock remained its owner, he had the legal right to vote it in person, if he so elected; but anticipating that a contingency might arise which would compel some such owner to part with the stock, either by sale or by hypothecation, the said stockholders signing the said contract solemnly agreed one with another, that because the life and success of the bank and the interest of the small stockholders therein were imperiled by the persistent attempt on the part of the said H. C. Bridgers to acquire control, in the event any one of them found it neccessary to sell his or her holding, gave to the trustees named, acting for their associates, a first right of purchase of said stock. In order to safeguard the rights and interests of him or her who might be impelled by necessity to part with said stock,

it was, on the other hand, pledged by the trustees, acting for their associates, that such stockholder should receive for his or her stock not only its market value, but its book value, which these defendants allege is, under normal conditions, always a few points in advance of the market value."

The defendants appealed from the order of the judge making the injunction perpetual against the defendants.

Aycock & Winston for plaintiff.

F. S. Spruill, H. A. Gilliam, W. W. Clark and L. V. Bassett for defendants.

MANNING, J. The defendants' counsel frankly concede that the judge below was correct in his ruling, unless we now modify the doctrine announced by this Court in *Harvey v. Imp. Co.*, 118 N. C., 693; *Bridgers v. Staton*, 150 N. C., 216; *Sheppard v. Power Co.*, 150 N. C., 776. We have, therefore, reëxamined the question presented with great care, and have reached the conclusion that the principles controlling the decision of those cases above cited are wise, salutary and make for the better management of corporate bodies.

The "voting trust" agreement presented in the present case is in contravention of a wise public policy, opposed, in our opinion, to a proper construction of the Federal statutes governing the management of National banks, and is invalid.

In the absence of a decision of the Supreme Court of the United States which would be controlling upon us, we are constrained to (299) determine the validity of the agreement by the principles heretofore declared by this Court and which we find to be in accord with the well-considered opinions of other courts, and with a proper construction of the Federal statutes.

This agreement confers upon the trustees and their successors the uncontrolled power of management of the bank for fifteen years; the unrestricted power of filling vacancies in their number; it accomplishes the complete separation of the legal and equitable ownership of the stock; it confers an irrevocable grant of representation by proxy for the term; its sole consideration is the mutual promises of the subscribers; it is uncoupled with any interest; and by it, the subscribing stockholders, owning a majority of the stock of the bank, strip themselves of their power to vote and to participate in the annual meetings of the stockholders, at which directors are elected, and to formulate and determine the policy of the bank. Those who are attempted to be entrusted with these large powers are the president, vice president, and cashier—persons forbidden by section 4155, Rev. Stat. U. S., to act as proxies, and the

avowed purpose, to quote the words of the agreement, is that "we and each of us desire to have, for a period of fifteen years from and after the date of this instrument, the continuance of the conditions above set out, and to assure ourselves and each other that these conditions and this *régime* will not be disturbed or affected by the act of any of us, except as hereinafter provided" (to wit, unanimous consent). The surrender of their duties by the stockholders to their proxies is complete. No limitation is placed upon the trustees named in selecting other trustees to fill any vacancy that may occur, no stipulation that the subscribers to the agreement shall be consulted, no power reserved in them to be used except by unanimous consent. "The power is absolute in the trustees to do as they see fit, and any instructions from the majority of stockholders would be useless."

In *Warren v. Pim,* 66 N. J. Eq., 353, *Judge Pitney,* in a well-reasoned and elaborate opinion, considers these voting-trust agreements in every point of view. At p. 378 he says: "I base my view that an irrevocable voting trust, or any other irrevocable grant (uncoupled with an interest) assuming to confer upon the donee the power to vote at corporate elections for the choice of directors, is unlawful and void: first, upon the plain letter of our general corporation act (P. L. of 1896, p. 277), and, secondly, upon the reason, spirit and manifest policy of the act."

(300) The provisions of the New Jersey statute, cited by the learned judge as controlling, are the same as those of our statute, to wit, that the directors are to be chosen annually by the stockholders, and that each stockholder shall be entitled to one vote, in person or by proxy, for each share of stock held by him, but no proxy shall be voted on after three years from its date. Rev., sec. 1184.

The learned judge proceeds further: "When it says an absent stockholder may vote by proxy, it means that no substitute for an absent stockholder, other than his proxy, may be admitted to vote in his stead. A proxy, *ex vi termini,* is revocable unless coupled with an interest. A proxy is presumably voicing the judgment and will of his principal. An irrevocable assignment of the voting power or, what amounts to the same thing, an act that irrevocably delegates the voting power to one who has no interest in the stock, upon trust that he will vote according to his own judgment, discretion and will, is an attempt to constitute a substitute voter who is not actuated by any interest in the welfare of the company. The difference is fundamental." Again, he says: "There may be room for dispute as to how unimportant may be the duties of a *bona fide* trustee with respect to the other property, in order that the right to vote in the management of the property may be annexed to the trust; but there is, in my mind, no doubt that the right to vote cannot be annexed to a trust which holds only the power of voting. An appur-

tenant right cannot be appurtenant to itself alone; an incidental power cannot be incidental to itself alone. Such a status is to me as unthinkable as a human voice without a human being, as a lever without a fulcrum; and, of course, to say that the assignment of the mere voting power 'in trust' passes to the trustee, by implication, such interest in the stock as will support the voting power, is the same as to say that the power may be appurtenant to itself alone." In accord with these views is the opinion of the Supreme Court of Georgia in *Morell v. Hoge,* 130 Ga., 625; 16 L. R. A. (N. S.), 1136.

The National banking act contains similar provisions. Indeed, in prescribing the qualifications of directors this act goes even further than our own statutes. Sections 5146 and 5147, Rev. Stat. U. S., prescribe that a director must be the owner in good faith of at least ten shares of stock, and the same shall not be in any way pledged or hypothecated, and that three-fourths of the directors must have resided at least one year in the State wherein the bank is located, and must be residents therein during their continuance in office. The evident purpose of this enactment is stated in *Bank v. Hawkins,* 174 U. S., 364. (301)

The views of this Court, as expressed in the three cases cited above, are supported by the *Shepaug Voting Trust Cases,* 60 Conn., 553.

In *Foll's Appeal,* 91 Pa. St., 434, the Court said: "A National bank is a *quasi*-public institution. While it is the property of its stockholders, and its profits inure to their benefit, it was nevertheless intended by the law creating it that it should be for the public accommodation. It furnishes a place, supposed to be safe, in which the general public may deposit their moneys and where they can obtain temporary loans upon giving the proper security, in the exercise of its equitable power." So the Court refused, "for reasons of public policy, to decree specific performance of a contract to sell certain shares of stock of a bank where such shares were sought for to control the bank, and were being purchased by borrowed money." We can see, therefore, less justification for these voting-trust agreements where the purpose is to obtain the control of the majority of the stock by a banking institution.

It is urged upon us that this voting-trust agreement ought to be sustained, because it was intended to prevent the control of a majority of the stock of the bank from passing into the hands of a stockholder who, to many of the stockholders, seems to be *persona non grata,* and who is buying up the stock and paying for it much more than its market or even book value. It is clear that the control of the stock cannot be acquired by this person unless some of the subscribers to the present agreement are willing to sell their stock to him; some, it seems, have done so; and this agreement prevents the transfer of the absolute and unconditional title. We are, by this argument, asked to sustain this agreement to pre-

vent a man who has invested a large sum of money in the purchase of this stock, who has that direct interest in the success of the bank which an investment of his own money necessarily creates, and who shall be denied the full use of his property by being deprived of an incident or privilege inseparably connected with it; and this to be done in favor of three trustees whose only interest in the stock of the other subscribers is to vote it at the annual or special meetings of the stockholders—to perform a trust uncoupled with an interest. While it may be, in exceptional cases, that some good may be accomplished by such agreements, yet, in our opinion, the general effect is vicious and in contravention of a sound public policy.

It cannot be, nor is it intended to be, denied that those stock-
(302) holders, be they few or many, owning the majority of the stock of a corporation, can agree, after full consideration, to maintain a certain business policy of the corporation or a certain management, and in giving the right of voting by proxy, our statute recognizes this; to accomplish this, they can give proxies that can last for three years; but these proxies are revocable at the will of the principal, and they cannot be made irrevocable, and the sale of the stock is itself a revocation of the proxy.

While the agreement presented, certainly, in the largest measure, expresses the confidence of the subscribers in the judgment, capacity and integrity of the three trustees named, we are constrained to hold the agreement contrary to public policy and void. There was no error in the order appealed from, and the judgment is

Affirmed.

BROWN, J., *dissenting:* I admit that the decision in the case of *Sheppard v. Power Co.*, to which I assented, is controlling here except in respect of section 2 of the agreement; but subsequent investigation and reflection have convinced me that the principle there enunciated should be somewhat modified. I do not think this Court should adhere to a cast-iron rule regardless of conditions, which will deprive the stockholders of a private corporation of the only effectual remedy which will prevent the control of their property from falling into the hands of a single individual, to be used, possibly, to further his own purposes. In saying this I mean no reflection upon the gentleman who is charged with attempting to monopolize the defendant bank. I know him and believe him to be a young man of integrity and of unusual energy and ability. It is the principle of the thing that influences my judgement. In my opinion, it is the worst possible policy to deny the stockholders, who have invested their money in private corporations, such as banks and manu-

facturing enterprises, the right to guard their property by "stockholders' agreements" such as the one now before us, from the often blighting effect of one-man power.

We have a recent illustration of this in the case of a great New York capitalist, who wrecked several money institutions he absolutely controlled, and is now repenting at leisure in a Federal penitentiary while stockholders and depositors are bewailing their losses.

Although there is nothing in this record casting a suspicion upon the ulterior motives and purposes of the person seeking control of the bank, yet the facts sworn to in the answer and affidavits disclose that the mere rumor of his purposes has had a most harmful effect upon (303) its business and prosperity.

The defendant bank, according to those statements, has been remarkably well conducted by the officers selected by the stockholders and who are the trustees named in this agreement. It has paid regularly dividends with steadily increasing surplus and undivided profits and carried a quarter of a million as deposits.

The salaries paid to its president, Mr. Holderness, and to other officials were extremely modest and under their watchful and judicious management the bank has obtained extraordinary success.

About the first of February, 1909, H. C. Bridgers, son of the plaintiff above named, who, it is alleged by the defendants, is the real party in interest, directing and financing this fight, began to acquire the stock of the defendant bank for the purpose of securing absolute control. The defendants aver that the book value as well as the market value of stock at that time was about $108 per share. At the very beginning of his campaign to acquire a majority of the stock, Bridgers offered and paid from $150 to $160 per share for the stock. Its purchase was quietly made—that is, made through another. Gradually he increased his price, until at length he was paying $500 per share for stock worth in the market by actual book value only $108.

This was all very well for those stockholders who were fortunate enough to sell, but subsequent averments of fact show how it has destroyed the shares of the other stockholders.

The defendants allege and offer to prove that the majority stockholders, believing that the object of Mr. Bridgers was injurious, and realizing the menace to them and to their fellows, who had gone into the enterprise at their solicitation, if he should acquire control under such conditions, sought to devise some method by which to avert what they honestly believed to be an impending calamity to the bank. Therefore, on 2 March, 1909, these men, actuated, as they solemnly avow, solely by a desire to protect the interests of the stockholders, minority as well as majority, against what they believed to have been the injurious and

hostile designs of Bridgers upon the bank, and actuated by no other motives or purposes, entered into the contract, which is now sought to be annulled. This contract was executed by a majority of the stockholders and those signing it owned from two to seventy shares each.

In justification of such protective measures and as evidence of their good faith and honest purposes in entering into it, the defendants allege and offer to prove that H. C. Bridgers has bought what he contends is a controlling interest in the stock of the bank, and that
(304) the mere circulation of the rumor that he controls the institution has affected the public confidence that the deposits have been withdrawn until they amount now to only about $120,000. The bank has lost customers, and the remaining stock has declined in value until there is no market for it. These defendants further aver that this decline in deposits and loss of customers did not begin for several months after said H. C. Bridgers began his crusade against the bank, because of the confidence inspired by the act of the majority in making the agreement hereinafter set out, nor did it begin until it was currently claimed by Bridgers that he had acquired a majority of the stock in spite of said agreement.

These allegations of the answer, supported by affidavits, are not denied by replication or counter affidavits.

The agreement, which is set out in the opinion of the Court, is declared to be void upon its face and the defendants are enjoined from executing it.

This decision is ruinous to the minority stockholder, and leaves him to the tender mercies of one man. It is not in furtherance of, but makes against the soundest principles of public policy in placing a monoply of power in the hands of one stockholder and depriving the others of their only effectual method of preventing it. This, in my opinion, is exceedingly detrimental to the banking, manufacturing and other business interests of the State, which very largely take the form of corporate association.

No prudent person will care to invest his means or deposit his money in a financial institution dominated wholly by the will of one man who elects himself without anybody's help.

It is much the wiser policy to commit the management to three persons, as in this instance, selected by the majority of the stockholders because of their proved capacity. Suppose some large capitalist should secure absolute control of all the banks of Raleigh, can any one doubt that the effect would be very injurious to the minority stockholders and highly detrimental to the true interests of the city?

Yet by its decision this Court has destroyed the only means by which such a calamity could be averted should it be attempted. Unless

stockholders are bound by some such agreement as this, entered into for a good purpose and in common interest, the temptation of a fancy price is generally too strong to be resisted.

The decision in *Sheppard v. Power Co.* is based upon the theory that all such voting agreements, whether accompanied by transfer of stock certificates of trustees or not, are void *per se* solely because they are contrary to public policy. (305)

In making no exceptions or qualifications, I think the decision is too broad; is not based upon a sound principle, and is contrary to the best and weightiest authority.

1. I am of opinion that such agreements among stockholders of a private corporation are not *per se* void or against public policy, but that their validity should be determined by the propriety and justness of the ultimate purpose which is sought to be accomplished. This is now the generally accepted view, as will be seen by consulting the Am. and Eng. Ency., vol. 29, p. 1077, and cases there cited.

These agreements, accompanied by deposits of stock certificates with trustees, is the usual method of placing the control of a corporation in the hands of persons selected by the majority of stockholders and of preventing absorption by one individual. They have given rise to much litigation, and the decisions as to their legality are numerous. I will not undertake to review them, as it has been most thoroughly done by Mr. Cook, who states his conclusions as follows: "The above decisions seem to lead to the conclusion that a deposit of certificates of stock with trustees for a specified period of time, either with or without a transfer of the same to trustees, is legal, and is not in violation of the usual statute against restraints on the alienation of personal property; and is not opposed to public policy as a restraint upon trade; and is not an implied fraud upon stockholders who are not allowed to participate; and is not an illegal separation of the voting power from the stock; provided always, that no actual fraud is involved in the transaction. In other words, such a pooling of stock is not illegal in itself, but, like all contracts, may be illegal if actual fraud is involved." 2 Cook on Corp., pp. 1722-1723 (6 Ed.)

In 10 Cyc., 341, Judge Thompson, in his article on corporations, in discussing this question, says: "It seems that the legality of such arrangements will be determined by the design of those entering into them and the purpose they were intended to subserve. They are not necessarily illegal."

And in an elaborate monographic note to *Morell v. Hoge,* 16 L. R. A. (N. S.), 1136, in which this question is exhaustively treated, the editor, summarizing the result of his investigation, says: "The practical question, then, is whether an agreement in this form is *per se* void, as con-

trary to public policy. . . . Probably the prevailing tendency is toward the view that such an agreement is not *per se* void as against public policy; in other words, that the agreement cannot be declared void irrespective of the propriety of the ultimate purpose to be accomplished, simply because it seeks to accomplish that purpose by
(306) severing the voting power of the stock from the beneficial ownership thereof."

The author reviews a great number of adjudicated cases which fully sustain his views. I call attention to only a few.

In *White v. Tire Co.,* 52 N. J. Eq., 178 (1893), it was decided that "A voting trust for a period of ten years, formed for a proper purpose in compliance with a contract made at the time of the organization of the corporation, pursuant to which all the shares were transferred to a trustee under an agreement that he should vote the same for directors in such a manner that the holder of the majority interest should name a minority of the directors, was valid and enforcible so long only as the parties retained their original interests and no other rights intervened."

And practically to the same effect is *Clowes v. Miller,* 60 N. J. Eq., 179, 345.

In *Kreisel v. Distilling Co.,* 61 N. J. Eq., 5 (1900), *Magie, Chancellor,* said, "That if a stockholder undertakes to make irrevocable his grant of power to vote his stock, and denude himself for a fixed period of the power to judge and determine and vote as to the proper management and control of the affairs of the corporation, then whether the grant of power is good or not must depend upon the purpose for which it is given; and that the same principles apply when the scheme devised does not embrace a grant of irrevocable power by proxy, but seeks a similar object by the creation of a trust and the appointment of a trustee, to whom the title of the stock is conveyed." Again, he says, "If stockholders, upon consideration, determine and adjudge that a certain plan for conducting and managing the affairs of the corporation is judicious and advisible, I have no doubt that they may, by power of attorney, or the creation of a trust, or the conveyance to a trustee of their stock, so combine or pool their stock as to provide for the carrying out of the plan so determined upon."

The Supreme Court of Massachusetts has rendered a logical and clear decision on this question. It holds that an agreement of various persons to purchase the majority of the stock of a corporation, the stock when purchased to be voted by a committee of five of the subscribers for at least three years, is not illegal, even though the title to the stock is given to a trustee during that time. The Court, speaking through *Holmes, C. J.,* said: "We know nothing in the policy of our

law to prevent a majority of the stockholders from transferring their stock to a trustee with unrestricted power to vote it. . . . A stockholder has a right to put his shares in trust, whatever his motive. If the trust is an active one he cannot terminate it at (307) will, and the attempt to cut him off by contract, instead of by the imposition of duties, from ending it, certainly is not enough to poison the covenant with the plaintiff. It might be held that the duty of voting incident to the legal title made such a trust an active one in all cases. As to the arrangement for the trustees uniting to elect their candidates, the decisions of other States show that such arrangements have been upheld, and we do not think that it needs argument to prove that they are lawful. If stockholders want to make their power felt, they must unite. There is no reason why a majority should not agree to keep together."

In support the learned judge cites *Brown v. Steamship Co.*, 5 Blatchford; *Greene v. Nash,* 85 Me., 148; *Williams v. Montgomery,* 148 N. Y., 519; *Faulds v. Yates,* 57 Ill., 416; *Smith v. R. R.,* 115 Cal., 584; *Fisher v. Bush,* 86 N. Y., 618.

In conclusion he says: "We have considered such decisions elsewhere as have been called to our attention or found by us. Few of them are by courts of final resort." In Purdy's Beach on Private Corporations, sec. 704 A, it is said: "Stockholders of a majority of the stock may lawfully combine to hold control of the corporation, and for a definite time may lawfully agree among themselves to vote as a unit." "Such agreements are not contrary to public policy." Mr. Mecham says that there are no possible objections to such voting contracts intended to secure control for the general benefit. Mecham Law of Corporations, secs. 1268-1269.

In *Gray v. R. R.,* 120 Ill. App., 159, it was held, "That an agreement among the promoters of a railroad corporation by which the stock of the individual parties was to be placed in trust in the hands of one of them for a period of ten years, and voted as a unit at all stockholders' meetings as four-fifths of the parties thereto should direct, in writing, is not contrary to public policy and void; the purpose being to vest and retain for a fixed period the management and control of the enterprise in the persons originally promoting the same." To same effect is *Griffith v. Jewett,* 9 Ohio Dec., 627, and *Greene v. Nash, supra; Schwartz v. R. R.,* 6 Ohio C. C., 415; *Moses v. Scott,* 84 Ala., 608.

In *Cone v. Russell,* 48 N. J. Eq., 208, the agreement was held void as against public policy because it provided that the shares should be so voted as to continually employ an interested person as manager of the corporation.

Commenting upon *Foll's Appeal* (cited in the majority opin-
(308) ion), the New Jersey Court says: "Following the reasoning of these cases (*Foll's Appeal,* 91 Pa. St., 434), I conclude that the contract complained of in this suit is void as against public policy. The conclusion does not reach so far as to necessarily forbid all pooling or combining of stock, when the object is to carry out a particular policy with the aim to promote the best interest of all the stockholders. The propriety of the object validates the means, and must affirmatively appear." See, also, *Woodruff v. R. R.,* 30 Fed., 91, last page; *Hey v. Dolphin,* 92 Hun., 230; *R. R. v. Nicholson,* 98 Ala., 92.

And so the validity of agreements, unaccompanied by proxy or trust, having for their object the control of the voting power of stock, have, by parity of reasoning, been upheld in numerous cases. *San Francisco v. R. R.,* 115 Cal., 584, L. R. A. (35), 509; *Faulds v. Yates,* 57 Ill., 416, 11 Am. Rep., 24; *Havemeyer v. Havemeyer,* 11 Jour. & S., 506.

Were it not for unduly lengthening this opinion, I could cite many other cases sustaining the view that the legality of voting agreements, especially, as in this case, accompanied by assignment of stock certificates to trustees, should be judged according to the purpose to be accomplished. There are but few that can be cited in support of the contrary view.

The cases cited in the opinion of the Court, except our own decisions, either fail to support or are easily to be distinguished from this.

Foll's Appeal, cited by the Court, is in line with what I contend for. The Pennsylvania Court declined to decree specific performance of a contract for sale of bank stock purchased in order to give one man absolute control. The Court says: "We have no intimation that the bank, as at present organized, is not prudently managed. The stock, as now held, is scattered among a variety of people. It is difficult to see how the small stockholders, who have their modest earnings invested in it, the depositors who use it for safe-keeping their moneys, or the business public who look to it for accommodation in the way of loans, are to be benefited by the concentration of its stock in the hands of one man. . . . The temptation to use it for personal ends is very strong." And the Court calls attention, as I have already done, to the fact that the financial wrecks of banking institutions, with which the pathway of the last few years is so thickly strewn, is largely the result of one-man control. The reasoning of the opinion is a powerful argument against the destruction of this agreement, designed by stockholders solely to prevent the control of their institution by a single in-
(309) dividual.

The authority most relied upon in the opinion of the Court as supporting our decisions is *Vice Chancellor Pitney's* opinion in

Warren v. Pim, 66 N. J. Eq., 353. The Court was divided, and five opinions were delivered. Only five judges concurred with the *Vice Chancellor.* The voting trust was set aside by a vote of seven to six upon grounds different from those urged in the case at bar. Mr. Cook says, referring to this case, "However, the decision was upon another phase of the case than that now under consideration. For the decision of the lower court is that 'voting trusts are not declared to be necessarily unlawful. They may or may not be lawful, according to the circumstances of the case. The general rule is that, *prima facie,* they are unlawful, but may be rendered lawful by the circumstances,' was practically affirmed." 2 Cook (6 Ed.), p. 1724.

As to *Morell v. Hoge,* cited by the Court, a cursory reading of the conclusion of the opinion of *Chief Justice Fish* indicates plainly that the voting agreement was set aside for reasons not at all applicable here. The commentator says, in L. R. A., p. 1137, the case "did not involve a voting trust by which the right to vote the stock was severed from the benefical ownership."

The *Shepaug Trust Cases,* 60 Conn., 553, the only remaining precedent cited by the Court, are among the earliest cases on the subject. They applied to the doings of a syndicate formed to get control of a railroad company, a *quasi*-public corporation affected with a public use. I confine myself for authority to cases which consider the validity of the agreement from the standpoint of stockholders in strictly private corporations in which the public have no interest, except incidentally as in good management. Therefore such cases as the above, as well as the *Northern Securities Co. case,* 193 U. S., 197, have no application.

2. It must be admitted that the purpose of this trust is one highly and equally beneficial to all the stockholders, depositors and other patrons of the bank, unless the control of one untried owner is to be preferred to that of three trustees of proved capacity.

The public policy which will set aside a contract is not founded upon judicial caprice, but in the common law, which will not permit a thing to be done or omitted if it is clearly injurious to the public welfare. But the power to declare a contract void as opposed to public policy is not to be lightly exercised by the courts. For, as Clark on Contracts, at pages 414, 415, says, "It is clearly to the interest of the public that persons shall not be unnecessarily restricted (310) in their freedom to make their own contracts. 'It must not be forgotten,' was said by an English judge, 'that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and compe-

tent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract.' " (See *Printing Co. v. Sampson,* L. R. 19 Eq., 462.)

The individual's right of private contract must yield to the superior right of society, that no valid and enforcible agreement shall be entered into which will work or which is of a nature calculated to work a public injury. Further than this, the common law does not seek to restrain the liberty of contract. It is trifling with the subject to offer an argument to sustain the proposition that an agreement calculated and intended to maintain this bank in the highest credit and efficiency is injurious to the public interests.

The public expressed its own opinion by withdrawing half the deposits as soon as it was rumored that one man had acquired control of the bank, and it was to prevent further injury to its waning credit that this contract, or voting trust, was at once entered into.

3. The agreement violates no statute of this State. It is not a proxy good for three years only under Revisal, sec. 1184, but an assignment of the stock certificates to trustees impressed with a trust to carry out a lawful purpose, beneficial alike to all shareholders. Mechem, sec. 1268.

There is no more objection to assigning certificates of stock in a private corporation in trust for a lawful purpose than any other property. Nor does this agreement violate the banking laws of the United States. The only pertinent section of Rev. Statutes U. S. is 5114, and is as follows: "In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing, but no officer, clerk, teller or bookkeeper of such association shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote."

The defendants do not rest their right to control this stock upon (311) the idea that the agreement is nothing more nor less than a proxy. They hold the legal title as trustees to carry out the trusts imposed. In 2 Cook on Corporations, p. 1664, it is said: "It is a general rule that a person holding stock as trustee is entitled to vote upon the stock, not only when he is duly registered as the holder of the stock in trust, but also when he is registered absolutely as a stockholder upon the books of the corporation." Also, see *Brightman v. Bates, supra.*

It is true that directors' shares must not be pledged or hypothecated, but that doubtless means for debt. But if it does not, there is nothing

in the record to show than any of the shares assigned in this trust are owned by directors, or that the directors own no others.

4. There is one feature of this case entirely overlooked in the opinion of the Court, and that is the contract for the sale of the stock contained in section 2 of the agreement, set out in full in the statement of facts preceding the opinion. This section gives the defendants the right to purchase the shares of stock, or to sell same to purchasers of their selection at not less than its book value. Although the voting trust may be annulled, this part of the contract ought not to be, as its validity is universally sustained, and it is separate and distinct from the other parts of the instrument.

2 Cook on Corporations, at pages 1708-1711, says: "A stockholder has a right to sell his stock at any time and to whomsoever he pleases, without regard to other stockholders. . . . Hence contracts are often entered into between a portion or all of the stockholders of a corporation, that they will hold and sell their stock together. Such a contract is legal." And again: "Another form of contract is to the effect that before any of the stockholders sell their stock they shall offer it to the other stockholders. This kind of contract is also legal, and will be enforced by the courts. A contract whereby a stockholder desiring to sell must first offer his stock to other stockholders is not contrary to public policy." *Scruggs v. Catterhill,* 67 N. Y. App. Div., 583; *Havemeyer v. Same,* 86 N. Y., 618; *Fitzsimmons v. Lindsay,* 205 Pa. St., 79; *In re Lindsay Est.,* 110 Pa. St., 224.

I think the option feature of this instrument is separate and distinct from other parts of the contract and may be enforced, and thus interposes an effectual bar to the granting of the relief sought, which seeks to annul the whole contract and to enjoin the defendants from taking advantage of any part of it.

5. I do not think that the plaintiff, who is a stranger to the agreement, and does not claim by assignment any of the shares of stock described in it, can maintain this action. *Zimmerman v. Jewett,* 19 Abb. New Cases, 459.

Cited: Bank v. Holderness, 160 N. C., 475.

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A. M. STOUT, ADMINISTRATOR, v. OSTIA PERRY ET AL.

(Filed 6 April, 1910.)

1. Husband and Wife—Antenuptial Debts—Notes—Charge in Equity—Trusts and Trustees.

In an action brought by the administrator of the deceased wife against the administrator of the deceased husband for the proceeds of certain notes given as purchase money for the wife's land, secured by mortgage thereon and made payable to the husband at her request, it is competent to show by the one who drafted the notes and mortgage that, at the time, the wife directed the husband to collect the notes as they fell due, for the purpose of paying her antenuptial debts, and use whatever surplus then remained for the support of her aged mother, then living with them.

2. Husband and Wife, Contracts Between—Agent of Husband—Appointment.

A wife may appoint her husband to act as her agent in the same manner as one *sui juris* may appoint an agent; and the formality required by Revisal, sec. 2107, regarding the execution of contracts concerning lands made between husband and wife, is not necessary when the wife's interest in her lands is not affected.

APPEAL from *W. J. Adams, J.*, at November Term, 1909, of CHATHAM.

The plaintiff is the administrator of Mrs. Susan Johnson; the defendants are the administrators of Joshua Johnson. Joshua Johnson and Susan Johnson were husband and wife. The former died 10 October, 1906; the latter 13 July, 1907. They were married 27 June, 1877. On 26 July 1878, the husband and wife executed their agreement to convey a tract of land, belonging to the wife, to E. E. Dismukes, for $900, of which $250 was paid in cash, and the balance evidenced by six notes; the first for $100, due one year after date, and the others for $110 each, one due each year thereafter. On 3 February, 1885, the notes having been paid the deed was executed. J. E. Perry was the draftsman of the agreement to convey and of the notes, which were made payable to Joshua Johnson, the husband. The defendant proposed to show by Perry that, at the time the notes were drawn by him and executed by Dismukes, Mrs. Johnson directed that they be made payable to her husband; that she owed antenuptial debts, which she desired to be paid; that she directed her husband to collect the notes as they fell due, pay her debts, and use a sufficient part of the remainder, if any and if sufficient, to support her mother, who was aged and infirm and living with Mr. and Mrs. Johnson. This evidence was excluded by his Honor, upon plaintiff's objection. The defendants excepted. There was a verdict for the plaintiff for $900, and judgment, from which de-

(313) fendants appealed.

R. H. Dixon, W. D. Siler, and N. Y. Gulley for plaintiff.

Hayes & Bynum, H. A. London & Son, and J. G. Hannah, Jr., for defendants.

MANNING, J. The plaintiff contends that the judge's ruling was correct, because the contract between the husband and wife was not executed with the formality required by section 2107, Rev., and the evidence offered did not so tend to prove, but established that it was not so executed.

The defendants contend that the evidence tended to prove that the wife created her husband her agent; that it was not a contract to charge or impair the body or capital of the wife's personal estate for the husband's advantage, and was not required to be executed with the formality prescribed by that section of the Revisal.

That the husband can be appointed her agent by the wife has been several times decided by this Court, and seems not to be controverted by the plaintiff. *Bazemore v. Mountain,* 121 N. C., 59; *Weathers v. Borders,* 121 N. C., 387; *Cunningham v. Cunningham,* 121 N. C., 413; *Witz v. Gray,* 116 N. C., 48; *Faircloth v. Borden,* 130 N. C., 263; *Francis v. Reeves,* 137 N. C., 269; *Weld v. Shop Co.,* 147 N. C., 588. It is clear that the contracts required by section 2107, Rev., to be executed with the formality of a deed are contracts made between the wife and the husband, by which the wife conveys, affects or charges any part of her real or personal estate to the benefit of and for the advantage of her husband. Its purpose was to prevent frauds by the husband upon the wife, and to give validity to transactions, invalid at common law, between husband and wife, of the nature described, provided they are executed with the prescribed formality. *Sims v. Ray,* 96 N. C., 87; *Long v. Rankin,* 108 N. C., 338.

The liability of the wife for her antenuptial debts is declared by section 2101. It being her clear duty to pay such debts, we know of no statute or decision which forbids her to appoint her husband her agent to pay these debts and deliver to him the means with which to do so. There is no statute which prevents a wife from being honest. If the wife recognized her moral duty to support an aged and invalid mother, we are not advised of any statute or decision which forbids her to discharge this high moral duty. It follows the precept of divine law, and we find no human statute which forbids it. She may appoint her husband her agent to disburse the means which she shall supply (314) him for the discharge of this moral obligation.

In several cases cited there can be found no utterance of this Court which indicates that a *feme covert* is required to use any indifferent for-

mality in appointing her agent than a person *sui juris.* The excluded evidence tended, at least, to prove that in the transaction detailed the wife appointed her husband her agent to collect the notes, and directed him how to disburse the proceeds. The burden is cast upon his representatives to prove (they admitting he did collect the notes) that he disbursed the proceeds as directed by his wife. In excluding the evidence offered by the defendants, there is error, for which there must be a

New trial.

ELIZABETH A. SMITH v. C. H. MILLER.

(Filed 6 April, 1910.)

Petition to Rehear—Former Opinion—Interpretation.

In this petition to rehear it is held that the former decision declared only that the court had no power to invest the fund, under the facts and circumstances of the case, and that the land must be sold and the heirs reimbursed, subject to any legal charges and liens upon the fund which a court of law or equity would allow in the further disposition of the case.

No counsel for plaintiff.
A. S. Barnard and F. A. Sondley for defendant.

WALKER, J. This is a petition filed by C. H. Miller to rehear the former decision and judgment of this Court. The petitioner complains that the Court did not pass upon his exceptions to the rulings of *Judge Peebles* in the court below, which were adverse to him and related to certain allowances which he claims should be paid to him out of the fund as a prior lien thereon.

The only question intended to be decided by us at the last term, *Smith v. Miller,* 151 N. C., 620, was as to the power of the court to order an investment of the proceeds of sale before any sale of the property had been made, and before it could be ascertained, with any degree of certainty, whether the said proceeds would be sufficient for the improvement of the other property, as contemplated by the former order of the Court.

We, therefore, merely directed a sale of the property by the com-
(315) missioner, W. R. Whitson, and a report of the sale to the court, and it was not our purpose to deprive the petitioner in this case of any rightful claim or lien he has upon the fund to be realized, as between him and the heirs or the owners of the property which is to be sold. Our decision was, it is true, that the heirs should be reimbursed;

but if, as contended by the petitioner, he is entitled to a lien upon the fund, as against the heirs, or to be preferred in the distribution of the proceeds of the sale, on account of commissions justly due him, or by reason of any other claim he has preferred and which constitutes a prior lien upon said proceeds, he is not deprived, by that decision, of asserting such prior lien, and his exceptions, as we said in the former opinion, will be considered without reference to the fact that we have merely ordered a sale of the premises and a report to the court, and refused to pass upon the exceptions until the clear amount of the proceeds of the sale could be ascertained.

What we have said in regard to the petition of C. H. Miller is clearly applicable to the exceptions of the other claimants, which will be hereafter considered by the court below, and on appeal, by us, if it becomes necessary to do so, when the amount of the funds, as we have said above, can be known, so that we can pass intelligently upon all of the exceptions. It may be, as argued by counsel, that the rulings of the referee, which were affirmed and which have not been questioned by exception or appeal, should prevail at the final hearing of the case, and, as at present advised, we do not see why such a course should not be adopted, as being authorized by the law, although we do not commit ourselves to a decision upon that question.

Our conclusion is that the former decision is sufficiently explicit to show that the petitioner and the other parties, who claim that they have a lien upon the fund, will not be prejudiced hereafter, by reason of our refusal to pass upon their exceptions at the time we made the decision. If the property in the hands of the heirs is, as between them and any of the claimants, subject to a charge or lien for its preservation, or for the payment of taxes or any other encumbrance of a like nature, this question will be open for consideration and decision in the court below, when the report of the commissioner, W. R. Whitson, is made to the court.

All we have decided is that the court had no power to invest the fund, under the facts and circumstances in this case, and that the land must be sold and the heirs reimbursed, subject, of course, to any just and legal charges or liens upon the fund which the heirs should, in law and good conscience, be required to pay.

The prior right of the heirs to reimbursement is established by our former decision, but the amount they will receive will depend, (316) necessarily, upon the extent of the liens or charges which may be adjudged against their share of the proceeds, by reason of any sum paid out by the petitioner, and which the court may hereafter decide should be deducted therefrom and paid to the proper claimant of the same.

We do not reverse or modify our former decision, but simply declare, by this opinion, that the legal rights of the claimants, who have excepted, shall be preserved until the land is sold and the final hearing is had upon the report of the commissioners.

Petition dismissed.

Cited: *S. c.*, 155 N. C., 243; *S. c.*, 158 N. C., 100.

W. C. WILCOX v. DURHAM AND CHARLOTTE RAILROAD COMPANY.

(Filed 6 April, 1910.)

1. Pleadings—Demurrer—Principal and Agent—Allegations Sufficient.

As a demurrer to the complaint admits the truth of its allegations, a demurrer thereto on the ground that it was not alleged that the superintendent of a corporation had the power to make contracts of the nature claimed, is bad, the complaint alleging that the contract was made with the corporation.

2. Pleadings—Demurrer—Rebate—Discrimination—Connecting Carrier—Allowance.

A complaint alleging that defendant railroad company agreed to pay the plaintiff a sum equivalent to ½ cent per 100 pounds for lumber delivered to it by the plaintiff's connecting tramroad for shipment, and that the amount demanded was for lumber thus delivered, a demurrer on the ground that, in effect, it was a rebate or discrimination in rates in plaintiff's favor, is bad, it not appearing that any of plaintiff's lumber was embraced in the shipments. Ch. 320, sec. 4, Laws of 1891 (then in force). The demurrer was properly overruled and defendant allowed to answer over. Revisal, 506.

APPEAL from *W. J. Adams, J.*, at September Term, 1909, of MOORE.

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

R. L. Burns for plaintiff.

H. F. Seawell and Guthrie & Guthrie for defendant.

CLARK, C. J. On 5 May, 1897, the defendant, through its superintendent, entered into a contract with the plaintiff containing the following provision: "For and in consideration of the benefits to be (317) derived by the building of a tramroad by the party of the second part, from a point on the line of railroad to a point on the property of the party of the second part, lying on the south side of Richlands

Creek, the party of the first part hereby agrees to pay to the party of the second part a sum equivalent to ½ cent per 100 pounds on all lumber or timber delivered by the aforementioned tramroad from some point hereafter to be located on the south side of Richlands Creek."

This action was begun before a justice of the peace for the sum of $200. The complaint alleges that the plaintiff built said tramroad in execution of the terms of said contract and hauled over it 1,108,356 feet of lumber, which he delivered to the defendant, who shipped the same, and that at the rate of compensation prescribed by the contract the plaintiff became entitled to recover the sum of $221.67, but remits all above $200, and the interest on the excess. The defendant demurs: (1) Because it is not alleged that F. D. Jones, superintendent, was authorized to make such contract; (2) that the contract was *ultra vires,* and in conflict with chapter 320, Laws 1891 (then in force), and contrary to public policy.

The demurrer admits the allegations of the complaint to be true. The complaint alleges the contract was made between the defendant and the plaintiff and that in pursuance of it the plaintiff built the tramroad and delivered the lumber, which was hauled over said tramroad in accordance with the terms of the contract. If the superintendent was not authorized to contract for the defendant, that must be set up as a defense in the answer.

As to the last ground of the demurrer, it is not averred that the plaintiff transported any of his own lumber over said tramway. If this contract was an attempt to give the plaintiff a rebate which was forbidden by section 4, ch. 320, Laws 1891 (in force at date of this contract), or a discrimination in rates in favor of plaintiff, this does not appear in, nor is it a fair inference from, the complaint. Such defense can be raised by answer. For all that now appears the "½ cent per 100 pounds was an allowance to the tramroad for its hauling, which was added to the defendant's rate from the point where it received this lumber.

The court below, therefore, properly overruled the demurrer and gave the defendant leave to answer over. Rev., 506.

Affirmed.

Cited: *S. c.,* 154 N. C., 582.

(318)

N. F. BARDEN v. ATLANTIC COAST LINE RAILWAY COMPANY.

(Filed 13 April, 1910.)

1. Railroads—Relief Department—Release of Damages—Void Stipulation—Waiver.

An unincorporated relief department of a railroad company for insuring the lives of the employees and indemnifying them against accident, providing hospitals for them under certain conditions while sick, which is contributed to by the employees and the company in a certain manner and is practically under the control and management of the company, is but a bureau or agency of the company; and a stipulation in the contract with its employee that in the case of accident he must accept the benefit of the contract and release the company from liability, is in effect a contract to relieve the latter of the result of its own negligence, is contrary to public policy and void, and is prohibited by the provisions of Revisal, sec. 2646, as a waiver of the benefits of that section.

2. Same—Demurrer.

Upon demurrer to the complaint in this action for damages alleged under the contract of insurance or indemnity of plaintiff as an employee of defendant, and arising under its employees' relief bureau, wherein the complaint sets out with particularity the nature and scope of the bureau, it is necessary to pass upon the validity of stipulations therein appearing to release the defendant from liability from its own negligence, in order to ascertain whether a cause of action is stated.

3. Railroads—Relief Department—Hospitals—Physicians in Charge—Selection—Negligence—Pleadings—Demurrer.

When by eliminating a stipulation in the provisions of a contract made with a relief department of a railroad company, which is void as releasing the defendant from the result of its own negligence to its own employees, the remainder of the contract with the employee is for beneficent purposes, in an action to recover of the company for injuries alleged by the plaintiff, an employee, to have been received while at a hospital undergoing treatment, in accordance with his contract with the company, by reason of the negligence or malpractice of the surgeon or physician selected and put in charge by the defendant company, a demurrer to a complaint on the ground that it failed to allege that defendant was negligent in their selection, or that it retained them after it knew, or had good reason to believe they were incompetent, is good, and should be sustained.

BROWN and WALKER, JJ., concur in result.

APPEAL from *Lyon, J.*, at July Term, 1909, of COLUMBUS.

Action heard on demurrer to the complaint.

The plaintiff complains that while he was an employee of the defendant he was taken sick and was received into the hospital of the Relief Department of the defendant at Rocky Mount, to be there operated upon

and attended to. That the operation was performed, and through the neglect and inattention and carlessness of the surgeon, nurses and attendants, he was permanently injured, and demanded dam- (319) age for his suffering and injury. The plaintiff alleges further, that he was entitled to admission into the hospital because he was a member of the Relief Department, under a certificate issued to him, as follows:

ATLANTIC COAST LINE RAILROAD COMPANY.

RELIEF DEPARTMENT.

CERTIFICATE OF MEMBERSHIP IN THE RELIEF FUND,

No. 5282.

Office of the Superintendent.

WILMINGTON, N. C., 19 September, 1902.

This Certifies, That N. F. Barden, employed by the Atlantic Coast Line Railroad Company, is a member of the Relief Fund of the Relief Department of the Atlantic Coast Line Railroad Company, and is entitled to the benefits provided by the regulations of the Relief Department for a member of the.....Class, with.....additional Death Benefit of the First Class.

....,
Superintendent of the Relief Department.

It was alleged that plaintiff was operated on in May, 1906; that he had paid since his membership, seventy-five cents per month; that this amount was retained out of his wages by the defendant. The rules and regulations of the Relief Department are attached to the complaint. The following is a summary of the principal rules and regulations, which are as follows:

It is a department of the defendant company's service. (Rule 1.) It is in charge of a superintendent and a chief surgeon, whose directions in carrying out these regulations are to be complied with, subject to the control of the defendant company's president. (Rule 1.) The said president appoints the superintendent, assistant superintendent and the chief surgeon. (Rule 11.) It has an advisory committee (Rule 5), of which the defendant company's general manager is *ex officio* a member, and the chairman, with twelve other members, of whom six are selected by the defendant company's board of directors and six by the contributing employees, insuring the control of this advisory committee to the defendant company by a "safe majority." The functions of this committee, controlled by the defendant company, is to "have general supervision of the operation of the departments, and see that they are con-

ducted in accordance with the regulations." (Rule 8.) This
(320) advisory committee may propose amendments to the regulations, but no amendment becomes operative until adopted by a majority of the *whole committee* and it is approved by the board of directors of the defendant company. (Rule 16.)

The superintendent, who is appointed by the defendant company's president, shall have charge of the business pertaining to the department, employing subordinates, certifying pay-rolls or bills, signing orders for payment of benefits, etc., and exercising such other authority as may be conferred upon him by the president of the defendant company. (Rule 9.) Its members are limited to employees of the defendant company. (Rule 17.) Its funds are derived from their contributions. (Rule 3.) If there should be a deficit in these contributions, then, only, the company advances the money for its operations, charging 4 per cent interest, and reimbursing itself out of the funds contributed by the employees. (Rule 14.) It pays 4 per cent on the monthly balances which may be in its hands derived from this fund, it is true, but the company is the trustee, and it administers the trust funds. (Rules 4 and 13.)

If a member of this relief department is furloughed, suspended or otherwise temporarily relieved from defendant's service for a specified time, he may retain his membership, during such absence by paying his contributions in advance; but if at the time specified by his division officer he does not return to his duty in the service of the company, his membership in the relief fund shall thereupon terminate. (Rule 29.) When a member resigns from defendant company's service, or leaves it without notice, is relieved or discharged therefrom, his membership in the relief fund terminates with his employment, and he shall not be entitled to any benefits for time thereafter, except he continue his membership only in respect of the minimum death benefit, if applied for within five days. (Rule 30.) If a member absents himself from the duty of the defendant company for six days, without permission previously obtained, or without satisfactory reasons to his employing officer, he is deemed to have left the defendant's service without notice, and his membership in the relief fund terminates. (Rule 31.) If a member reported by a medical examiner as able to work, fails to report for work at the time set, he must obtain a written furlough from his employing officer; otherwise, his relief fund membership ceases. (Rule 32.)

The employee must make written application for membership in the relief fund. (Rule 34.) In this application, set out in Rule 34, he is to state he has read or had read the regulations of the department,
(321) accepts them, together with subsequent changes or amendments, and accepts any agreement "now or hereafter made by the said company with any corporation or corporations now or hereafter asso-

ciated with it in the administration of their relief departments." He agrees that the company may retain the stipulated contributions from his wages to be appled to the relief fund, and his agreement to do so shall constitute an assignment in advance for such portions of his wages to the said company in trust. He also agrees that if transferred to the service of any other company associated with the said company in the joint operation of their relief departments, it shall operate to transfer his membership in the relief department of such other company. (Rule 34.)

It is further provided that "conrtibutions for any month will be due on the first of that month, and ordinarily be deducted from the member's wages on the pay-roll of the preceding month"; but, when a member has no wages on the pay-roll, any contribution due from him must be paid in cash in advance, otherwise he will be in arrears. (Rule 40.) The benefits from this relief fund "shall not be due on account of disability beginning, or death occurring while a member is in arrears, and when in arrears for two months his membership shall thereupon cease." (Rule 41.)

It is provided by Rule 49 how much shall be paid in the nature of benefits: to a member of the first class, 50 cents per week; second class, $1; third class, $1.50; fourth class, $2; fifth class, $2.50, and at half these rates during the continuance of disability; but these sums are not paid for a longer period than fifty-two weeks. It is also provided by this rule (49) that provisions shall be made by the department, in addition to the benefits allowed, "for necessary surgical attendance, or, when such provision is not made, payment in behalf of the member of such bills for surgical attendance as are authorized and approved by the chief surgeon." There is likewise a provision that, in case of sickness, he shall have the same benefits. (Rule 49.) It is also provided by this rule (49) that "disabled members must take proper care of themselves and have suitable treatment; benefits will be discontinued if members refuse or neglect to comply with the recommendations of the medical officers of the Relief Department as to proper care and treatment."

Certain death benefits are provided by Rule 49. All of these "benefits are to be paid in conformity with the financial methods of the company, and on orders drawn by the superintendent, upon his receiving satisfactory certificates respecting the claims and such releases (322) as may be required by him."

"When a member resigns from the service, or leaves the service without notice, or is relieved or discharged therefrom, his membership in the relief fund shall terminate with his employment, and he shall not be entitled to any benefits for time thereafter."

In the Revised Regulations (Exhibit B, page 30), Rule 47 provides: "Payment for each day, except for the first six days of disability classed as due to sickness, for a period not longer than fifty-two weeks, at the

same rates as for accident benefits; and provision by the department for free medical treatment of the member, in one of the hospitals under its control, in cases of disability, classed as due to sickness which, in the opinion of the medical examiners of the department, may require such treatment, and when approved by the superintendent or chief surgeon."

Extract from Regulation No. 64:

"The acceptance by the member of benefits for injury shall operate as a release and satisfaction of all claims against the company and in all other companies associated therewith as aforesaid, for damages arising from or growing out of such injury; and further, in the event of the death of a member, no part of the death benefit shall be due or payable, unless and until good and sufficient releases shall be delivered to the superintendent, of all claims against the Relief Department as well as against the company, and all other companies associated therewith as aforesaid, said releases having been duly executed by all who might legally assert such claim; and further, if any suit shall be brought against the company, or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable and all obligations of the Relief Department and of the company created by the membership of such member in the relief fund, shall thereupon be forfeited, without any declaration or other act by the Relief Department or the company; but the superintendent may, in his discretion, waive such forfeiture upon condition that all pending suits shall first be dismissed.

"If a claim for damages on account of injuries shall be settled by the company without suit, such settlement shall release the Relief Department and the company from all claims for benefits on account of such injuries."

(323) Extract from Regulation No. 65:

"All claims of members, or of their beneficiaries or other representatives, for benefits, and all questions or controversies of whatsoever character, arising in any manner or between any parties or persons, in connection with the Relief Department or the operation thereof, whether as to the construction of language, or the meaning of regulations, or as to any writing, decision, instructions or acts in connection with the operation of the department, shall be submitted to the determination of the superintendent, whose decision shall be final and conclusive thereof, unless a written appeal from his decision is made to the committee.

"If the party or parties so submitting any matter to the superintendent shall be dissatisfied with his decision, such party or parties shall appeal to the committee within thirty days after notice to the parties interested of the decision of the superintendent.

"When an appeal is taken to the committee, it shall be heard by said committee without further notice, at their next stated meeting, or at such future meeting or time as they may designate, and shall be determined by vote of the majority of a quorum, or of any other number not less than a quorum of the members present at such meeting, and the decision arrived at thereon by the committee shall be final and conclusive upon all parties, without exception or appeal."

Extract from application agreement required:

"I also agree that in consideration of the amounts paid and to be paid by said company for the maintenance of said Relief Department, and of the guarantee by said company of the payments of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said company, and all other companies associated therewith in the administration of their Relief Department, for damages arising from or growing out of said injury; and further, in the event of my death, no part of said death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the superintendent of said Relief Department, of all claims against said Relief Department as well as against said company and all other companies associated therewith as aforesaid, arising from or growing out of my death, said releases having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against said company, or any other company associated therewith as aforesaid, for damages arising from or out of injury or death occurring to me, the benefits otherwise payable, and all obligations of said Relief Department and of said company, created by my membership in said relief fund, shall thereupon be forfeited without declaration or other act by said Relief Department or said (324) Company."

Extract from Revised Regulations (Exhibit "B," p. 19):

"I also agree, for myself and those claiming through me, to be especially bound by the regulation providing for final and conclusive settlement of all claims for benefits or controversies of whatsoever nature, by reference to the superintendent of the Relief Department, and an appeal from his decision to the advisory committee."

The defendant demurred to the complaint upon the following grounds:

"1. It does not allege that the defendant did not use reasonable care and diligence in the selection and employment of the surgeons, nurses and attendants in the hospital, at the time alleged in the complaint, when plaintiff was in said hospital for surgical care and attention.

"2. That it does not allege that the defendant knew that the said surgeons, nurses and attendants, or any of them, were incompetent or

careless, or that it retained them, or any of them, after knowing that they were incompetent, or having grounds to believe they were incompetent.

"3. That it does not allege any negligence on the part of the defendant in the selection or employment of any of the said surgeons, nurses or attendants, or in retaining them after it knew they were incompetent, or had good reasons to believe they were incompetent."

His Honor overruled the demurrer, with leave to the defendant to answer over. The defendant appealed.

D. J. Lewis and Meares & Ruark for plaintiff.
George B. Elliott, Davis & Davis, and J. B. Schulken for defendant.

MANNING, J., after stating the case: The defendant company owns and controls and operates several thousand miles of railroad in this and other States. It has established in this State, at least, a Relief Department, in which only its employees are admitted as members, and in which they can remain as members only so long as they continue to be employees. As members, they are required to contribute each month a fixed amount, regulated by the monthly pay; the lowest paying 75 cents per month, and the highest $8.25 per month, according to the benefits to be received, which range from $250 to $5,000. The membership is based upon an application signed by the employee, and the applicant agrees to be bound by the rules and regulations of the Relief Department; (325) that the company shall apply the stipulated amount each month from his wages, "for the purpose of securing the benefits provided in the regulations for a member of the relief fund"; further, the applicant agrees, "that, in consideration of the amount paid and to be paid by said company for the maintenance of said Relief Department, and of the guarantee by said company of the payment of said benefit, the acceptance by me of said benefits shall operate as a release and satisfaction of all claims against said company, and all other companies associated therewith in the administration of their Relief Department, for damages arising from or growing out of said injury; and further, in the event of my death, no part of said death benefit or unpaid disability benefit shall be due or payable *unless and until* good and sufficient release shall be delivered to the superintendent of said Relief Department of all claims against said Relief Department, as well as against said company and all other companies associated therewith, as aforesaid."

In our opinion, it becomes necessary to determine the validity and effect of the agreement, in order to fix the character of the Relief Department of the defendant, whether it is an agency or an association with

only benevolent aims and purposes, or a mere agency created by the defendant to serve, under the cloak of charity, the purpose of avoiding liability for negligent injuries received by its employees.

The concluding sentence of section 2646, Rev., known as the Fellow-servant Act, is in these words: "Any contract or agreement, express or implied, made by any employee of such company to waive the benefits of this section, shall be null and void." The authorities agree, without dissent, that all contracts made by railroad companies to avoid liability for their own negligence are void. There is, also, a unanimity of decision that if the agreement made by the employee, upon entering the Relief Department, is a contract by which the railroad company undertakes to stipulate against liability for its own negligence, then all such stipulations are void. Some courts, however, as Pennsylvania, Maryland, Iowa, South Carolina, Indiana, Georgia, construe the agreement as giving the injured employee an election or choice of remedies: either to accept the benefits or to bring his action for damages. These courts also hold that it is not the stipulation made in advance that is effective, but the acceptance of benefits after the injury that constitutes the release of the company and bars the action for damages. We have read with care and attention the opinions of the learned courts that have considered this question, and have given to them that attentive consideration which their learning and high standing demand that they shall (326) receive from us. Their conclusions are but persuasive upon us; the question has not been passed upon by this Court and is an open question. After giving the matter that careful consideration that its importance requires, we have reached the conclusion which we now express.

The Relief Department of this defendant has been declared by this Court, in *Nelson's case,* 147 N. C., 103, to be a mere agency of the defendant; it is not incorporated and has no separate entity, but it is, in fact, "a bureau or department" of the defendant company, not having the capacity to sue or be sued. The employees of the defendant company contribute of their monthly wages to this department; the defendant handles the money and is responsible for its safe-keeping; it agrees to pay 4 per cent on monthly balances and guarantees the payment of the benefits accruing by the regulations to its members. It, likewise, contributes to this department, it is potent in its management and control, and in the selection of the surgeons and physicians. If an employee of the company is injured by negligence, why should he be required to stipulate in advance that he must choose between a forfeiture, on the one hand, of all benefits which accrue to him under the rules and regulations of the department to which he has contributed each month, and, on the other hand, his right of action, of which he cannot be deprived by any agreement, express or implied? For whose benefit is this choice of reme-

dies to be made? Certainly, not for that injured employee who has, during each month of his membership, been contributing of his earnings in order that the benefits of the department may be his in time of need. Why should he be forced to elect for the sole benefit of that contributor to this department who receives and manages its funds, even though its contributions to it largely exceed those of any other contributor? Is it not the obvious purpose of the company to place its employees, who may be negligently injured, in the position to forego the benefits of an association which they have helped to create, or to take the chance of a suit with it for damages in the courts, with its attendant annoyances, delays and uncertainties? What doth it advantage the employee? Is not all the benefit to the company? This choice of remedies is to be made only by those employees whose injuries or death are caused by the negligence of the defendant. Upon no other contingency is the employee forced to choose; in no other contingency is he confronted with an election of remedies, nor is he under the compulsion of choice. Further, those who are injured or killed by negligence can receive no benefit stipu-
(327) lated in the rules and regulations, "unless and until" a complete release of the action for damages is properly executed. Such is the compulsion of the stipulation; such is the "letter of the bond." The election of remedies originates in and is predicated upon this stipulation.

In our opinion, this stipulation is an ingenious scheme devised by the company to avoid responsibility for its negligence, and, as such, is inequitable and void. Such would seem to be the view of the Federal Congress, by its adoption, in 1906, of the following enactment, 34 Stat. L., 234, approved 11 June, 1906: "No contract of employment, insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity, by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: *Provided, however,* that upon the trial of such action against any common carrier the defendant may set off therein any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative." And by the adoption, 22 April, 1908, ch. 149, sec. 535, Stat. L., 65, of the following enactment: That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided,* that in any action brought against any such common carrier, under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief

benefit, or indemnity, that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Eliminating, therefore, this regulation and stipulation, as void, we have then a Relief Department or association, supported by the mutual contributions of employee and employer, maintained for the sole purpose of relieving and mitigating the suffering of its members—a charity whose noble purposes are untainted by selfish interest, or, to quote the definition of *Gray, J.*, in *Johnson v. Phillips,* 14 Allen, 539, we have a charity which, "in the legal sense, may be more fully defined as a gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial (328) whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." *Fire Patrol v. Boyd,* 120 Pa. St., 624; 1 L. R. A., 4171.

With the character of the relief association thus defined, what is the extent of the duty of the defendant in selecting the physicians and surgeons and attendants who perform the offices cast upon them in their respective positions? The law is well settled that the only duty imposed upon the defendant is the duty to exercise reasonable care in the selection of the physicians and surgeons who are reasonably competent, and having exercised this duty, the company is not chargeable with the want of skill of the physician or surgeon whom it has selected, in the performance of the service he is required to render. 3 Elliott on Railroads (2 Ed.), sec. 1388; *R. R. v. Zeiler,* 54 Kan., 340; *R. R. v. Artist,* 60 Fed., 365; *Powers v. Hospital,* 109 Fed., 294; *Maine v. R. R.,* 109 Iowa, 260; *York v. R. R.,* 98 Iowa, 544; *Quinn v. R. R.,* 94 Tenn., 713; *R. R. v. Price,* 32 Fla., 46; *McDonald v. Hospital,* 120 Mass., 432; *Loubheim v. S. S. Co.,* 107 N. Y., 228; *Allen v. S. S. Co.,* 132 N. Y., 91; *O'Brien v. S. S. Co.,* 154 Mass., 272; *R. R. v. Sullivan,* 141 Ind., 83; *Haggarty v. R. R.,* 100 Mo. App., 424; *Perry v. House of Refuge,* 63 Mo., 20; *Hearns v. Waterbury Hospital,* 66 Conn., 98; *Downes v. Harper Hospital,* 101 Mich., 555; *Fire Patrol v. Boyd,* 120 Pa. St., 624; 1 L. R. A., 417; *Parks v. Northwestern Univ.,* 2 L. R. A. (N. S.), 556; 218 Ill., 381; *R. R. v. Howard,* 45 Neb., 570.

We find no allegation of such negligence of the defendant in the complaint; the negligence complaind of, and the sole theory of the complaint, is the malpractice of the surgeon and his attendants, but it is

nowhere alleged that these were carelessly or negligently selected by the defendant; or, if they were incompetent, that such incompetency was known to the defendant. We think the allegation of such negligence material and that the complaint, in failing to contain it, is demurrable. We conclude there was error in overruling the demurrer, and the judgment is reversed and the action will be dismissed, unless the plaintiff shall obtain leave to amend the complaint, from the judge before whom the motion shall be made.

Reversed.

BROWN, J. (in whose opinion Mr. Justice WALKER concurs): While I concur in the result, I cannot agree to all that is said in the opinion of the Court.

(329) The facts are that the plaintiff was a member of the Relief Department of the defendant, and voluntarily went to its hospital to be treated for a fistula, brought on from natural causes, and in no sense an injury received by reason of the negligence of the defendant or its employees.

1. It would seem, therefore, that the Court has unnecessarily and improperly declared section 64 of the regulations of the Relief Department void. The Court has done this of its own motion and not at instance of either party. The learned counsel for both plaintiff and defendant admitted that section 64 was a valid and binding regulation upon the parties to this record.

If this plaintiff, having been injured by the negligence of the defendant, had sued to recover damages, and defendant had pleaded in bar of a recovery that the plaintiff had elected to take the benefits of the Relief Department, offered by it in lieu of damages, then the validity of section 64 would be squarely before the Court. But, as it is not claimed by plaintiff that the defendant is in any way responsible for the existence of the fistula, I am constrained to think that the validity of section 64 is not presented upon this appeal, and that the observations upon it are to be regarded as purely *obiter dicta*.

2. I am of opinion that section 64 is not void as against public policy, as a scheme devised by defendant to avoid the consequences of its own negligence.

The act of Congress referred to by the Court has no bearing whatever upon this case, as it appears upon the pleadings to be a matter wholly under the jurisdiction of this State, and in no particular within the domain of Federal legislation regulating interstate commerce. Besides, it makes the employee when holding the company liable for negligence, account for all he may have received from the Relief Department. Section 64 does not enable the defendant to avoid the consequences of its own negligence.

The whole scheme of the Relief Department is founded upon a policy that considers the welfare of the employees as well as of the employer. While the member pays certain annual dues, which are very small, the company bears by far the heaviest portion of the expense of maintaining the department. Its benefits are not confined to free hospital service, but embraces pay for 52 weeks, if disabled so long. All the employees of the company may take its benefits, whether disabled in the company's service or ill from other causes. The insurance feature is a most valuable one to the employee. And if an employee is injured in the company's service, he is not denied the right to sue the company for damages. That right is expressly reserved to him but he cannot take the benefits conferred by the Relief Department in case he does sue for damages.

No principle of public policy requires that the injured em- (330) ployee should be permitted to take both. If he is sick from natural causes he has the right to seek aid from the Relief Department. If he is injured in the service of the company he is entirely free to sue for damages, as much so as if no Relief Department existed. Under existing conditions, the injured employee may take whichever course he thinks is to his interest, whereas before he was confined to one.

If, in a helpless or unconscious condition from sudden injury, he is involuntarily carried to the hospital, no court will hold it to be an election, and it would be no bar to his action. The acceptance to bar recovery must be under circumstances when the injured employee has capacity to decide for himself. It seems that my learned brethren have not been able to fortify their opinion with any authority, as the case quoted from 14 Allan bears on a bequest in a will for charitable purposes.

On the other hand, it appears that this identical Relief Department is no new thing in this country. It has worked well for employees and employers for thirty years or more and is common to nearly all the great railway systems of this country and Canada. The validity of section 64 has been upheld by text-writers and nearly all the courts of the Union. My brethren are setting up their personal opinions against the collective wisdom and well-considered judgments of over a hundred judges of the ablest courts in our land as well as in Canada.

All the text-writers agree with Judge Thompson, that the validity of this provision of the Relief Department of railways has been so well settled that it is not open to question. Thompson on Neg., sec. 3853-4635.

While novel in this State, the validity of this contract has been supported by the highest courts of New York, Pennsylvania, Maryland, Indiana, Iowa, Nebraska, Ohio, Illinois, West Virginia, New Jersey, South Carolina, Georgia, Alabama, and also by the Federal Courts of Appeal in the Fourth, Fifth, Sixth, Seventh and Eighth circuits. I quote from a few of the opinions:

In *Petty v. R. R.,* 109 Ga., 666, the Court, speaking through *Justice Lumpkin,* states the case with great clearness: "The contract does not in any of its terms or conditions stipulate that the defendant company should be absolved from the legal consequences of its own negligence or that of its servants. On the contrary, it merely provides an additional remedy to that given by law to an employee who might suffer injury by reason of the negligence, actual or imputable, of his master. The (331) latter remedy was left intact, undisturbed and unimpaired; and the injured employee might or might not, at his option, take advantage thereof. True, he could not avail himself of both, but was put upon his voluntary election as to which of the two he would pursue. This feature of the contract is not only technically permissible, but is in perfect harmony and accord with the fundamental rule of law, based upon sound and sensible considerations of public policy, which contemplates that indemnity, rather than the mere chance of speculative gain should be the primordial purpose of every contract designed to afford protection to the party thereto, in the event he sustains loss." Approved in *Carter v. R. R.,* 115 Ga., 853.

In *Leas v. R. R.,* 10 Ind. App., 47; the Supreme Court of Indiana says: "There is no rule of public policy which condemns an arrangement between an employer and his servants, looking to compromises of claims for damages, and a system of general mutual relief for servants and their families." So, also, is *Bell v. R. R.,* 42 Neb., 44; *Eckman v. R. R.,* 169 Ill., 312; 38 L. R. A., 750; *Fuller v. Rel. Assn.,* 67 Md., 43; *R. R. v. Curtis,* 51 Neb., 442; *Maine v. R. R.,* 109 Iowa, 269.

In *R. R. v. Moore,* 152 Ind., 345, the Court said: "It is nothing more nor less than a contract for a choice between sources of compensation, where but a single one existed, and it is the final choice—the acceptance of one against the other—that gives validity to the transaction." The Iowa courts said substantially the same thing, and that the contract was mutual and violated no principle of public policy. As said by the Supreme Court of Pennsylvania, *Johnson v. R. R.,* 163 Penn., 127: "The employee is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby." The same Court well says: "The substantial feature of the contract, which distinguishes it from those held void as against public policy, is that the party retains whatsoever right of action until after knowledge of all the facts and an opportunity to make his choice between the sure benefit of the association and the chances of litigation, and, having accepted the former, he cannot justly ask the latter in addition." To the same effect speaks the Ohio Court: *R. R. v. Cox,* 55 Ohio St., 497.

In the Indiana case, *R. R. v. Moore, supra,* the Court, reviewing the authorities, says: "Indeed, the cases seem to be in substantial accord."

The Ohio Court, in *Sheets v. R. R.*, 68 Ohio St., sustaining the (332) identical section now under consideration, said: "The cases form a uniform current of judicial opinion. We have not been cited to a single case holding a contrary view, and our research has not been rewarded with one. We think the tide of judicial opinion is irresistible."

There were only two decisions in this country adverse to these views, and they were both overruled by the courts that made them. *Miller v. R. R.*, 65 Fed., overruled 76 Fed., 439; *Montgomery v. R. R.*, overruled in *Moore v. R. R.*, 152 Ind., 345.

In view of the great array of cases from nearly all the courts of this country, constituting a solid phalanx of judicial precedents, as well as text-writers, against them, I can but admire the courage with which my brethren stand by their own unsupported views.

For myself, I believe with my Lord Coke, that "It is the function of a judge not to make, but declare the law according to the golden metewand of the law, and not by the crooked cord of discretion." *Omnis innovatio plus novitate perturbat quam utilitate prodest.*

To indicate how absolutely overwhelming the judicial precedents are against the views of the majority of this Court, I append a list of forty-one cases in the United States and Canada wherein the validity of this contract has been sustained. There are none against it. *Graft v. R. R.*, 8 Atl., 206; *Fuller v. Rel. Assn.*, 67 Md., 433; *Owens v. R. R.*, 1 L. R. A., 75; *Post v. Rel. Assn.*, 122 Pa., 579; *Black v. R. R.*, 36 Fed., 655; *Martin v. R. R.*, 41 Fed., 125; *Kinney v. Emp. Assn.*, 15 L. R. A., 142 (W. Va.); *Spitze v. R. R.*, 75 Md., 162; *Leas v. R. R.*, 10 Ind. App., 47; *Johnson v. R. R.*, 163 Pa. St., 127; *Ringle v. R. R.*, 164 Pa. St., 529; *Donald v. R. R.*, 93 Iowa, 284; *Wymore v. R. R.*, 50 Neb., 658; *Bell v. R. R.*, 44 Neb., 44; *Bryant v. Emp. Assn.*, 9 Ohio C. C., 333; *Brown v. Emp. Assn.*, 6 App. D. C., 246; *Smith v. Emp. Assn.*, 81 Md., 412; *Vickers v. R. R.*, 71 Fed., 139; *Otis v. R. R.*, 71 Fed., 136; *Shaver v. R. R.*, 71 Fed., 931; *Eckman v. R. R.*, 169 Ill., 312; *Cox v. R. R.*, 35 L. R. A., 507 (Ohio); *Standard v. R. R.*, 49 L. R. A., 381; *Maine v. R. R.*, 109 Iowa, 269; *Curtis v. R. R.*, 51 Neb., 442; *Johnson v. R. R.*, 55 S. C., 152; *Moore v. R. R.*, 152 Ind., 345; *Hosea v. R. R.*, 152 Ind., 416; *Beck v. R. R.*, 63 N. J. L., 233; *Petty v. R. R.*, 109 Ga., 666; *Clinton v. R. R.*, 60 Neb., 692; *Elwood v. R. R.*, 25 Ind. App., 674; *Cowen v. Ray*, 108 Fed., 320; U. S. Cir. Ct. App.; *Fivey v. R. R.*, 12 Am. Neg. 313 (N. J.); *Ferguson v. R. R.*, Rap. Jud. Que., 2 C. (333) S., 54 (following *Queen v. Grenier*, 30 Can. Sup. St., 42); *Hamilton v. R. R.*, 118 Fed., 95; *Carter v. R. R.*, 115 Ga., 853; *Oyster v. Rel. Dep.*, 59 L. R. A., 291 (Neb.); *Sheets v. R. R.*, 68 Ohio St., 9; *Walters v. R. R.*, 19 Am. Neg. Rep., 350 (Neb.); *Harrison v. R. R.*, 40 Law Rep., 394.

Cited: *Hospital Association v. Hobbs,* 153 N. C., 194; *King v. R. R.,* 157 N. C., 56, 66, 69, 72; *Nelson v. R. R., ib.,* 196; *Nelson v. R. R.,* 167 N. C., 189; *Clark v. Wright, ib.,* 649; *Herring v. R. R.,* 168 N. C., 556, 557.

J. B. BUCHANAN ET AL. V. A. B. HARRINGTON.

(Filed 13 April, 1910.)

Tenants in Common—Partition—Quantity of Interest—Estoppel—Deeds and Conveyances—Correction.

The quantity of the estate held by tenants in common can be litigated and determined in proceedings for partition; and a judgment therein is a complete estoppel in a suit by one of them to establish that his cotenant held a less interest in the land in common, by reason of the mistake of the draftsman in writing the deed under which he claimed.

APPEAL from *Justice, J.,* at November (Special) Term, 1909, of LEE.

The plaintiffs brought this action to correct the quantity of interest conveyed by the plaintiffs to the defendant, by deed dated 11 March, 1902, in a certain tract of land therein described, upon the ground that the deed conveyed a one-half undivided interest, instead of a one-half of three-fourths undivided interest, alleging that the error was caused by the mistake or inadvertence of the draftsman, and was not discovered until some months thereafter; that plaintiffs and defendant knew that the *feme* plaintiff owned only a three-fourths interest, and that it was the intention of the plaintiffs to sell, and the defendant to buy, only a one-half interest of the three-fourths interest, but the deed to defendant conveyed a one-half interest in the entire tract. That, subsequently, in March, 1903, *feme* plaintiff purchased the outstanding one-fourth interest. Plaintiffs therefore prayed that the deed to defendant be corrected to speak the truth, and convey to him only one-half of a three-fourths interest.

The defendant denied some of the allegations of the complaint (334) and admitted others, and specially pleaded as an estoppel upon the plaintiff the former judgment of the court, in which it was adjudged that the *feme* plaintiff and the defendant were the owners each of a one-half interest in the land; that the land was, by the decree of the court, actually partitioned between them, in accordance with that interest, and that there was a final decree confirming the partition; that the plaintiffs instituted against this defendant the former action, being a special proceeding for partition, and upon answer filed putting at issue

the respective interest in the land of the *feme* plaintiff and defendant, and upon transfer of the cause to the Superior Court, a trial by a jury was had, and a verdict rendered finding the interest of each to be one-half; judgment was rendered upon the verdict; appeal taken by the plaintiffs to the Supreme Court; judgment affirmed (141 N. C., 39), and the actual partition made and finally determined. The judgment roll offered supported the plea of the defendant.

The plaintiffs offered evidence tending to support their allegations, and tendered issues presenting the mistake of the draftsman.

His Honor, after hearing the evidence, submitted only one issue, to wit: "Are the plaintiffs estopped by the former judgment in the case between the same parties for partition of the land now in controversy?" and instructed the jury to answer the issue, "Yes."

The plaintiffs excepted, and from the judgment appealed to this Court.

L. H. Gibbons and H. F. Seawell for plaintiffs.
Seawell & McIver for defendant.

MANNING, J., after stating the case: In 30 Cyc., 310, the author, Judge Freeman, thus sums up the law of the title, "Concluded by partition proceedings under modern statutes": "We apprehend, however, that whenever plaintiff alleges himself to be the owner in fee, or of any specified estate, or avers any other ultimate fact under which he is entitled to relief, it becomes the duty of the defendant either to concede or take issue with the allegation or averment, and that the judgment in the action will be as conclusive as it would be upon a like issue in any other action. The truth is, that a judgment in partition is as conclusive as any other. It does not create or manufacture a title, nor divest the title of any one not actually or constructively a party to the suit; but it operates by way of estoppel; it prevents any of the parties from relitigating any of the issues presented for decision, and the decision of which necessarily entered into the judgment; and it divests all titles (335) held by any of the parties at the institution of the suit."

It has been held by this Court that the doctrine of estoppel, with its conclusive effect, applies to proceedings in partition, which, it has been held, are no longer merely possessory actions, but are proceedings in which the quantity of estate or the title can be litigated. *Armfield v. Moore,* 44 N. C., 157; *Carter v. White,* 134 N. C., 466; *McCullum v. Chisholm,* 146 N. C., 18. The pleadings, verdict and judgment in the partition proceedings, pleaded in the present action as an estoppel, show that the litigated question, presented by proper allegation by the plaintiffs and denied by the defendant, was the quantity of the estate held by each, and it determined that question. The correction of the deed, now

made the basis of the present action, could have been had in that proceeding when it was transferred to the Superior Court, by making proper amendments. This was held by this Court on appeal from the judgment. *Buchanan v. Harrington,* 141 N. C., 39. "The plea of *res judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject in litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time, and determined respecting it." 1 Herman on Estoppel, sec. 123; *Wagon Co. v. Byrd,* 119 N. C., 460; *Tuttle v. Harrill,* 85 N. C., 456. If the Court were to correct the deed, it would not, therefore, avail the plaintiff to enlarge the quantity of the interest held by her in the land, as against the defendant and those claiming under him, the estoppel would be a complete bar. *Harrison v. Ray,* 108 N. C., 215. The Court would not do a vain thing. *Steinback v. Ins. Co.,* 77 N. Y., 498; *Sibert v. McAvoy,* 15 Ill., 106; *Thompson v. Ins. Co.,* 25 Fed., 296. We are, therefore, of the opinion that there was

No error.

Cited: Hughes v. Pritchard, 153 N. C., 147; *Ludwick v. Penny,* 158 N. C., 109; *Gregory v. Pinnix, ib.,* 152; *Weston v. Lumber Co.,* 162 N. C., 182; *McKimmon v. Caulk,* 170 N. C., 56.

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W. McD. CUTHBERTSON v. J. A. AUSTIN.

(Filed 13 April, 1910.)

1. Usury—Element of Oppression.

Involved in the charge of usury is the idea of illegal advantage or oppression, and it is competent to offer testimony of dealings or communications between the parties which tend to strengthen this element in the charge.

2. Same—Evidence.

In an action against a mortgagee of plaintiff's land, consisting of several tracts, to recover a usurious charge of interest by his failing to give proper credits on the principal sum out of payments made in excess of the legal rate, it is competent for plaintiff to show that he had had offers of purchase of each of the tracts in a sum total of more than sufficient to pay the mortgage debt, and that the defendant's refusal to release the mortgage lien as to each caused a failure of the various sales.

3. Evidence—Contradiction—Declarations—Witness—Character.

The declarations of a witness made to others, who corroborate them on the witness stand, are competent by way of corroboration when the testimony of the witness is contradicted, though his credibility and character have not been directly attacked.

APPEAL from *W. J. Adams, J.*, at November Term, 1909 of UNION.

The action was brought to reform a mortgage and to recover damages for breach of the reformed contract, and for usury. His Honor instructed the jury to answer the issue as to mistake in the mortgage in the negative; and the contest was waged on the allegations of usury. The plaintiff's evidence tended to show that there was a considerable amount paid by plaintiff to defendant in excess of the amount loaned and the legal rate of interest; and the evidence of defendant tended to prove the contrary. The questions involved were submitted, under proper instructions, to the jury, and they answered the issues in favor of plaintiff, finding that defendant had knowingly collected and received more than the legal rate of interest, and the amount paid and received as interest was $500. There was judgment on the verdict for double the amount of interest paid, as provided in sec. 1951, Rev., from which judgment the defendant appealed to this Court.

Redwine & Sikes for plaintiff.

A. M. Stack and J. J. Parker for defendant.

MANNING, J. The first four exceptions are to his Honor's permitting the plaintiff to give in evidence offers to him for the several tracts of land included in the mortgage to the defendant, which offers were communicated to the defendant. The aggregate amount of these (337) offers was more than sufficient to pay the mortgage debt, and the offers were made by persons able to comply therewith. The defendant declined to permit plaintiff to make any of the sales, by refusing to release the lien of the mortgage to the purchaser. The evident purpose of this evidence was to show that the defendant was pursuing a scheme, not so much to obtain payment of the amount legally due him, as to acquire plaintiff's land by oppressive methods. There was evidence, which the jury has found to be amply sufficient to sustain the charge of the plaintiff, that the defendant took advantage of his condition by knowingly taking, receiving and reserving a greater rate of interest than is permitted by law.

Involved in the charge of usury is the idea of illegal advantage or oppression, and we do not see why it is not competent to offer testimony of dealings or communications between the parties, which tend to strengthen this element in the charge. We do not think the admission of the evidence excepted to was reversible error.

The fifth and sixth exceptions are taken to his Honor's ruling, permitting the plaintiff to testify that he told his wife and one T. F. James, at the time of the loan, the rate of interest the defendant was charging him, and to the testimony of James, that the plaintiff told him, as testified to by him. This was admitted as corroboratory of plaintiff and was restricted by his Honor to this purpose, and so explained to the jury. The evidence was objected to by defendant, for the reason that the credibility or character of the witness had not been attacked, but there was evidence contradicting him, to wit, the testimony of the defendant. Both plaintiff and defendant offered, without objection, evidence of their good character.

The defendant's argument proceeds upon the theory that contradiction was not an attack upon the credibility of the witness—was not an attempt to impeach him. The precise question was presented in *Bullinger v. Marshall,* 70 N. C., 520, in which case *Pearson, C. J.,* said: "First, the plaintiff was introduced as a witness in his own behalf, and swore that, at the time of the sale, the defendant said: 'The mule was sound, as far as he knew, but did not tell him the mule had the sweeny.' Here was a direct contradiction. The plaintiff, by way of corroborating his testimony, was allowed to prove that soon after the sale and after the unsoundness of the mule had become apparent, the plaintiff, in a conversation with the witness, in detailing the circumstances of the trade, told him that the defendant had not dis-
(338) closed the fact 'that the mule had had the sweeny.' We concur with his Honor in the opinion that this testimony was admissible."

In *Roberts v. Roberts,* 82 N. C., 29, *Chief Justice Smith,* speaking to this question, said: "The admissibility of similar and concurring statements previously made by a witness to sustain his assailed testimony and strengthen confidence in the accuracy of his memory and the truthfulness of his evidence, has been so often declared in numerous cases before the Court, from *Johnson v. Patterson,* 9 N. C., 183 (decided in 1822), down to the recent case of *Jones v. Jones,* 80 N. C., 246, and the rule so thoroughly settled and so often recognized and acted on, as to make a citation of authorities entirely needless. We do not propose now to review them, because in England and in New York, and perhaps other States, this species of evidence is received under restrictions and modifications not recognized in this State. We will only say that in *Bullinger v. Marshall,* 70 N. C., 520, *as in our case,* the testimony of the respective parties was in direct conflict, and to corroborate that of plaintiff, he was allowed to show correspondent representations made shortly after the facts occurred." *March v. Harrell,* 46 N. C., 329; *Burnett v. R. R.,* 120 N. C., 517. In this last case the cases decided by this Court upon this question are collected by *Clark,*

J. In section 1127, 2 Wigmore on Ev., and in the note under this section, the eminent author recognizes the lack of unanimity in the decisions of the courts on this question, and cites many cases in accord with the uniform holding of this Court. *S. v. Parrish,* 79 N. C., 610, is urged upon our attention as laying down a different rule. In the case of the witness in that case, who sought to be corroborated by previous statements, the Court says: "He was not cross-examined, *not contradicted,* his character not assailed, nor was he in any way impeached, but stood before the court as any other witness, upon his merits." It was held there that the evidence was not admissible. In the present case, the witness was cross-examined; he was contradicted; and he was permitted, without objection, to prove that his character was good. Under the cases cited, we do not think his Honor erred in admitting the evidence.

The other assigned errors are to his Honor's charge. We have read it carefully, and do not think the defendant has any just ground of complaint. It seems the defendant requested no special instructions to be given upon any particular phase of the law applicable to the evidence, and we see no error in the charge given. The record stated that his Honor carefully stated the contentions of the parties. The questions involved were almost entirely matters of fact to (339) be ascertained by the jury. These facts have been found against the defendant, and we discover no error in the trial. The judgment is Affirmed.

No error.

J. Y. DOSTER AND KATE W. DOSTER v. J. R. ENGLISH AND S. O. BLAIR.

(Filed 13 April, 1910.)

1. Judgment Non Obstante—Plaintiff's Motion.

A plaintiff's motion for judgment *non obstante* cannot be granted unless the answer confesses the cause of action and sets up matters in avoidance which are insufficient, although found true, to constitute either a defense or a bar to the action.

2. Usury—Loan—Intent—Deeds and Conveyances—Evidence—Instructions.

The defendant having bought plaintiff's land and obtained a deed from a commissioner appointed by the court in a suit to foreclose a mortgage, conveyed the lands to plaintiff at an advanced price. There was conflicting evidence as to whether the defendant's purchase and resale was under an agreement with plaintiff to buy the lands for them and loan the purchase money, or a *bona fide* purchase by him and a resale to plaintiffs at a profit. In an action for usury under Revisal, sec. 1910: *Held,* no

error to instruct the jury, that if the transaction was a loan of money with the intent of defendant to exact an unlawful profit for the use of the money, it was usurious; otherwise, if it was a *bona fide* purchase and resale of the land; and defendant's testimony as to his intent in making the transaction was competent.

3. Same—Evidence—Attorney and Client—Agency.

The testimony of agents and attorneys who negotiated and managed the whole transaction for the parties is competent to show its purpose and character.

APPEAL from *Lyon, J.*, at February Term, 1910, of UNION.

Action to recover the penalty for usury given by Revisal, sec. 1951, if brought within two years. Section 396.

The following issues were submitted:

1. Was the deed of W. S. Blakeney, commissioner, to the defendants intended as a security for money furnished by the defendants to pay off the Jefferson Bank judgment, the cost of that action, the taxes and insurance against the *feme* plaintiff's property, as alleged in the complaint? Answer: No.

2. Did the plaintiff contract to buy of the defendants the two (340) houses and lots described in the complaint, as alleged in the answer? Answer: Yes.

3. How much money did the defendants furnish to pay off the liens and charges against said property on 13 June, 1908? Answer: $4,343.32.

4. What amount did the defendants collect out of the plaintiffs? Answer: $5,012.37.

5. Did the defendants knowingly take and receive more than 6 *per cent interest* (6%) on the money advanced to pay off the liens and charges against the property described in the complaint? Answer: No.

6. What was the total amount collected by the defendants over and above the amount advanced by them? Answer: $669.05.

The plaintiff moved for judgment *non obstante veredicto*. The court declined to grant the motion, and rendered judgment for defendants. Plaintiffs excepted and appealed.

A. M. Stack for plaintiffs.

R. W. Lemmonds and Redwine & Sikes for defendants.

BROWN, J. The facts are that plaintiffs had mortgaged the wife's property to a bank and foreclosure proceedings in default of payment were had in the Superior Court of Union County.

The property was sold under the decree and was bid off for $4,100. The bid was raised by defendants, who purchased it at their advanced bid. It is claimed by plaintiffs that this was done for their benefit and

in pursuance of an agreement to loan them the money, including a bonus of $350, and that although the legal title was held by defendants, it was in effect a mortgage to secure the money advanced. The defendants contended that the transaction was a sale to them and a resale by them to the plaintiffs, and that the "profit" charged in the transaction was legitimate. Some of the property was sold afterwards by consent, and the sum claimed by defendants paid in full by plaintiffs, including the "$350 profit."

The plaintiffs contend that the transaction was a loan by defendant to pay off and discharge the prior mortgage debt, and that the $350 was a bonus (in addition to 6 per cent interest) charged for the use of the money. The defendants contend that it was not a loan, but a purchase by them outright, and that they sold to plaintiffs at a profit. The motion for judgment *non obstante* was properly overruled. As we have recently said, such motion can only be granted when the plea confessed the cause of action and set up matters in avoidance which are insufficient, although found true, to constitute either a defense (341) or a bar to the action. *Shives v. Cotton Mills,* 151 N. C., 291.

In the case at bar, the essential facts pleaded by plaintiffs and necessary to make out their cause of action, have been found against them.

In order to constitute a usurious transaction, four requisites must appear: (1) There must be a loan, express or implied; (2) an understanding between the parties that the money lent shall be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and (4) there must exist a corrupt intent to take more than the legal rate for the use of the money loaned.

The text-writers declare that these rules are applicable everywhere and under the usury laws of every State, and that unless these four things concur in every transaction it is safe to say that no case of usury can be declared. Tyler on Usury, p. 110; Webb on Usury, sec. 18, and cases cited; *Bennett v. Best,* 142 N. C., 168; *U. S. v. Wagoner,* 34 U. S., 378. A profit, greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, imposed upon the necessities of the borrower in a transaction where the treaty is for a loan and the money is to be returned at all events, is a violation of the usury laws, it matters not what form or disguise it may assume.

Where the facts are admitted and the unlawful intent plainly manifest from them, the Court may declare a transaction usurious as a matter of law. Applying these well-settled principles, it is plain the Court could not declare this transaction usurious as matter of law. It is true, the plaintiffs gave their note for $4,728.65 and the deed for the lands was made to defendants by the commissioner, but there is nothing in the

written exhibits indicating that the note was given for money loaned rather than for the purchase price of the property.

That is the mooted question in the case, and one that could only be solved by the jury.

His Honor substantially charged the jury that if the transaction was a loan of money, and the purpose and intent of plaintiffs was to exact an unlawful profit of $350 for the use of the money, it was usurious. But if it was a *bona fide* sale and purchase of land, and not a loan of money to pay off the previous lien, then the transaction was not usurious. We think the charge of the court placed the matter correctly and clearly before the jury.

(342) The exceptions to the evidence are without merit. They principally relate to the admission of the testimony of Williams, Armfield, Blair and English. Williams was the agent and attorney of the defendants, and Armfield was the agent and attorney of plaintiffs, and as such negotiated and managed the whole transaction. *Martin v. Platt,* 58 N. Y., 437, and cases cited. Abbott's Trial Evidence (2 Ed.), pp. 1009 and 1010.

The intent and purpose of the parties in making and entering into this transaction is the "pole star" that must guide the jury in determining the all-important fact in the case, to wit, Was the transaction a loan or purchase and sale? If the transaction was a purchase, and was so intended by the defendants, then, certainly, there could not be usury. We think, therefore, that it was proper and not objectionable for defendants to testify as to what their intention and purpose was in entering into the transaction. *Bennett v. Best, supra.*

No error.

Cited: Riley v. Sears, 154 N. C., 519; *Elks v. Hemby,* 60 N. C., 22, 23; *McRackan v. Bank,* 164 N. C., 26; *Monk v. Goldstein,* 172 N. C., 518; *Elliott v. Brady, ib.,* 830.

JARRETT STATIONERY COMPANY (E. H. JARRETT) v. SOUTHERN EXPRESS COMPANY.

(Filed 13 April, 1910.)

1. Penalty Statutes—Carriers of Goods—Failure to Pay Claim—Amendments—Discretion.

In an action against the carrier to recover the penalty prescribed by Revisal, sec. 2634, for the failure of the company to settle a claim, it is in the discretionary powers of the trial court to allow plaintiff, during the trial, to amend so as to show that the claim for damages had been

agreed upon, though not settled, it being necessary for plaintiff to prove the exact amount of the damage claimed in order to recover the penalty, of which the defendant was put upon notice by the nature of the suit and by the statute.

2. Penalty Statutes—Carriers of Goods—Failure to Pay Claim—Subsequent Voluntary Payment.

In an action to recover the penalty for failure of the carrier to settle a claim for damages under Revisal, sec. 2634, the mere voluntary payment of the damages after the statutory time is neither a forfeiture nor a satisfaction of the penalty.

APPEAL from *Long, J.*, at April Term, 1909, of GUILFORD.

Action tried, on appeal from a judgment of a justice of the peace, and instituted to recover penalty fixed by sec. 2634, Rev. 1905, for failure to settle claim in the time prescribed. The summons required the defendant "to answer to the complaint of E. H. Jarrett, plaintiff, in a civil action for the recovery of $50 and .... cents, and interest on $50 from 17 January, 1907, until paid, due by penalty for failure to settle claim in ninety days after filing same with defendant, and (343) demanded by plaintiff." In the Superior Court and during the trial, after plaintiff had testified that the express package was tendered to him in a damaged condition, and after he had seen defendant's agent and amount of damages, to wit, $4, had been agreed on, and claim in writing filed with such agent, and that the same had not been settled, adjusted or paid, the court permitted the plaintiff to amend by suing also for the $4 damage. The defendant objected upon the ground that a new cause of action was inserted. The objection was overruled, and defendant excepted. The defendant moved in apt time to nonsuit the plaintiff under the statute. Motion overruled and defendant excepted.

The jury found, in response to the issue, that the goods transported by defendant had been damaged to the amount of $4; that plaintiff filed his claim in writing on 16 September, 1907; that defendant did not adjust and pay the claim in ninety days, and that plaintiff was entitled to recover the penalty of $50. Judgment was rendered on the verdict, and defendant appealed to this Court.

W. P. Ragan and G. S. Bradshaw for plaintiff.
John A. Barringer for defendant.

MANNING, J. We do not think his Honor erred in permitting the amendment complained of. The statute, sec. 2634, Rev. 1905, provides, "that unless such consignee recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid. Causes of action for the recovery of the possession of the property shipped, for loss or damage

thereto, and for the penalties herein provided for, may be united in the same complaint." It will be seen, therefore, that in order for the plaintiff to recover the penalty, he must establish his damage to be in exact agreement, in amount, with the claim filed by him; otherwise, no penalty shall be recovered. Whether this damage has been adjudicated in an independent action, or united in the action to recover the penalty, the agreement in amount must be shown. As no independent action for the damage had been brought, it was incumbent upon the plaintiff to establish that his damage was the full amount of the claim filed, and it was open to the defendant, as one way to avoid the penalty, to prove that the damage was less. *Albritton v. R. R.,* 148 N. C., 485.

(344) The summons fixed the defendant with notice of the specific penalty plaintiff sought to recover, and the statute, as construed by this Court in the case cited, fixed the defendant with notice of the proof required to sustain the cause of action so stated, which embraced the proof of the claim for damages as a condition precedent to the right to recover the penalty. The amount of damage can as well be determined by agreement as by suit.

The voluntary payment of the amount claimed as damage, when after the statutory time, is neither a forfeiture nor a satisfaction of the penalty. This Court, in the case cited, quotes with approval the following language, *inter alia,* of *Justice Gary,* in his dissenting opinion in *Best v. R. R.,* 72 S. C., 488: "The mode of determining whether the consignee was entitled to recover the full amount of his claim is a mere incident and not a condition precedent to his right to recover the penalty." If a judgment had been recovered in a prior independent action, for the full amount of the claim for damages, then in the suit for the penalty, such action would operate as an estoppel upon the defendant to contest this fact in its liability for the penalty. The allowance of the amendment did not reduce the burden resting upon the plaintiff, nor take away from the defendant any defenses which could be set up in a new action commenced when the amendment was asked for. It did not substantially change the claim or defense. Section 1467, Rev.; *Simpson v. Lumber Co.,* 133 N. C., 95; *Stone v. R. R.,* 144 N. C., 220; *Kron v. Smith,* 96 N. C., 389. In the case last cited, *Chief Justice Smith* says: "It does not appear that any defenses are taken away which could be set up in a new action commenced when the amendment was asked for, and it would be a reproach to the administration of the law to deny to the court the authority to allow it."

We do not think his Honor exceeded his power in allowing the amendment. Having the power to act upon the question of amendment, it was addressed to his discretion as to how he should act and upon what terms he would permit it, and his action is not subject to review by us. In

our opinion, the motion to nonsuit was properly overruled. Having examined the record and the authorities cited, we discover no error at the trial, and the judgment is affirmed.

No error.

(345)

VIRGINIA BREEDING AND TRAINING ASSOCIATION v. SOUTHERN RAILWAY COMPANY.

(Filed 13 April, 1910.)

Carrier of Goods—Live-stock Bills of Lading—Valuable Horse—Delivery—Special Contract—Measure of Damages.

A valuable race horse was shipped with knowledge by the carrier's agent under its ordinary live-stock bill of lading, limiting the amount of recovery to $100, and under the terms of which the shipper assumed to indemnify the carrier against all claims arising from heat, etc. The carrier's agent, knowing that the horse was shipped for races to be held at its destination at a certain time, made a special contract that it would reach its destination accordingly. The animal finally died from the effects of being overheated in the car, and then exposed to cold, and its bad condition was at once made known to the agent at its destination before its removal. *Held*, recovery for full damages should be allowed, under *Stringfield v. R. R., ante*, 125.

APPEAL from *Long, J.*, at February Term, 1909, of GUILFORD.

Action for damages to one horse, called "Jay Bird's Delight," shipped from Lynchburg to Greensboro, under a "live-stock contract" of carriage, which provided, among other things, that the shipper "will indemnify and save harmless the railroad company against claims arising out of loss or injury to said live stock accruing from . . . (*c*) heat, suffocation or other ill effects of being crowded in cars," and which limited the amount of recovery to $100.

From verdict and judgment, defendant appealed.

The case is further stated in the opinion of MR. JUSTICE BROWN.

Justice & Broadhurst for plaintiff.
Wilson & Ferguson for defendant.

BROWN, J. The evidence tends to prove that Jay Bird's Delight was shipped with five other horses belonging to plaintiff, under an agreement with defendant's agent at Lynchburg that they would be delivered at Greensboro, N. C., ready for unloading on the morning of 7 October, provided they were loaded on the car by 3:30 p. m., 6 October, at Lynchburg, and that they were loaded before that time; that these

horses were race horses being transported to Greensboro for the Fair, and were of much greater value than ordinary animals; and that defendant's agent at Lynchburg had knowledge of these facts.

The animals were not delivered as per agreement, but were held in Lynchburg until the night of 7 October, in the loaded car exposed to great heat, succeeded by sudden cold, in consequence of which (346) Jay Bird's Delight contracted pneumonia *en route* and subsequently died. The condition of the horse on arrival at Greensboro was at once made known to defendant's agents before removal.

This Court has not overruled *Jones v. R. R.*, 148 N. C., 583, but as at present constituted reaffirmed it in *Winslow v. R. R.*, 151 N. C., 250. A majority of the Court held that the facts in *Stringfield v. R. R., ante,* 125, took the case out of the rulings in those cases. In this case the animals were shipped under a special contract to deliver at a certain time, and the peculiar value of the animals made known to the defendant's agent at Lynchburg.

These facts, we think, bring the case within the scope of the *Stringfield case,* even from the minority point of view.

No error.

Cited: Kime v. R. R., 153 N. C., 400.

SCOTT-SPARGER COMPANY v. FERGUSON ET AL.

(Filed 13 April, 1910.)

1. Married Women—Husband as Agent—Sign Required—Constitutional Law.

Revisal, sec. 2118, declaring a married woman a free trader, as to goods purchased in conducting a mercantile business, in charge of her husband as agent, etc., without displaying a sign to that effect in the manner directed, is constitutional and valid.

2. Married Women—Sign Required—Goods Sold and Delivered—Interpretation of Statutes.

The stock of goods of a *feme covert* in charge of her husband as her agent, etc., when the provisions of section 2118 have not been complied with, requiring the sign to be displayed showing her christian name, and the fact that she was a *feme covert,* is liable for debts for goods sold to the husband for the business, notwithstanding the vendor knew the fact and that the husband, for a brief interval previous to the purchase in question, did not run the business.

3. Married Women—Sign Required—Goods Sold and Delivered—Justice's Court—Jurisdiction.

An action to make a stock of goods liable for a debt of a *feme covert* for goods sold and delivered, the business being hers and run by the husband as her agent, without complying with the provisions of Revisal, sec. 2118, requiring the sign to be displayed showing such fact and the christian name of the *feme covert*, is cognizable in the court of a justice of the peace when the amount is within his jurisdiction.

APPEAL from *Biggs, J.*, at October Term, 1909, of GUILFORD. (347)

Action heard before a justice of the peace to recover of a *feme covert* goods alleged to have been sold and delivered to her husband, while she was conducting a mercantile business without displaying the sign required by Revisal, sec. 2118.

Morehead & Sapp for plaintiff.
J. A. Barringer for defendant.

CLARK, C. J. Revisal, sec. 2118, provides, "if any married woman shall conduct such business through her husband, or any other agent, or if any husband or agent of any married woman shall conduct such business for her, without displaying the christian name of such married woman, and the fact that she is a *feme covert,* by a sign placed conspicuously at the place wherein such business is conducted, then all the property, stock of goods and merchandise, and choses in action purchased, used and contracted in the course of such business shall, as to creditors, be liable for the debts contracted in the course of such business, by the person in charge of the same. Any married woman conducting such business as aforesaid without complying with the provisions of this section shall for all purposes be deemed and treated, as to all debts contracted in the course of such business, as a free trader as fully as if she had in all respects complied with the provisions of this subchapter: *Provided,* this section shall not apply to any person transacting business under license as an auctioneer, broker or commission merchant. In all actions under this section it shall be incumbent on such trader, merchant or married woman to prove compliance with the same."

The jury responded to the issues submitted to them as follows:

1. Was J. E. Ferguson, as husband of Mrs. Sarah Ferguson, conducting for her a business without displaying, at the place of business, a sign showing her christian name and the fact that she was a *feme covert?* Answer: Yes.

2. Was the indebtedness sued on contracted in the course of said business? Answer: Yes.

3. In what amount, if any, is the *feme* defendant, Mrs. Sarah Ferguson, indebted to the plaintiff? Answer: $104.09.

The only error assigned by defendant is the refusal of his Honor to dismiss the action as upon judgment of nonsuit under the statute.

There was evidence that the business was that of the *feme* defendant, and was run in the name of her husband; that there was no (348) sign of any kind, nor any other thing, at the place of business to indicate that she had anything to do with the business, and that she was a *feme covert*. There was also evidence that at one time, when the husband was drunk and in the calaboose, the *feme covert* defendant ran the store till her husband got back, and the plaintiff sold him goods thereafter, knowing he was running the business for his wife. The latter fact is immaterial (and knowledge that it was the wife's business but increases the plaintiff's natural equity to recover) under the terms of the statute, if the facts are as the jury find. There being evidence to that effect, the motion of nonsuit was properly denied.

This case differs from *Weld v. Shop Co.*, 147 N. C., 588, in which this statute was held inapplicable because there the business was run solely by the wife. Here the business was run by the husband (with a brief interval) for the wife, without complying with the requirements of the statute in such cases. By the very terms of the statute, noncompliance with its provisions makes the wife *ipso facto* a free trader, "as to all debts contracted in the course of such business."

The Legislature has the power to declare when and how a married woman may become a free trader. *Hall v. Walker*, 118 N. C., 377. The evidence in this case shows that the *feme* defendant was, as to the debt sued on, a free trader, and she could therefore, as to this debt, be sued in a court of justice of the peace. *Nevill v. Pope*, 95 N. C., 346; *Hodges v. Hill*, 105 N. C., 130.

A very similar statute is Rev., 2016, which makes a married woman's realty liable for betterments put thereon with her tacit consent. *Finger v. Hunter*, 130 N. C., 529; *Ball v. Paquin*, 140 N. C., 83. Somewhat similar statutes making a married woman liable as a *feme sole*, are the two immediately preceding sections to this, sections 2116 and 2117.

No error.

Cited: *Stone Co. v. McLamb*, 153 N. C., 382.

(349)

G. C. COLE v. J. G. SEAWELL.

(Filed 13 April, 1910.)

Processioning—Disputed Lines—Survey—Procedure.

When the petitioner in proceedings for processioning or locating certain lines between his own and adjoining lands, before the clerk, alleges that the lands of a party to the proceedings are adjoining his, which is admitted by that party, but he denies all the allegations of the petition which conflict with his title and the description of the line he sets up as the true one, without further denial of the petitioner's title, the issue so raised is not one of title, but of boundary, and an order of the clerk that the county surveyor survey the boundaries in dispute, etc., and make report, is in accord with the statute. Revisal, sec. 325.

APPEAL from the order of *W. J. Adams, J.*, at chambers at Carthage, 22 October, 1909, confirming an order made by the clerk of MOORE in proceedings in processioning, for the purpose of locating a certain line alleged to be in dispute as shown by the pleadings in the cause.

Upon the filing of the answer the defendant moved before the clerk of the court that the issues of fact raised by the pleadings be made up and transmitted to the Superior Court of Moore for trial in term before the judge and a jury. The motion of the defendant was overruled, and the defendant excepted. Exception 1.

The clerk thereupon made an order that the county surveyor survey the lands and boundaries in dispute between petitioner and defendant and such contiguous lands thereto as might be necessary to show the contentions of the parties and the true location of the disputed lines and boundaries, and make a report of the same as shown by the record. To this judgment the defendant objected in apt time, and excepted thereto and appealed therefrom to the judge residing in the Eighth Judicial District. Exception 2.

Said appeal of the defendant came on for hearing before his Honor, *W. J. Adams, J.*, at his chambers in the town of Carthage on 22 October, 1909, and upon the hearing of said appeal his Honor affirmed the judgment heretofore made by the clerk, and remanded said cause to said clerk for proceedings in accordance with said order, as shown by the record. The defendant in apt time excepted and objected to said ruling and judgment, and appealed therefrom to the Supreme Court.

H. F. Seawell for plaintiff. (350)
U. L. Spence for defendant.

HOKE, J. Our statute on this subject, Revisal, ch. 10, sec. 325 *et seq.*, provides that when an owner of land having disputed boundaries

desires to establish their location, he shall file a petition under oath before the clerk, setting forth the facts sufficient to establish the correct location as claimed by him, and designating as defendants all adjoining owners whose interest may be affected by the location of the lines in dispute; and thereupon process having been first issued and served on the parties defendant, if no answer is filed, judgment shall be entered establishing the lines as claimed by the petitioner. Under other sections of the Revisal appropriate to special proceedings, if answer is filed raising an issue as to title, or other material issues in bar of plaintiff's right to the relief prayed for, the same shall be transferred to the civil-issue docket, to be considered and determined according to the course and practice of the court. *Woody v. Fountain,* 143 N. C., 66; *Jackson v. Williams, ante,* 203; *Biggs v. Gurganus, ante,* 173. In case answer is filed raising an issue only on the location as claimed by plaintiff, then the law directs that the clerk shall issue an order to the county or other competent surveyor, who shall survey said line or lines according to the contention of both parties, and make report with a map showing the survey, and not more than thirty days from the date of the order. The clerk shall thereupon hear the matter and give judgment fixing the location of the line. If either party desires to except to this judgment of the clerk determining the line, he may do so within ten days, on giving proper notice, and thereupon the clerk is directed to transmit the issues raised before him to the next term of the Superior Court for trial by jury, etc.

In the present case, it appears from a perusal of the pleadings that the allegations only raise an issue as to the location of the disputed lines. The plaintiff alleging possession and ownership of a certain tract of land, describing the same by metes and bound, states, further, that defendant is owner of an adjoining tract, giving the boundaries of same.

The petitioner further avers that two of the lines are in dispute, and sets forth and describes the location of these lines as claimed by him, with clearness and precision.

The answer sets forth and describes the tract of land owned by defendant, giving the description by metes and bounds, and in effect and substance, denies all the allegations of the petition, in so far (351) as the same conflict with his title and description. The land so described is the tract alleged and referred to by the plaintiff as an adjoining tract. There is no denial of plaintiff's ownership of the tract claimed by him, and it is clear that the issue is in no sense an issue as to title, but only as to location or boundary, and the ruling below directing in the first instance that a survey should be had, is in accordance with the express provisions of the statute, and the same is

Affirmed.

S. B. CARRAWAY ET AL. v. W. O. MOSELEY ET AL.

(Filed 13 April, 1910.)

1. Wills, Interpretation of—Power of Appointment—Its Exercise.

When under the will of a donee of a power the devise of lands is effective without the execution of the power, the intent of the testator to execute it must be so clearly expressed that no other reasonable one can be imputed.

2. Same—Lands Adjoining—Description.

L. devised a life estate in his lands, with a limitation over to W., a grandson, in default of the exercise by S., the son of the former and father of the latter, of a power of designation or appointment under the will of L. In the will of S., devising to W. certain of his own lands, the *locus in quo* is given as adjoining lands, which were referred to as those given to W. by the last will and testament of L.: *Held*, (1) that by the will of S. it was intended by S. that only his own lands were to be conveyed to his son, and the devise was not an execution of the power of appointment he held under the will of L., his father, the reference in his will to the *locus in quo* being for the purpose of description.

APPEAL by plaintiffs from *O. H. Allen, J.*, at November Term, 1909, of LENOIR. The facts are stated in the opinion of the Court.

G. V. Cowper, Aycock & Winston, F. A. Daniels, and W. C. Munroe for plaintiff.

Loftin, Varser & Dawson, Y. T. Ormond, T. C. Wooten, and Simmons, Ward & Allen for defendant.

WALKER, J. This action was brought by the plaintiffs to recover of the defendants the possession of a certain tract of land, or a portion thereof, in the county of Lenoir, called "Monticello," and which is fully described in the complaint. The plaintiffs claim the land as the children of William W. Carraway, upon the ground that, by virtue of the execution of a power given by Louis Whitfield to Snoad (352) B. Carraway, the said William W. Carraway acquired a life estate in the said land, with a remainder in fee to his children. The defendants claim through mesne conveyances under William W. Carraway, and base their claim upon the ground that there was no execution of the power by Snoad B. Carraway and, therefore, by the terms of the will the lands were devised directly by Louis Whitfield to William W. Carraway in fee simple.

The clause of the will by which the power of appointment is conferred upon Snoad B. Carraway is as follows: "I give and bequeath unto my son-in-law, Snoad B. Carraway, and wife, Harriet, and to the

survivor of them for life, that part of my land on Wheat Swamp whereon they now live, called 'Monticello,' beginning at a small maple (describing it); also the land I hold by deed from John Patridge, and the two Robert Wetheringtons; also a part of land on Beaver Dam Branch, called LaFayette (describing it); also a half of two lots in the town of Hookerton, and after the death of said survivor, I give and bequeath the said tracts of land and plantations to such child or children now in being of the said Snoad B. Carraway as he shall name, and designate and appoint to take the said land, in and by his last will and testament; and after the death of said child or children and the devisees so named, designated and appointed, to the children of said child or children to be equally divided between them and their heirs forever, and in default of any appointment or designation of any such child or children by the said S. B. Carraway as before said, then I give and devise that part of my land on Wheat Swamp as above described, called 'Monticello,' and a half of two lots in Hookerton, to William W. Carraway, son of S. B. Carraway and Harriet, his wife, and that part of my land on Beaver Dam as above described, called LaFayette, to Mary Carraway, daughter of Snoad B. Carraway and Harriet, his wife, to them and their heirs forever."

After the death of Louis Whitfield and the probate of his will, and also after the death of Harriet Carraway, the wife of Snoad B. Carraway, the latter, that is, Snoad B. Carraway, executed his will, which contained the following item: "I give and bequeath unto my son, William W. Carraway, all of my land on or near Wheat Swamp, which I have acquired by purchase from Levi Mewborn, from the heirs of Robert Wetherington and others, adjoining the lands and plantation called 'Monticello,' given to William Carraway by the last will and testament of his grandfather, Louis Whitfield. I also give him (353) (my son William) the following negroes (naming them); also one acre of land at Becton's old field on Neuse River; also my household and kitchen furniture, including all the silver of every kind, bed, bedsteads and bedclothing, not given away in another legacy; also one lot in Hookerton, Greene County."

The contention of the plaintiffs is that the devise in the will of Snoad B. Carraway was an execution of the power of appointment, which devolved upon him by the will of Louis Whitfield, and which we have already stated. We are unable to agree with the plaintiffs in this construction of the said devise. The law in regard to the execution of powers of appointment has been well settled for many years.

The rule generally accepted is that if the donee of the power intends to execute it, and the mode be, in other respects, unexceptionable, that intention, however manifested, whether directly or indirectly, positively

or by just implication, will make the execution full and operative; the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation; and if it be doubtful under all the circumstances, that doubt will prevent it from being deemed an execution of the power. It is not necessary, therefore, that the intention to execute the power should appear by express terms or recitals in the instrument, but it is sufficient that it appears by words which, when fairly construed, indicate the intention of the donee to execute the power. Three classes of cases have been held to be sufficient demonstrations of such intention: (1) Where there has been some reference in the will, or other instrument, to the power; (2) or a reference to the property which is the subject on which it is to be executed; (3) or where the provision in the will, or other instrument executed by the donee of the power, would otherwise be ineffectual or a mere nullity, or, in other words, it would have no operation except as an execution of the power. This rule has been approved in the following cases: *Blagge v. Myers,* 1 Story, 426; *Blake v. Hawkins,* 98 U. S., 315, and in *Lee v. Simpson,* 134 U. S., 572, in which case the authorities are collected. This Court adopted the rule in *Taylor v. Eatman,* 92 N. C., 601, and held that, as a general rule, in executing a power, the deed or will should regularly refer to it expressly, and it is usually recited; yet it is not necessary to do this if the act shows that the donee had in view the subject of the power at the time. 2 Washburn on Real Property (4 Ed.), 658. We may add to these the following authorities: Hopkins on Real Property, 316; *Lane v. Lane,* 64 L. R. A., 849; 2 Story Eq. Jur. (13 Ed.), sec. 1062a; 2 Perry on Trusts, sec. 511c; 4 Kent's Commentaries (13 Ed.), marg. p. 335. It has generally been held that a will need not contain express evi- (354) dence of an intention to execute a power. If the will be made without any reference to the power, it operates as an appointment under the power, provided it cannot have operation without the power. The intent must be so clear that no other reasonable one can be imputed to the will, and if the will does not refer to a power or the subject of it, and if the words of the will may be satisfied without supposing an intention to execute the power, then, unless the intention to execute the power be clearly expressed, there is no execution of it. For this statement of the law we have the authority of Chancellor Kent. 4 Kent's Commentaries, *supra.*

Applying these principles to the wills under consideration, we think it clear that Snoad B. Carraway, by the devise in his will, intended only to convey his own property to his son, William W. Carraway, and not to execute the power of appointment which he held by virtue of the will of Louis Whitfield. The words in the will, after a general descrip-

tion of the land he gave to his son, namely, "adjoining the lands and plantation called 'Monticello,' given to William W. Carraway by the last will and testament of his grandfather, Louis Whitfield," are merely descriptive of his own land which he was then devising to his son. No land was devised to William W. Carraway by the will of Louis Whitfield, except in the event that the donee of the power should fail to execute it. Snoad B. Carraway did not intend, by the words we have quoted, to refer to any land acquired by his son, William W. Carraway, under any execution of the power of appointment, but to the land devised to him by Louis Whitfield, in the event, as we have said, Snoad B. Carraway failed to execute the power appointment. The devise in the will of Snoad B. Carraway to his son, William W. Carraway, could, therefore, have full force and effect without reference to any execution of the power, and, under the rule we have stated, the law will not consider the power as having been executed. Besides, we think it is perfectly manifest that Snoad B. Carraway intended, not to execute the power, but to further describe the particular tract of land which, at the time of executing his will, he was devising to his son.

A trial was waived by the parties, and the court, by consent, found the facts to be as we have already stated them. We are of the opinion that there was no error in the judgment of the court upon the facts in the case.

Affirmed.

Cited: Herring v. Williams, 158 N. C., 9; *Ryder v. Oates,* 173 N. C., 574.

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(355)

A. VINEBERG v. F. N. DAY ET AL.

(Filed 13 April, 1910.)

1. Optometry — Board of Examiners — Judicial Powers — Interpretation of Statutes.

The Board of Examiners in Optometry, established by chapter 444, Laws of 1899, has authority to pass upon the proof required from an applicant to practice without examination, under section 6, to the effect that he had been engaged in the practice two years prior to the passage of the act, etc., this authority being construed from the requirement that he shall "file an affidavit as proof (of the facts) with the board."

2. Optometry—Without Examination—Residents—Interpretation of Statutes.

The provisions for one to practice optometry in North Carolina without an examination from the board of examiners, who has engaged in its practice here for two years prior or next preceding the date of the

passage of the act, apply only to residents of the State, such being the construction of the language of section 8, "that any recipient of a certificate of registration shall present the same for record to the clerk of the Superior Court of the county in which he resides, etc."

3. Optometry—Board of Examiners—Judicial Powers—Mandamus.

The statute confers upon the Board of Examiners in Optometry authority to pass upon the proof required of one desiring to practice without an examination, and, having found from the petition that the applicant was not so entitled under the requirements of the act, a mandamus will not lie to compel the board to issue the certificate.

APPEAL from *W. J. Adams, J.*, from GUILFORD, heard by consent at chambers, 3 January, 1910.

The case is stated in the opinion of the Court.

Stedman & Cooke for plaintiff.

A. L. Brooks, E. D. Kuykendall, and C. W. Hall for defendants.

WALKER, J. This action was brought by the plaintiff against the defendants, who constitute the Board of Examiners in Optometry in this State, for the purpose of obtaining a peremptory writ of *mandamus*, compelling the defendants to issue to him a license to practice optometry in the State, without undergoing an examination as to his qualifications, by virtue of the provisions of Laws 1899, ch. 444. Section 5 of the said act provides for an examination by the board, in order to ascertain whether the applicant is qualified, by learning or experience, to practice optometry. The purpose of the act is to protect the people of the State against quacks and empirics. It is further provided (356) by the act as follows:

"SEC. 6. Every person who has been engaged in the practice of optometry in the State of North Carolina for two years prior to the date of the passage of this act shall, within six months thereafter, file an affidavit as proof thereof with said board. The secretary shall keep a record of said person and shall, upon payment of $3, issue to said person a certificate of registration without the necessity of an examination.

"SEC. 7. All persons entitled to a certificate of registration under the full provisions of section 6, shall be exempt from the provisions of section 5 of this act.

"SEC. 8. All recipients of said certificate of registration shall present the same for record to the clerk of the Superior Court of the county in which they reside, and shall pay a fee of fifty cents for recording the same. Said clerk shall record said certificate in a book to be provided by him for that purpose.

"SEC. 9. Any person entitled to a certificate as provided for in section 6 in this act who shall not, within six months after the passage of

this act, make written application to the board of examiners for a certificate of registration, accompanied by a written statement, signed by him and duly verified before an officer authorized to administer oaths in this State, fully setting forth the ground upon which he claims such certificate, shall be deemed to have waived his right to a certificate under the provisions of said section. Any such person may obtain a certificate thereafter by successfully passing examination and paying a fee as provided for in this act.

"SEC. 10. Every person to whom a certificate of examination or registration is granted shall display the same in a conspicuous part of his office wherein the practice of optometry is conducted."

The plaintiff presented to the board an affidavit which was defective, and afterwards he presented an amended affidavit, in which he stated that he had practiced optometry in this State continuously for two years next preceding the passage of said act. It appeared in the said affidavit that he had practiced optometry in other States occasionally, when called upon to do so. The affidavit was taken in the form of questions and answers, and many questions were propounded to the applicant, for the purpose of ascertaining his qualifications to practice the profession of optometry, which were answered by him. The board refused to issue the certificate, and he then brought this action to compel them to do so.

(357) It was agreed at the hearing that the judge should find the facts, and, among others, he found the following: First, that the petitioner has not been a resident of this State, and, second, that the defendants duly considered the affidavit first filed by the petitioner and the second affidavit, or written application, and passed upon the same, the board finding as a fact that the petitioner had not been engaged in the practice of optometry in this State for two years prior to the passage of said act, and that the grounds set forth in his application were not such as, under the law, entitled him to a certificate; third, that the petitioner had not been engaged in the practice of optometry in this State for two years prior to and next preceding the date of the passage of the act of 1899.

It will be observed that the act of 1899, in section 6 thereof, requires that the applicant for a certificate without examination shall offer proof showing that he is entitled thereto. It is true that this proof may be made in the form of an affidavit, for the words in the act are that he shall "file an affidavit as proof (of the facts) with said board." The evident purpose of the act is that the applicant should be required to file an affidavit in order to prove to the board, or, in other words, to the satisfaction of the board, that he had practiced optometry in the State within two years next preceding the passage of the act. Why should

the Legislature require proof of the fact that he had so practiced in this State, unless the board had the authority to pass upon the proof and to find whether he had so practiced or not? The requirement that the proof should be in the form of an affidavit should make no difference in the construction of the act.

But assuming that the board had no discretion in the matter, and no right to pass upon the proof or to find the facts, one way or another, the act clearly requires that its provisions should apply only to a resident of this State, for in section 8 it provides that, "any recipient of a certificate of registration shall present the same for record to the clerk of the Superior Court of the county in which he resides, and shall pay a fee of fifty cents for recording the same, and the clerk shall record the certificate in a book to be provided by him for that purpose." How can the certificate be filed with the clerk of the court in the county of the plaintiff's residence, if the plaintiff has no residence there? And the court below has expressly found as a fact that the plaintiff has not been a resident of this State. The parties agreed that the judge might find the facts and declare his conclusions of law arising thereon.

If we should hold that the act conferred judicial power upon the board to pass upon the facts stated in the application, or to exercise a sound legal discretion in the matter, the remedy by *mandamus* could not be invoked for the purpose of compelling the board to issue the (358) certificate. In *Board of Education v. Commissioners,* 150 N. C., 116, this Court, quoting from High on Extra-legal Remedies (2 Ed.), sec. 24, said: "'An important distinction to be observed in the outset, and which will more fully appear hereafter, is that between duties that are peremptory and absolute, and hence merely ministerial in their nature, and those which involve the exercise of some degree of official discretion and judgment upon the part of the officers charged with their performance. As regards the latter class of duties, concerning which the officer is vested with discretionary powers, while the writ may properly command him to act or may set him in motion, it will not further control or interfere with his action, nor will it direct him to act in any specific manner.' The doctrine so stated by Mr. High is in accord with the uniform decisions of this Court on the subject. *Ward v. Commissioners,* 146 N. C., 534; *Glenn v. Commissioners,* 139 N. C., 412; *Burton v. Furman,* 115 N. C., 166." See *Barnes v. Commissioners,* 135 N. C., 27.

We are of the opinion that, upon the facts as found by *Judge W. J. Adams* in the court below, the judgment refusing the writ of *mandamus* was correct. It is unnecessary that we should refer to the cases cited in the brief of the appellant, as in the view we take of the case they have no application to the facts as found by the court.

Affirmed.

LURIN HEILIG v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 13 April, 1910.)

1. Insurance, Accident—Stipulation—Suit in Year.

The stipulation in policies of accident insurance, limiting the time in which actions to recover the loss covered by the policies can be begun, is valid and binding, and not in contravention of Revisal, sec. 4809, being construed to give plaintiff one year after his cause of action accrued, or seventeen months, at most, from the time of injury, within which to bring his action.

2. Same—Infancy—Aetion on Policy—Ratification.

An action brought by one after reaching his majority to recover benefits under an accident policy of insurance, taken out by him during his minority, is an affirmance or ratification of the contract; and the stipulation of the policy requiring that suit thereon shall be brought in one year is binding upon him. Should he elect to disaffirm his contract, his action would be to recover the premiums or assessments paid by him during his minority.

(359) APPEAL from *Long, J.*, at August Term, 1909, of ROWAN.

The plaintiff sued to recover upon an accident policy issued to him by the defendant on 21 March, 1902, the amount stipulated to be paid for the accidental loss of a foot. The accident resulting in the injury to plaintiff occurred on 12 July, 1902. Action was begun by plaintiff on 28 aJnuary, 1904, which was dismissed at August Term, 1906, of the Superior Court, for failure of plaintiff to comply with the terms imposed upon him for a continuance granted at a previous term. The present action was begun 29 April, 1907.

The policy sued upon contained the following stipulation: "No legal proceedings be brought to recover any sum hereby insured, within ninety days after receipt of proofs at Hartford, nor at all, unless commenced within one year from the date of the alleged accident, as to death, loss of limb, or sight, within six months from the filing of said claim with the company as to total disability." The plaintiff became of age between the time of injury and the bringing of the first action. The failure to bring the action within the stipulated time was, among other things, pleaded as a defense to the action by the defendant. The following issues were submitted by his Honor:

1. Were the plaintiff's injuries caused by the unnecessary exposure of the plaintiff to obvious danger or obvious risk? Answer: No.

2. Did the plaintiff commence his action within a year from the time of the accident which caused the injury? Answer: No.

3. What sum, if any, is plaintiff entitled to recover? Answer: $266.66, with interest from the time due under the policy.

The judgment rendered by his Honor contains the following: "The court, pending the trial, reserved the question of law as to whether or not the plaintiff could recover, and upon the consideration of all the facts, the court is of the opinion that the plaintiff, in affirming the contract, which appears to be a single one, cannot affirm in part and disaffirm in part, and in view of the language of the policy quoted, is of the opinion that, upon the whole record, the plaintiff cannot recover. The court thereupon enters a judgment of nonsuit." The plaintiff excepted and appealed to this Court.

George W. Garland for plaintiff.
John L. Rendleman and Jerome, Maness & Sikes for defendant.

MANNING, J. The stipulation in policies of insurance, limiting the time in which actions to recover the loss covered by the policies can be begun, has been upheld by this Court in several cases, and is uniformly sustained by American courts. *Modlin v. Ins. Co.*, 151 N. (360) C., 35; *Parker v. Ins. Co.*, 143 N. C., 339; *Muse v. Assurance Co.*, 108 N. C., 240; *Lowe v. Acc. Assur.*, 115 N. C., 18; *Dibbrell v. Ins. Co.*, 110 N. C., 193; *Gerringer v. Ins. Co.*, 133 N. C., 407; Vance on Insurance, sec. 191, citing in the notes a large number of cases.

The stipulation contained in the policy sued upon does not contravene the provisions of section 4809, Rev., for the fair and equitable construction of the stipulation is to give the plaintiff twelve months or one year after his right of action accrued, in which to bring his action. *Modlin's case, supra;* Clement's Fire Insurance as a Valid Contract, pp. 390 and 391, and cases cited; 4 Joyce on Insurance, sec. 3188; *Miller v. Hartford Fire Insurance Co.*, 70 Iowa, 704; 25 Cyc., 911; 19 Cyc., 907. The only provision of the policy, relating to the point now under consideration, set out in the record, is the stipulation quoted in the statement of the case. The policy itself is not sent up. Assuming that the policy allows sixty days in which proofs of injury are to be filed, it stipulates that the company shall have ninety days to determine its action upon them, and the insured, under the construction we place upon the stipulation, would have one year thereafter in which to bring his action. This was not done. The first action was not brought until 28 January, 1904, the accident occurring 12 July, 1902; this was more than eighteen months thereafter. The stipulated time limit was seventeen months, by a construction most favorable to the insured. The action, therefore, would be defeated by the delay unless saved by the infancy of the plaintiff. In Vance on Insurance, p. 508, the doctrine is thus stated: "The fact that the insured is an infant does not relieve him of the obligation to bring his suit within the twelve months stipulated, and a suit brought

by him after reaching majority is held to be barred." *Mead v. Ins. Co.* (Kan.), 64 L. R. A., 79; *Suggs v. Ins. Co.* (Tex.), 1 L. R. A., 847. The principle upon which this doctrine rests is that a suit upon the contract of insurance, to recover the benefits due under it, is an affirmance or ratification of the contract, and its stipulations are therefore binding; but if the infant, upon attaining his majority, should elect to disaffirm, his action would be to recover the premiums or assessments paid by him during his minority, and not an action upon the contract to recover its benefits. This follows from the well-settled principle that the contracts of infants, except for necessaries and those not *mala prohibita* or *mala in se,* are voidable. Upon ratification or affirm-
(361) ance, the contract stands *cum onere,* not *ex onere.* Our conclusion, therefore, is that there was no error in his Honor's ruling, and the judgment is

Affirmed.

Cited: Holly v. Assurance Co., 170 N. C., 5; *Faulk v. Mystic Circle,* 171 N. C., 312.

IDA BLACKBURN v. THE CHEROKEE LUMBER COMPANY.

(Filed 20 April, 1910.)

1. Railroads—Automatic Couplers—Negligence—To What Roads Applicable.

A corporation operating a short standard-guage railroad with steam motive power, well surveyed and constructed, over which a very large output of sawed lumber from a mill was exclusively hauled to its connecting railroad for further transportation, is responsible for an injury received by its employee in the course of his employment, caused by its negligently failing to furnish and equip its cars with automatic couplers.

2. Same—Continuing Negligence — Contributory Negligence — Question for Jury.

When the injury complained of was received by reason of the parting of a freight car from the engine, which would not have occurred if the defendant railroad company had equipped its cars with automatic couplers, the plaintiff being an employee acting within the scope of his duties, at the time, the negligent failure of the defendant to so equip its cars continued up to the time of the injury, and bars the defense of contributory negligence, unless the negligence of the defendant amounted to recklessness; and the mere fact that the plaintiff was on the running-board of the engine at the time, and used an iron pin to make the coupling, furnished for the purpose by the defendant, raises a question of fact for the jury, under the circumstances, upon the question of such contributory negligence.

3. Master and Servant—Servant's Discretionary Powers—Scope of Agency.

An engineer having full authority to hire or discharge his train crew is presumed as not acting beyond the sphere of his assigned duties in doing the work of a brakeman, when, dissatisfied with the manner in which the brakeman was doing his work, and having ordered him to fire the engine and ordered a competent man to run it, and when killed while acting as brakeman, by the negligence of the defendant in failing to equip its train with an automatic coupler, the relation of master and servant still existed, and the master is liable for the injury received by reason of its negligent act.

APPEAL from *O. H. Allen, J.*, at August Term, 1909, of SAMPSON.

The following issues were submitted to the jury:

1. Was plaintiff's intestate injured by the negligence of the (362) defendant as alleged? Answer: Yes.

2. If so, was the plaintiff's intestate guilty of contributory negligence, as alleged? Answer: No.

3. What damage, if any, is plaintiff entitled to recover? Answer: $725.

The evidence tended to show, and was accepted by the jury as sufficient to prove, that defendant company was operating a well-constructed railroad from its mill to a station named Garland on the Atlantic Coast Line Railroad; that its track was standard gauge, well surveyed and constructed, and regularly and properly inspected and maintained; that its output of sawed lumber was very large and it was hauled over this track exclusively, and in cars of standard guage, furnished it by the Atlantic Coast Line Railroad Company; that the intestate was the engineer having in charge the trains operated on its road, with power to hire and discharge his train crew, brakemen and firemen. The length of this road was two miles. On the night of 30 November, 1907, the engineer, Blackburn, was run over and killed while going from the defendant's mill to Garland. This action was brought by his widow, as administratrix.

The circumstances of the alleged negligent killing were substantially as follows. At the mill, a certain amount of shifting of cars had to be done by the engine; Will Hassell was doing the switching and Lem Rich was firing for the engine. The intestate, for some reason, became impatient with the manner in which Hassell was doing his work, and ordered him to the engine to fire it: that intestate did the work of the switchman, and Rich, under his orders, acted as engineer; Rich had had some experience in running the engine, and seems to have performed his work well that night. The defendant did not use automatic couplers, but coupled its cars in the old way. One of the cars to be hauled by the engine that night was an A. C. L. box car, equipped with

the automatic coupler, but it had to be coupled to the engine of the defendant by an iron pin; it was so coupled by intestate, he using the smaller of two pins on the engine, provided by the defendant for coupling. The engine was running backward, pulling the car. There was evidence that intestate tried to use the larger pin, but unsuccessfully; and there was evidence that he picked it up, but did not attempt to use it. After the train was ready to move, the intestate, having a lantern on his arm, stepped on the board running across in front of the engine, the usual place for the switchman; there being no hand-hold on the engine, he leaned back against the box car and signaled the (363) acting engineer to proceed. The train started and proceeded without accident until it reached an upgrade, when in pulling it, the coupling-pin bent, the car separated from the engine, the intestate fell and was run over and killed. There was evidence that intestate's attention was called to his position of danger, but he replied he did not think he would get hurt. There was evidence that the intestate had been drinking, but this was contradicted; this was submitted by his Honor to the jury, to be considered by them in passing upon the conduct of the intestate. From the judgment entered upon the verdict, the defendant appealed.

Faison & Wright for plaintiff.
George E. Butler and H. L. Stevens for defendant.

MANNING, J. The exceptions taken by defendant and assigned as errors can be arranged and considered in three groups, to wit: 1. That the defendant was under the duty to furnish and equip its cars with automatic couplers, and its failure to do so was negligence. 2. That intestate was guilty of contributory negligence in voluntarily taking a position of peril, and in failing to use the larger of the two pins in coupling the car to the engine. 3. That having voluntarily undertaken to perform a service not within the scope of his employment, the relation of master and servant was temporarily suspended, and the defendant owed him no duty, except to abstain from willful injury.

This Court has ruled against the contention of the defendant in its exceptions embraced in the first group, as above arranged. *Hairston v. Leather Co.*, 143 N. C., 512; *Bird of Leather Co.*, 143 N. C., 283; *Hemphill v. Lumber Co.*, 141 N. C., 487; *Sawyer v. R. R.*, 145 N. C., 24; *Stewart v. Lumber Co.*, 146 N. C., 47; *Wright v. R. R.*, 151 N. C., 529.

We have examined the charge of his Honor covering the view contended for by defendant in the exceptions included in the second group, and we find that his Honor charged the jury in the language approved by this Court in *Elmore v. R. R.*, 132 N. C., 865, and *Hairston v. Leather Co., supra,* and *Coley v. R. R.*, 129 N. C., 407. We cannot say, as a

matter of law, upon the evidence presented in the record, that "the apparent danger was so great that its assumption amounted to reckless indifference to probable consequences," or that the intestate "acted foolishly and without prudence," and that his conduct amounted to recklessness. If the defendant had furnished and equipped its train with automatic couplers there would have been, on the night in question, no separation of the train and no accident to the itnestate. (364) "The proximate cause of the injury was the breaking of the defective coupling-pin, and the consequent parting of the cars. The negligence of the injured brakeman, in being in an improper place, if it can be called negligence, was a mere condition of the injury. The breaking of the defective pin was the proximate cause of the injury. His being on the cars was not the immediate cause of it in a juridical sense." *R. R. v. Mansberger,* 65 Fed., 196; *Phillips v. R. R.,* 64 Wis., 475. If the death of intestate had been caused by being jostled from the running-board, on which his feet were resting, or by being thrown from his position by the ordinary movement of the train, then the proximate cause might have been, in a "juridical sense," the perilous position he had assumed; but this view is not presented by the evidence. The separation of the train—the parting of the cars—would not have occurred if the automatic coupler had been used. It was not furnished, and this failure constituted negligence continuing up to the time of the injury, and bars the defense of contributory negligence, unless the negligent conduct of the injured employee amounted to recklessness. This was a question for the jury; and they have resolved the question, upon the evidence, against the defendant.

The third group of exceptions embraces those resting upon the contention that the intestate was doing work without the scope of his employment and beyond the sphere of his assigned duties, and that the intestate became a volunteer as to that work—a bare licensee—and the defendant cannot be compelled to answer in damages for an injury which the intestate "brought on himself by undertaking to do that which he was not directed to do or required to do." This contention is rested upon the doctrine so well stated by *Mr. Justice Walker* in *Patterson v. Lumber Co.,* 145 N. C., 42, and, if applicable, is decisive of this appeal. The witness Fleming, the general manager of the defendant company, being offered as a witness for it, testified: "Blackburn was employed as engineer—was not to do any switching or firing. He was to have complete charge of the train crew. He had power to hire and discharge the trainmen. This was the power he had up to the time he was killed. When Lem Rich went to work, I told him I wanted him to learn all he could about the engine. I did not tell him I wanted him to run the engine or do any switching. I told him I wanted him to

learn all he could. Will Hassell was employed as switchman at the time of Blackburn's death." Again this witness said: "I did not tell Blackburn to do any switching or not to do any switching. Rich (365) ran the engine that night, after Blackburn was killed." Here, by this evidence, we have a man to whom is given the entire charge of his train crew, with the power to hire, and discharge any of his trainmen; yet it is contended he cannot fire his own engine—he cannot, when the switchman is not doing his work satisfactorily, do it himself, without going beyond the sphere of his assigned duties and becoming a volunteer—a bare licensee—doing his master's work, but with no master to serve, suspending thereby the relation of master and servant. If the intestate had, that night, discharged Hassell, the switchman, we think he could have performed his duties as switchman without absolving his master (the defendant) from liability for injuries caused by its breach of duty.

In *Rodman v. R. R.*, 55 Mich., 57, *Cooley, C. J.*, says: "That contingencies may and do arise in which the conductor should take charge of the engine for the time, is undoubted. The necessity may sometimes be as urgent as it is plain, and lives may depend upon it. This might happen from injury to the engineer, or sudden illness, and when, to leave the train where the disability of the engineer occurs, would endanger some other train. But there might be other reasons for the engineer leaving his post, for which the company would not be at fault, and the conductor, with the train in his charge and under obligation to avoid other trains, must act in the emergency as the necessities of the case shall require. His highest and plainest duty, in some circumstances, will be to take possession of the engine and operate it . . . and he being the person responsible for the safety and management of the train, must be allowed a certain discretion in deciding upon emergencies, and the presumption must favor his action." To the same effect is *Seley v. R. R.*, 6 Utah 319; *R. R. v. Fowler*, 154 Ind., 682; 48 L. R. A., 531; *Barry v. R. R.*, 98 Mo., 62; 2 Bailey Pers. Inj., sec. 3524.

The intestate being in charge of the train, in full charge of the train, having ample power to discharge and hire his crew, it would seem clear that his authority extended to supervision of the work done by his crew, and, as we have said, if any one of his crew did his work unsatisfactorily or was incompetent, the intestate had authority to discharge him or temporarily to suspend him and assign him other work on the train, and, for the time, perform the work of this removed trainman, without, in legal contemplation, going beyond the scope of his employment. He would still be the servant of the defendant. He must be considered, under the evidence, as invested with a certain discretion in de- (366) ciding upon the occasion which makes his interference neces-

sary in the proper management of his train and the proper conduct of the master's business entrusted to him, "and the presumption must favor his action."

The defendant requested his Honor to charge the jury that if the intestate voluntarily assumed to act as switchman and, while so acting, was injured, the injuries were received by the intestate in doing work outside the sphere of his assigned duties, and hence the defendant would not be liable. None of the defendant's instructions, however, presented the view, predicated upon the evidence of defendant's general manager, that we have herein presented as the decisive view, to wit, that intestate was in full charge of the train crew, etc., and we do not think it constitutes reversible error for his Honor to have refused the defendant's prayers. We are of the opinion that there was no reversible error committed at the trial, and the judgment is affirmed.

No error.

Cited: Roberson v. Lumber Co., 153 N. C., 123; *Twiddy v. Lumber Co.*, 154 N. C., 240.

J. B. SMITHWICK v. W. H. WHITLEY.

(Filed 20 April, 1910.)

Usury—Notes—Payment in Advance—Interest to Maturity.

When the payee of a note receives payment in full from the maker before maturity, only upon condition that interest shall be paid to maturity, which was accordingly done, the payee not being required by law to do so and the note itself being untainted with usury, the penalty for usury under Revisal, 1951, cannot be recovered, the transaction being the very reverse of a loan, or of an extension of credit or a forbearance necessary to sustain the action.

APPEAL from *Ward, J.*, at December Term, 1909, of BEAUFORT.

Action to recover the penalty for usury under section 1951, Revisal.

The plaintiff, being indebted to the defendant in the sum of $469.90, which was evidenced by ten notes for $46.99 each, maturing 1 January, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910 and 1911, all notes bearing interest from 30 December, 1900, and secured by a mortgage, went to defendant to pay his indebtedness on 5 December, 1905; the defendant figured the interest due up to that time at $54.05, but refused to accept the principal and the interest due to that date, but made the plaintiff pay in addition thereto the sum of $44.62 which sum was equal to the amount of interest on each note if it had not (367)

been paid until maturity. The plaintiff had to pay it in order to get his notes and mortgage. Plaintiff sued defendant for usury. The court rendered judgment against the defendant, who appealed.

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

BROWN, J. The plaintiff testified that the ten notes secured by mortgage and dated 30 December, 1900, were given for the purchase money of a tract of land purchased by plaintiff from defendant and bore 6 per cent interest from date. Each note was in sum of $46.99, and one matured 1 January, each year.

On 3 December, 1905, the notes due 1 January, 1902, 1903, 1904 and 1905, were due and unpaid. The remaining notes were not due. The plaintiff then sold the land to Tilman Paul, and on 5 December, 1905, they both went to Whitley to pay the purchase-money debt and have the notes and mortgage surrendered and canceled.

The defendant refused to accept payment for the notes not due and refused to surrender the mortgage unless plaintiff paid the notes not yet due in full.

In order to procure the surrender of his notes and mortgage, plaintiff paid the entire debt in full, including the $44.62, called in the record "unearned interest" on the notes not due. Whereupon defendant surrendered the notes and mortgage.

Our statute entitled "Penalty for Usury" prohibits "the taking, receiving, reserving or charging a greater rate of interest than 6 per cent, either before or after the interest may accrue, when knowingly done." In this respect it is similar to many of the usury statutes of this country.

While usury laws differ in some respects, there are certain principles which are universal in their application to all. The object of the law is to save borrowers from oppression and to prevent extortion on them when money is loaned or credit is otherwise extended. Therefore, it is universally held "that in order that a transaction shall fall within the prohibition of the statutes against usury it is essential that there should be a *contract for the forbearance* of an existing indebtedness or a loan of money." *Struthers v. Drexel,* 122 U. S., 487. See 29 A. & E. Enc., 464, sec. 4, and note 5, where a large number of cases are cited in support of the text.

There is no exception to this universal rule, that there must be an extension of credit and an illegal compensation for it, knowingly
(368) taken, in order to constitute usury. This is recognized in the earliest cases on the subject up to the present time.

In *Spurrie v. Mayoss,* 1 Vesey, Jr., in 1792, *Lord Commissioner Eyre* said: "Usury is taking more than the law allows upon a loan, or, as I read it, for forbearance of a debt."

Berkley v. Wamsley, Espinasse & Peake, 11; *Barclay v. Walmsley,* East, 55.

In this last case *Lord Ellenborough* said: "To constitute usury, there must be a direct loan and taking more than legal interest for the forbearance of repayment. Here there was no loan or forbearance, only a mere anticipation of the payment of a debt by a party before the time when by law he could be called upon to pay it."

Webb on Usury lays it down as universally held that usury cannot be established unless it is shown that a loan of money or its equivalent was contemplated by the parties. Section 20, citing an array of cases. To same effect is Tyler on Usury, p. 92; "Where there is no right to demand payment there can be no forbearance, and if no forbearance, no usury." *Lloyd v. Scott,* Fed. Cases, No. 8434; *Leslie v. Johnson,* 41 Barb. (N. Y.), 359.

In 47 Century Digest, title Usury, are to be found innumerable cases sustaining this proposition, and that "anticipation of payment by paying a debt in full before due is not usury."

Vol. 29, A. & E. Enc., 465, says: "The payment of an indebtedness by debtor before maturity is not a loan or forbearance."

It is essential, to constitute usury, that the lender shall at all events be entitled to demand repayment of the money loaned. 29 A. & E. Enc., *supra,* citing many cases in notes. 22 Cyc., 1483. "Where the transaction shows it is not for the loan of money or goods, nor for the forbearance of an existing debt, it cannot be usurious." *Stockwell v. Holmes,* 33 N. Y., 53.

The identical question presented by this appeal has been determined by the Supreme Court of Georgia as follows, 99 Ga., 291: "Where a debt, including both principal and interest and due by installments, if paid according to the terms of the contract, is free from usury, the transaction is not rendered usurious by the voluntary payment of the debt in full before some of the installments mature, although as a result the creditor would receive, in the aggregate, a sum amounting to more than the principal and the maximum legal rate of interest."

In reference to this question, Webb says, sec. 29: "The test of usury in a contract is whether it would, if fully performed, result in securing a greater rate of interest on the subject-matter than is (369) allowed by law," citing a number of cases.

Tested by these principles, the defendant cannot be held to have taken usury for either a loan or a forbearance. *Lord Ellenborough* said in a

similar case, *supra,* "The defendant's conduct may not be liberal or praiseworthy, but it is not usury."

It is not claimed that the original transaction, when the defendant sold the land to plaintiff, was usurious, or that defendant would have received more than 6 per cent interest had the notes run to maturity. It is admitted that the defendant was not required by law to accept payment of the unmatured notes before maturity or to surrender the mortgage.

If defendant had a good investment, he had the right to hold on to it, and if plaintiff desired to be released from his lawful and binding contract to pay interest until maturity of the debt, defendant had a right to exact payment of the $44 as compensation for such release. Defendant had as much right to sell his solvent debt at a premium to the plaintiff as to any one else. The defendant was called upon to surrender a perfectly good investment, untained with usury and not for an extension of credit or forbearance on an obligation the debtor could not meet.

The transaction, as stated by plaintiff, is the very reverse of a loan, an extension of credit or a forbearance, without which there can be no usury. It put an end to credit instead of giving it.

There is no case in our reports sustaining the contention of the plaintiff. In *Tayloe v. Parker,* 137 N. C., 418, cited by plaintiff, there was a bonus of $35 paid for further extension of the debt. It was the reverse of the transaction under consideration. We are of opinion that his Honor erred in rendering judgment against defendant.

Reversed.

Cited: Monk v. Goldstein, 172 N. C., 517.

J. B. SMITHWICK v. W. H. WHITLEY.

(Filed 20 April, 1910.)

PLAINTIFF'S APPEAL.

Usurious Contracts—Voluntary Payment.

An action to recover money alleged to be paid under duress, will not lie, when it appears that plaintiff in possession of the land under a contract to purchase at a certain price, had given his various notes to defendant, who withheld the deed; that defendant, who denies the validity of the contract, forced him, after he had remained on the lands and improved them, to pay a higher price in order to obtain his deed. The payment of the difference by plaintiff was voluntary in order to get an adjustment of the dispute without litigation.

APPEAL from *Ward, J.*, at December Term, 1909, of BEAUFORT. (370)

Action to recover $280 alleged to have been paid under duress.

The facts are as follows:

On 3 December, 1900, plaintiff made a contract with defendant to purchase a piece of land containing 13 82-100 acres, for $483.72, and to give in payment ten notes of $46.99 each, one to be paid annually, secured by mortgage on land, and the balance in cash. The plaintiff alleges and proves that said notes and mortgage were delivered to defendant, and the bargain consummated at that time (the mortgage and notes being executed about a month thereafter and delivered to defendant, and the deed bearing date 31 December, 1900; with acknowledgment of grantor on 15 January, 1901, being left with defendant to be registered). The plaintiff went into possession of the land and began clearing it. Defendant denies that the deal was consummated, or that the notes and mortgage were left with him. Deed had not been turned over to plaintiff. Some time in February, 1904, defendant notified plaintiff that his deal on the swamp land was off. On 4 March, 1904, plaintiff went to see defendant, and defendant said, if he (plaintiff) would make it $50 an acre, he would give him (plaintiff) the deed. The price agreed on in December, 1900, and the consideration named in the deed, having been $35 per acre. After considerable talk, plaintiff agreed to pay the price demanded rather than lose the land he had been working on for three years. He had ditched it, fenced it, and got it in tillable condition. He paid $275, the amount demanded, and defendant gave him his deed dated 31 December, 1900.

Upon an intimation by the court as to the charge, plaintiff submitted to a nonsuit and appealed.

Ward & Grimes for plaintiff.

Small, MacLean & McMullan for defendant.

BROWN, J. We agree with his Honor, that the cause of action, upon plaintiff's own evidence, is barred by the statute of limitations, assuming that a cause of action had been made out. But no cause of action for duress is made out in the evidence or stated in the complaint.

The payment of the $280 in order to get a deed for the land was voluntary. The plaintiff had a right to stand on his legal rights in the land, if he had any, and assert his equities in the courts (371) of the State.

Duress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will. 14 Cyc., 1123, and cases cited. *Bank v. Logan*, 99 Ga., 291; *Mathews v. Smith*, 67 N. C., 374; *Miller v. Miller*, 68 Pa. St., 486.

Duress is commonly said to be of the person where it is manifested by imprisonment, or by threats, or by an exhibition of force which apparently cannot be resisted. Or it may be of the goods, when one is obliged to submit to an illegal exaction in order to obtain possession of his goods and chattels from one who has wrongfully taken them into possession. *Astley v. Reynolds,* 2 Strange, 915, is a leading case on this subject. *Hackley v. Hackley,* 45 Mich., 573.

There is neither duress of the person nor goods here. The plaintiff was in actual possession of the land and the defendant denied his title, claiming that the "deal had not been consummated." In order to get a deed plaintiff acceded to defendant's demand and paid the advanced price. Upon all the authorities it was a voluntary payment, an adjustment of dispute.

No error.

D. H. LAMBETH v. SOUTHERN POWER COMPANY.

(Filed 20 April, 1910.)

1. Rights of Way—Permanent Damages—Generally Increased Value—Evidence.

In an action to recover damages of defendant for a permanent appropriation of a right of way over plaintiff's lands, it is not competent for this defendant to show the generally increased value of lands after the construction of defendant's overhead electric system, common to the entire community.

2. Rights of Way—Permanent Damages—Measure.

The measure of permanent damages against this defendant for appropriating a right of way over plaintiff's lands for the construction of an electrical overhead system is the difference between the fair market value of the land before the right of way was taken and its impaired value, directly, materially and proximately resulting to plaintiff's land by the placing of the power line across the premises in the manner, and to the extent, and in respect to the uses for which the easement was acquired.

3. Same—Imaginary Causes.

The charge to the jury, that they may not allow damages based upon unknown or imaginary contingencies or events, eliminates the objection by defendant, in this case, that the jury might have considered the possible dangers from wires falling from its overhead electrical system on plaintiff's land, in assessing permanent damages.

(372) APPEAL from *Long, J.,* at January Special Term, 1910, of DAVIDSON.

LAMBETH *v.* POWER COMPANY.

Action to recover permanent damages on account of the entry and appropriation by defendant of plaintiff's lands.

The right of condemnation is not in question, and the only issue submitted is as follows: What compensation, if any, is plaintiff, S. A. Lambeth, entitled to recover of defendant company for entering upon the lands of the plaintiffs, and for the right and privileges across her lands, and permanent appropriation thereof for the purposes of the defendant, as alleged in the answer, for a distance of fifteen (15) feet from center of towers from each side, making a distance of thirty (30) feet wide along the line over plaintiff's property?

From the judgment rendered, the defendant appealed.

E. E. Raper for plaintiffs.
Walser & Walser for defendant.

BROWN, J. The exceptions to the evidence are, in our opinion, without merit. The defendant could not be permitted to show the increased value of the land a year or more after defendant's line was constructed.

The enhanced value, it is not claimed, was the result of erecting towers on the land and constructing an electric system overhead. Benefits, considered in assessing such damages, must be those in a measure peculiar to the landowner and not common to the entire community. The exceptions to the charge cannot be sustained.

His Honor correctly instructed the jury when he charged them that the "measure of recovery is the difference between the fair market value of the land before the right of way and easement was taken, and its impaired value, directly, materially and proximately resulting to plaintiff's land by placing defendant's power line across her premises in the manner and to the extent and in respect of the uses for which the easement is acquired."

We are also of opinion that the alarm of defendant's counsel, (373) that the jury might consider possible danger from falling wires as an element of damage, should have been allayed when his Honor told the jury: "You cannot allow anything as damages, based upon unknown or imaginary contingencies or events, or such as may not reasonably and naturally be expected to occur and cause damage to the plaintiff—not other persons—from the construction, operation and maintenance of defendant's line for the uses for which it is constructed."

The entire charge is an admirable instruction upon the law governing the assessment of damage in cases of this character. Lewis on Em. Dom. (2 Ed.), 478-462; *Brown v. Power Co.*, 140 N. C., 333; *Abernethy v. R. R.*, 150 N. C., 97; 15 Cyc., 684.

No error.

Cited: R. R. v. Mfg. Co., 166 N. C., 177; *R. R. v. Armfield*, 167 N. C., 465.

CHARLES R. THOMAS v. THE BOARD OF PHARMACY.

(Filed 20 April, 1910.)

1. Pharmacist—Sale of Cocaine—Revocation of License—Authority of Board.

The provision of chapter 77, Laws 1907, as amended by chapter 713, Laws 1909, that the license of a pharmacist convicted of the unlawful sale of cocaine, etc., shall be revoked, leaves the board without authority to renew the license of a pharmacist so convicted upon the tender of the prescribed fee of $2.

2. Same—Mandamus.

A *mandamus* will not lie to compel the Board of Pharmacy to renew the license of a pharmacist who has been convicted of the sale of cocaine, contrary to the provisions of the statute, to which license the board, for that reason, found he was not entitled.

HOKE, J., concurs in result.

APPEAL by plaintiff from *Biggs, J.*, at Spring Term, 1910, of DAVIDSON.

The facts are stated in the opinion of the Court.

Emery E. Raper, B. W. Parham for plaintiff.
B. S. Royster for defendant.

CLARK, C. J. Chapter 77, Laws 1907, as amended by chapter 713, Laws 1909, makes it unlawful for any person, firm or corporation to sell, furnish or give away cocaine, except upon prescription; and that any person who shall violate any provisions of the said act shall be (374) guilty of a misdemeanor, and upon conviction "shall be fined or imprisoned, in the discretion of the court, and if a licensed pharmacist, his license shall be revoked."

The plaintiff, after an examination by the Board of Pharmacy in 1901, had been duly licensed as a pharmacist, and on 1 September of each year thereafter, upon his application, his license had been renewed. Rev., 4484. On 16 August, 1909, the plaintiff was indicted in the Superior Court of Davidson in four several indictments for the unlawful sale of cocaine, and pleaded guilty at said term to all four indictments. On 1 September, 1909, he made application to the defendant board to renew his license, tendering payment of $2. This being refused, he brought this proceeding by *mandamus* to compel the defendant board to renew his license. Upon the above facts, which are uncontradicted, his Honor properly refused the writ.

By the very terms of the statute the conviction upon a plea of guilty was a revocation of the plaintiff's license. The board was therefore not authorized to accept the $2 and renew a license which had been revoked.

Whether the plaintiff could be reinstated upon an examination and a new license, or whether the revocation of his license was final unless and until the Legislature has prescribed some method by which a pharmacist whose license has been forfeited by a *conviction of crime* can be restored, is a matter not now before us. Upon conviction of felony, the right to vote is forfeited (*S. v. Jones*, 82 N. C., 685), and can only be restored in consequence of an act of the Legislature, and in a method therein prescribed. Rev., 2675-2680. But we need not pass on this point, as it is not presented.

By Rev., 4480 and 4481, an applicant for license who has passed his examination before the Board of Pharmacy and been granted a license, must apply on 1 September of each succeeding year for a renewal thereof, which is granted upon his payment of $2, "if the Board of Pharmacy shall find that the applicant is entitled to renewal thereof." Rev., 4484. Here the board, in view of the conviction, and the provision of law which makes the conviction a revocation of the license, found that he was not entitled, and properly refused to grant the renewal. The annual renewal would be a useless formality if the board were bound to grant it in all cases.

The selling of drugs is an important matter to the health and lives of the public. The Legislature has carefully guarded it, by the provisions to be found in Rev., 4471-4490. The sale of cocaine and other deleterious drugs is the subject of carefully drawn provisions. The plaintiff knew that the violation of those provisions subjected (375) him to fine and imprisonment in the discretion of the court, and to a revocation of his license, the latter not being discretionary, but the necessary result of his conviction. The evidence was so clear that the plaintiff pleaded guilty, and the facts found by his Honor show a case of great turpitude; yet the plaintiff in less than ten days thereafter applied for a license, and contends that the payment of $2 entitles him to resume the important business of selling drugs.

The judgment below is

Affirmed.

HOKE, J., concurring in result.

GEORGE T. PENNY v. O. J. LUDWICK AND F. J. BAME.

(Filed 20 April, 1910.)

1. Pleadings—Mortgagor and Mortgagee—Claim and Delivery—Counterclaim—Accounting—Question for Jury.

In an action to declare valid a sale of property under mortgage described in the pleadings, the possession of which had been obtained under claim and delivery proceedings, damages by way of counterclaim being alleged in the answer, the defendant mortgagors are entitled to an accounting to ascertain the amount realized at the sale in excess of the mortgage debt, and for such excess, if any, they are entitled to judgment, thus raising a question for the jury; and therefore plaintiff's motion for judgment upon the pleadings should be denied.

2. Claim and Delivery—Wrongful Seizure—Damages—Issues.

When the pleadings in an action to declare valid a sale of property under mortgage raise questions as to whether the mortgage had been released, and the sale was unlawful, and the property wrongfully seized under claim and delivery proceedings, the defendant, if successful, is entitled to judgment "for a return of the property, or for the value thereof in case return cannot be had, and damages for taking and withholding the same" (Revisal, sec. 570), and issues were properly submitted to the jury to ascertain the value of the property alleged to have been wrongfully converted.

3. Claim and Delivery—Wrongful Seizure—Damages—Tender.

The fact that the verdict of the jury has established that the plaintiff wrongfully seized, under claim and delivery proceedings, and sold defendant mortgagor's property, and tendered the unsold property in excess of the debt, without a finding that such excess of property is not in plaintiff's possession or under his control, does not discharge the plaintiff from liability to defendant; and the question as to whether the tender was a valid one and would thereafter relieve the plaintiff from paying interest, does not arise.

4. Claim and Delivery—Mortgagor and Mortgagee—Excess—Verdict—Judgment—Interest—Damages, Unliquidated.

When the verdict of the jury has only established that plaintiff has wrongfully converted to his own use an excess of property in a certain sum over that required to pay off defendant's mortgage to him, the judgment thereon should not include interest from the time of the alleged conversion, but only from the date of the judgment, the conversion being a tort and the damages unliquidated; and when on appeal the judgment of the court is erroneous in this respect only, it will be ordered to be amended and affirmed.

(376) APPEAL by plaintiff, from *G. W. Ward, J.*, at January Term, 1910, of GUILFORD.

The facts are stated in the opinion of the Court.

Thomas J. Gold and Stedman & Cooke for plaintiff.
Justice & Broadhurst for defendant.

WALKER, J. This action was brought by the plaintiff for the purpose of having declared valid or lawful a sale of the property described in the pleadings, and for the payment to the plaintiff of the amount due him on the note secured by the mortgage from the proceeds of sale. When the action was commenced, the plaintiff instituted proceedings under claim and delivery as ancillary to his principal suit, and caused certain property to be seized, under the requisition issued by the clerk of the court, the value of which, it appears from the verdict of the jury as hereinafter set out, was largely in excess of the amount due to the plaintiff. The defendant answered, and alleged that the plaintiff had converted a part of the property which the jury in their verdict have valued at $2,500, though the defendant claimed a much larger amount than the sum so stated.

The following issues were submitted to the jury:

1. Was it agreed between plaintiff and defendant that plaintiff would release the mortgage held by him against Thomas upon the café outfit, as alleged by the defendant? Answer: Yes.

2. Is plaintiff the owner of and entitled to the possession of articles of personal property mentioned in the complaint? Answer: No.

3. What was the value of the personal property that was sold at public auction, and also that which perished, if any? Answer: $700.

4. What was the value of the property that was unsold and (377) did not perish? Answer: $1,800.

5. Did plaintiff tender to defendants that which was unsold, and if so, what date? Answer: Yes; on or about 7 October, 1907.

The plaintiff, who appealed in the action, has reserved only two assignments of error. The first of these is that the court refused, at the request of the plaintiff, to give judgment upon the pleadings. This prayer was properly refused, as there were issues of fact presented in the case, which were for the jury to determine. The motion of the plaintiff for judgment was based upon the ground that the defendants, in their answer, had sought to recover of the plaintiff damages by way of counterclaim. If the sale was a lawful one, we have held that the defendants, occupying the position of mortgagors, were entitled to an accounting between the plaintiff and themselves, in order to ascertain the amount realized at the sale, in excess of what was necessary to pay the plaintiff's claims, and the amount so ascertained the defendant would be entitled to recover and to have a judgment entered therefor. *Smith v. French,* 144 N. C., 2. But in this case the jury have found that the mortgage had been released, and was not, therefore, an encumbrance

upon the property; that the plaintiff is not the owner of and entitled to the possession of the personal property mentioned in the complaint.

It would appear, therefore, by these findings of the jury that there had been an unlawful conversion of the property by the plaintiff, or, in other words, that he was not entitled to the ancillary remedy of claim and delivery. The plaintiff seized the property under the requisition in the claim and delivery proceedings, and, as we have said, the jury have found that the seizure was wrongful. In such a case it is provided as follows: "If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or for the value thereof in case a return cannot be had, and damages for taking and withholding the same." Revisal, sec. 570. It was proper, therefore, to submit issues to the jury in order to ascertain the value of the property thus unlawfully converted. The jury found that property of the value of $700 could not be returned by the plaintiff, and that there was left property of the value of $1,800, which could be returned; in other words, which is or should be, in the possession of the plaintiff. The court entered judgment for the $700, with interest from 31 August 1907, and as to the property which the jury valued at $1,800, it is provided in the
(378) judgment that the cause be retained for further directions, until it can be ascertained how much of this property can be returned, so that if a part of this property cannot be returned, the value of such part may be ascertained and judgment entered in favor of the defendants against the plaintiff for the amount assessed by the jury. The defendants would be entitled to an execution for a return of so much of the property as can be found by the sheriff.

The plaintiff contends that he made a tender of the property to the defendants, and they refused to accept the same; but this does not discharge him from liability to the defendants, as there is no finding in the verdict of the jury to the effect that the property is not now in the possession of the plaintiff or under his control. In passing upon the validity of the judgment in this case, or the exceptions of the plaintiff thereto, we are confined to a consideration of the verdict, and are not at liberty to examine the evidence and find the facts for ourselves. Whether the plaintiff, if he has made a good and valid tender to the defendant of the property, will be entitled to a discharge from the interest upon the value of the property from the date of the tender, provided the jury should see fit to allow interest as a part of the damages, is a question which is not now before us for decision. *Stephens v. Koonce,* 103 N. C., 266; *Lance v. Butler,* 135 N. C., 419.

The defendant also excepted upon the ground that the court had allowed interest from the alleged date of conversion, 31 August, 1907,

on the $700, found by the jury to be the value of the property which cannot be returned. We think it was error to allow interest on this amount, as the conversion was a tort and the damages were unliquidated. The very question is decided in *Lance v. Butler, supra,* in which the Court said: "The defendant properly asked that the third issue should be, 'Was the plaintiff damaged by such sale; if so, how much?' Had it been submitted in that form, the jury in their discretion, could have allowed interest from the date of the conversion. *Stephens v. Koonce,* 103 N. C., 266. In the form actually submitted, 'What was the value of the goods sold by the defendant under his mortgage?' the jury responded, '$300.' Upon this finding it was error to allow interest, except from the date of the judgment. Code, sec. 530 (Revisal, sec. 1954). Besides, the date of the conversion, '6 February, 1895,' as stated in the judgment, is not found by the verdict. This error, therefore, does not call for a new trial, but the judgment will be affirmed, so that the $300 shall bear interest only from the date of the judgment." The two cases seem to be practically identical as to the question presented for consideration. In accordance with what was said in that case, we direct that the judgment be modi- (379) fied by allowing interest only from its date, and, as thus amended, the judgment of the court below is affirmed. The costs of this Court will be divided equally between the parties, that is, the plaintiff will pay one-half and the defendants the other half thereof.

Modified and affirmed.

Cited: Ludwick v. Penny, 158 N. C., 114.

G. M. SHARPE v. PHILIP SOWERS.

(Filed 20 April, 1910.)

1. Nonsuit After Verdict—Verdict Sufficient—Judgment.

In an action to establish the boundary line between the adjoining lands of the parties, wherein issues were specifically submitted in accordance with the contention of each as to the true line, a judgment of nonsuit should not be granted as to one of them at his request after verdict rendered, which finds only the issue which establishes the line as claimed by his adversary, as a valid judgment may be entered on the finding of the jury on that issue.

2. Same—Formal Defect.

When issues have been submitted to the jury in accordance with the contentions of the parties in an action to establish the boundary line

between their adjoining lands, and the jury has answered only one issue, deeming it to be sufficient, the party claiming the line to be that as called for in the other issue cannot take a nonsuit, for if the failure of the jury to answer this issue made a defective verdict, it was cured by the subsequent logical answer of the jury thereto, having been instructed by the judge to answer it "Yes" or "No."

3. Issues—Assent—Pleadings—Objection and Exception.

A party assenting to the submission of an issue not raised by the answer, and upon which there was evidence, will not be heard to complain after verdict rendered therein.

APPEAL from *Long, J.*, at January Special Term, 1910, of DAVIDSON. The facts are stated in the opinion of the Court.

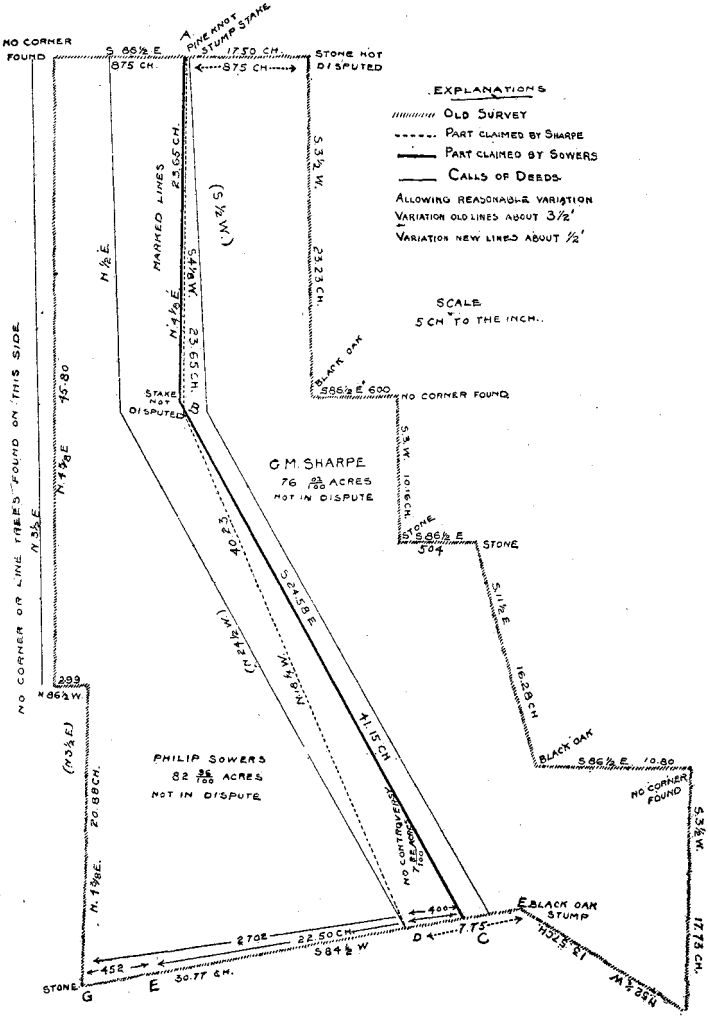
Walser & Walser and E. E. Raper for plaintiff.
Linn & Linn and McCrary & McCrary for defendant.

WALKER, J. This action was commenced before the clerk of the Superior Court by plaintiff, to establish the boundary line between his and defendant's land, they being owners of adjoining tracts. (381) The clerk entered a judgment in favor of the plaintiff, that the dividing line is the one represented on the map as between the letters B and D, whereas the defendant contended that the true line is the one represented on the map as between the letters C and B. From the judgment of the clerk the defendant appealed to the Superior Court, where the case was tried before a jury upon the following issues:

1. Is the true line between the plaintiff and defendant from the black-oak stump at E, thence south 84½ degrees, west 7.75 chains to D, thence north 18¼ degrees, west 40.23 chains to B, on map?

2. If this is not the true line, is the true line on the map the one from C to B?

The jury came into court and returned a verdict in which they answered the second issue "Yes," or in the affirmative, and in favor of the defendant, but did not answer the first issue. The court thereupon directed the jury to retire and answer the first issue "Yes" or "No," under the instruction which had formerly been given to the jury. While the jury were still in their room, and before their return into the courtroom, the counsel for the plaintiff asked the court to be allowed to submit to a nonsuit, which request was resisted by the counsel for the defendant. The court, at that time, did not grant the request of the counsel for the plaintiff, but stated that it would allow the jury to answer the first issue as directed. The jury returned to the courtroom, having answered the first issue in the negative, whereupon the court asked the jury if they had reached a conclusion, at the time they first came into court with their verdict, as to what their answer should be



AREA.

G. M. Sharpe (not in dispute).. $76\frac{02}{100}$ acres.

Philip Sowers (not in dispute).. $82\frac{96}{100}$ acres.

Part in controversy..... $7\frac{82}{100}$ acres.

Total.....$166\frac{80}{100}$ acres.

to the first issue, to which they responded that they thought the answer to the second issue was sufficient, but that they had decided to answer the first issue "No," if it was necessary to do so, and that they failed to do so because they thought the answer to the second issue was a sufficient response to the issues submitted by the court. The court refused to grant the motion of the plaintiff, to be allowed to take a nonsuit, whereupon he excepted and appealed.

The answer to the second issue was sufficient to dispose of the case in favor of the defendant. The plaintiff contended that the dividing line was the one represented on the map by the letters B-D, and in order to ascertain if this was the line, the court submitted the first issue. The defendant alleged that the line was the one represented on the map by the letters C-B, and the jury having found that this was the true line, it necessarily followed that the line B-D was not
(382) the true line, and an affirmative answer to the second issue was, when logically considered, equivalent to a negative answer to the first issue. In other words, the answer to the second issue was a full response to the issues raised by the pleadings or contentions of the parties, and settled the controversy in favor of the defendant.

The two issues were submitted, we suppose, in order that the jury might determine, not only whether the allegation of the plaintiff, that the line is the one represented by the letters B-D on the map, was true, but also to enable them to determine the location of the true dividing line, which could not be the one represented on the map by the letters B-D if it is the one represented by the letters C-B, as the two lines are not coincident. The failure of the jury, therefore, to answer the first issue was a mere formal defect, if it was a defect at all, and it is evident that the court accepted their verdict as to the second issue, because the instruction was, when they were sent back to their room, that they should answer, not the second issue, but the first, which implies that the response to the second issue was received by the court as sufficient, so far as that issue was concerned.

This case does not differ substantially from *Strause v. Sawyer,* 133 N. C., 64, in which the question now presented was considered by the Court, and it was held that where a verdict was only formally defective and it could be seen therefrom what the jury had decided, and the verdict was not indefinite, uncertain or insensible, but was one upon which the court could render a judgment, the party against whom the verdict was rendered could not submit to a nonsuit, although the jury had been directed to return to their room and correct the technical informality. See, also, *Clough v. State,* 7 Neb., 342. Our case is much stronger in favor of the defendant than the ones we have cited, as here there was really no informality, but the verdict was, as first rendered, sufficient

in form and substance to sustain a judgment thereon for the defendant. It would not be fair to the defendant, if a full and sufficient verdict had been returned, to permit the plaintiff to take a nonsuit, nor do we think that such action on the part of the court would be in accordance with the well-settled rule of the law applicable to such cases. Having decided that the ruling of the court upon the motion of the plaintiff, that he be allowed to take a nonsuit, was correct upon the facts of this case, it is not necessary to consider or decide whether a nonsuit could be taken in a proceeding of this kind.

We do not think there is any merit in the other exceptions. (383) There was evidence to sustain the verdict of the jury, and the plaintiff, having assented to the submission of the second issue, when tendered, will not now be heard to say that there was no averment in the defendant's answer which warranted the submission of that issue to the jury. *Person v. Leary,* 127 N. C., 114.

Upon an examination of the record and the case on appeal, we find no error therein.

No error.

Cited: Cahoon v. Brinkley, 168 N. C., 258.

JAMES M. BAILEY v. J. C. BISHOP.

(Filed 20 April, 1910.)

Contracts—Principal and Agent—Ratification—Cities and Towns—Easement—Liability Imposed by Third Person.

Defendant having a body of land north of Greensboro, desired the extension of a public street through his property, and, at his instance, plaintiff, who owned a lot between the town and defendant's property, was induced to join in the application for such extension. When the matter came on for decision plaintiff was absent, but submitted a written proposition as to the terms upon which he would grant the city a right of way through his lot. The municipal board having rejected plaintiff's proposition, defendant, who was present, without authority from plaintiff, agreed with the authorities for a right of way through both properties on payment by the city to defendant of $1,500, defendant agreeing to pay all costs and charges against abutting owners. Later, defendant told plaintiff of his agreement, saying he had agreed to bear all the costs, and plaintiff thereupon ratified defendant's action, conveyed the right of way: *Held*, that on the facts stated a primary liability was created against defendant for the costs lawfully imposed upon abutting owners, and plaintiff, having been compelled by the city to pay his *pro rata* of the costs of paving the sidewalk through his property, was entitled to recover said sum of defendant.

BAILEY *v.* BISHOP.

APPEAL from *W. G. Ward, J.*, at January Term, 1910, of GUILFORD.

Action, heard on appeal from a justice's court. There was evidence on the part of plaintiff tending to show, in substance, that defendant owned a body of land lying north of the city of Greensboro, or in the northern part of the city, and desired to have an extension of Elm Street through his property; that plaintiff owned a lot lying in front of defendant's land, making it necessary for the proposed extension to run through or take a part of plaintiff's lot; that plaintiff, having to be out of the city when the matter was considered, submitted his (384) proposition in writing to the city authorities, to the effect that he would give the right of way to the extent of eight feet through one side of his lot in consideration of $160, a conveyance of ten feet by the city in rear of plaintiff's lot, and that the sidewalk and street of the proposed extension should be macadamized and paved along the entire length of plaintiff's lot without any cost to him. Defendant attended the meeting in person, and the aldermen having declined to extend the street on the terms proposed, defendant thereupon, ignoring plaintiff's proposition, for the sum of $1,500 agreed to deed the city a right of way for the entire length, including the portion through plaintiff's lot. When plaintiff returned to the city defendant told him that he couldn't get the street on the terms desired, and that he, defendant, had stipulated for the entire right of way, and to stand between plaintiff and any and all cost, etc. This statement appears in different forms in plaintiff's evidence, thus:

"A. He said he would become responsible for the paving and macadamizing so that he could get the street, and says, 'You must help me out some.'

"Q. Didn't you say, 'We will have to assume the paving just like the property-owners on the other streets'?

"A. Said that the city would not agree to do the paving, and he had to agree to do it in order to get the street.

"Q. That agreement to pave and macadamize should have been with the city. Mr. Bishop didn't promise to pave your sidewalk?

"A. All he said was that he had agreed to do the paving on all the street."

Plaintiff, in recognition of defendant's agreement, conveyed to defendant the eight feet to enable defendant to comply with his agreement to acquire for the city the entire right of way, etc., etc. The street was extended, and the city compelled plaintiff, under the terms and provisions of the charter, to pave the sidewalk at a cost of $141, for which sum the present suit was brought.

Defendant admitted that he had contracted with the city for the entire right of way, in disregard of the proposition submitted by plain-

tiff, and had received $1,500 for said right of way, but denied that he had made any promise or agreement to save plaintiff harmless, etc.

There was other testimony on the issue, but none relevant to the question presented on appeal.

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

Morehead & Sapp for plaintiff.
T. J. Murphy for defendant.

HOKE, J., after stating the case: On exceptions formally noted, (385) defendant objects to the validity of this recovery, chiefly by reason of the statute of frauds, requiring contracts concerning land to be in writing; but, on the facts presented in the record, the position cannot be sustained. This statute applies to contracts when and to the extent that they are executory, and where it appears that every feature of the transaction coming within the purview of the statute has been executed, its provisions no longer affect the matter. *Hall v. Fisher*, 126 N. C., 205. And so it is here. The right of way has been conveyed to the city, the paving has been done, and the issue between these parties, so far as the statute of frauds is concerned, involves only a money demand, coming within the doctrine as declared in *Bourne v. Sherrill*, 143 N. C., 381, and that class of cases; and on the facts presented to be determined under the general principles of *indebitatus assumpsit*.

The evidence of the defendant is not more fully set out, for the reason that the jury have accepted the plaintiff's version of the occurrence, an excerpt from which is given in the statement of facts; and, considering the case in that aspect, when the defendant stipulated with the city authorities for the entire right of way, including the portion through plaintiff's land, and agreed that if the street was opened, "he would stand between plaintiff and all costs; that he had agreed to do the paving," such agreement established a primary liability for such cost on the part of defendant, and the plaintiff, having been compelled by the authorities to pave and pay for the sidewalk, an obligation arose on the part of defendant to reimburse plaintiff; and this is the claim recovered in the present suit.

The subsequent conveyance of the right of way by plaintiff and ratification of defendant's action would create a privity between them in reference to this transaction, but on authority no such privity is required to the validity of plaintiff's demand. In Keener on Quasi Contracts, at page 396, the doctrine is stated thus:

"The question of allowing a plaintiff to recover from a defendant for the payment of a claim existing in fact against himself, may arise in a case where the plaintiff and the defendant sustained to each other

the relationship of principal and surety, or that of cosureties, or it may arise where the parties are strangers to each other with reference to the transaction in question.

(386) "It may be stated as a general proposition, that a plaintiff can recover against a defendant as for money paid to his use to the extent that the claim paid by the plaintiff should have been paid by the defendant. Thus, it was held in *Brown v. Hodgson* that the plaintiffs, common carriers, who by mistake delivered to the defendant goods consigned to another, could recover from the defendant the amount of money which they were compelled to pay the consignee of the goods in consequence of the defendant having appropriated the goods to his own use. *Mansfield, C. J.,* said: 'The plaintiffs pay Payne on account of these goods being wrongfully detained by Hodgson. They paid the value to the person to whom both they and Payne were bound to pay; and this, therefore, is not the case of a man officiously and without reason paying money for another; and therefore the action may be supported.'"

And the statement is supported by many well-considered decisions of the courts. *San Gabriel v. Whitmer Co.,* 96 Cal., 623; *Nutter v. Sydenstucker,* 11 W. Va., 535. In the California case it was held: "Where a plaintiff, either by compulsion of law, or to relieve himself from liability, or to save himself from damage, has paid money, not officiously, which the defendant ought to have paid, a count in *assumpsit* for money paid will be supported. In such case the law implies a request on the part of the defendant and a promise to repay, and the plaintiff has the same right of action as if he had paid the money at the defendant's express request."

And in *Nutter v. Sydenstucker, supra:* "In general, where the plaintiff shows that he either by compulsion of law, or to relieve himself from liability, or to save himself from damage, has paid money which the defendant ought to have paid, the count for money paid will be supported."

And the same general principle was declared and upheld by our own Court in *R. R. v. R. R.,* 147 N. C., 368-386.

There is no error in the proceedings below, and the judgment in plaintiff's favor must be affirmed.

No error.

(387)

COMMISSIONERS OF RICHMOND COUNTY v. FARMERS BANK.

(Filed 20 April, 1910.)

1. Legislature—Correction of Journals.

The same Legislature has power to correct its records or journals so as to make them speak the truth, and, when corrected, the journals shall stand as if originally so made.

2. Same—Bond Issue—Special Session—Constitutional Law.

While the provisions of Art. II, sec. 14, of the Constitution are mandatory as to the manner in which counties, cities and towns may pledge their faith or credit to the payment of their debts, it does not prohibit a subsequent special session of the same Legislature from correcting its journals of the regular session so as to show in point of fact that a bill of this character was properly passed in accordance with these provisions.

3. Same.

When an issue of bonds of a county, appearing to be regular on the journals of the Legislature at its regular session, except for an inadvertence of the clerk of one branch of the Legislature to note that the bill passed its third and final reading by the recorded "aye" and "no" vote, and at a subsequent special session of the same Legislature the defect was called to the attention of that branch, the matter referred to the "Committee on the Journal," which, after investigation, reported that a majority, giving the names of the voters, had voted "aye," with none voting to the contrary, the adoption of this report, and the correction of the journals accordingly, establishes the validity of the bonds in respect to the defect complained of.

APPEAL from *Lyon, J.*, at March Term, 1910, of RICHMOND.

Controversy without action. From the facts agreed upon, it appeared:

1. That on the first Monday of December, 1909, the board of commissioners of the county of Richmond, and the defendant, the Farmers Bank, entered into a written contract by which the said board of commissioners agreed to sell to said bank, and said bank agreed to buy from said board of commissioners, $15,000 of 6 per cent road bonds, which the said board of commissioners proposed to issue for and on behalf of Beaver Dam Township in said Richmond County; said bonds were to be dated 1 January, 1910, and were to mature thirty years from date. Said bonds were to have been issued by virtue and in pursuance of chapter 512 of the Public Laws of North Carolina, session of 1907, entitled "An Act to Provide for the Improvement of the Public Roads of Richmond County," and of an election duly and regularly called and held and carried in said Beaver Dam Township. (388) Said election being held on 12 October, 1909.

2. That the defendant, The Farmers Bank, has declined and refused, and now declines and refuses, to carry out said contract by taking up said bonds and paying the purchase price as agreed in said written contract.

That the reason why the said The Farmers Bank has declined to carry out said contract is, that it contends that the said act, authorizing said bonds, to wit, chapter 512 of the Public Laws of 1907, did not pass the General Assembly of North Carolina as required by Article II, sec. 14, of the Constitution of North Carolina, in that the journal of the Senate for the session of 1907 did not originally show that the "ayes" and "noes" on the passage of said bill on said third reading were entered upon said journal for the session of 1907.

The facts with reference to the passage of said bill, as will appear from said journal, are as follows:

The said act was House Bill 1203, and was introduced into the House by Hon. W. L. Parsons, member of the House from Richmond County, and was entitled "A Bill to be Entitled An Act to Provide for the Improvement of the Public Roads of Richmond County." This bill passed the House of Representatives, as required by said Article II, sec. 14, of the Constitution, and was ratified in the House of Representatives on 2 March, 1907. See journal of the House of Representatives, 1907, pages 406, 514, 609 and 769.

The bill passed its first reading in the Senate on 28 February (see page 619); its second reading 1 March (page 665), as required by the Constitution, and was ratified in the Senate on 2 March (page 685).

The bill did regularly pass its third reading in the Senate of 1907, though the same was inadvertently not recorded on the journal, and at the special session of the General Assembly, held in Raleigh, in January, 1908, which was a special session called by the Governor, the Senate undertook to correct the journal for the year 1907, and passed a resolution declaring that there was an error in the journal of 1907, setting forth in full that said bill passed the Senate as required by the Constitution, and recommended a correction of the journal by the clerk, which was made, all of which will more fully appear by reference to page 21 of the Senate Journal of the Special Session of 1908, and the original Senate Journal of 1907 as corrected.

It is agreed that the printed journals of 1907 and 1908, to-
(389) gether with the original journal as corrected, and certified copy of entries on bill in the Senate, shall be a part of this case.

The defendant, The Farmers Bank, contends that the journal of 1907 could not be corrected at the special session of 1908, and that for this reason the act authorizing said bonds did not pass the General Assembly as required by Article II, sec. 14, of the Constitution, and that,

therefore, the plaintiff has no right to issue said bonds, and, if issued, they would be invalid and void, and for that reason the defendant declines to carry out said contract.

And on these facts the judgment of the court is prayed, etc.

The court below being of opinion that the Legislature had a right to correct its journals, and that the bonds in question would constitute a valid indebtedness, entered judgment for plaintiff, and defendant excepted and appealed.

W. S. Thomas and A. S. Dockery for plaintiff.
Charles A. Webb for defendant.

HOKE, J., after stating the case: Our State Constitution, Article II, sec. 14, provides as follows: "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities and towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal."

Construing this section, the Court has repeatedly held that its provisions are mandatory, and that a statute of this character which has failed to comply with its requirements is not a valid law. *Cotton Mills v. Waxhaw,* 130 N. C., 293, and authorities cited.

In the present case it appears that all of the requirements in question have been complied with, except that by inadvertence the clerk of the Senate failed to note that the bill passed its third reading in that body and to enter the "yeas and nays" upon such reading on the Senate journal. At the special session of the same Legislature, in 1908, the defect in question having been called to the attention of the Senate, the matter was referred to the "Committee on the Journal," and it was ascertained and declared, on a report duly made, that the bill in question did pass its third reading, the report setting forth the Senators present by name and showing that forty-seven Senators were (390) present and all voted for the bill, and recommending that the journal be amended so as to show the facts. The report was adopted and the journal corrected, and, as it now stands, shows that the act passed its third reading; that forty-seven Senators were present and voted for same on such reading, giving the names of the Senators, and showing that all voted for the bill: "Those voting in the negative, none." Senate Journal, Extra Session, 1908, p. 21; *Commissioners v. Trust Co.,* 143 N. C., 110.

It is an accepted principle that the same Legislature has power to correct its records or journals so as to make them speak the truth, and when corrected, the journal shall stand as if it was so originally made. This is true on general principles applicable to the amendment of records, certainly where no adversary rights of innocent third parties have intervened (26 A. & E., 503), and there are decisions more directly apposite to the same effect. *R. R. v. Black,* 119 Ill., 207; *Turney v. Logan,* 17 Ill., 151; *Village of Gilbert v. Rabe,* 49 Ill. App., 418; *Leighton v. School District,* 66 N. H., 548; and see Black on Constitutional Law, 266.

This provision of our Constitution was no doubt established with a view chiefly of obtaining more careful deliberation on these important measures, and by a lawful quorum of each of the legislative bodies and, further, that responsibility for the enactment of such measures might be properly placed.

Every purpose of these requirements has been met by the deliberation and care with which the journal in the present case has been dealt with and corrected, and, both on reason and authority, we are of opinion that the act in question has been properly passed and that the same is a valid law.

There is no error, and the judgment below is

Affirmed.

EVA H. BOGGAN AND HER HUSBAND, L. L. BOGGAN, v. CLARK SOMERS ET AL.

(Filed 20 April, 1910.)

1. Deeds and Conveyances—Construction—Heirs—Fee, Prior to 1879.

Deeds to lands made prior to the statute of 1879 will not be construed as a conveyance of the fee in the absence of the use of the word "heirs" in the conveyance, connected with the name of the grantee, and descriptive in some way of the estate he is to take; and a fee will not pass when it appears only in connection with the name of the grantor.

2. Same—Descriptio Personæ.

The word "heirs" not appearing in the conveyance clause in a deed of lands to M., in connection with the name of the grantee, made before the statute of 1879, the *habendum* clause being to her "own and separate use during her natural life, and at her death, then to her daughters" and "issue of such as may not be living at the time, equally to be divided between them," the issue, if any, to take the share of their deceased parent, the words, "and issue of such as may not be living at the time

to be equally divided," etc., are merely *descriptio personæ*, indicating that the children, grandchildren, or other lineal descendants should represent their ancestor, *per stirpes*, in the event provided, and take the estate conveyed by the deed, *i. e.*, a life estate.

3. Deeds and Conveyances—Life Estates—Tenants in Common—Adverse Possession—Title.

H. conveyed by deed certain lands to his daughter M. for life, then to her daughters for life, with limitation over. M. having reconveyed her interest, died leaving her daughters in possession, all of whom have since died, except one, who is a lunatic, in the asylum, and whose son lived on the lands with his grandmother and aunts until their death, and now lives there representing his mother: *Held*, that upon the death of each of the daughters her interest reverted to the grantor, or to *feme* plaintiff, the devisee of the property under the grantor's will, constituting them tenants in common as to such interest with the others.

4. Tenants in Common—Possession of One—Adverse Possession—Limitation of Actions.

That as between tenants in common, occupation and sole appropriation of the proceeds of the property by one or more of the tenants will not ripen title by adverse possession as against others of the cotenants without more, for any period short of twenty years; and there is no evidence in this case of such occupation as against *feme* plaintiff.

5. Wills—Probate Defective—Second Probate.

A second probate to a holograph will may be made correcting a defect in the first probate, which failed to state that the "will, and every part thereof, was in the handwriting of the testator."

6. Appeal and Error—Jurors—Relationship—Discretion of Court.

It is within the discretion of the trial judge to allow a new trial on the ground that a juror was related to one of the parties, and his refusal to do so is not appealable.

APPEAL from *W. J. Adams, J.*, at October Term, 1909, of (391) ANSON.

Action to recover land.

The *feme* plaintiff claimed title under the will of her father, H. B. Hammond, who died in 1883; the part of the will directly (392) relevant to the inquiry being as follows:

"Item 8. I give to my son-in-law, W. O. Bennett, the house and lot in the town of Wadesboro in which Mary Jane, Ellen and Lydia Moore now live, and the Cash land near Wadesboro, in trust for the following purposes to wit: That he shall allow the said Mary Jane, Ellen and Lydia Moore to occupy said house, and pay the rent of the land toward their support so long as he thinks it advisable to do so, and after he ceases to pay said rent for their benefit, the house and lot they occupy and one-half of the Cash land shall be given to my daughter, Eva Bog-

gan, wife of L. L. Boggan, and her children, the other half of the Cash land having been disposed of by me in Item 4 of this will."

Defendant claimed title under a deed from H. B. Hammond, bearing date 6 August, 1856; the clause in the deed relevant being as follows:

"To have and to hold said lot of land, with the appurtenances, to her, the said Mary D. Moore, for her own sole and separate use during her natural life, and, at her death, then to the daughters of said Mary D. Moore and issue of such as may not be living at the time, equally to be divided between them, said issue, if any, to take the share of their deceased parent; and the said H. B. Hammond doth warrant the title of the said lot, etc., against the lawful claims of all persons whatsoever."

It was admitted that both the will and deed embraced the land in controversy; that Mary D. Moore, one of the grantees therein, died 22 August, 1873, having reconveyed her interest in the land to H. B. Hammond, and leaving her surviving four daughters, Mary Jane, Lydia, Ellen and Elizabeth Moore (now Summers); that Mary Jane Moore died without issue in 1885, Lydia Moore died without issue in 1895, Ellen Moore died without issue in 1904; that Elizabeth Moore (now Summers) is still living; that Mary D. Moore and her three daughters who are dead lived on the land from the date of the deed till their death respectively, as above set forth, and the fourth daughter, Elizabeth Moore (now Summers), is a lunatic and has been in the asylum since 1870, or about that time, and her son, Clark Summers, now about forty-five years of age, has been on the property at intervals for forty-two years, living with his grandmother and aunts till they died, and has since lived there representing his mother.

There was testimony tending to show that soon after the death of Mr. Hammond, the devisor, his son-in-law, W. O. Bennett, mentioned
(393) in Item 8 of the will, acting under the will, permitted the three daughters of Mary D. Moore to continue in possession of the property, or acquiesced in such possession, and gave them the revenue arising from the property conveyed under the 8th item of the will till the death of Ellen Moore in 1904; the testimony of W. O. Bennett on that matter being as follows:

"Q. Who gave them their support after his death? A. Well, I had to begin to help them along in a few days after Mr. Hammond died. They came to me for help, when I found that he had made some arrangement for their support.

"Q. How long and to what extent did you continue this assistance? A. I continued it from about 23 October, 1883, up to 6 October, 1904, making about twenty-one years, you might say."

(Defendant objects to question and answer.)

"Q. Why did you stop? A. Ellen Moore, the last one of them died.

"Q. State whether or not you permitted them to live in the house on the lot where they were living at Mr. Hammond's death, in accordance with the direction vested in you under the will?"

(Defendant objects.)

(Defendant objected to counsel prompting the witness about his answers, especially a different counsel from the one conducting the examination.)

"A. When Mr. Hammond died, they were living in the house. I furnished them as much as the rents of the place would justify and more. I hauled them wood. What I mean, I had not the means to give them better. I left them to the enjoyment of all the profits of the whole property without interfering with them in any way whatever under the will. All I did was under the will. Let that be understood. In three days after Mr. Hammond died I was feeding them. I went from my house to the Cash place with wagons and hauled wood for them.

There was verdict for plaintiff. The court rendered judgment in favor of plaintiff for the ownership and possession of the property, subject to the estate of Elizabeth Summers, as tenant in common of one undivided fourth interest for and during the term of her natural life, and defendant excepted and appealed.

McLendon & Thomas, J. A. Lockhart for plaintiff.
J. W. Gulledge for defendant.

HOKE, J., after stating the case: On the testimony, if be- (394) lieved, the *feme* plaintiff took and holds whatever interest was conveyed by her father's will, and, if this interest is sufficient to justify the plaintiff's recovery, the results of the trial should not be disturbed. And we are not called on to determine whether, on the facts in evidence, the three daughters of Mary D. Moore, referred to in Item 8, had elected to take under the will, for if this position should be conceded to defendant, we are of opinion that the plaintiff is entitled to the estate which has been awarded her by the verdict and judgment.

As heretofore stated, the defendants claim under the deed of H. B. Hammond, bearing date in 1856, and contend that this deed conveyed a fee simple to the four daughters of Mary D. Moore, and, if not, that defendant's title is protected by the statute of limitations; but neither position can be maintained.

While our Court has long shown a disposition to interpret deeds as conveying a fee simple where such a construction would manifestly best effectuate the intent of the parties, in deeds bearing date prior to the

statute of 1879, they have always required, for the creation of such an estate, that, as a mere construction of the legal title on the face of the instrument, the word "heirs" should appear in the deed as connected with the name of the grantee, and descriptive in some way of his estate, and that such a construction was not permissible when it only appeared in connection with the name of the grantor.

A very full reference to many of these decisions will be found in *Real Estate Co. v. Bland, ante,* 225, and in addition to this case we will only cite the case of *Anderson v. Logan,* 105 N. C., 266, as an authority more directly apposite to the precise question presented, and in which it was held:

"3. Where there are no words of conveyance in the instrument, or where the word 'heirs' does not appear in any part of the deed except in connection with the name of the bargainor, or with some expression, such as 'party of the first part,' used in the clause of warranty, or elsewhere, to designate the grantor, the deed, if executed before the act of 1879 was passed, will be construed as vesting only a life estate in the bargainee."

Applying this principle, the deed in question, bearing date in 1856, contains the following *habendum* as descriptive of the estate conveyed:

"To have and to hold said lot of land, with the appurtenances, to her, the said Mary D. Moore, for her own sole and separate use during her natural life, and, at her death, then to the daughters of said Mary D. Moore and issue of such as may not be living at the time, equally to be divided between them, said issue, if any, to take the share of their
(395) deceased parent; and the said H. B. Hammond doth warrant the title of the said lot, etc., against the lawful claims of all persons whatsoever."

And shows that neither in this nor any other part of the instrument does the word "heirs" appear in connection with the name of the grantee, or any one of them; and it is clear that the words, "and issue of such as may not be living at the time, equally to be divided between them, said issue, if any, to take the share of their deceased parent," were only used by the grantor as words of purchase, merely as a *descriptio personæ,* indicating that the children, or grandchildren, or other lineal descendant, should represent their mother or ancestor, and take the same estate as she would have done under the terms of the deed. This interpretation finds support in the fact that one of the witnesses seems to have been versed in the law, and the grantor himself was evidently a man of fine business qualifications, leaving a large estate intelligently disposed of by a holograph will, and both were no doubt fully aware of the requirement that the word "heirs" was necessary to the creation of a fee-simple estate.

This, then, being the correct interpretation of the deed, the will of H. B. Hammond would operate on and convey such an interest as he had, and, as the life estate was terminated by the death of each tenant, her share would accrue and inure for the benefit of the devisee and holder of the reversion under the will. Nor will the plea of the statute of limitations avail for defendant's protection. As we have stated, the deed of H. B. Hammond, under which defendant claims, coveyed to Mary D. Moore a life estate in the property, remainder for life to the daughters of said Mary D. Moore, and as each one of these daughters died her interest reverted to the grantor or his devisee, constituting her a tenant in common as to such interest with the others; and in such case our decisions are to the effect that the title of such a tenant will not be destroyed by occupation and sole appropriation of the proceeds of the property on the part of a cotenant, without more, for any period short of twenty years. *Clary v. Hatton, ante,* 107; *Dobbins v. Dobbins,* 141 N. C., 210; *Ward v. Sullivan,* 92 N. C., 93; the principle referred to being stated in this last case as follows:

"The rule, declared in *Caldwell v. Neely,* 81 N. C., 114, that an ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and the appropriation of its profits to himself for a less period than twenty years; and the result is not changed when one enters to whom a tenant in common has, by deed, attempted to convey the entire tract; affirmed. This rule extends to purchaser of the interest of a tenant in common at execution (396) sale, and to his vendee."

And there is no one now claiming this property adversely to plaintiff, who can show such an occupation for any such period; defendant Elizabeth Summers, so far as the evidence now discloses, not having been on the property since 1870, and Clark Summers himself not having occupied the property with any continuity except from the death of his aunt, Ellen Moore, which occurred in 1904. His wife seems to have lived upon the property from some time after her marriage, which occurred in 1894; but, from the testimony, she was only living with the aunts till the death of Ellen, and, if it were otherwise, the occupation is not of sufficient length. The deed, then, conveying this life estate to the four daughters of Mary D. Moore, and three of them being dead, and there having been no adverse occupation by any one for the time required to mature an adverse title, the judgment properly awards to *feme* plaintiff the ownership of the land, subject to a life estate of Elizabeth Summers for one undivided fourth interest.

It is further objected to the validity of the trial, that the first probate of the will of H. B. Hammond, in October, 1883, was defective, in that the statement of the witnesses examined did not comply with the statute

as to holograph wills, "requiring such witnesses to state that the will and every part thereof was in the handwriting of the testator"; and that the second probate, in December, 1898, correcting such defect, was without warrant of law. But this question has been resolved against defendant's position in the case of *Steadman v. Steadman,* 143 N. C., 345.

Again, it is contended that a new trial should be awarded because it was made to appear after a verdict that one of the jurors was of kin to some of the formal parties, plaintiffs of record; but our decisions are to the effect that this is a matter in the discretion of the trial court. *S. v. Maultsby,* 130 N. C., 664, and authorities cited. And on the facts in evidence we think this discretion was properly exercised in denial of the defendant's motion.

On the entire matter we are of opinion that the cause has been correctly and carefully tried, and the judgment in plaintiff's favor should be affirmed.

No error.

Cited: Cullins v. Cullins, 161 N. C., 346; *Lumber Co. v. Cedar Works,* 168 N. C., 350.

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(397)

ELLA HOUSE v. SOUTHERN RAILWAY COMPANY.

(Filed 27 April, 1910.)

1. Master and Servant—Safe Place to Work—Appliances—Duty of Employer—Rule—Proximate Cause.

The rule requiring the employer of labor to provide for his employees a reasonably safe place to work and appliances reasonably safe and suitable for the work in which they are engaged, obtains in case of machinery more or less complicated, and more especially driven by mechanical power, and does not apply to ordinary conditions requiring no special care, preparation or provision, the defects readily observable and the injury unlikely to be anticipated; the distinction being that in the latter instances the element of proximate cause is ordinarily lacking.

2. Same—Unlikely Results.

One who is employed to clean out defendant railroad company's passenger coach cannot recover damages caused by her hand slipping through a glass of a window she was instructed to raise, the negligence complained of being that the coach had just been repaired and the windows left so tight she had to exert unusual force, and that the lift of the window, necessary to be used, had been worn smooth and was unfit for the purpose.

APPEAL from *Long, J.*, at November Term, 1909, of IREDELL.

On issues submitted the jury rendered the following verdict:

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

"2. Did the plaintiff by her own negligence contribute to her own injury? Answer: No.

"3. What damages, if any, has the plaintiff sustained? Answer: $700."

Motion to dismiss as on judgment of nonsuit formally entered and renewed at close of entire testimony; motion denied, and defendant excepted. Judgment on verdict for plaintiff, and defendant excepted and appealed. The facts are further stated in the opinion of the Court.

G. W. Garland and Armfield & Turner for plaintiff.

L. C. Caldwell for defendant.

HOKE, J. The plaintiff set forth her cause of action in the complaint as follows:

"(2) That on the....day of December, 1906, the plaintiff was in the employ of the defendant as a servant, at Salisbury, and engaged in cleaning passenger coaches of the defendant for a valuable consideration; that on the aforesaid day of December, 1906, while the plaintiff was at work, as aforesaid, in the performance of her duties upon a car belonging to the defendant, she was ordered and directed (398) by the defendant to raise the windows of the car, one of which had just been repaired by the defendant, but had been repaired in such a negligent manner that when plaintiff attempted to raise the said window the defendant had carelessly permitted it to become so fastened and tight when she undertook to raise it she had to exert an unusual amount of force, and in doing so her hand slipped and went through the windowpane, breaking the glass and cutting her arm and hand, whereby she was made to suffer mental agony, bodily pain and was permanently injured; (3) that the pull provided by the defendant, which it was necessary for the plaintiff to use in raising said window, had become worn smooth and unsafe for the purpose for which it was provided, thereby causing plaintiff's hand to more easily slip when it became necessary for her to exert unusual force in raising the said window"; and offered evidence tending to sustain it; and on this statement the Court is of opinion that the motion to dismiss as on judgment of nonsuit should have been allowed.

We have repeatedly decided that an employer of labor is required to provide for his employees a reasonably safe place to work, and to supply them with implements and appliances reasonably safe and suitable for the work in which they were engaged. As stated in *Hicks v. Manufac-*

turing Co., 138 N. C., 319-325, and other cases of like import, the principle more usually obtains in the case of "machinery more or less complicated, and more especially when driven by mechanical power"; and does not, as a rule, apply to the use of ordinary everyday tools, nor to ordinary everyday conditions, requiring no special care, preparation or prevision; where the defects are readily observable, and where there was no good reason to suppose that the injury complained of would result.

The reason for the distinction will ordinarily be found to rest on the fact that the element of proximate cause is lacking; defined in some of the decisions as "the doing or omitting to do an act which a person of ordinary prudence could forsee would naturally or probably produce the injury." *Brewster v. Elizabeth City,* 137 N. C., 392.

These windows not infrequently become tightened from different causes, and, while it may be a great inconvenience and should perhaps be given more attention than it receives, no one would say that an injury of this character would ordinarily arise or be likely to ensue, and therefore, no actionable wrong has been established.

Our decisions on this subject are also against the plaintiff. (399) *Dunn v. R. R.,* 151 N. C., 313; *Farris v. R. R.,* 151 N. C., 483.

In *Dunn's case,* plaintiff was injured by an ordinary sledge-hammer flying from the helve just as a coemployee, in the line of his duty, was in the act of striking with it; and the Court held:

"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."

There was error in refusing defendant's motion for nonsuit and same must be reversed.

Reversed.

Cited: Rich v. Electric Co., post, 691; *Hipp v. Fiber Co., post,* 748; *Warwick v. Ginning Co.,* 153 N. C., 265; *Rumley v. R. R., ib.,* 458; *Simpson v. R. R.,* 154 N. C., 53; *Russ v. Harper,* 156 N. C., 448; *Pritchett v. R. R.,* 157 N. C., 102; *Whitener v. R. R.,* 157 N. C., 564; *Young v. Fiber Co.,* 159 N. C., 380; *Briley v. R. R.,* 160 N. C., 93; *Mace v. Mineral Co.,* 169 N. C., 146; *Bradley v. Coal Co., ib.,* 256; *Bunn v. R. R., ib.,* 651; *Wright v. Thompson,* 171 N. C., 90.

S. L. CROWELL ET AL. v. THE CITY OF MONROE.

(Filed 27 April, 1910.)

Cities and Towns—Closing Streets—Public Safety—Damnum Absque Injuria.

The courts will not interfere with the exercise of a discretionary power conferred upon a town by its charter in temporarily closing a street at a dangerous railroad crossing, and ordering an overhead bridge to be built there for the safety and convenience of the public, and damages thereby caused to the lands of a citizen is *damnum absque injuria*, in the absence of express legislation permitting its recovery.

HOKE, J., dissenting.

APPEAL from *Lyon, J.*, at February Term, 1910, of UNION.

Action for damages for wrongfully closing a public street. These issues were submitted:

1. Is the *feme* plaintiff the owner of the lots and property, as alleged in the complaint? Answer: Yes.

2. Has the defendant wrongfully closed, or caused to be closed, that portion of Church Street on which *feme* plaintiff's property abuts, as alleged in the complaint? Answer: Yes.

3. Has the defendant, by closing Church Street at the railroad crossing, interfered with the ingress and egress of plaintiff's property, as alleged in the complaint? Answer: Yes.

4. What damage, if any, has the plaintiff sustained by reason (400) of the closing of Church Street by the defendant, as alleged in the complaint? Answer: $500.

From a judgment for the plaintiff, the defendant appealed.

A. M. Stack and J. J. Parker for plaintiff.

Redwine & Sikes and John Vann for defendant.

BROWN, J. The case of the plaintiff is based upon the contention that the defendant municipality wrongfully and unlawfully closed Church Street where it crosses the tracks of the Seaboard Air Line Railway, whereby plaintiff was subject to inconvenience and damage, for which she avers the defendant is liable.

Upon a careful examination of the record, and giving due consideration to the arguments of the learned counsel for plaintiff, we are of opinion that the motion to nonsuit should have been allowed.

The evidence shows that Church Street proper stopped at the old corporation limits on south side of the railroad. Beyond the corporate limits a pathway or alley crossed the tracks of the company, which was used as a public crossing, but that it has been dedicated as a public

street does not appear. This continuation of Church Street, however, where it crosses the tracks, was directed to be discontinued by defendant.

Assuming, for the purposes of this case, that it was a public street of the city of Monroe, upon the evidence, we think the municipality is not liable in damages.

The several ordinances in evidence show that the crossing was regarded as a dangerous one, so that the board of aldermen, in 1903, directed the railroad company to maintain gates and a gatekeeper at it. The ordinances subsequently enacted show that this crossing was discontinued for public safety and convenience. The ordinance reads as follows: "It is ordered that a street of sufficient width to accomodate the public travel be opened from Crowell Street between Church and Depot streets to the right of way of Seaboard Air Line Railway, so as to connect with the overhead bridge to be erected by the Seaboard Air Line Railway across its track, to be built of iron and plans and specifications to be approved by the Board of Aldermen of the City of Monroe. It is ordered that when the said iron bridge is built over the tracks of the Seaboard Air Line Railway, Church Street and Depot Street, or the street passing the present freight depot, shall be closed from the right of way on the south side of tracks to the right of way on the north side of tracks, and shall remain closed so long as
(401) the Seaboard Air Line Railway shall keep the overhead bridge in good repair."

Afterwards, another ordinance was passed, discontinuing this crossing, to take effect at once. The defendant offered to show that the overhead bridge was being erected, but his Honor excluded the evidence erroneously, we think; but as the purpose for which the crossing was discontinued appears upon the face of the ordinance, the ruling is immaterial.

The record does not present the question of taking private property for public use, nor the question of the permanent closing of a public street in which an abutting owner has certain recognized rights. *Moose v. Carson;* 104 N. C., 431. The facts disclose nothing more than a closing of a railway crossing in order that an overhead bridge immediately above the crossing may be erected for the use of the public and evidently for public safety and convenience. It may be that plaintiff is inconvenienced and temporarily damaged, but it is *damnum absque injuria.*

This is a matter committed by the charter of the city to the sound discretion of its authorities. Private Laws 1899, ch. 352, sec. 22. With the exercise of this discretion the courts will not interfere. It is not a taking of private property for public use, and in the absence of express statutory law decreeing compensation, none can be recovered. 2 Dil-

lon on Mun. Corp., sec. 1040; *Dorsey v. Henderson,* 148 N. C., 423, and cases coted; *Cherry v. Rock Hill,* 48 S. C., 553; *St Louis v. O'Flynn,* 119 Ill., 200; *Smith v. Washington,* 61 U. S., 134.

Reversed and action dismissed.

HOKE, J., *dissenting:* I make no special objection to the propositions of law rather generally stated in the opinion of the Court, but do not think that they apply to any facts disclosed in the record, and am of opinion that the direction of a nonsuit, as adjudged by the Court, will work at grave injustice to the plaintiff.

There was abundant testimony that Church Street was a public street leading from the main portion of the town of Monroe, N. C., to plaintiff's property, and crossing the tracks of the Seaboard Air Line Railway Company; that it had been dedicated and accepted and worked and used as such street for twenty-five years or more; that the municipal authorities had ordered the closing of the street across the railroad tracks, and that, under and by virtue of this ordinance, the street at that point had been closed and turned into a railroad yard, and the grade of the approach changed so that there was no longer (402) any passway from the town along said street to plaintiff's property; that by reason of these obstructions, the ingress and egress to and from plaintiff's property had been impaired and interrupted and causing damage to the same of 30 to 40 per cent of its value.

Speaking to this interruption, J. A. Crowell testified as follows: "Railroad has blockaded street where it crossed. Impossible to cross, day or night, on account of being blocked. There are ten tracks. There were only three or four tracks up to three or four years ago. Wife's property has been damaged. No way to get in or out without trespassing."

And G. W. Redfearn said: "The closing of Church Street has taken the property off of public street."

On this evidence, and other testimony relevant to the inquiry, and under a charge free from error, the jury have rendered the following verdict:

"1. Is the *feme* plaintiff the owner of the lots and property as alleged in the complaint? Answer: Yes.

"2. Has the defendant wrongfully closed, or caused to be closed, that part of Church Street on which *feme* plaintiff's property abuts, as alleged in the complaint? Answer: Yes.

"3. Has the defendant, by closing Church Street at the railroad crossing, interfered with the ingress and egress of plaintiff's property, as alleged in the complaint? Answer: Yes.

"4. What damages, if any, has the plaintiff sustained by reason of the closing of Church Street by the defendant, as alleged in the complaint? Answer: $500."

And instead of awarding judgment on the verdict, a nonsuit is directed by the Court.

There was no serious question raised below as to plaintiff having an easement in the street. There was no serious question raised, and no evidence tending to show, that its user had not been impaired and interrupted by defendant to plaintiff's damage.

R. V. Houston, a witness for plaintiff, testified: "I know plaintiff's property. My father owned this property. He cut it up into lots and streets. This was one of the lots and streets. My father gave railroad right of way. Street or road in front of plaintiff's house was used by public twenty-five or thirty years. Platform built in 1874. Railroad came here in 1872, thirty-six years ago. Street was used by the public from then to the time it was closed three or four years ago. Closing of crossing has injured plaintiff's property. Plaintiff's property (403) has been damaged 40 or 50 per cent in value. It is worth $1,500 now. It would be worth $3,000 if street were open."

G. W. Redfearn testified as follows: "I know property. Church Street has been closed and plaintiff's property been damaged 35 or 40 per cent. I have lived here forty years. Street kept open since I have been here, until three years ago. Had a guano house there for a while. City works street on north side of railroad to Winchester Avenue. Curve is on railroad's right of way."

There is not in the record any evidence tending to show that a bridge over the track had been constructed or stipulated for by the town, except a suggestion to that effect in the order of the board on 11 January, 1906, and it was under the order of 17 May that the street was arbitrarily closed. Nor is it anywhere shown that the railroad, or any one else, is under a binding obligation to construct such bridge.

The ordinance closing the street and shutting off plaintiff, or the occupants of his property, from access to the town, except by a roundabout and inconvenient route, passing through a back alley, has been in existence now since May, 1906, and, so far as the testimony shows, no bridge has been built, and none had been commenced at the time of this action, begun in January, 1909, a period of more than two and one-half years. It may be that if a bridge is even now being built, affording plaintiff a convenient access to his property, that evidence to that effect should be received on the issues as to damages; but I am unable to perceive how an order of nonsuit can be justified on this record; or plaintiff's cause of action, established by the verdict, should be disregarded and set at naught by the Court.

In *Moose v. Carson,* 104 N. C., 434, an authority recognized in the opinion of the Court, *Avery, J.,* delivering the opinion said:

"We may deduce from the rules of law already stated the further principle that the owners of a lot having a property or easement appurtenant in the adjacent streets, with reference to the advantages of which they expended their money for the land and the improvements put upon it, cannot be deprived of their rights by a sale for the benefit of the town that was, in effect, though not nominally, one of the grantors through whom they claim title; nor has the Legislature the power to deprive them of such appurtenant rights by authorizing such grantor, whether a person or a corporation, to again enter upon and sell such streets to others. The General Assembly cannot, without a violation of the Constitution, divest or provide for divesting, by law, the right of a person to his property, for the purpose of vesting such right in another person or corporation merely for private use to all, and (404) it has no power, under the organic law, to provide for taking private property for public purposes without just compensation, to be ascertained in a mode pointed out by the law."

Applying this principle to the facts established, the defendant in the present case had no right to close the street affording plaintiff access to his property, without making him compensation; and, under the present decision, this compensation has been denied him.

Cited: *Hoyle v. Hickory,* 164 N. C., 82.

J. H. O'NEAL v. SOUTH AND WESTERN RAILROAD COMPANY.

(Filed 27 April, 1910.)

Master and Servant—Fellow-servant Act—Uncompleted Railroad.

One who is injured by the negligent acts of a fellow-servant while working as a blacksmith for a force engaged in building bridges for the construction of a railroad cannot recover of the master, for, to bring his action within the meaning of the fellow-servant act, he must show that he received the injury in performing a required service necessary to or connected with the use and operation of a railroad.

APPEAL from *Jones, J.,* at November Term, 1909, of SURRY.

Action to recover damages for personal injury. A motion in apt time was made to nonsuit the plaintiff, and was sustained. The plaintiff excepted and appealed.

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

R. C. Freeman, Folger & Folger, and W. F. Carter for plaintiff.
J. Norment Powell and J. J. McLaughlin for defendant.

BROWN, J. Taking all the evidence in its most favorable light for the plaintiff, it tends to prove that he was employed by one Ellis, foreman of the masonry force of defendant, as a blacksmith for the construction forces of defendant at Camp Ten, near Marion, N. C. Plaintiff and two fellow-servants were endeavoring to hang up a coil of rope weighing from two to three hundred pounds upon a peg in the tool-house. For some reason unexplained the fellow-servants let fall the coil on plaintiff's shoulders and injured him.

Omitting any discussion of the question of negligence, it is (405) plain that if any negligent act caused the injury, it was the act of a fellow-servant, for which the defendant is not liable.

According to all the evidence, the road was being constructed, not operated. To use a nautical term, the "ship was not in commission." The plaintiff was employed as a blacksmith on the construction force.

While it is not necessary to prove that the plaintiff was injured by a fellow-servant while actually on a train or operating it, it must appear to bring the case within the railway fellow-servant act, that he was injured while performing a service necessary to or connected with the operation of the railway as a common carrier.

This plaintiff was not performing a service necessary to or connected with the use and operation of a railroad. He was the blacksmith for a force engaged in constructing bridges, and was hurt while attempting to hang up a coil of rope, twenty miles from the then terminus of the railroad.

The law governing the case is so fully stated in the opinion of this Court by the Chief Justice in *Nicholson v. R. R.*, 138 N. C., 516; that it is unnecessary to further discuss the subject.

Affirmed.

Cited: Bailey v. Meadows Co., post, 604; *Twiddy v. Lumber Co.,* 154 N. C., 239; *McDonald v. R. R.,* 165 N. C., 625.

J. I. CASE THRESHING MACHINE COMPANY v.
C. L. McCLAMROCK ET AL.

(Filed 27 April, 1910.)

1. Contracts—Personal Property—Sale Without Warranty.

Personal property may be sold with or without warranty, and a warranty cannot be implied from a written contract of purchase expressly stipulating that the property was not warranted.

2. Same—Written Contracts—Variance—Evidence—Principal and Agent—Representations of Agent.

Vendees of a certain machine, who could read and write and were afforded full opportunity to read a written contract of purchase voluntarily executed by them without fraudulent inducement or device of vendor, cannot show that vendor's agent by parol warranted the machine, or that it was not a second-hand machine, when it expressly and clearly appears that the contract was for the sale of a second-hand machine, that it was not warranted, and that the agent was without authority to vary its written terms.

3. Same—Satisfaction—Fraud—Evidence.

Parol evidence that the sales agent of a feeder for a threshing machine warranted the feeder in a sale to the plaintiffs, and that his representations thereof were false, is not sufficient upon the question of fraud, when it appears that the purchase was made under a written contract expressly setting out that the feeder was second-hand and not warranted, that the salesman had no authority to vary these terms, and that after the feeder had been attached to the thresher and demonstrated and used, the plaintiffs signed a "satisfaction slip" to the effect that they were well pleased, and that it was satisfactory.

APPEAL from *Long, J.*, at October Term, 1909, of DAVIE. (406)

Action tried on appeal from a judgment of a justice of the peace.

The plaintiff sued on three notes: two of $40 each and one of $33.25, executed by defendants on 16 July, 1906, for the purchase price of a second-hand self-feeder for a separator. The contract of purchase was in writing, was signed by the two defendants, and contained, among other stipulations, the following: "As a condition hereof, it is fully understood and agreed that said machinery is purchased as second-hand, and not warranted." The contract, in bold type, at its beginning has the following words: "J. I. Case Threshing Machine Company, Second-hand Machinery Order." On its margin, in bold type it contained the following notice: "No person has any authority to waive, alter or enlarge this contract, or make any new or substituted or different contract, representation or warranty. Mechanics and experts are not au-

thorized to bind the company by any act, contract or statement." Both defendants can read and write, and admitted signing the order, the notes and the chattel mortgage. The machine came and was attached and operated, and after seeing it operated, the defendant admitted signing the following "satisfaction slip":

MOCKSVILLE, N. C., 16 July, 1906.

J. I. CASE THRESHING MACHINE COMPANY,
Racine, Wisconsin.

GENTLEMEN:—Your Mr. F. D. Halcomb has rendered us the desired assistance in operating the machinery recently purchased from you, and we are well pleased and satisfied with same, Self-feeder, No. 6629.

Yours truly,
L. M. MCCLAMROCK.
C. L. MCCLAMROCK.

The defendant C. L. McClamrock, on his cross-examination as a witness, stated that he and his father signed the satisfaction slip; that his father stated that he was satisfied; that he (witness) was satisfied; that it was working all right. The defense set up by the defend-
(407) ants was that they thought they were buyiyng a new, not a second-hand, machine; that the agent of plaintiff stated, upon the arrival of machine, that it was new, though they had copy of the contract order; that the machine did not work well and damaged the machine to which it was attached. This constituted the fraud relied upon by defendants to defeat recovery. At the conclusion of the evidence, his Honor ruled that he would instruct the jury that, upon all the evidence, if believed by them, the plaintiff was entitled to recover, and the jury thereupon answered the issue of indebtedness, the only issue submitted, in favor of plaintiff, and defendants appealed from the judgment entered against them.

McLaughlin & Nicholson for plaintiff.
E. E. Raper and Jacob Stewart for defendant.

MANNING, J., after stating the case: The only exception presented by the record is the correctness of his Honor's ruling. We concur in his ruling. The defendants admitted the execution of the notes sued upon and the chattel mortgage given to secure their payment. The execution by them of the contract, pursuant to which the notes and mortgage were executed, was likewise admitted. This contract expressly stipulated that the machine purchased was a second-hand machine, and was not warranted. It was entirely competent for the parties to so stipulate in their contract. The defendants retained a copy of the contract, and it expressly warned them of the limitation of the power of an agent of plaintiff to vary its terms by parol. The record states that both

the quality of the machine as secondhand and the limitation upon the agent's authority to vary the terms were printed in bold type. Apart from this, the defendants could read, and no trick or device was resorted to to prevent them from reading it.

It cannot admit of doubt that personal property may be sold with or without warranty, and that from an express stipulation that the property is not warranted a warranty will not be implied. *Woodridge v. Brown,* 149 N. C., 299. To sustain the defense of defendants, that the agent said the machine was a new machine and not a second-hand machine, and that its quality was good, would be, in terms, to contradict the express stipulations of the written contract by the parol promises of an agent expressly unauthorized to make any change or alteration, and in particulars about which the written contract speaks in unambiguous terms. *Woodson v. Beck,* 151 N. C., 144; *Walker v. Cooper,* 150 N. C., 128; *Walker v. Venters,* 148 N. C., 388. In *Woodridge v.* (408) *Brown, supra,* this Court held (see headnote 4): "In the absence of warranty of the grade of merchandise sold and delivered, evidence that the merchandise was of inferior quality is inadmissible, though the purchaser could not have ascertained that the quality was inferior except in its use"; and that this is true, though the seller knew the purpose for which it was to be used. *Dickson v. Jordan,* 33 N. C., 166.

The fraud and misrepresentation alleged in the answer were that "plaintiff represented said feeder to be a new one and suitable to work on the threshing machine of defendants, and it would warrant the same," and that these representations were not true. We have examined the evidence and we do not think it sustains the allegations, or that, viewed in its most favorable aspect for the defendants, it supported the allegations. After the self-feeder had been attached to the threshing machine and had been operated, defendants not only expressed their satisfaction, but signed the "satisfaction slip" set out in the preceding statement of the case.

The evidence failing altogether to support the defense, it was proper for his Honor to instruct the jury as he did. *Woodridge v. Brown, supra.* In addition, the contract contained this express stipulation: "Acceptance by purchaser is a full waiver of all claims arising from any cause." Having carefully examined the entire record and the authorities cited, we discover in the ruling of his Honor, to which exception was taken,

No error.

Cited: Machine Co. v. Feezer, post, 521; *Simpson v. Green,* 160 N. C., 303; *Machine Co. v. Bullock,* 161 N. C., 13; *Mercantile Co. v. Parker,* 163 N. C., 278; *Guano Co. v. Livestock Co.,* 168 N. C., 447; *Harvester Co. v. Carter,* 173 N. C., 231.

E. E. THOMPSON v. D. A. OSBORNE.

(Filed 27 April, 1910.)

Notes, Non-negotiable—Indorser for Value—Defenses, Legal and Equitable—Party in Interest.

The indorsee for value of a non-negotiable note may maintain his action thereon, as the real party in interest, subject to any defenses existing between the original parties, whether legal or equitable (Revisal, sec. 354), and when such defense is set up in the answer, which, if true, is a valid one, upon conflicting evidence, an issue of fact is raised for the determination of the jury, notwithstanding the fact that the instrument sued on is not negotiable.

(409) APPEAL from *Jones, J.*, at July Term, 1909, of ASHE.

Action heard on appeal from a justice of the peace.

The facts are stated in the opinion of the Court.

T. C. Bowie and R. A. Doughton for plaintiff.

No counsel for defendant.

WALKER, J. This action was brought to recover the amount of a bond or a note under seal, executed by the defendant to B. Morris and by the latter assigned for value to the plaintiff, E. E. Thompson. The bond is in the following words and figures:

$120.00. November 15, 1904.

Four months after date I promise to pay B. Morris one hundred and twenty dollars ($120) for value received in land this day bought from him, adjoining lands of H. Wingler, John Royal heirs and others. This note is to be discharged by D. A. Osborne delivering to B. Morris, on cars in town of Durham, N. C., ten thousand (10,000) feet of black pine lumber, 12 feet long, log run (mill culls out), to be sawn widths and thickness as per order to be furnished. D. A. Osborne to pay freight on lumber.

D. A. OSBORNE. (SEAL.)

The defendant alleged, in his answer, that the bond was given for the purchase money of a tract of land, and that B. Morris, who sold the land to him and to whom he gave the note, had promised to make him a good and perfect title to the land which he had purchased, and that at the time the note was given the said B. Morris did not have a good and perfect title to the land, although he had represented to the plaintiff that he had a good and perfect title thereto; and he further averred, in his answer, that the plaintiff purchased the note and the same was indorsed after its maturity, and, therefore, he took the same with full

notice and knowledge of the agreement between B. Morris and the defendant, and that as Morris did not have the title to the land, the plaintiff was not entitled to recover the amount of the note. After the pleadings were read, and before any testimony was introduced by either party, the court intimated that, as the note was not negotiable, the plaintiff was not entitled to recover in the action, whereupon he submitted to a nonsuit and appealed to this Court.

The right of the plaintiff to recover upon the note did not depend upon its negotiability, for if it was not negotiable, the plaintiff would be entitled to recover the amount of the note, unless the defendant had a valid defense, if the action had been between B. Morris and (410) himself. By the indorsement of the note to the plaintiff, for value, he acquired title to it and, consequently, the right to recover the amount which the defendant had promised to pay to Morris, unless the defendant could show that he had a good legal or equitable defense which would defeat the plaintiff's right of recovery. The plaintiff acquired, by the assignment of the note, the right to maintain this action, he being the real party in interest, even if, by virtue of the assignment, he had only an equitable title to it, which is subject to all equities and defenses which the defendant may have against the original payee. Revisal, sec. 354.

This Court, when construing Code, sec. 177, held, in *Kiff v. Weaver,* 94 N. C., 274, that the assignee of a bond or note not indorsed, is the proper person to maintain an action upon it in his own name, because he is the real party in interest, and that the possession of an unindorsed negotiable note, payable to bearer, raises the presumption that the person presenting it on the trial is the real and rightful owner, citing *Andrews v. McDaniel,* 68 N. C., 385; *Jackson v. Love,* 82 N. C., 404; *Bank v. Bynum,* 84 N. C., 24; *Pate v. Brown,* 85 N. C., 166. It was further held to be immaterial whether the action brought by the plaintiff is legal or equitable, for under the present system of procedure the distinction between actions at law and suits in equity and the forms of all such actions are abolished.

In this case the court, when it ruled against the plaintiff, assumed that the averments of the answer, as to the agreement between the defendant and Morris, were true, whereas that was the question to be decided by the jury, even if the note was not negotiable. The question involved in this case is fully discussed in *Tyson v. Joyner,* 139 N. C., 69.

There was error in the ruling of the court. The judgment of nonsuit will be set aside.

New trial.

Cited: Bank v. R. R., 153 N. C., 349.

(411)

J. C. ADERHOLT v. SEABOARD AIR LINE RAILWAY ET AL.

(Filed 27 April, 1910.)

1. Damages—Release—Avoidance—Burden of Proof.

A release of claim for damages for personal injury based upon a valuable consideration is a complete defense to an action to recover them, and when its execution is admitted or established by the evidence the plaintiff must prove matter in avoidance.

2. Same—Evidence—Nonsuit.

When the execution of a release founded upon a valuable consideration has been admitted in an action to recover damages for personal injury, and it appears from the evidence that the plaintiff signed it, in full possession of his faculties, two months after the injury, upon condition that if the consideration should be paid the release would be effective, and about two weeks thereafter signed the final release upon receiving the stipulated payment, a judgment of nonsuit upon the evidence, upon defendant's motion, should be granted, the evidence as to fraud in its procurement not being sufficient to carry the question to the jury.

3. Damages—Release—Signing—Knowledge Presumed.

One who has voluntarily signed a release for damages, being able to read and having been afforded full opportunity to do so, is charged with knowledge of its contents.

4. Damages—Release—Fraud—Intent—Evidence Insufficient.

Evidence that plaintiff, an employee, voluntarily signed a conditional release for the damages for personal injury sought in his action, about two months after the injury, and a final release about two weeks thereafter, upon receiving the valuable consideration therein named, and that, at the time the conditional release was signed, the defendant's claim agent said that plaintiff could retain his position as employee of defendant as long as he could do the work satisfactorily, is no sufficient evidence of a fraudulent intent on defendant's part in procuring the release, it appearing that plaintiff was again employed, but was discharged by one of defendant's vice-principals for inefficiency, and without knowledge of the release or plaintiff's claim therein.

APPEAL from *W. R. Allen, J.*, at October Term, 1909, of WAKE.

Action to recover damages for personal injuries which plaintiff alleged resulted from the negligence of the defendant company, while he was in the discharge of his duties as roadmaster. The defendant denied the allegations of the complaint as to its negligence, and set up as a defense certain releases executed by the plaintiff. The plaintiff replied, admitting the execution of the releases set forth in the answer, but alleged that they were procured by fraudulent representations. The issues submitted were found against the defendant; and judgment being rendered thereon, defendant appealed.

Douglass & Lyon and Armistead Jones & Son for plaintiff. (412)
Murray Allen and W. H. Pace for defendant.

WALKER, J. In the view we take this case, it is only necessary to consider questions relating to the first and second issues:

1. Did the plaintiff execute and deliver the several releases mentioned in the answer? Answer: Yes.

2. Did the defendant secure the signature of plaintiff to said release with the fraudulent intent as alleged in the pleadings? Answer: Yes.

That the jury's response to the first issue, which was made by consent, would have put an end to this cause, in the absence of an affirmative answer to the second issue, is a matter not open to dispute. A release executed by an injured party and based upon a valuable consideration is a complete defense to an action for damages for the injuries, and where the execution of such a release is admitted or established by the evidence, it is necessary for the plaintiff to prove the matter in avoidance of the release. In this case the plaintiff admits the execution of the releases relied upon by the defendant, and alleges in his reply that they were procured by the representations of the defendant, made with fraudulent intent, that the plaintiff should have employment with the defendant, in his former capacity, as long as he could properly discharge his duties; and the second issue, quoted above, was intended to cover that view of the case. The burden of that issue was upon the plaintiff, and, as we have said, unless he sustained the burden and procured an affirmative response to that issue, he could not have recovered in this action, and the jury's finding upon the issues of negligence, contributory negligence and damages would have been unnecessary and of no avail to the plaintiff.

At the conclusion of the evidence the defendant entered a motion of nonsuit, which raises the question of the sufficiency of the evidence to be submitted to the jury on the second issue, that is, whether or not there was any evidence of fraud in the procurement of the releases. Upon a careful examination of all the testimony, we are of the opinion that there was not sufficient evidence of fraud to be submitted to the jury, and the defendant's motion of nonsuit should have been sustained.

Plaintiff's evidence shows a state of facts that is inconsistent with an intention on the part of the defendant to procure the releases in this case by fraud. The plaintiff sustained the injuries complained of on 5 April, 1905, and was removed to the home of his father-in-law at Sanford, N. C., and more than two months elapsed before the defendant's agent called on him. The plaintiff himself says that no settlement was made at the time of the first visit, but that defendant's (413) agent returned at the end of two or three weeks, and, on 5 July,

three months after the injury, a conditional release agreement, in the following words, was signed by the plaintiff: "If, before the expiration of thirty days from this date, the Seaboard Air Line Railway shall pay to me, J. C. Aderholt, the sum of $300, I do hereby agree to release the said railway of and from all claims whatsoever for damages for or on account of personal injury sustained by freight train parting and running together, throwing me against seat, breaking four ribs and injuring back, on 5 April, 1905." At the time of signing this agreement, besides the plaintiff's and defendant's agent, there were present D. M. McIver, plaintiff's father-in-law, and Miss Mary McIver, his sister-in-law, and no one else. D. M. McIver signed the agreement as a witness. There is no evidence that the plaintiff was not then in full possession of his mental faculties and did not fully understand what he was doing.

The plaintiff says that at this meeting in Sanford, when the conditional release agreement, recited above, was signed, he had a very pleasant conversation with Baldwin, the defendant's agent, and that Baldwin said that as soon as he, Aderholt, was able he could get his position back. Plaintiff says "that is all that passed."

The negotiations for a settlement, which culminated in the execution of the release agreement, were open and fair and there is nothing in the evidence which tends to show that any unfair advantage was taken of the plaintiff. He signed the agreement freely and voluntarily. The final release was signed seventeen days after the execution of the conditional release agreement. According to the undisputed facts, Aderholt met Baldwin in Raleigh on 22 July and received a voucher for $300 and executed the final release in the following words: "For and in consideration of the sum of three hundred dollars ($300) to me paid, the receipt of which is hereby acknowledged, I, J. C. Aderholt, roadmaster, do hereby release and forever discharge the Seaboard Air Line Railway, and any and all railroads owned, leased, operated or controlled by it and its successors, from all claims and causes of action for or by reason of the injuries received by me while riding on freight train No....., injuring back, same parting, throwing me against seat and breaking ribs, on or about 5 April, at or near Aberdeen, N. C., while an employee of the Seaboard Air Line Railway; the consideration hereinbefore referred to being in full compromise, satisfaction and discharge of all claims and causes of action arising out of the
(414) injuries and in exoneration of the railway from all liability by reason thereof."

Plaintiff says that he did not read this release; that it was "shoved" across the table to him, and he signed it. When asked if he knew its contents, he said: "No not exactly. I knew it would have some features

which I would object to, but I did not want to be contrary, and I knew if I did not sign it I could not go back to work at all." At the time this release was executed he received a voucher for $300, reciting that it was accepted in full settlement, satisfaction and discharge of all claim whatsoever for the injuries complained of. This voucher was read and signed by the plaintiff at the time he secured the money from the bank in Raleigh. It appears from the facts recited, which were not in dispute, that the plaintiff read the conditional release agreement at the time he signed it and knew its contents, and that he knew the contents of the voucher, but he did not read the final release. However, the fact that he did not read this release cannot avail him. He could read; he had the opportunity to do so, and there are no circumstances connected with the signing of this instrument which relieved him of the duty to read it. He is charged, therefore, with knowledge of its contents. *Dorsett v. Mfg. Co.,* 131 N. C., 259; *Dellinger v. Gillespie,* 118 N. C., 737; *Griffin v. Lumber Co.,* 140 N. C., 514.

The plaintiff admits the execution of these releases and the collection of the $300, the consideration recited therein, but says there was a contemporaneous agreement to give him employment as long as he proved satisfactory. It is true that there is evidence that he and defendant's agent, Baldwin, talked about plaintiff's continuing in the defendant's employment, and one of plaintiff's witnesses, Miss McIver, his sister-in-law, testified that Baldwin said the company would be glad to give plaintiff his position back "as long as he wanted it." The witness said that this conversation took place at the time the conditional release was executed. It is also in evidence that Aderholt himself calculated the amount he would accept in settlement and that amount was placed in the agreement as the sole consideration. There is no evidence that he was induced by any device to sign this agreement, but did so voluntarily. A period of more than two weeks, in which to consider the effect of his act, elapsed before he was called to execute the final release of his claim for damages. When this release was presented to him for his signature, nothing was said about any additional consideration or reëmployment. He knew then the full effect of his act, and he accepted the consideration of $300, and, in addition to execut- (415) ing the release, signed a receipt which recited that this amount was accepted in full satisfaction of his claim for injuries.

In a case involving facts strikingly similar to these, the Supreme Court of Kansas held that: "Such a contract, made without fraud in its execution, full and complete in its terms, unambiguous, reasonable and plain, but containing no agreement for future employment of the releasor, cannot be supplemented by parol proof of such an agreement, claimed to have been made in the negotiations concluded by the release,

even though it be asserted that such agreement was the inducement for making the release." *Vanordstrand v. R. R.*, 67 Kan., 387.

In his charge his Honor properly instructed the jury that there was no evidence to warrant them in finding that Aderholt, when these papers were signed, did not have sufficient mental capacity to know what he was signing. It appears that he was fully aware of what he was doing; he was not coerced in any way, and we must hold that in accepting $300, which was a sufficient consideration to support the release, and in executing the papers recited above, plaintiff has surrendered and released his right to maintain an action for his injuries, and, in the absence of evidence of fraud in the procurement of the release, the action should have been dismissed.

When we consider the evidence that plaintiff relies upon to establish the fraudulent intent of the defendant to promise him employment in order to secure the release and then discharge him, we are forced to the conclusion that such evidence is not sufficient to be submitted to the jury. After the final release was executed, plaintiff continued in defendant's employment until the following February, and was then discharged by the superintendent in charge of the division of the railroad on which plaintiff was engaged, and the superintendent gave as the cause of the discharge, plaintiff's failure to keep his track in condition. In fact, plaintiff himself says that he had difficulty in getting the track in good condition, due to the scarcity of hands. There is nothing in the evidence which tends to show that the superintendent, who discharged plaintiff, knew of the settlement that had been made with him. The superintendent said that he did not know of it and had no connection with the division on which Aderholt was employed until the September after the settlement was made, which was in July. The defend-
(416) ant's agent, R. M. Baldwin, who procured the execution of the release, was a claim adjuster, and testified that he had no authority to hire or discharge employees.

As we have said in *Byrd v. Express Co.*, 139 N. C., 273, there must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it. The rule is thus stated in *S. v. Vinson*, 63 N. C., 335: "We may say with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury." *Young v. R. R.*, 116 N. C., 932. In *Crenshaw v. R. R.*, 144 N. C., 321, we quoted with approval the language of *Justice Maule* in *Jewell v. Parr*, 13 C. B. (76 E. C. L.), 916: "The question for the judge is not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established."

The evidence in the case before us does not rise to this standard, and there was error in submitting it to the jury. The motion of nonsuit should have been sustained.

Reversed.

Cited: *Wacksmuth v. R. R.*, 157 N. C., 41.

JAMES L. BUTLER v. F. R. PENN TOBACCO COMPANY ET ALS.

(Filed 27 April, 1910.)

1. Cities and Towns—Railroads—Private Sidings—Streets and Sidewalks—License to Obstruct.

Without express legislative power, a city may not authorize a contract between a manufacturing company and a railroad company for the building of a sidetrack across its public street, beyond the right of way of the latter, for the benefit of the former and its business. *Griffin v. R. R.*, 150 N. C., 312, cited and distinguished.

2. Same—Party Injured—Injunction.

A citizen whose property is injured, and who is deprived of his right of easement to freely pass and repass along a street and sidewalk of a town by reason of an unauthorized license to a railroad company by the town to build a private siding across the street beyond the right of way, for the benefit of another, is entitled to an injunction, although his property is not immediately adjacent.

APPEAL, from ROCKINGHAM, by plaintiff from judgment upon return to restraining order heard by *Long, J.*, 10 March, 1910, at chambers in Statesville, by consent.

The facts are stated in the opinion of the Court.

W. P. Bynum and R. C. Strudwick for plaintiff. (417)
Manly & Hendren for defendant railway company.
A. L. Brooks, H. P. Land, and C. A. Hall for town of Reidsville.
Justice and Glidewell for defendant tobacco company.

CLARK, C. J. The plaintiff, since 1903, has been the owner and in possession of a house and lot on West Market Street, in Reidsville, whereon he has continuously resided since that year. This street with its sidewalks is, and has been for more than thirty years, one of the principal thoroughfares of said town, and has been continuously used by the plaintiff as his only convenient and practical route from his residence to the post office and other public places in said town. The

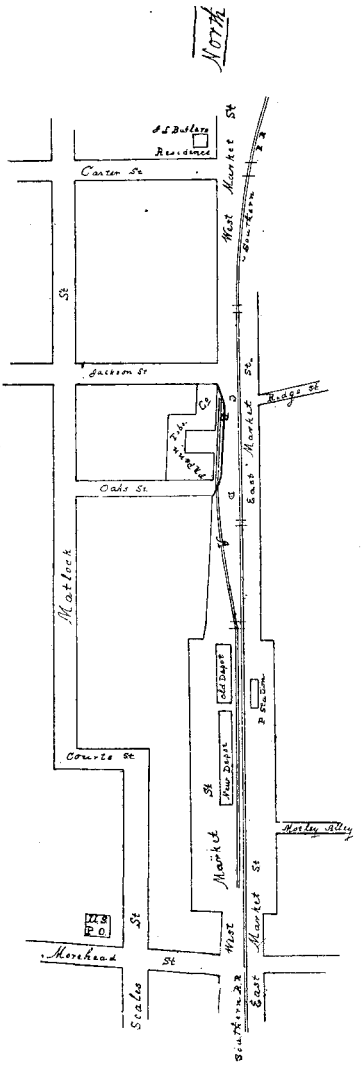
defendant tobacco company applied to the board of commissioners of said town for permission to construct upon West Market Street, outside of the right of way of the defendant railroad company, and for a part of the distance upon the sidewalk of said street, a private sidetrack running from the line of the railroad to the door of the factory of said tobacco company, and making no other connection whatever. On 9 October, 1909, the said board of commissioners undertook to grant such license to said tobacco company, and thereafter, on 1 December, 1909, the said tobacco company entered into a written agreement with said town, whereby it undertook to construct said sidetrack at its own expense, and it further contracted with the defendant railroad company to build said track in consideration of $1,062, to be paid to it by said tobacco company. Acting under said alleged license, said tobacco company and the railroad company were at the beginning of this action proceeding to construct said sidetrack between the main business portion of the town and the warehouse of the said tobacco company, about 600 feet distant from the plaintiff's residence on the same street.

It further appeared, according to affidavits filed for the plaintiff, that the said sidetrack, if built and operated as proposed, would impair the value of plaintiff's lot, would greatly injure and partially destroy the right or easement of plaintiff to pass and repass along the said street, and would entirely destroy the right of plaintiff to use said sidewalk.

The relative positions of the line of the railroad company, West Market Street and the sidewalk, the factory of the tobacco company, and the property of the plaintiff, will appear from the map herein.

The plaintiff appealed from the order dissolving the restraining order theretofore granted. The question presented is whether the defendant, the town of Reidsville, has the power to grant license (419) to the defendant, the Penn Tobacco Company, to build on the public street and upon the sidewalk thereof a private sidetrack, from the railroad track to the warehouse of the said tobacco company, for its use and benefit, whereby the plaintiff, a resident upon said street, is deprived of his right of easement to freely pass and repass along said street and sidewalk, and the value of his house and lot is imparied.

Nearly all of the 670 feet of the proposed sidetrack is off of the right of way of the defendant railroad company, whose track, right of way and depot in Reidsville have been located for nearly fifty years. It has no power to exceed its right of way, in the absence of legislative authority, even for public purposes. In *Griffin v. R. R.,* 150 N. C., 312, the defendant was authorized to lay its track along a street to make connection at a union depot, which had been ordered by the Corporation Commission, under authority of the staute and of the board of aldermen, who were empowered to grant such permission by the terms of the charter



EXPLANATIONS.

A—Proposed sidetrack, 670 feet long.
B—Proposed sidewalk, 330 feet long.
Dotted line thus: . . . . . foot of railroad fill in front of Penn's factory.
Between street line and fill at C is 46 feet; height of fill 5 feet.
Between street line and fill at D is 50 feet; height of fill 2½ feet.
Two lines thus: | | indicate railroad crossing.
From J. L. Butler's residence to U. S. post office by West Market Street is 2,579 feet; by Matlock Street (scale measure) 2,880 feet.

of the city. *Dewey v. R. R.,* 142 N. C., 392. Besides, it was a public purpose. Here it does not appear that the charter of Reidsville confers such authority on its board of commissioners. Certainly no authority is shown by statute or order of Corporation Commission empowering the defendant railroad company either to lay or operate a sidetrack, not upon its right of way, for the purpose of reaching the tobacco company's warehouse.

In *White v. R. R.,* 113 N. C., 610, cited with approval in *Staton v. R. R.,* 147 N. C., 437, it was held to be established that "the use of a street by steam railroads is not a legitimate use for public purposes, and it must of course follow that the city has no right in the exercise of its usual and ordinary powers relating to highways to authorize the entry and occupation of the street by the defendant, and the bare license of the city can afford no justification."

The town authorities hold the streets in trust for the purposes of public traffic and cannot, in the absence of statutory power, grant to any one the right to obstruct the street to the inconvenience of the public, even for public purposes, and for private purposes not at all. *Moose v. Carson,* 104 N. C., 435; *Field v. Barling,* 149 Ill., 556; *Service Co. v. Murphy* (Mo.), 34 L. R. A., 374. The city cannot (in the absence of statutory power) authorize the use of the streets by a private railroad. *Gustaffson v. Hamm* (Minn.), 22 L. R. A., 565; *Mikesell v. Durkee,* 36 Kans., 97. Permission by a city to a private individual to occupy a public street with a railroad switch, to be used for his private business, is void. *Swift v. R. R.,* 66 N. J. Eq., 34. Such (420) power may be granted to a municipality by legislative authority, but in the absence of legislation the town authorities cannot grant any use of the streets for private purposes (Elliott Roads and Streets (2 Ed.), sec. 653), for the entire street, "from side to side and from end to end, belongs to the public." *ib.,* sec. 645. The use of the street for a street railroad is in aid of and facilitates its use for public traffic and travel. *Hester v. Traction Co.,* 138 N. C., 291; *Merrick v. R. R.,* 118 N. C., 1081.

The *Industrial Siding Case,* 140 N. C., 239, is not in point. There the Corporation Commission, under statutory authority, ordered the railroad company to establish such siding, having, after investigation, found this to be to the public interest. But it does not follow that because a public agency is empowered to order the establishment of such sidings on its rights of way, or on land acquired by it for that purpose, that a railroad company may lay down its track in the streets of a city, under contract with any individual or manufacturing company, to facilitate the operation of such private business, by the permission

of the town authorities, who have no legislative power to that end conferred upon them. 28 Cyc., 873, and numerous cases there cited; 27 A. & E. Enc., 176.

No reason is shown why the defendant railroad company cannot lay the sidetrack upon its right of way to a point abreast the warehouse of the tobacco company. This would necessitate that company carrying its goods a few feet from its door to the sidetrack, but there are facilities for that. Certainly the defendants cannot take the public street and sidewalk, which would greatly inconvenience the public, because it would serve their own convenience.

Though the plaintiff is not an abutting proprietor, the use of this street and its sidewalk for a siding for the tobacco company and filling it up, at times, with cars, shifting about or standing, impedes the use of the street, and he is entitled to an injunction to prevent it. *McManus v. R. R.*, 150 N. C., 661; *Tise v. Whittaker Co.*, 144 N. C., 511; *Corby v. R. R.*, 150 Mo., 457; *Longworth v. Sedevick*, 166 *ib.*, 221; *Fielding v. Barling*, 149 Ill., 569; Elliott, R. and S. (2 Ed.), secs. 664, 665. This is especially true, as no action for damages lies against the city for an unauthorized grant or license. 2 Dillon Mun. Corp. (4 Ed.), 710.

The owner of a lot, whose use of a street is interfered with by an obstruction therein, is entitled to an injunction, although his lot is not immediately adjacent. *Conrad v. Land Co.*, 126 N. C., 776; *Collins v. Land Co.*, 128 N. C., 563; *Hughes v. Clark*, 134 N. C., (421) 461.

The order dissolving the restraining order is

Reversed.

Cited: *S. v. R. R.*, 153 N. C., 560; *R. R. v. R. R.*, 161 N. C., 537; *Guano Co. v. Lumber Co.*, 168 N. C., 339; *Kirkpatrick v. Traction Co.*, 170 N. C., 479; *Hales v. R. R.*, 172 N. C., 109.

A. W. HAYWOOD AND E. C. LAIRD, SURVIVING EXECUTORS AND TRUSTEES UNDER THE WILL OF THOMAS M. HOLT, v. ELLA M. WRIGHT AND HER HUSBAND, C. B. WRIGHT, AND LOUISE B. WRIGHT, AN INFANT, ETC.

Filed 27 April, 1910.)

1. Wills—Bequests for Life—Trusts and Trustees—Shares of Stock—Management and Control—Interest to Life Tenant—Executors and Administrators.

While the executors under a will bequeathing specific personal property for life, remainder over, may assent to the legacy and deliver the property to the life tenant, unless the exigencies and proper administration of the estate otherwise require, without ordinarily being charged

with the duty of looking further after the property and of insuring its delivery intact to the remainderman, a different principle prevails when a mixed fund, under a general residuary clause, *eo nomine*, is given to one for life, remainder over. In this latter case the executor is ordinarily required to sell the property, pay the interest on the proceeds to the life tenant, and hold the fund for the remainderman under the will.

2. Same—Interpretation of Wills—Different Intent.

Both of these principles, however, are only rules of interpretation established because they are ordinarily supposed the better to effect the testator's intent, and both yield when it is apparent that a different intent is required by the terms of the will.

3. Same.

Where a testator in the 4th clause of his will bequeaths certain shares of stock in a corporation to his five children, two sons and three daughters, the portion of the sons absolutely, and that of the daughters to them for life, remainder over, and affects the remainder with a contingent limitation, and styles the provision for these daughters as a limitation and trust; and another clause, to wit, clause 5, provides for a sale and reinvestment of the stock, and directs that on such sale the executors shall retain and invest the proceeds, paying the interest to the daughters for life, and the remainder over under the same limitations and trusts as contained in clause 4; and in various other clauses of the will refers to the limitations and trusts provided for his daughters in sections 4 and 5, and finally appoints certain persons executors and trustees to carry out and perform the "trusts hereinbefore declared"; it sufficiently appears that the testator desired and intended to impress the fund with a trust, and it became the duty of the executors and trustees named to take charge of the stock to be held by them as executors, while the exigencies and well ordering of the estate so required, and then to turn the same over to themselves as trustees to be dealt with and disposed of as the proper management of the trust would suggest, and as directed by the provisions of the will.

4. Wills—Shares of Stock—Bequest for Life—Trustees—Corporations—Voting Powers.

When the terms and provisions of a will bequeathing a life interest in certain shares of stock in a corporation is construed to be that the shares be held and controlled by trustees therein named as executors and trustees, the trustees may vote the same in stockholders' meetings under Revisal, sec. 1185, and sec. 1186, providing for the voting of the shares by the life tenant, has no application.

WALKER, J., did not sit on the hearing of this case.

(422) PROCEEDINGS, from ALAMANCE, to obtain the construction of the last will and testament of Governor Thomas M. Holt, deceased, heard by consent, a jury trial being formally waived, at Hillsboro, N. C., on 15 March, 1910, before *W. J. Adams, J.*, holding the courts of the Ninth Judicial District.

The facts pertinent to the inquiry, found on the hearing to be true, are stated in the original complaint as follows:

"1. That on 11 April, 1896, Governor Thomas M. Holt, a resident and domiciled in said Alamance County, N. C., died in said county, leaving a last will and testament and codicils thereto, wherein and whereby Charles T. Holt, A. W. Haywood, Thomas M. Holt, Jr., and E. C. Laird were named as executors and trustees thereof, a copy of which last will and testament and codicils is hereto attached, marked 'Exhibit A' and made a part of this complaint.

"2. That subsequently, to wit, on 13 May, 1896, said last will and testament and codicils thereto were duly admitted to probate before the clerk of the Superior Court of said county, and recorded in his office in Will Book No. 3, at page 112.

"3. That the said Charles T. Holt, A. W. Haywood, Thomas M. Holt, Jr., and E. C. Laird, on 13 May, 1896, duly qualified as executors of said last will and testament and codicils thereto, before the clerk of the court, who duly issued to them letters testamentary thereon, and they thereupon at once entered upon the discharge of their duties as such executors.

"That the said Thomas M. Holt, Jr., died on 6 January, 1897, and the said Charles T. Holt died on 13 December, 1900, leaving the plaintiffs, A. W. Haywood and E. C. Laird, as the sole surviving executors and trustees under the said last will and testament and (423) codicils thereto.

"4. That the defendant Ella M. Wright is one of the three daughters of said Governor Thomas M. Holt, deceased; is the same person named in said last will and testament and codicils thereto, and is possessed absolutely in her own right of large means outside of the property involved in this controversy.

"That the defendant C. Bruce Wright is the husband of said Ella M. Wright, and they both reside at Raleigh, N. C.

"That the defendant Louise B. Wright is the daughter and only child of said C. Bruce Wright and Ella M. Wright; resides with her said parents at Raleigh, N. C.; is an infant under the age of 21 years (being 20 years of age) and is without general or testamentary guardian, and appears in this action by her duly appointed guardian *ad litem*, C. B. Wright.

"5. That the estate of said Governor Thomas M. Holt, at the time of his death (outside of the property specifically devised and requeathed by his said last will and testament and codicils thereof) consisted, among other things, of shares of the common stock of cotton-mill corporations located at Haw River, N. C., and of other corporations, life insurance policies, bonds of corporations, money on hand, a plantation

in Davidson County, N. C., known as 'Linwood,' with horses, mules, cattle, farming implements, crops, houses, household and kitchen furniture, etc., on said plantation and was of a mixed character.

"That a large part of the proceeds of collection of said life insurance policies and of the proceeds of sale of small parcels of said 'Linwood' plantation were loaned out; said loans being represented by what was generally known as 'trustee notes,' said notes amounting in the aggregate to $35,092.64, principal money.

"6. That cotton-mill corporations located at Haw River, N. C., were subsequently, to wit, on 14 May, 1901, consolidated into one corporation, known as the Holt-Granite Manufacturing Company, and the stock in said old cotton-mill corporations was exchanged for stock in the said new consolidated corporation.

"In exchange for the common stock in said old cotton-mill corporations, held for the benefit of the defendant Ella M. Wright, the plaintiffs received and now hold, for her benefit, 711 shares (of the face value of $71,100) of the common stock of said new consolidated corporation, the said Holt-Granite Manufacturing Company, the certificate therefor being issued and now standing in the name of A. W. Haywood and E. C. Laird, surviving trustees under the will of Thomas M. Holt, for Ella M. Wright and others.

(424) "7. That pursuant to the power and authority conferred by item 6 of said last will and testament and codicils thereto of said Governor Thomas M. Holt, the balance of said 'Linwood' plantation and personal property thereon was on 18 March, 1907, sold and conveyed by the executors of said Governor Thomas M. Holt, and the share (to wit, $5,800) of the proceeds of such sale for the benefit of said defendant Ella M. Wright was pursuant to her instructions, invested in the 6 per cent first preferred stock of said Holt-Granite Manufacturing Company, for which the plaintiffs received, and now hold, for the benefit of said Ella M. Wright, 58 shares (of the value of $5,800) of said preferred stock, the certificates therefor being issued and now standing in the name of A. W. Haywood and E. C. Laird, executors and trustees for Ella M. Wright and others.

"8. That said 'trustee notes' (representing, as aforesaid, a large portion of the proceeds of life insurance policies and the proceeds of sale of small parcels of said 'Linwood' plantation) were collected on 8 April, 1907, and the share (to wit, $8,800) of the same for the benefit of said defendant Ella M. Wright was pursuant to her instructions, invested in said 6 per cent first preferred stock of said Holt-Granite Manufacturing Company, for which the plaintiffs received, and now hold, for the benefit of said Ella M. Wright, 88 shares (of the face value of $8,800) of said preferred stock, the certificates therefor being issued

and now standing in the name of A. W. Haywood and E. C. Laird, executors and trustees for Ella M. Wright and others.

"9. That the plaintiffs have, from time to time, paid over to said Ella M. Wright the income from the property and estate devised and bequeathed as aforesaid, by said Governor Thomas M. Holt, for her benefit, and from said common and preferred stock, into which the same was converted and was received, and is now held as aforesaid by the plaintiffs, for her benefit.

"10. That all the debts of said Governor Thomas M. Holt, presented to his executors, have been paid, and there are no other debts due by him, to the best of the plaintiffs' information and belief, and all the specific legacies and devises made in said last will and testament and the codicils thereto have been paid and discharged.

"11. That the plaintiffs aforesaid now have in their possession assets belonging to the estate of said Governor Thomas M. Holt, which was devised and bequeathed for the benefit of said Ella M. Wright, or its proceeds, as follows:

"Seven hundred and eleven shares (of the face value of $71,100) of the common stock of said Holt-Granite Manufacturing Company derived as aforesaid from the exchange of Governor Holt's origi- (425) nal stock in the old cotton mills at Haw River, N. C.

"Fifty-eight shares (of the face value $5,800) of the 6 per cent first preferred stock of said Holt-Granite Manufacturing Company, derived from the sale of said 'Linwood' plantation and its personal property.

"Eighty-eight shares (of the par value of $8,800) of the 6 per cent first preferred stock of said Holt-Granite Manufacturing Company, derived from collection of said 'trustee notes,' which notes represented collections of Governor Holt's life insurance policies and sale of small parcels of said 'Linwood' plantation, all subject, however, to the cost and expenses of administering and settling any trust in regard thereto.

"12. That the plaintiffs are ready and anxious to make a final settlement of the estate of their said testator, and to pay, deliver and turn over to the parties entitled thereto all the assets belonging to his estate, as soon as they can safely do so; but owing to difficulty arising from the obscure and uncertain terms of some of the clauses of his said will and codicils thereto, they desire, for their protection, to obtain the construction of the terms of said will and codicils by the court, and directions from the court as to their duties in the premises, and to that end they ask of the court a solution of the following questions, arising upon the construction of said Governor Thomas M. Holt's will and codicils thereto, as follows:"

And in an amended complaint, filed by leave of court, the procedure by which three corporations were consolidated and the Holt-Granite

Manufacturing Company formed, and stock therein substituted for the original holdings, was more fully and formally stated.

The portions of the principal will and codicils relevant to the questions presented here are as follows:

"Fourth. I give, devise and bequeath unto my five children, Charles T. Holt, Thomas M. Holt, Jr., Cora M. Laird, wife of Dr. E. Chambers Laird; Louise M. Haywood, wife of Alfred W. Haywood, and Ella M. Wright, wife of C. Bruce Wright, in equal parts, all my shares of stock in the 'Granite Manufacturing Company,' a corporation duly chartered, organized and doing business in the State of North Carolina; the parts and shares of my two sons to them and their heirs, executors and administrators, absolutely and in fee simple; but the parts and shares of my daughters to be each one severally, for and during her life, with remainder absolutely and in fee simple to such child or children of hers, if any, or the issue of such child or children. (426) Should any child or children of either of my said daughters predecease their mother and leave issue—as shall be alive at the time of the death of their mother—the issue to represent their parent and take such share as he or she would have taken, if alive; but should either of my said daughters die leaving no child or children or the issue of such, alive at the time of her death, then with remainder, as to the share of the one so dying, to my other children, share and share alike, and the issue of such as may be dead, the issue representing their parent and taking such share as he or she would have taken, if alive, on the same limitations and trusts as hereinbefore expressed as to their own shares devised and bequeathed to them in this last will and testament.

"Fifth. My children may wish to sell the property above given to them, and in case they do, my desire and direction is that any one so desiring to sell his or her share may do so, on condition that they shall give the others the option and refusal to take such share or shares at a fair and *bona fide* price before selling out of the family; or they may concur in making a joint sale of the whole, and they are hereby authorized to do so, if they wish; then, and in either case, that is to say, whether, on a joint or a several sale, the shares of the daughters in the proceeds of the sale shall be received by my executors hereinafter named, and by them invested in trust to pay the annual interest on each one's share to her, during her life, and at her death, in trust absolutely and in fee simple for such child or children of hers, if any, or the issue of such child or children—should any child or children of my said daughters predecease their mother and leave issue—as shall be alive at the time of the death of their mother, the issue to represent their parent and take such share as he or she would have taken, if alive; but should either of my said daughters die leaving no child or children or the

issue of such alive at the time of her death, then the share of the one so dying in trust for my other children surviving, share and share alike, and the issue of such as may be dead, the issue representing their parent and taking such share as he or she would have taken, if alive, on the same limitations and trusts as hereinbefore expressed as to their own shares, devised and bequeathed to them in this last will and testament.

"Sixth. I give, devise and bequeath my Linwood farm in Davidson County, containing about 1,100 acres, and also my Jersey Mills in the same county, with all my personal property of every kind on said plantation, and in said mills, unto my sons and daughters hereinbefore named, the shares of the sons therein to them and their heirs in fee simple, and the shares of the daughters on the same limi- (427) tations and trusts as hereinbefore expressed as to their shares in the devise and bequest to them contained in the fourth and fifth items of this my last will and testament; and in regard to this property my wish and direction in that my executors hereinafter mentioned do keep and run the same, using for that purpose the stock, implements and other personalty thereon at the time of my death, and that they divide and pay over at the end of each year the net profits therefrom to my said five children, the share of each to be in absolute property, and so continue to do until, by consent of all, a sale is requested, or in the judgment of my executors it is thought best to sell; and then, and in either case, my direction is, that my executors sell and convey said property, real and personal, and divide out the proceeds and pay over the same, except as to the shares therein of the daughters, which they shall invest and hold in trust for them for life, and with remainder as expressed in regard to the purchase money of the property devised and bequeathed in the fifth item of this my last will and testament.

"Seventh. All the rest and residue of my property of every kind and description, including bonds, stocks, notes, accounts, policies of insurance on my life for my benefit, the sums charged on the devises and bequests to my sons, Charles T. Holt and Thomas M. Holt, Jr., so much of the Ætna Life Insurance Company policy set apart as a provision for my wife as she may not consume, and all demands of every sort and kind, due and owing to me at the time of my death, shall be a fund in the hands of my executors for the payment of my debts and costs and charges of administration, among which shall be considered and allowed $250 to each of my executors in full for all services in executing this my will, except as to the shares of my daughters directed to be held in trust, for which they may receive a compensation out of the trust fund to be such an amount as may be just, fair and reasonable for their services as such trustees; and should there be any residue from this source remaining in their hands after the payment of my debts and the

costs and charges of administration, I give, devise and bequeath the same to the same parties and on the same limitations and trusts as hereinbefore set out in items four and five of this last will and testament.

"Ninth. Lastly, I nominate, constitute and appoint my son Charles T. Holt and my son-in-law A. W. Haywood, and my son Thomas M. Holt, Jr., at his full age of twenty-one years, as executors of (428) this my last will and testament, and as trustees to carry out and perform the trusts hereinbefore declared, hereby revoking all former wills by me made."

And by codicil, purporting to have been executed 26 January, 1892, reference is made to the interest bequeathed to defendant Mrs. Ella M. Wright, as follows:

"And whereas, I have not during my lifetime given to my daughter Ella M. Wright, wife of C. Bruce Wright, as much in value as I have to each of my other four children, now, in order and for the purpose of making her share in my estate equal to that received by my other children, I do hereby give and bequeath to my said daughter Ella M. Wright, for and during her life, with remainder as stated in item fourth of my said last will and testament and on the same limitation and trusts as expressed as to her share in the devise and bequest to her contained in the fourth item of this my last will and testament, one hundred and twenty-six (126) shares of stock in the 'Granite Manufacturing Company.'"

And in another codicil, purporting to have been executed 28 December, 1893, further reference is made as follows:

"And whereas, in a former codicil to this my last will and testament, said codicil bearing date 26 January, 1892, I gave and bequeathed to my daughter Ella M. Wright, for and during her natural life, with remainder as expressed and stated in said codicil, one hundred and twenty-six (126) shares of stock in the Granite Manufacturing Company;

"And whereas I now desire to give to my said beloved wife, Louisa M. Holt, for and during her natural life only, with remainder over as hereinafter declared and provided for, an equal or one-sixth (1-6) part or share in such stock of the Granite Manufacturing Company as I shall own at the time of my death, first deducting therefrom the above-mentioned one hundred and twenty-six (126) shares, I do hereby declare, will and give and bequeath to my said beloved wife, Louisa M. Holt, for and during her natural life only, an equal or one-sixth part or share in such stock of the Granite Manufacturing Company as I shall own at the time of my death, first deducting therefrom the above-mentioned one hundred and twenty-six (126) shares, and at her death I give, devise and bequeath the remainder, after my said wife's life estate in said one-sixth part or share in said above-mentioned stock to the same parties and in

the same estates and upon the same limitations and trusts, terms and conditions as are set out in items four and five of my said last will and testament.

"The provisions, legacies, bequests and devises to my said wife (429) in this codicil contained are in lieu of her dower and distributive share in my property and estate and in full of her portion of my said estate; and the executors and trustees named in my said last will and testament are hereby constituted and appointed trustees to carry out and perform the trusts hereinbefore in this codicil and in my said last will and testament declared as to and in favor of my said wife; and in case of a joint sale of the property, as provided for in the fifth item of my said last will and testament and of my said wife's concurrence in the same—and she is hereby authorized to concur in such sale if she wishes—then, and in that case, the share of my wife in the proceeds of such sale shall be received by my aforesaid executors and trustees, which they shall invest and hold in trust for my said wife for and during her natural life, and in remainder as expressed in regard to the shares of stock in this codicil hereinbefore bequeathed and disposed of, and from the sale of which the said proceeds of sale are derived."

And by codicil, purporting to have been executed 14 June, 1895, Dr. E. C. Laird was constituted one of the executors and trustees in terms as follows:

"I nominate, constitute and appoint my son-in-law Dr. E. C. Laird as one of the executors of my last will and testament, and as one of the trustees to carry out and perform the trusts declared in said last will and testament and the codicils thereto."

Upon this will, and the codicils thereto, and upon the pertinent facts as stated, questions were propounded as follows: Are the persons named as executors in said will constituted trustees of the estate and interest thereby conferred upon Mrs. Ella M. Wright, with power to hold, invest and control the same according to the provisions of said will for and during her life, paying the net income to her during such period, and, at her death, to pay over and deliver the corpus thereof to the parties entitled, etc.; and is their present duty to take charge of said estate as trustees? And the same interrogatories, in general terms, are submitted as to the 711 shares of common stock in the Holt-Granite Manufacturing Company, and as to the 58 shares of preferred stock, arising from a sale of the Linwood plantation, referred to in item 6 of the will, and as to the 88 shares of preferred stock purchased with proceeds of insurance policies from investment of "trustee notes," referred to and described in the statement of facts. Speaking more specifically with reference to the ownership and control of the shares of stock, the question is thus stated:

"3. Do said Governor Thomas M. Holt's will and codicils thereto constitute and make said A. W. Haywood and E. C. Laird trus-
(430) tees to take now said 711 shares of common stock of said Holt-Granite Manufacturing Company, received in exchange for the shares of the old cotton-mill stock bequeathed for the benefit of said Ella M. Wright, and until her death (or sooner sale of the same as provided for in said will), to hold the same in their name as such trustees, to keep in their custody the certificates for the same, to represent and vote the same, receive the income therefrom and after deducting from such income from taxes, charges and expenses of the trust, etc., to pay the net income so left to said Ella M. Wright; and upon the sale of the same during the life of said Ella M. Wright, as provided in said will, to receive as such trustees the proceeds of such sale, invest the same in their names as such trustees, and until the death of said Ella M. Wright, manage and control such investments, receive the income therefrom, and after deducting from such income the taxes, charges and expenses of trust, etc., to pay the net income so left to said Ella during her life, and at her death to pay, deliver and convey the said stock, or the investments into which it may have been converted, to the parties entitled thereto under and in the estates and proportions designated in said will and codicils thereto?"

And like specific statement is made as to the preferred stock, etc.

On the facts established, the court below entered judgment as follows:

That, under the will, and codicils thereto, of said Governor Thomas M. Holt, it was the right and duty of the plaintiffs to take the 711 shares of the common stock of the Holt-Granite Manufacturing Company and the 58 shares and the 88 shares of the 6 per cent preferred stock of said Holt-Granite Manufacturing Company, referred to in paragraph 11 of the complaint, and to hold in their name, to control and manage the same and the investments into which it may be converted, in trust for the benefit of the defendant Ella M. Wright, for life; said plaintiffs representing and voting said stock at the meetings of the stockholders of said corporation, receiving the dividends thereon and the income from the investments into which it may be converted, and, after deducting from such dividends and income the taxes, charges and expenses of the trust, etc., to pay the net income so left therefrom to said Ella M. Wright during her life, and at her death to pay, deliver and convey the corpus of the same, or of the investments into which it may have been converted, to the parties entitled thereto, under and in the estates and proportions designated in the will, and codicils thereto, of said Governor Thomas M. Holt.

That the costs of this action, as taxed by the clerk, be paid (431) by the plaintiffs out of the estate of said Governor Thomas M. Holt in their hands as a part of the costs and expenses of administration.

W. J. ADAMS,
Judge.

This 15 March, 1910.

To this judgment defendants excepted and appealed, and assign for error:

1. The adjudication that it is the right and duty of the plaintiffs to take the 711 shares of common stock of the Holt-Granite Manufacturing company, and to hold the same in their name, to control and manage the same, in trust, for the benefit of the defendant Ella M. Wright, for life, said plaintiffs representing and voting said stock at the meetings of the stockholders of said corporation, receiving the dividends thereon and the income from the investment, and to pay the net income to the said Ella M. Wright during her life, and at her death to pay and deliver the corpus of the same to the parties entitled thereto under the will and codicil of Governor Thomas M. Holt.

2. For that the said judgment does not authorize the life tenant, Ella M. Wright, to vote said stock at all stockholders' meetings.

3. For that said judgment does not authorize the said Ella M. Wright to have a transfer of said stock to herself for life, with limitations to her daughter, and the secondary takers, as provided in the will of Governor Thomas M. Holt.

John W. Hinsdale, S. Brown Shepherd, Ernest Haywood for plaintiffs.

Aycock & Winston, Stedman & Cooke, Parker & Parker for defendants.

HOKE, J., after stating the case: Our decisions are to the effect that when specific personal property is bequeathed to one for life, remainder over, the executor, unless the exigencies and proper administration of the estate otherwise require, may assent to the legacy and deliver the property to the life tenant. He is ordinarily, not charged with the duty of looking further after the property, and of insuring its delivery intact to the remainderman.

This rule is qualified, or rather a different principle prevails, when a mixed fund, under a general residuary clause *eo nomine* is given to one for life, remainder over. In such case the executor is, ordinarily, required to sell the property, pay the interest on the proceeds to the life tenant, and hold the fund for the remainderman under the will. Both of these positions are established as rules of interpretation because

(432) they are supposed the better to carry out the will of the testator, and both yield when a different intent is apparent from the terms of the will.

These familiar principles have been discussed and applied in numerous cases before this Court, as *In re Knowles,* 148 N. C., 461; *Holt v. Holt,* 114 N. C., 241; *Britt v. Smith,* 86 N. C., 305; *Ritch v. Morris,* 78 N. C., 377; *Tayloe v. Bond,* 45 N. C., 5; *Jones v. Simmons,* 42 N. C., 178; *Smith v. Barham,* 17 N. C., 420, and are in accord with doctrine very generally accepted here and elsewhere.

Applying the controlling principle, we think it clearly appears that the property bequeathed to the *feme* defendant under the will was impressed with a trust, and the same is to be held, managed and controlled, and the net income therefrom paid to her during her life, and the corpus of the fund to be delivered to those who may be entitled thereto as remaindermen under the will, to be held by the executors, while the proper care and administration of the estate requires that it remain in their hands as such, and to be then turned over to themselves as trustees to be held and dealt with and applied as stated.

This intent, in our opinion, is disclosed in each and every portion of the will that bears upon the question presented. In reference to the preferred stock, this being an investment of the proceeds arising from a sale of the principal part of the Linwood farm under item 6, and of the sum realized from the mixed fund disposed of by item 7, the meaning of the will is too plain for construction; the contrary view was not seriously urged by counsel. But as to the common stock arising from the bequest in item 4, we are of opinion that a proper consideration of that item and of the other portions of the will referring thereto and affecting its construction undoubtedly requires that the same interpretation should prevail. In the 4th item, the stock is bequeathed to the five children of the testator: the portion to his sons absolutely to them in fee, and that to the daughters, one of them the *feme* defendant, to them for life, remainder over; and, after making this disposition of the fund, the clause then proceeds:

"But should either of my said daughters die leaving no child or children or the issue of such, alive at the time of her death, then with remainder, as to share of the one so dying, to my other children, share and share alike, and the issue of such as may be dead—the issue representing their parent and taking such share as he or she would have taken, if alive—on the same *limitations* and *trusts* as hereinbefore expressed as to their own shares devised and bequeathed to them in this last will and testament."

It will thus be seen that after making the distinction between (433) the interest of the sons and daughters by giving the daughters

only an estate for life, remainder over, the testator affects the remainder with a contingent limitation, and then refers to the provision as having created a trust, "on the same limitations and trusts as hereinbefore expressed."

In item 5 provision is made for a sale of the entire property, or of the interest of either legatee, and in case of sale of any individual interest the vendor is required to give the others the option of purchasing at a "fair and *bona fide* price before selling out of the family"; and whether the entire property, or an individual interest, is sold, the share of the daughters is to be received by the executors and the proceeds invested in trust to pay the annual interest on each one's share during her natural life, and then over, etc., and with the remainder affected by like limitations, as in item 4, and expressed as follows:

"But should either of my said daughters die leaving no child or children or the issue of such, alive at the time of her death, then the share of the one so dying in trust for my other children surviving, share and share alike, and the issue of such as may be dead—the issue representing their parent and taking such share as he or she would have taken, if alive—on the same limitations and trusts as hereinbefore expressed as to their own shares, devised and bequeathed to them in this last will and testament."

Again, in item 6, which deals with the Linwood farm, the same is devised to his five children, "the shares of the sons to them and their heirs in fee, and the shares of the daughters on same limitations and trusts as hereinbefore expressed as to their shares in the devise and bequests to them contained in items 4 and 5, etc." The executors are then empowered, in their discretion, to sell said farm and divide out the proceeds and pay over the same, "except as to the shares therein of the daughters, which they shall invest and hold in trust for them for life, with remainder as expressed in regard to the purchase money bequeathed in item 5," etc.

And in item 7, disposing of miscellaneous property, "the shares of the daughters are to be held under the same *limitations* and *trusts* as hereinbefore set out in items 4 and 5 of this last will and testament."

Further, in the codicil of 26 January, 1892, in giving the *feme* defendant 126 shares of stock in the Granite Manufacturing Company, to make her equal with his other children in the amounts received by them, the testator is careful to state that the bequest is to the legatee for life, remainder, "as stated in item 4 of my last will and testament, and in the same limitations and trusts as expressed as to her share (434) as to the bequest to her in said item 4."

It will thus appear that whenever the testator refers to the share bequeathed to his daughters, either in the will or codicils, he speaks of

it as a trust; and, finally, in the selection of his executors he appoints them as executors "and as trustees to carry out and perform the trusts hereinbefore declared." The interpretation we have given is confirmed, if confirmation is necessary, by the consideration that ownership and control on the part of the trustees is reasonably required for the sale and transfer and reinvestment of the fund as contemplated in item 5, and for the preservation of the same for the benefit of the remaindermen who may be eventually entitled under the provisions of the different items of the will.

The disposition of this case is, in fact, controlled by the decision of the Court in *Haywood v. Trust Co.,* 149 N. C., 208; that being a case construing a will in which the expressions favoring a trust are much less pronounced than in the one before us. The same authority is also to the effect that, when the proper administration and well ordering of the estate permits, and the executors are ready to settle as such, it is their right and duty to turn the property affected by the trust over to themselves as trustees, to be controlled and managed according to the provisions of the will and as the best interest of the fund may require.

In the case referred to, speaking to the questions presented, *Associate Justice Connor,* for the Court, said:

"The fact that the estate is not given to the trustees, and the 'limitations and conditions' imposed, declared in the form of specific trusts, does not affect the question. 'When it is essential to the carrying into effect the provisions of a will, a trust, by implication of law, will be decreed. Though no trust is created by the will, the Court will have regard to the intention as gathered from the entire document.' Beach on Trusts, sec. 88. While it is true that to constitute a valid declaration of trust it must appear from the language used that such was the intention of the testator, and that the terms, subject-matter, beneficiaries, etc., must be so reasonably certain as to be capable of enforcement, it is equally true that specific language, declaratory of a trust, is not necessary, provided the intention is clear and the other requisites are found. It is not necessary that the title be given in express terms to the trustees.

If the trust is otherwise manifested and a trustee named, he will,
(435) by implication, take such title and estate as is necessary to enable him to execute the trust. *Smith v. Proctor,* 139 N. C., 314.

In *Payne v. Sale,* 22 N. C., 455, it is held, in accordance with the authorities, both in England and this country, that, in the construction of wills, the estate given to a trustee is to continue for so long a period as is necessary to enable him to execute the trust. Looking to the entire will and the codicil, we have no doubt that it was the purpose and intention of the testator to create a trust, and that, upon the settlement

of his estate by Mr. Haywood and Mr. Robertson, as executors, they should, as trustees, at once hold and invest the corpus of the residue given to his daughter to preserve for her own use and benefit, during her life, and at her death to pay over and deliver to those who may be entitled, under the 'limitations and conditions' imposed upon the estate. We should be inclined to the same opinion if he had not named trustees; but any doubt of his intention is removed by the fact that he has named plaintiffs as trustees, 'to perform and carry out the trusts therein declared.' We see no difficulty in carrying out this intention. The plaintiffs, as executors, will turn over to themselves, as trustees, the estate in their hands, keep the same invested and pay over the income during her minority, to the Wachovia Loan and Trust Company, guardian, and, when she shall arrive at full age, pay over such income to her during the remainder of her life and, at her death, deliver the property to such person or persons as may be entitled under the terms and provisions of the will. It is conceded that the 'limitations and conditions' applied to the estate do not apply to the excess of the income, that being given absolutely to Louise M. Holt."

Having expressed the opinion that the will creates a trust as to the property bequeathed to the daughters under item 4, it is not necessary to determine whether the consolidation of the different corporations and the substitution of stock therein amounts to a sale of the property, so as to bring the proceeds directly under the provisions of item 5, and we have purposely refrained from deciding the question.

Section 1186 of Revisal, to which we were referred by counsel, and which provides for the voting of stock in a corporation by life tenants, does not affect the question. This is merely a statutory provision for the government and well ordering of corporations, and applying to life tenants who are owners of stock as such and without qualification. Having decided that this stock is to be held and controlled by the trustees, section 1185 of Revisal is the section controlling the matter, the section which provides for the voting of stock by admin- (436) istrators, guardians and trustees.

There is no error in the judgment of the court, and same is

Affirmed.

WALKER, J., did not sit.

Cited: *Brown v. Brown,* 168 N. C., 13; *Bank v. Johnson, ib.,* 307.

J. A. DAVIDSON v. GUILFORD COUNTY.

(Filed 27 April, 1910.)

County Commissioners—Special Service—Compensation.

A member of the board of county commissioners who, under the direction of the board, inspected and reported upon a bridge over a stream where it crossed the public road, with recommendations, cannot recover in his action for the services rendered or mileage; he is forbidden to do so as a county commissioner under Revisal, 2785, and is indictable if claiming compensation for extra services under either an express or implied contract with the board. Revisal, 3572.

APPEAL by defendant from *Ward, J.*, at March Term, 1910, of GUILFORD.

The facts are sufficiently stated in the opinion.

King & Kimball for plaintiff.
John N. Wilson for defendant.

CLARK, C. J. The plaintiff is a member of the Board of County Commissioners of Guilford. By direction of said board, he inspected a bridge over a stream where it crossed the public road, and made a report to the board recommending the rebuilding of said bridge, and demanded payment in the sum of $3 for one day spent in said service and 80 cents mileage. This action was tried upon an appeal from a justice of the peace, and judgment was rendered upon "case agreed."

The principle involved is an exceedingly important one, both in morals and to the public welfare. Under Rev., 2785, as it was originally, before amendments were enacted with special provisions as to certain counties, the county commissioners for their services and expenses were to receive such sum, not exceeding $2 per day, as the majority of the board might fix upon, with mileage to and from their respective places of meeting not to exceed 5 cents per mile. Under this section they were allowed compensation and mileage only for
(437) regular meetings of the board and received neither at special nor called meetings. Laws 1907, ch. 13, added the following amendment: "The chairman of the Board of County Commissioners of Guilford and each of the members thereof shall be paid for his services the sum of $3 per day, and mileage of 5 cents per mile each way, for each meeting of said board, whether it be a regular or a special meeting of said board called by said chairman; and this shall be full compensation of said board for all services whatsoever."

The Legislature taking notice of the increased duties of the board of commissioners for that county, raised their per diem to $3 and allowed

per diem and mileage for special as well as regular meetings; and then added this significant sentence: "And this shall be full compensation of said board for all services whatsoever."

Rev., 3572, makes it a misdemeanor for any county commissioner to make any contract "for his own benefit" with said county or be in any manner concerned or be interested in any manner whatsoever in such contract. It follows, therefore, that if the plaintiff in discharging this duty acted as a county commissioner, he was forbidden to receive any compensation other than that above set out. And if he acted by virtue of a contract, either express or implied, with the board, it was an indictable offense, and he is not entitled to recover anything. This has already been decided in this State in *Snipes v. Winston,* 126 N. C., 375.

Independently of any statute or precedent, upon the general principles of law and morality a member of an official board cannot contract with the body of which he is a member. To permit it would open the door wide to fraud and corruption. The other members of the board in allowing compensation thus to one of their members would be aware that each of them in turn might receive contracts and good compensation, and thus public office. instead of being a public trust, would become, in the language of the day, "a private snap."

In this particular case there is no reason to suppose that the slightest wrong was intended or that the compensation was excessive, but it is the principle that is at stake. Such conduct cannot be recognized or permitted. The judgment below is

Reversed.

Cited: King v. Guilford, post, 438.

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(438)

JOHN L. KING v. GUILFORD COUNTY.

(Filed 27 April, 1910.)

The decision in this case is governed by that in *Davidson v. Guilford,* next above, ch. 166, Laws 1903, providing that the highway commission shall be entitled to the same per diem, etc., as the board of commissioners.

APPEAL from *Ward, J.,* at March Special Term, 1910, of GUILFORD.

King & Kimball for plaintiff.
John N. Wilson for defendant.

CLARK, C. J. The plaintiff is chairman of the Board of Highway Commissioners of Guilford. By direction of said board, he and another member of the board were appointed a committee to inspect the progress of the work on a certain road, and report as to the advisability of removing the force at work there and the convict camp and locate a new site for said work and camp. For doing such work he demands payment in the sum of $3 for one day so spent.

The act creating said board, ch. 166, Laws 1903, sec. 18, reads as follows: "The said highway commission shall be entitled to same per diem and mileage as the Board of Commissioners of Guilford County."

We have just passed upon a similar claim by a member of the board of commissioners of Guilford in *Davidson v. Guilford, ante,* 436. As members of the highway commission are entitled "to the same per diem and mileage," it is unnecessary to repeat the reasons given in the decision of that case. The claim for extra services is invalid in this case for the same reason.

If acting as commissioner, the plaintiff was not entitled to "extra pay," and if as an agent of the board, he would be indictable under Rev., 3572, for making any contract for compensation, express or implied, with the board of which he is a member.

Reversed.

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(439)

W. T. OWENS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 4 May, 1910.)

1. Railroads—Regular Stops—Train Orders—Rights of Passengers—Substantial Damages.

There was evidence tending to prove that plaintiff was a passenger on defendant's train scheduled to stop at McFarland; that he tendered his fare to conductor, who refused to receive it; that conductor had orders to stop at McFarland; that he willfully disobeyed them; that plaintiff told conductor that he must stop at McFarland to attend his child's funeral, and that then conductor refused to stop: *Held*, that the evidence justified the court in submitting the question of punitive damages to the jury.

2. Railroads—Moving Trains—Passengers Alighting—Instructions of Conductor—Contributory Negligence—Questions for Jury.

The question of contributory negligence of plaintiff in alighting from a moving train should be submitted to the jury upon evidence tending to show that the train had slowed down so that it was moving very slowly, and that, as plaintiff was alighting, under the instruction of the conductor, it started to go more rapidly and threw plaintiff to the ground and inflicted the injury.

APPEAL from *W. J. Adams, J.*, at October Term, 1909, of ANSON.

These issues were submitted:

1. Did the defendant wrongfully refuse to stop its train at McFarland to permit the plaintiff to alight therefrom, as alleged in the complaint? Answer: Yes.

2. Was the plaintiff injured through the negligence of the defendant, as alleged in the complaint? Answer: Yes.

3. Did the plaintiff by his own negligence contribute to his injuries? Answer: No.

4. Did the defendant willfully and wantonly refuse to stop its train at McFarland to permit the plaintiff to alight therefrom? Answer: Yes.

5. What damages, if any, is plaintiff entitled to recover? Answer: $2,500.

From the judgment rendered the defendant appealed.

Robinson & Caudle for plaintiff.

James A. Lockhart and McLean & McLean for defendant.

BROWN, J. This case was before us at a former term upon a demurrer *ore tenus* to the complaint, and is reported in 147 N. C., 357, which is referred to as to its general nature. The Superior Court sustained the demurrer, and upon appeal this Court reversed the judgment, holding that upon the allegations of the complaint the (440) plaintiff was entitled to nominal damages. Thereafter, by leave of the lower court, an amended complaint was filed, to which the defendant filed an answer.

The defendant excepted to the submission of the second and fourth issues. Under the allegations of the amended complaint it was proper to submit those issues, as they were clearly raised by the amended pleadings. We have examined the twenty-five assignments of error set out in the record, but do not deem it necessary to discuss them *seriatim*.

1. The defendant requested the court to instruct the jury that the plaintiff can recover only nominal damages. The court declined, and defendant excepted. The case presented upon the amended pleadings and the evidence is essentially different from that presented upon the demurrer. The evidence tends to prove that the plaintiff had tendered his fare to McFarland, a regular scheduled station on the defendant's road; that he informed the conductor that his child was dead and would be buried that afternoon, and repeatedly begged the conductor to stop there. It is in evidence that the conductor had orders to stop at McFarland and take the siding in case he arrived later than 1:20 p. m.; that the conductor examined his watch when he neared McFarland and said it was 1:22 p. m. Nevertheless, he did not stop, although repeat-

edly urged by the plaintiff to do so. The plaintiff had a right to have the train stop at McFarland in obedience to orders, and under the unusual and painful circumstances of this case the extraordinary and unfeeling conduct of the conductor is some evidence of a willful, wanton and reckless disregard of the plaintiff's rights, sufficient to be submitted to the jury in connection with the question of punitive damages.

2. It is further contended by the defendant that in any view of the evidence the plaintiff is guilty of such contributory negligence as bars recovery. We are not disposed to relax the just and reasonable rule laid down in the former opinion in this case, and quoted from the opinion in *Johnson v. R. R.*, 130 N. C., 488, but there are facts and circumstances in evidence which we think warranted the judge below in submitting the matter under proper instructions to the jury.

It must be admitted that the tempation to alight from a moving train to reach the body of a beloved child is very great, almost irresistible. Yet that would not have excused the plaintiff. But there are facts and circumstances in evidence that the conductor had not only slowed the train down very much at McFarland, but that he invited and encouraged the plaintiff to jump, and that just as the plaintiff was about to
(441) jump with his hand hold of the rail, the train started up more rapidly and threw him to the ground. It is generally recognized that passengers are in many cases excused from the imputation of negligence where they obey the directions or advice of the trainmen, whom the passenger may justly suppose, by reason of their experience, to be better able to judge whether a given act is dangerous than the passenger himself. Thompson on Neg., sec. 2879; *Johnson v. R. R.*, 130 N. C., 490. The charge of the court below upon this feature of the case was a clear statement of the law as settled by repeated decisions. Submitting the question of the plaintiff's negligence to the jury, instead of imputing negligence to him as matter of law upon his own evidence, we think was not erroneous under the evidence in this record.

Upon a careful review of the whole case we are of opinion that no substantial error was committed, certainly none that warrants another trial.

No error.

Cited: *Roberts v. R. R.*, 155 N. C., 90.

GEORGE C. TUDOR v. R. J. BOWEN.

(Filed 4 May, 1910.)

Negligence—Automobiles—Public Thoroughfares—Reasonable Requirements—Unusual Noises—Frightened Horses.

The use of an automobile upon a public thoroughfare imposes upon the chauffeur the duty to observe that degree of care in its operation which is commensurate with the risk of danger thereby caused to others; and when the chauffeur commences to crank his machine for the purpose of starting in close proximity to harnessed horses standing quietly in charge of a driver, without giving any previous warning, and thereby causes them to run away and inflict the injury complained of, actionable negligence is established.

APPEAL from *Long, J.*, at February Term 1910, of FORSYTH.

The plaintiff alleged that his team of horses were made to take fright and run away by reason of the negligent management and operation of an automobile by defendant upon the streets of Winston-Salem, whereby plaintiff was damaged.

Upon the pleadings these issues were submitted:

1. Was the plaintiff's property injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, or his agent, by his own negligence, contribute to the injury to his own property? Answer: No.

3. What damage, if any, is the plaintiff entitled to recover? (442) Answer: $168.

There was a judgment for plaintiff, from which defendant appealed.

The defendant excepted to each of the following paragraphs of the charge of the court and assigned the same as error:

"2. Although the jury may find that there was nothing unusual about the defendant's automobile, and that it did not make any unusual noise, still, if they further find that the defendant knew, or could, by the exercise of that care required of him under the circumstances—that is, by the use of ordinary care—have known that the horses were restless and had been frightened by his automobile, if the jury find as a fact that they were restless and frightened thereby, then it was a wrongful and negligent act for him to have done anything in reference to his automobile which would have been considered by an ordinarily prudent man to have a tendency to increase their fright and cause them to run away; and if the jury find that the defendant, under the circumstances just stated, cranked his machine and started it off, and by the noise made thereby the team was caused to run away, they will answer the first issue 'Yes.'

"3. If the jury should find from the evidence that, in attempting to start the defendant's machine, it made an unusually loud and alarming noise, one calculated to startle or frighten horses of ordinary temper and training, and this condition of the machine was known to the defendant, it was his duty, in operating said machine, to use reasonable prudence in seeing that no horses or animals were about and so situated as, under reasonable circumstances, would be frightened by the starting of the said machine; and if the defendant, knowing that he had a machine which made such an unusual and alarming noise, failed to look around or to regard horses that were frightened in his immediate vicinity, and went on cranking his machine, making such a noise as would reasonably scare horses of ordinary temper and training, and if thereby, as a proximate result, plaintiff's horses were scared and the injury brought about, he would be guilty of negligence, and you will answer the first issue 'Yes.'"

Manly & Hendren for plaintiff.
Watson, Buxton & Watson for defendant.

BROWN, J., after stating the case: No motion to nonsuit was made and no assignment of error challenges the sufficiency of the evi-
(443) dence upon the issue of negligence. So we have to consider only the correctness of the portions of the charge excepted to in view of the evidence adduced on the trial.

In the brief the defendant abandons the first assignment of error and confines his criticisms to the second and third paragraphs of the charge.

The evidence introduced by the plaintiff tends to prove that the defendant was driving his automobile on the streets of Winston-Salem and stopped it for purposes of examination within a few feet of where plaintiff's team of horses were standing harnessed to a surrey and in charge of a competent driver; that the machine could not be seen by the horses, but could be heard by them; that when the machine was being cranked for the purpose of starting, the horses began to prance and show symptoms of fright; that the cranking kept on and did not stop, causing the horses to run away and injure themselves and the vehicle; that the driver when the cranking commenced, called to defendant to "Wait a minute," but whether the call was heard or not does not appear. This evidence also tends to prove that the defendant's automobile made a most unusual and loud noise while being cranked up; that "the gear-wheels were loose and made a terrible noise"; that no other machine makes such fearful noise; that it could have been avoided by using rawhide gearing, but defendant said the price was too high.

Upon this phase of the evidence we think his Honor's charge is supported by generally recognized principles of law.

Negligence is essentially relative and comparative. The legal duty we owe to others is the accepted standard, and that duty is measured by the exigencies of the occasion.

A want of caution to avoid injury, where the duty to exercise caution is incumbent, and a reckless or heedless use of a dangerous agency in a locality where the peril from its use is obvious, constitute breaches of duty which may become, when causing injury, actionable negligence. As has been said, "the term covers all those shades of inadvertence which range between deliberate intention on the one hand and total absence of responsible consciousness on the other." *Cook v. Traction Co.,* 80 Md., 554; *R. R. v. Jones,* 95 U. S., 439. The existence of negligence is, therefore, to be sought for in the facts and surroundings of each particular case.

Although the use of automobiles began in recent years, it seems to have caused much litigation, though not in this State. It is the consensus of judicial opinion that it is the duty of the operator of an automobile upon highways and public streets to use every reasonable precaution to avoid causing injury, and this duty requires him to take into consideration *"the character of his machine* and *its tendency* to frighten horses." *Hannigan v. Wright,* 5 Penn., 537; *House v.* (444) *Cramer,* 13 Am. & Eng. Anno. Cases, 463, note, and cases cited.

The possession of a powerful or dangerous vehicle imposes upon the chauffeur the duty of employing a decree of care commensurate with the risk of danger to others engendered by the use of such a machine on a public thoroughfare.

Upon the case as made out by plaintiff we think the defendant is liable for the damage done, upon two phases of the evidence:

1. The proximity of the auto to plaintiff's team when it stopped was such that defendant must have seen the horses and vehicle unless he was either blind or guilty of gross carelessness.

There is evidence, sufficient to go to the jury, that when the defendant began to "crank up," the animals manifested fright, and that defendant, if at all observant, must have seen it, but instead of stopping his cranking, he continued until his machine started.

It is well settled that it is the duty of an autoist to stop his machine, or to do whatever is reasonably required to relieve persons of peril when he sees a horse is becoming frightened by his machine. *Springs Co. v. Brown,* 6 Anno. Cases, 656; *Shinkle v. McCullough,* 116 Ky., 960; *House v. Cramer, supra,* and cases cited in notes. This duty is imposed by statutes in many States regulating the use of automobiles, but we think it is easily deducible from elementary principles of the common law. *Long v. Warwick,* 148 N. C., 32.

It was the duty of this defendant, assuming that his machine was a normal one, when he began to "crank up," to keep a watchful eye on the horses standing so close by. It was his duty, when he saw that they were manifesting symptoms of fright, to stop at once, until the horses could be removed. There is evidence that in this respect the defendant failed in his duty.

2. The plaintiff shows by evidence that defendant's machine was not a normal, but a most abnormal, one; that the noise it made when cranking up was something "terrible," to use the expression of one witness. That defendant was fully aware of this, and refused to correct it because of the incidental expense, is testified to by the machinist Hamlin.

His Honor might well have told the jury that to crank up such a defective and abnormal machine in close proximity to a pair of horses, without giving the driver notice to remove them, is *per se* negligence.

(445) This imposes no great burden upon those who use the public highways even with the best equipped and safest machines. To require less would render the highways of the country dangerous to the lives and property of those who daily use them.

We are of opinion that his Honor correctly and fairly submitted the case to the jury in a charge free from error.

No error.

Cited: *Curry v. Fleer,* 157 N. C., 19; *Cates v. Hall,* 171 N. C., 362.

J. H. HUDSON ET AL. V. V. J. MCARTHUR ET AL.

(Filed 4 May, 1910.)

1. County Commissioners—Sheriff's Bond—Default—Sureties—Liability of Commissioners—Interpretation of Statutes.

The county commissioners are not liable to the sureties on the bond of a defaulting sheriff and tax collector whose defalcations they were required to pay, for a failure to comply with Revisal, sec. 5241, in demanding of the sheriff his receipts in full, for the taxes collected the previous year before permitting him to receive the tax duplicate for the current year; for, construing this section in connection with sections 2812, 2813, 2814 and 313, Revisal, the evident purpose is only to protect and safeguard the public revenue and to insure its honest collection and application.

2. Same.

The failure of the county commissioners to require the sheriff and tax collector to produce his receipts, etc., in 1904, as required by Revisal, sec.

2812, could not injure plaintiffs, the subsequent sureties on the sheriff's bond, for default of the sheriff in the following year in which he was permitted to perform the duties of his office.

3. Same.

The duties imposed upon the county commissioners by Revisal, secs. 5241 and 5250, are of a public character, and for the benefit and protection of the public revenue; and the commissioners are not liable to the sureties on the bond of a defaulting sheriff and tax collector, who have been compelled to make good their principal's default, as such is not within the purview of the statute and there being no express legislative authority to make them thus liable.

4. Same—Causal Connection.

The sureties on the bond of a defaulting sheriff cannot recover of the county commissioners for failure to comply with Revisal, secs. 2812, 5241 and 5250, the amount of the default they were required to pay, as the losses thus sustained by them are not the necessary, direct or immediate results of the acts complained of; for as the default could have resulted the same if the statutory requirements had been complied with, there is no causal connection between the alleged acts and the default.

BROWN, J., dissenting.

APPEAL from *Guion, J.*, at January Term, 1910, of SAMPSON. (446)

Action heard upon demurrer to the complaint. It was originally brought by J. H. Hudson, "on behalf of himself and all other bondsmen of A. W. Aman who will come in and aid in the prosecution." Later, by an order made at February Term, 1908, Levett Warren, J. H. Turlington and C. H. Fisher were made parties plaintiff, and A. W. Aman was made a party defendant. V. J. McArthur, A. T. Herring and George Highsmith composed the Board of Commissioners of Sampson County, and George E. Butler was the county attorney. A. W. Aman, the other defendant, was the sheriff of the county and acting treasurer. The plaintiffs were the sureties on his official bond. They alleged that Aman, while sheriff, embezzled the county funds, and each of the plaintiffs was compelled to pay $418.50, except J. H. Turlington, who paid $94 additional. The particular breaches of duty by the defendant commissioners, for which the plaintiffs seek in this action to recover from them, as individuals, the several sums paid by them as sureties on the sheriff's bond, are thus stated in the complaint:

"(*a*) The plaintiffs are informed and believe, and upon such information and belief aver, that the defendant commissioners negligently failed to require of said A. W. Aman, sheriff and treasurer as aforesaid, the settlements required by statute in February, May and September, for the years A. D. 1905 and 1906, respectively.

"(*b*) The plaintiffs are informed and believe, and upon such information and belief aver, that the said defendants, V. J. McArthur, A. T. Herring and George Highsmith, the board of county commissioners as aforesaid of Sampson County, were required to demand of the said sheriff and treasurer, A. W. Aman, the first Monday in December, 1904, before they allowed him to reënter the duties of his said office, his receipts in full for the taxes which he had collected and which he should have collected for Sampson County for previous years, as set out in Revisal, sec. 2812, and that they failed to do so; but on the contrary, allowed said A. W. Aman, sheriff and treasurer as aforesaid, to reënter upon the duties of his said office and to renew his said bond before he had produced before the said board the receipt in full for taxes which he had or should have collected.

"(*c*) That said A. W. Aman, sheriff and treasurer as aforesaid, failed to collect and settle the taxes of said county, placed in his hands to collect, for the year 1905, or produce his receipts for the same before he received his tax list from the said board to collect the taxes for the year 1906, and the said defendant board permitted said (447) Aman to receive and collect the taxes for the year 1906 for said county before the said A. W. Aman, sheriff and treasurer as aforesaid, had settled the taxes for the previous year, or had produced his receipts for the same, as provided by section 5241 of the Revisal of 1905 of North Carolina; and the said board of commissioners and the defendants V. J. McArthur, A. T. Herring and George Highsmith, as members thereof, failed and neglected to appoint a tax collector as provided for by said section 5241 of the Revisal of 1905 of North Carolina, and permitted said A. W. Aman to receive the tax list for said Sampson County for the year 1906 and to collect the taxes for said county for that year without requiring him to perform his duties as aforesaid, as required by law, and failed and neglected to appoint a tax collector, as set out above.

"7. That some time prior to the first Monday in September, 1906, one O. F. Herring, one of the sureties on said Aman's bond with these plaintiffs, warned the defendants V. J. McArthur, A. T. Herring and George Highsmith, the board of county commissioners, through their chairman, V. J. McArthur, not to turn over the tax books for Sampson County for the year 1906 to said A. W. Aman until a full and complete settlement was had by said commissioners with said defendant A. W. Aman for all arrears of taxes; that he had heard that A. W. Aman was financially embarrassed and behind in his accounts with the county, and that as one of the bondsmen, he objected to the tax books of said county for the year 1906 being turned over to said A. W. Aman before a full settlement was had.

"8. That, notwithstanding said warning, the defendant commissioners negligently failed to make a proper or full settlement with said A. W. Aman on the first Monday in September, 1906, and carelessly and negligently, and contrary to their duty as required of them by law, as the plaintiffs are informed and believe, and upon such information and belief aver, turned over the tax books of Sampson County for the year 1906 to said A. W. Aman, sheriff and treasurer as aforesaid, and allowed him to collect said taxes without requiring of him a full settlement for the taxes of the previous year and when he was at that time behind in his accounts with the said county, as the plaintiffs are informed and believe. Plaintiffs allege, upon information and belief, that at the said meeting of the board of commissioners of the defendant V. J. McArthur, A. T. Herring and George Highsmith, the first Monday in September, 1906, to settle with the said A. W. Aman, sheriff and treasurer as aforesaid, the said defendant commissioners ascertained the amounts that said A. W. Aman was behind and was due the county, and did not require him to exhibit the money received from the collec- (448) tion of taxes, but looked at the tax books in his hands then uncollected, and received those uncollected tax receipts then in said Aman's hands in settlement of the balances said Aman was then due the county as sheriff and treasurer as aforesaid, and left those said uncollected tax receipts for previous years in the hands of said A. W. Aman, sheriff and treasurer as aforesaid, and upon that kind of alleged settlement, which the plaintiffs say was negligent and careless, turned over to said Aman for collection the tax books for Sampson County for the next succeeding year, to wit, the year 1906."

The defendant commissioners and Butler demurred to the complaint upon various grounds, and the demurrer was sustained as to Butler, from which there was no appeal. It was overruled as to the commissioners, and they appealed.

Faison & Wright for plaintiff.
F. R. Cooper and J. D. Kerr for defendant.

MANNING, J. Passing the question as to the misjoinder of the parties plaintiff, and the joinder of defendant Aman as a party defendant —the plaintiffs having each a separate, and not a joint, cause of action against the defendant commissioners, if they have any cause of action at all, and the cause of action against Aman being distinct from and arising from totally different facts from that alleged against the defendant commissioners—we proceed to consider if the complaint states facts sufficient to constitute a cause of action in favor of any one, or all, of the plaintiffs against the defendant commissioners.

The argument addressed to us in support of his Honor's ruling is rested upon sections 2812, 5241 and 5250, Revisal of 1905; that these sections impose mandatory duties upon the boards of county commissioners, and that defendants violated these duties in the manner of making the settlement with Aman, the sheriff, and these violations of duty directly caused the loss to plaintiffs, to recover which they have brought this action against the defendants.

The liability of the board of commissioners for a failure to comply in good faith with sections 2812 and 2813, Rev., is declared by section 2814, Rev., to be "for all loss sustained in the collection of taxes, on motion to be made by the solicitor of the district." The evident purpose of the section is to further protect and safeguard the public revenue and to further assure its honest collection and application by subjecting the commissioners to liability if they fail to require the proper bonds from the collecting officer; and this is further enforced and some-
(449) what extended by section 313, Rev., which provides that, "Every commissioner who approves an official bond, which he knows to be, or which by reasonable diligence he could have discovered to have been, insufficient in the penal sum, or in the security thereof, shall be liable as if he were a surety thereto, and may be sued accordingly by any person having a cause of action on said bond." The bond of the defaulting sheriff in the present case was not deficient either in the penal sum or in the security thereof; the plaintiffs as his sureties have made good his default, and paid the money to the proper authorities. The obligation of the bond has been met and the bond has been discharged. This action is not on the bond.

If any one of the defendants permitted the defendant Aman, on the first Monday of December, 1902, or on the first Monday of December, 1904, these being the first Mondays in December next after his election and he being a former sheriff, to give his bonds or reënter upon the duties of his office until he had produced before the board the receipt in full of every such officer for taxes which he had or should have collected, then such commissioner, under section 3590, Rev., was guilty of a misdemeanor and also liable to the penalty of $200 for each offense, "to be paid to any person who shall sue for the same." *Bray v. Barnard,* 109 N. C., 44; *Lee v. Dunn,* 73 N. C., 595. If the defendants failed to require such receipts on the first Monday in December, 1904, the plaintiffs were not endamaged in the particulars alleged, for they only became sureties on the bond then given, and the default of their principal, for which they allege they were compelled to answer on that bond, occurred afterwards in his failure to honestly account for the taxes for the fiscal years 1905 and 1906. So that if the commissioners failed to observe the requirements of section 2812, Rev., such failure

did not injure plaintiffs in the manner alleged by them, though such failure might have subjected them to indictment and to an action for the penalty prescribed by the statute.

Coming now to the consideration of sections 5241 and 5250, Rev., and the particulars in which it is alleged these sections were violated by the defendant commissioners in their settlement 1 September, 1906, with Sheriff Aman, we quote the pertinent provisions of them. Section 5241 provides: *"Provided,* the sheriff or tax collector shall not collect the taxes for any year until he shall have settled in full with the State and county for the taxes of the previous year (if he was sheriff or tax collector), and gives the bond required by law; and if upon examination the commissioners are not satisfied with the solvency of the surety to said bonds, they may require new bonds to be given. Before receiving the tax duplicate he shall produce the receipts of the (450) State and county, if he was the sheriff or tax collector, for the previous year, to the clerk of the board of commissioners, and in the event the sheriff fails to produce the aforesaid receipts or give the required bond, the board of commissioners shall appoint a tax collector, who shall give bond," etc. And section 5250, Rev., provides: *"Provided further,* that it shall be unlawful for any sheriff or tax collector, in accounting with the board of county commissioners for either the State or county taxes, to exhibit or present in said county any money not actually derived from the collecting of taxes, and any such sheriff or tax collector so offending shall forfeit a penalty of $500, one-half of which shall belong to any person who shall sue for the same, and the other half to the county in which the sheriff resides."

It is alleged as a fact, and the demurrer admits the fact, that the settlement by the county commissioners with Sheriff Aman in September, 1906, was not made in the manner directed by these two sections. It is contended that the statutes are mandatory, and the acts of the county commissioners were ministerial, leaving in them the exercise of no discretion, and that the delivery of the tax duplicates to the sheriff enabled him to embezzle the funds to the injury of the plaintiffs, and, therefore, the defendants are liable.

If we concede the mandatory character of the statutes, and the ministerial character of the acts to be done by the commissioners, involving the exercise of no discretion, we do not think the injury to plaintiffs complained of necessarily or by direct connection follows. In *S. v. Harris,* 46 Am. Rep., 169; 89 Ind., 363 (in which case the doctrine stated by *Judge Cooley* in *Raynsford v. Phelps,* 43 Mich., 342, is disapproved as not in harmony with the weight of authority and reason), the Supreme Court of Indiana says: "It is not enough in any case for a plaintiff, who seeks to recover for an injury caused by the negligence

of another, to show simply injury and negligence; he must also show that there was a breach of duty owing to him. This general rule applies with peculiar force to persons who sue for injuries caused by official misconduct. It is not every person who sustains an injury from the negligence of a public officer that can maintain an action on the officer's bond. In general, a public officer is liable only to the person to whom the particular duty is owing, and the ruling question in all cases of the kind is as to whether the plaintiff shares the breach of the particular duty owing to him. It is not sufficient to show a general public duty, or a duty to some other person directly interested." *Judge*
(451) *Cooley* says: "But the sheriff can only be liable to the person to whom the particular duty was owing—the party to whom he is bound by the duty of his office." In Shearm. and Red. on Negligence (3 Ed.), sec. 174, it is said: "It is a general rule that, whenever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he has an interest in the performance of the duty, and that the duty was imposed for his benefit." In this connection the same learned writers, at section 166, observe: "In speaking of the liability of nonjudicial public officers to a civil action by private persons, it will be found convenient, if not indeed necessary, to a proper understanding of the decided cases, to make a distinction between those officers whose duties are of a general public nature and who act for the profit of the public at large, and that other class of officers who are appointed to act, not for the public in general, but for such individuals as may have occasion to employ them for a specific fee paid."

It is clear, at least, that the county commissioners belong to the first of the two classes—"officers whose duties are of a general public nature and who act for the profit of the public at large."

The above authorities state the doctrine upon which plainiffs must depend to maintain this action as strongly in their favor as the decided cases and text-writers warrant; but even so stated, we do not think the action can be maintained against the defendant commissioners. The acts complained of were public acts, done by the commissioners in their corporate capacity. The clear purpose of these statutory requirements was to impose duties for the benefit and protection of the public revenue, to provide more vigilant measures for its safety for the public good and benefit. They prescribe public duties to be discharged by the commissioners. The protection of the plaintiffs, as sureties upon the sheriff's bond, is clearly not within the purview of the statutes; the taking of a bond with approved security was, itself, to further assure the public. To make good the default of the sheriff was the express obligation of the bond signed by the plaintiffs; it was the guarantee of his honesty and fidelity. By the statutes, to enforce promptness, accur-

acy and completeness of settlements, penalties are imposd both upon the commissioners and the sheriff. The commissioners are made liable also to indictment. These liabilities are imposed by express statutes. The Legislature has not yet deemed it wise or proper to impose the additional liability upon the commissioners contended for by plaintiffs, and in the absence of express statutory enactment, or of some well-settled principle of law constraining us to so hold, we do not (452) think the commissioners are liable to the plaintiffs.

In addition we do not think the injury suffered by plaintiffs and the loss sustained by them was the necessary, direct or immediate result of the defendants' acts. They do not stand in the relation of cause and effect; the turning over the tax books was simply a condition, the injury was a *post hoc,* but not an *ergo propter hoc.* The direct and immediate and only cause of the loss sustained by plaintiffs was the dishonesty and embezzlement of the sheriff—their principal, whose honesty and fidelity was the express obligation of their undertaking. The defendant commissioners could have done all they did, and yet no injury to the plaintiffs resulted; they could have observed the statutes to their very letter, and the loss to the plaintiffs have been the same. The sheriff could have embezzled the county funds with or without a strict settlement. There is, therefore, no causal connection between the acts alleged and the loss sustained. In addition to the authorities cited, the following sustain the conclusion we have reached: 2 Abbott on Municipal Corporations, secs. 672 and 673; *McConnell v. Dewey,* 5 Neb., 385; *School Dist. v. Burgess,* 2 Neb., 554; Mechem on Public Officers, secs. 598, 599; *Press Brick Co. v. School Dist.,* 79 Mo. App., 665; *Bassett v. Fish,* 75 N. Y., 303; *Heeney v. Sprague,* 11 R. I., 456, 23 Am. Rep., 502; 1 Suth. on Dam., 56; *Nelson County v. Northcate,* 6 L. R. A., 230.

In its final analysis, to sustain the contentions of the plaintiffs would be to make the members of the board of county commissioners liable to the sureties on the official bonds of the sheriffs and other officers, whose performance of duty they are required by statute to supervise, if the commissioners fail to discharge their statutory duties in the manner prescribed by law, and this to be held regardless of whether a particular duty was owing to the particular person complaining, and whether there was any causal connection between the violation of the statute and the injury complained of. We cannot so hold. In our opinion, the demurrer filed by the defendant commissioners should have been sustained, and the order of his Honor overruling it is

Reversed.

BROWN, J., *dissenting:* In discussing this question it must be borne in mind that every allegation of the complaint is admitted in manner

and form as stated. Among other allegations the plaintiffs aver that after they had become sureties on the official bonds of the sheriff, (453) the defendants knowingly and illegally permitted the tax books to be delivered to the sheriff in direct violation of the statute of the State. Revisal, 5241. And plaintiffs aver that in addition to the tax lists of 1905, those of 1906 were delivered to the sheriff, while they were his bondsmen, in violation of the same law. They further aver that prior to September, 1906, before those lists had been placed in Sheriff Aman's hands for collection, the defendants were notified by plaintiffs not to turn over the tax books for the year 1906 to Aman until a full settlement was had by the commissioners with Aman for all arrears of taxes; that Aman was financially embarrassed and behind in his accounts with the county, and that the bondsmen objected to the tax books of the county for the year 1906 being turned over before a full settlement was had. That, notwithstanding said warning, the defendant commissioners negligently failed to make a proper or full settlement with Aman on the first Monday in September, 1906, and negligently, and contrary to their duty as required of them by law, delivered the tax books of Sampson County for the year 1906 to Aman and allowed him to collect said taxes without requiring of him a full settlement for the taxes of the previous year, and when he was at that time behind in his accounts with the said county. The plaintiffs further aver that in consequence of such violation of law they have been compelled to pay considerable sums of money recovered of them by legal process on said tax bonds.

The statute declares in express terms that the sheriff shall not be permitted to collect the taxes for any year until he shall have settled in full with the State and county for the taxes of the previous year. A pretended and fraudulent settlement such as is alleged in the complaint to have taken place will not meet the demands of the law. The complaint expressly charges a willful violation of the statute by the defendants, and upon demurrer that fact is admitted.

The statute is mandatory, and expressly forbids the very act the defendants are charged with committing. In my opinion, this intentional violation of a positive statute forbidding the act renders the defendants not only liable to penalty and indictment, but also to such damages as may be directly sustained by those bondsmen of the sheriff who had previously assumed such obligation and must perforce bear the loss.

The board of commissioners possesses *quasi*-judicial, legislative and administrative powers. A willful or negligent disregard of any of their duties of whatever character by its members subjects the culpable individual to the pains and penalties of the statute, Revisal, sec. 3590; but

personal liability for damages will not generally be incurred in (454) the absence of malice, unless the wrongful act be purely ministerial in its nature.

The wrongful and negligent acts complained of involve no exercise of judgment and discretion. Official action is judicial only when it is the result of judgment and discretion. A judicial inquiry is one which investigates, declares and carries out existing law, and, when performed in good faith, however erroneously done, the officer is immune so far as legal liability is concerned.

Official action is ministerial when it is the result of performing a duty imposed by law, the details of which are defined and prescribed with such certainty that nothing is left to the judgment or discretion of the officer. Therefore, a willful violation of a statute prohibiting the doing of an act can never be seriously regarded as a judicial function. It is plain that if the allegations of the complaint be true, the defendants in delivering the tax lists to the sheriff were not performing a *quasi*-judicial function and cannot be clothed with the immunity of a judicial officer.

They were given no discretion in the matter, but were expressly forbidden by the statute to turn over the lists unless the sheriff had settled in full for the previous year.

It is alleged that the defendants in performing this purely ministerial duty were guilty of gross negligence and violation of law. A ministerial officer is not liable for performing a duty imposed by statute, if done with due care. But he is answerable in damages for nonfeasance, misfeasance of malfeasance. He is liable in a civil action for a failure or refusal to perform his duty as well as for its negligent or illegal performance. *Ferguson v. Kinnard,* 9 C. & P., 251; *Brayer v. MacLean,* L. R., 6 P. C., 398; *Dowbert v. Humbert,* 91 U. S., 294; Throop on Pub. Officers, sec. 726; Mechem on Officers, sec. 664, and cases cited in notes. A public official owes to every individual the duty of performing his official acts with reasonable care, and he is consequently liable to any individual having a special and direct interest, who is injured in person or in property by reason of his negligence in performing a ministerial act.

This subject is discussed elaborately by *Judge Cooley* in *Raynsford v. Phelps,* 43 Mich., 342, who says: "It is immaterial that the duty is imposed primarily on public grounds, and therefore primarily a duty owing to the public; the right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance, which it was in part the purpose of the law to protect against. It is also immaterial that a failure in performance is made by the law a penal offense." This principle was settled (455)

in Great Britain as far back as the reports of Blackstone. *Rouning v. Goodchild,* 2 Blk., 906, wherein it is held that a public officer charged with ministerial duties to perform, in which a private individual has a special interest, is liable to such individual for any injury sustained by him in consequence of the failure to perform such duties. This decision has been approved in this country in the case cited from Michigan. *Teall v. Felton,* 1 N. Y., 537; same case, 12 How. U. S., 284; *Lincoln v. Hapgood,* 11 Mass.; *Hayes v. Porter,* 22 Maine, 371; *Jeffreys v. Ankeny,* 11 Ohio, 372; *Brown v. Lester,* 21 Miss., 392. The principle is undoubtedly sound and is not unfamiliar learning in this State. With us it has long been held that a ministerial officer is personally liable for the nonperformance of every duty prescribed by statute to the party injured and to the extent of the damages received, and he is also liable criminally to the public. *Dunn v. Stone,* 4 N. C., 241; *Hathaway v. Hinton,* 46 N. C., 247; *Holt v. MacLean,* 75 N. C., 347; *Moretz v. Ray,* 75 N. C., 170.

The plaintiffs in this case had assumed heavy abligations for the sheriff on his official bonds and had a direct and personal interest that those officials to whom he was directly accountable should obey the law prescribed for the protection of sureties as well as the public generally. The defendants were vested in this matter with no discretionary powers. They acted in defiance of the law and disobeyed the express words of the statute by placing the tax lists in his hands when the sheriff had not fully settled the taxes for the previous year.

But it is said that although the defendants may have committed a tort in violating the statute, it is not the proximate cause of plaintiff's loss. It is generally held that the proximate cause of an injury is one that produces the result and without which it would not occur, and one from which any man of ordinary prudence could foresee that such result was probable under all of the facts as they existed. This is the idea so well expressed by *Mr. Justice Hoke* in the often cited case of *Ramsbottom v. R. R.,* 138 N. C., 41, in support of which he cites recognized authority. Tested by his definition, it is apparent that the wrongful act of the defendants was the proximate cause of plaintiff's loss.

(1) If the defendants had obeyed the statute and refused to deliver the tax lists of 1906 to the sheriff unless he settled in full with money collected from taxes for the year 1905, it is impossible that the
(456) sheriff could have embezzled the taxes for 1906. That is a self-evident proposition and need not be discussed.

(2) A man of ordinary prudence could easily foresee that such result was probable under all the facts as they existed. As alleged in the complaint, the defendants had been notified by the plaintiff's bondsmen that the sheriff was a defaulter and had embezzled the tax money

of 1905, and they were notified not to place the lists of 1906 in his hands until the law was complied with and a full and complete settlement made for the previous year. A person of ordinary prudence, having the knowledge of the defendants, could easily foresee that if the sheriff had embezzled the taxes for 1905 he would probably embezzle those of 1906. Suppose a merchant forbids his bookkeeper to send money to the bank by a certain messenger because he suspects his honesty, the bookkeeper violates instructions and the messenger embezzles the money: is not the disobedience of the bookkeeper the direct or proximate cause of the merchant's loss, and can it be maintained that the bookkeeper would not be liable in consequence of his act?

I am of opinion that the duty imposed by the statute was mandatory; that a violation of it was necessarily a ministerial act; that it was the proximate cause of plaintiff's loss and that they had such direct interest that they can maintain an action for the culpable negligence of defendants.

I am authorized to state that Mr. Justice WALKER concurs in this opinion.

Cited: *Penny v. R. R.*, 153 N. C., 301; *Hudson v. Aman*, 158 N. C., 430; *Templeton v. Beard*, 159 N. C., 65; *Hipp v. Farrell*, 169 N. C., 557; *S. c.*, 173 N. C., 169.

W. L. CLEMENT v. R. R. KING ET AL.

(Filed 4 May, 1910.)

1. Corporations—Mortgages—Liens—Sales—Subsequent Judgments—Deeds and Conveyances—Priorities.

A corporation deed of trust executed in good faith to secure the indorsers on its note given for borrowed money, and duly registered prior to the docketing of judgments in favor of the corporation creditors recovered upon causes of action lying in contract, constitutes a lien upon the property described in the deed superior to the liens acquired by the judgments. Revisal, secs. 574, 982.

2. Same—Title.

The sale of mortgaged property of a corporation under a valid mortgage and in pursuance of the power therein divests the equitable title of the corporation in the property conveyed; and a sale thereof under execution issued upon judgments obtained on contract after the due registration of the mortgage is ineffectual to pass title to the purchaser, and his deed is a nullity.

3. Corporations—Mortgages—Torts—Judgments—Priorities.

A prior registered mortgage of a corporation is ineffectual to pass title to the property described as against a judgment for damages obtained against the corporation arising from its torts, etc., under Revisal, sec. 1131.

4. Same—Bankruptcy—"Four Months"—Creditors—Trustees.

Revisal, sec. 1131, gives to the tort-claimant the right to follow and subject to the payment of his claim such property as the corporation had disposed of by mortgage, even when the sale under mortgage has taken place before judgment has been rendered in favor of the one who has suffered damage from the tort of the corporation; and when the mortgage and a sale made in pursuance thereof antedates the four months provided by the bankrupt act, the mortgaged property does not pass to the trustees in bankruptcy, and the rights under Revisal, sec. 1131, given to such judgment creditor, being good as against the claims of all other creditors, his judgment is good against them and the trustee in bankruptcy, though obtained within the four-months period.

5. Corporations—Torts—Judgments—Priorities—Cloud on Title.

The plaintiff in ths case being a purchaser at the sale under execution of a judgment having superiority under Revisal, sec. 1131, to a mortgage given by a corporation and to several judgments obtained upon contract under which the property had been sold and invalid deeds given, the Court in reversing the lower court, orders the invalid deeds canceled of record in order to remove cloud upon plaintiff's title.

CLARK, C. J., dissenting.

(457) APPEAL from *W. J. Adams, J.*, at February Term, 1910, of GUILFORD.

Action, heard on motion for judgment upon the pleadings. His Honor denied the motion, and plaintiff appealed. The facts alleged and admitted in the pleadings and exhibits are substantially as follows: The High Point Trunk and Bag Company, which we will hereafter designate as the "Trunk Company," was a manufacturing corporation, created under the laws of this State, and doing business at High Point, where it owned a factory site and buildings thereon, together with machinery and other property.

For the purposes of its business the Trunk Company decided to borrow $5,000, but its credit being insufficient to obtain the loan on its own note, the defendants, W. H. Ragan, J. H. Millis and H. A. Millis, being officers and directors of the company, signed its note as indorsers and sureties to the First National Bank of High Point on 22 October, 1902, and on the same day the Trunk Company executed, with the approval of its proper corporate authorities, a deed of trust to

(458) J. A. Lindsay, as trustee, conveying its factory site and buildings thereon, to secure and save harmless the said indorsers and sure-

ties. The deed was properly executed and was duly and promptly recorded. The Trunk Company continued in possession of the property conveyed to Lindsay until 13 October, 1905. On that day the trustee Lindsay sold the property pursuant to the power of sale in the deed of trust and in compliance with the demand of the bank, payment of the note for $5,000 having been demanded of the Trunk Company and refused.

At the sale by the trustee, the defendants W. H. Ragan and J. H. Millis became the purchasers at the sum of $5,000, paid the purchase price to the trustee, who in turn paid it to the bank and received the canceled notes of the Trunk Company. Deed was made to the purchasers by the trustee and duly recorded.

On 21 September, 1904, one Causey Jarrett, a minor, in the service of the Trunk Company, received injuries resulting in the loss of an arm, and on 29 December, 1904, brought suit for the recovery of damages for such injury. This action pended until January Term, 1908, when final judgment upon the verdict was rendered for Jarrett and against the Trunk Company, for $2,730 and costs. The judgment was duly docketed.

On 11 January, 1907, two judgments were rendered and docketed against the Trunk Company, one in favor of R. R. King and A. B. Kimball, the other in favor of J. T. Morehead, both for fees as attorneys for services rendered the Trunk Company in the Jarrett suit. Executions were duly issued on these judgments and levy was made by the sheriff on the property conveyed in the deed to Lindsay, trustee, and by him sold and conveyed to Ragan and J. H. Millis, advertisement duly made, the property sold and R. R. King became the purchaser at the sum of $200, and on 19 August, 1907, the day of sale, deed was executed to King by the sheriff and duly and promptly recorded.

On 2 January, 1907, W. H. Ragan, J. H. Millis and H. A. Millis each instituted action in the Superior Court of Guilford County against the Trunk Company, to recover one-third, each, of $5,000—the bank debt indorsed by them, for the payment of which the property had been sold by Lindsay, trustee, and alleged in each complaint the facts of the debt of the Trunk Company to the bank, their indorsement, the execution of the deed of trust to Lindsay, the sale by him as trustee, the purchase by W. H. Ragan and J. H. Millis, and the deed to them and its registration, and then alleged:

"7. That it has been suggested that the deed thus made to the (459) said Ragan and the said J. H. Millis is invalid and has not legal effect to pass the title to the said property, free and clear of all claims against the said defendant, and that they took nothing thereby. That the money paid over to Lindsay, trustee, was applied to the discharge

of said note or bond, on which the plaintiff was indorser, and thus this plaintiff has paid out for the use and benefit of the said defendant the sum of $1,666.66, and to that extent, by reason of his said suretyship and his undertaking to purchase this property, he is a creditor of the defendant in that amount, with interest thereon since 13 October, 1905."

The Trunk Company, in its answer, admitted the several allegations, except it questions the legal conclusion of the plaintiff as to the effect of the sale by Lindsay, trustee, stating as "its impression" that the deed by Lindsay, trustee, was good.

Judgment was entered, as prayed, for $1,666.66 in favor of each plaintiff, and duly docketed.

It further appears that on 4 August, 1909, execution was duly issued on the Jarrett judgment, and it was levied on the property conveyed in mortgage by the Trunk Company to Lindsay, trustee, and after due advertisement the Sheriff of Guilford County sold it at the courthouse door, when Clement, the plaintiff, became the purchaser at the price of $1,000, and the sheriff executed deed to him, which deed was duly recorded. The defendants, denying that plaintiff is the owner of and entitled to the possession of the land, but admitting the facts, further plead that on 11 March, 1908, the Trunk Company was duly adjudicated a bankrupt in the United States District Court, and as this adjudication as within four months from the date of the Jarrett judgment, it was thereby rendered invalid; and that Jarrett proved his claim in the court of bankruptcy. It is not alleged that the Trunk Company has received its discharge in bankruptcy.

W. P. Bynum and Justice & Broadhurst for plaintiff.
A. B. Kimball for defendant King.
Morehead & Sapp for the other defendants.

MANNING, J., after stating the case: The pleadings contain no suggestion affecting the *bona fides* of the deed of trust of the Trunk Company to Lindsay, nor the sufficiency of the power of sale therein conferred, nor that the power was not executed in strict conformity with its terms, nor that the deed to the purchasers was not properly executed and recorded. The deed of trust having been executed in good faith and for a sufficient consideration and duly registered prior to the docketing of the judgments in favor of King & Kimball, J. T. Morehead,
(460) W. H. Ragan, J. H. and H. A. Millis, recovered upon causes of action lying in contract, constituted a lien upon the property therein described and conveyed superior to the general lien of these judgments upon the mortgaged property of the judgment debtor. This is well settled in this State, and must logically and necessarily follow

from the statutory provisions which give to judgments a lien from their docketing, and mortgages and deeds of trust validity from their registration, as against creditors or purchasers for a valuable consideration. Rev., secs. 574, 982, and cases cited thereunder in Pell's Revisal, 1908; *James v. Markham,* 128 N. C., 380; *Gammon v. Johnson,* 126 N. C., 66; *Gambrill v. Wilcox,* 111 N. C., 42; *Gully v. Thurston,* 112 N. C., 192.

Default having been made by the Trunk Company in the payment of the note to the bank, the deed by the trustee executed to the purchasers at the sale made by him in conformity with the power of sale divested the equitable title of the Trunk Company in the mortgaged property, and left no estate nor interest in the corporation to which the lien of the subsequent judgments, in favor of King & Kimball, Morehead, Ragan, J. H. and H. A. Millis, could attach; and this would be equally true as to the Jarrett judgment but for the provisions of section 1131, Rev., which we will presently consider.

When these judgments (except the Jarrett judgment) were docketed, the Trunk Company did not own the property previously sold by Lindsay; it had been divested of the entire legal and equitable estate. The deeds passing its entire legal and equitable estate had been properly executed, delivered and registered. There had been no reconveyance to it by the purchasers, and no act done sufficient in law to reinvest the title in the corporation. The sale and deed of the Sheriff of Guilford County, made pursuant to the execution issued on the King & Kimball and Morehead judgment, were therefore, ineffectual to pass the title to the purchaser at that sale, and the deed conveyed no title nor interest in the property to the purchaser, King. The deed is a nullity.

The same conclusion would be reached as to the Jarrett judgment but for the provisions of section 1131, Rev., and the construction of that section by the decisions of this Court. Section 1131 is as follows: "Mortgages of corporations upon their property or earnings, whether in bonds or otherwise, shall not have power to exempt the property or earnings of such corporations from execution for the satisfaction of any judgment obtained in courts of the State against such corporations for labor performed nor torts committed by such corporation whereby any person is killed or any person or property injured, any (461) clause or clauses in such mortgage to the contrary notwithstanding." In *Williams v. R. R.,* 126 N. C., 918, the Falls of Neuse Manufacturing Company petitioned the court to direct its receiver to pay out of the proceeds derived from a foreclosure sale of defendant's property the amount of a judgment recovered by it for damages occasioned by ponding back water on its lands, its judgment having been recovered after the foreclosure sale had been had and confirmed, and in disallow-

ing the motion the present Chief Justice, then Associate Justice, said: "This case is governed by *R. R. v. Burnett,* 123 N. C., 210. There Burnett brought an action against a corporation for personal injuries, recovered judgment and sued out execution. In the meantime a mortgage had been foreclosed against the corporation, the property had been sold and a new company was in possession as purchaser. This Court said: 'The fact that the plaintiff claims under a decree of foreclosure by order of court does not affect the rights of the defendant Burnett. The decree was based on the mortgage and conveyed no more than was conveyed by the mortgage. It conveyed no more than would have been conveyed by a foreclosure of the mortgage under power of sale contained in the mortgage.' And says further: 'The principle underlying this decision, and upon which it is decided, is that under section 1255 of The Code (now section 1131, Rev. 1905), the mortgage conveyed nothing as against this claim, and as it conveyed nothing as against this claim, the purchaser got nothing as against this claim by the mortgage sale,'" The Court further proceeds: "The purchaser stands in the shoes of the original debtor, bought only such interest as he could mortgage as against the Falls of Neuse Manufacturing Company, and subject to any judgment it might obtain, and the Falls of Neuse Manufacturing Company has no right to share in the proceeds of such sale. It must proceed against its debtor and assert its rights by execution against the property, notwithstanding the foreclosure sale, just as was held in *R. R. v. Burnett, supra.* The same doctrine was reiterated in *Belvin v. Paper Co.,* 123 N. C., 138. . . . But here as in *R. R. v. Burnett,* the judgment was obtained after the sale under foreclosure, and after the property was turned over to the purchaser, and there was no obstruction of the petitioner's execution by any action of the court. As to it, *the mortgage and any rights obtained under it, either by bondholders or purchasers, are nonexistent."* In *Howe v. Harper,* 127 N. C., 356, the same conclusion was reached and the same construction affirmed in an opinion delivered by the same learned
(462) judge. The proper construction and effect of this statute has become settled by these decisions, and applying this construction to the admitted facts of this case, we hold that the title obtained by Ragan and Millis under the deed from the trustee, Lindsay, was subject to the satisfaction of the judgment recovered by Jarrett for the tort of the corporation resulting in personal injuries to him; it was, however, valid and effectual against all subsequently recovered judgments except "for labor performed or torts committed by such corporation whereby," etc.

The defendants, however, plead as a defense that the trunk company was duly adjudicated a bankrupt within four months after the judg-

ment in favor of Jarrett was recovered, to wit, 11 March, 1908, and under the provisions of section 67f, Bankruptcy Act of 1898, "all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate, and thereupon the same may pass to, and shall be preserved by, the trustee for the benefit of the estate, as aforesaid."

Before considering the construction placed upon this section by the Supreme Court of the United States and other courts, we must bear in mind that the property included in the mortgage and sold by the trustee was sold 13 October, 1905, and the adjudication in bankruptcy was made 11 March, 1908—two and a half years intervening; the deed of trust under which the sale was made was executed 22 October, 1902—six and one-half years before the adjudication. The property included in the deed could not have passed to the trustee in bankruptcy; as against him, the deed, made when it was, was an insuperable barrier. No other creditor except Jarrett, as appears from this record, could have reached that property, either through the trustee or otherwise. While the defendants plead that the Trunk Company was adjudicated a bankrupt, they do not plead its discharge in bankruptcy, nor does it appear that any discharge has been granted.

In *Coal Co. v. Electric Light Co.,* 118 N. C., 232, in considering whether the effect of section 1131, Rev., was to create a lien, this Court said: "This section differs entirely from section 1781 (463) (Code, now sec. 2016, Rev.), which creates, or provides for creating, a lien as a security for certain debts. It (section 1255, Code, now sec. 1131, Rev.) creates no lien, but undertakes to afford the creditor protection by disabling corporations from conveying their property, by mortgage, freed from liability upon a judgment obtained against such corporations 'for labor performed, for materials furnished [now omitted from section 1131], or torts committed by such corporations, their agents or employees.' This statute must mean such labor performed, such materials furnished and such torts committed after making the mortgage, as the act was passed in 1879 . . . [p. 235]. As we have said, this section neither creates nor provides for the creation of a lien. It does not seem to provide against prior judgment liens, whether taken upon a prior or subsequent debt; nor does it provide against an absolute

bona fide sale, but only provides that the property mortgaged shall stand, so far as their debts and liabilities are concerned, just as if there had been no such mortgage made."

Neither the learned counsel, in their briefs or oral arguments, nor our own researches have found a similar statute in other States; but in Georgia they have an analogous provision which permits the maker of a note to waive as to its payment the benefit of the homestead provision of the Georgia Constitution. In *McKenny v. Cheney,* 118 Geo., 387, in determining the effect of section 67f, Bankruptcy Act, upon a note with a waiver clause in it, the Court held, quoting from *Frazee v. Nelson,* 179 Mass., 456: "The effect of section 67f of the United States Bankruptcy Act of 1898 is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy and those claiming under him, so that the property may pass to and be distributed among the creditors of the bankrupt." The Federal Court, as ruled in the *Lockwood case* (190 U. S., 294), having no jurisdiction to administer the property set apart as exempt, subsection 67f of the Bankruptcy Act does not affect a judgment obtained in a State court on a note waiving such exemption, when such judgment is proceeding only against property set apart as exempt." The Court further proceeds: "Aside from the authorities cited, however, we think that the language of the statute affords ample warrant for the ruling here made. The section in question provides simply that the effect of the discharge of such liens as are obtained in four months prior to the filing of the petition in bankruptcy shall be to pass the property against which the lien is held 'to the trustee as a part of the estate of the bankrupt.' "

(464) In *Lockwood v. Bank,* 190 U. S., 292, the Supreme Court said: "The difference, however, between the two is, that in the latter case—that is, causing the exempt property to form a part of the bankruptcy assets—the inconvenience would be irremediable, since it would compel the administration of the exempt property as part of the estate in bankruptcy, whilst in the other, the rights of creditors having no lien, as in the case at bar, but having a remedy under the State law against the exempt property, may be protected by the court of bankruptcy, since, certainly, there would exist in favor of a creditor holding a waiver note, like that possessed by the petitioning creditor in the case at bar, an equity entitling him to a reasonable postponement of the discharge of the bankrupt, in order to allow the institution in the State court of such proceedings as might be necessary to make effective the rights possessed by the creditors." So in the present case, while section 1131, Rev., does not create a lien, it gives to the tort-claimant, who has reduced his claim to judgment, a right (remedy) to follow and

subject to the payment of his claim such property as the corporation has disposed of by mortgage, even where the sale under mortgage has taken place before judgment has been rendered. In concluding the opinion in *Lockwood v. Bank, supra, Mr. Justice White* says: "As in the case at bar the entire property which the bankrupt owned is within the exemption of the State law, it becomes unnecessary to consider what, if any, remedy might be available in the court of bankruptcy for the benefit of general creditors, in order to prevent the creditor holding the waiver as to exempt property from taking a dividend on his whole claim from the general assets, and thereafter availing himself of the right resulting from the waiver to proceed against exempt property."

What property, if any, the Trunk Company had at the time of the petition and adjudication in bankruptcy does not appear; the only property involved in this litigation is the property conveyed by it in the deed of trust or mortgage to Lindsay, which, by the prior registration of the deed, its *bona fides* being unquestioned, was placed beyond the reach of its general creditors, and which, by the provisions of section 1131, Rev., was not exempt from the satisfaction of the judgment recovered by the tort-claimant, Jarrett.

To hold that the Jarrett judgment, under section 1131, Rev., drew the mortgaged property into the bankruptcy court for the equal benefit of all the creditors of the Trunk Company, including the Jarrett judgment, would be to give an effect to the provisions of that section much broader than the construction of that section, as settled by the decisions of this Court, would warrant, and would go far be- (465) yond its evident purpose. It would be to subject the mortgaged property of a corporation, though a foreclosure had been had more than two years before and adjudication in bankruptcy, to distribution among the general contract creditors, because there happened to exist a judgment for labor performed or a tort committed, resulting in death or personal injuries. We cannot accept this enlargement or broadening of the provisions of the statute. Its language does not admit of such interpretation, nor are we constrained to so interpret it by the provisions of any section of the bankruptcy act.

Accepting all the facts alleged in the complaint and admitted in the answer as true, and accepting as true all the defenses pleaded in the answer, except their legal effect, we conclude that the plaintiff was entitled to judgment, upon the pleadings, that he is the owner and entitled to the possession of the land described, with the buildings thereon, and the deeds to the defendants casting a cloud upon his title should be canceled of record, by placing upon the margin a memorandum of the judgment to be entered in accordance with this opinion. In refusing the motion of the plaintiff there was error.

Reversed.

CLARK, C. J., *dissenting:* Under our precedents, the mortgage was nonexistent as to the Jarrett claim for a tort, but the Trunk Company having been adjudged a bankrupt 11 March, 1908, and Jarrett having proven his claim is bankruptcy, the property could not be sold thereafter under the judgment in favor of Jarrett which was obtained by him in January, 1908. Jarrett had no lien save by virtue of that judgment, which having been obtained within four months prior to the adjudication in bankruptcy, execution could not issue for its enforcement.

If the Trunk Company had made a *bona fide* sale of its property prior to the lien of the Jarrett judgment, the purchaser would have obtained a good title. *Coal Co. v. Electric Co.,* 118 N. C., 232. It follows that the trustee in bankruptcy acquired a good title, as against the Jarrett judgment, which was obtained within four months prior to the adjudication in bankruptcy.

It is true that it does not yet appear that the Trunk Company has obtained its final discharge, but its property by virtue of the adjudication passed to the trustee in bankruptcy and no execution could issue on the Jarrett judgment unless the property was restored to the bankrupt by decree of the court which had taken it into custody. The sale
(466) under the Jarrett judgment 4 August, 1909, was therefore a nullity, and the purchaser at such sale acquired no title.

BROWN, J., *dissenting:* I agree with the Chief Justice that Causey Jarrett, having proven his claim in bankruptcy, could not proceed at the same time in the State court, and that the sale under his judgment is a nullity.

To my mind, it is plain that if there was any estate or remnant of title left in the bankrupt corporation which its deeds in trust to Lindsay could not pass by reason of our statute (Revisal 1905, sec. 1131), that interest passed to the trustee in bankruptcy under section 67f of the bankrupt law, for our statute does not prevent it. I think the decision of the Supreme Court of the United States in *Bank v. Staake,* 202 U. S., 141, is an authoritative adjudication upon the provisions of that section, that all judgments within the four-months period are nullified and annihilated, not only as against the trustee, but as against third parties and all the world as well. The language of *Mr. Justice Brown,* in delivering the opinion, seems to admit of no other construction. He says: "The argument that section 67f in question here refers only to liens upon property which, if such liens were annulled, would pass to the trustee of the bankrupt, we think is unsound, since that contingency is amply provided for by the prior clause of the section annulling all such liens, and providing that property affected thereby shall pass to the trustee as a part of the estate."

But to my mind there are other reasons why plaintiff is not entitled to a judgment upon the pleadings.

1. This motion must be treated in the light of a demurrer to the answer, and therefore as admitting its allegations to be true. The defendants in their answers expressly deny that plaintiff is the owner and entitled to possession, and they deny in express terms the allegation of unlawful possession, thus raising the general issue as to title. Under these pleadings defendants are entitled to prove, if they can, an outstanding legal title paramount to that of the Trunk and Bag Corporation, and to connect themselves with it. While they admit that the corporation executed the deed in trust to Lindsay, they nowhere admit that the corporation had a valid and indefeasible title to the property. It is true, the answer set up other defenses and facts, but it is settled in this State that a defendant may plead different as well as inconsistent defenses to the same action.

2. There appears to me to be another reason why, taking the facts as set out in the answers to be true, the plaintiff is not entitled to recover. Although some of the defendants may claim title under (467) the deed in trust to Lindsay, they all claim title under valid judgments against the Trunk and Bag Company which antedated the Causey Jarrett judgment. The defendant King, who filed a separate answer, does not claim under the deed in trust, but under a judgment likewise antedating the Causey Jarrett judgment.

Section 1131, Revisal, applies only to mortgages and not to judgments. This is expressly recognized in *Coal Co. v. Electric Light Co.*, 118 N. C., 235, where it is said: "It (meaning section 1131 of the Revisal) does not seem to provide against prior judgment liens, whether taken upon a prior or subsequent debt. Nor does it provide against an absolutely *bona fide* sale, but only provides," etc. Assuming that a sale under the deed in trust could not in consequence of the statute pass an absolute and indefeasible title as against a judgment founded upon tort (such as the Causey Jarrett judgment), there is no such restriction in regard to *judgments* duly docketed. If after the mortgage was executed or foreclosed there was any right, interest or estate left in the Trunk and Bag Company that Causey Jarrett could sell and convey under his judgment and execution, it follows that such interest must have passed out of the Bag Company under the sale in August, 1907, made under executions upon judgments antedating his. If Jarrett could sell such interest, the prior judgment creditors could do the same, for their judgments were not affected by the statute and were as valid and unrestricted as his.

If there was no interest left in the Bag Company, the subject of execution, then plaintiff acquired no title under the Causey Jarrett execution.

If there was an interest or estate of any kind left in the corporation

after the execution of the mortgage, plaintiff likewise got no title, because it had been sold and passed under prior judgments and executions.

For this reason, *R. R. v. Burnett* and *Williams v. R. R.*, cited in the opinion, have no application. In those cases there were no prior judgments against the mortgagor corporation under which the property had been sold and conveyed to purchasers. This is not a contest between Causey Jarrett and the purchaser under the mortgage, as in the *Burnett case,* but it is a contest between a purchaser under Causey Jarrett's judgment and a purchaser under prior judgments equally valid and binding on the corporate defendant as Causey Jarrett's.

If this was an action in which Causey Jarrett was seeking to subject the property to the payment of his judgment debt in the hands (468) of a purchaser under the mortgage, the cause would be different.

But is is not that. It is an action of ejectment under which plaintiff claims title under an execution sale. It must therefore appear that there was some interest left in the judgment debtor subject to sale under execution. There must have been something in the debtor for the execution to operate on.

If there was, then such interest had been previously sold and conveyed to defendant King under prior judgments, for the statute applies only to mortgages and does not restrict or in any way limit the lien and operation of a judgment and execution.

Whatever residuum of estate was left in the corporate mortgagor was liable to be sold under any docketed judgment, whether founded on tort or contract, and therefore priority must govern.

Another obstacle, in my opinion, stands in plaintiff's way. The mortgage to Lindsay, trustee, was executed and recorded before Causey Jarrett was injured or his action commenced. It seems to me subversive of elementary principles of law to hold the trustee and those claiming under him bound by the findings in a cause to which neither of them were parties.

It is true, the mortgage is void as to a tort, but the tort which thus avoids it must be proved in an action to which the trustee or his assigns were parties. They are entitled to "a day in court" when the fact which avoids their title is adjudicated; otherwise, an insolvent corporation might submit to judgment upon fictitious torts for the purpose of avoiding its mortgage, and those interested in the mortgage be without remedy.

To destroy the value of the existing mortgage by a trial and judgment when the mortgagee cannot be heard and of which he may be in entire ignorance, is taking his property without due process of law.

I think, therefore, the plaintiff is required to establish the tort again to the satisfaction of a jury in this action before he can recover.

Cited: Withrell v. Murphy, 154 N. C., 91.

(469)

LURIN HEILIG v. SOUTHERN RAILWAY COMPANY.

(Filed 4 May, 1910.)

1. Appeal and Error—Evidence—How Considered.

On appeal from a judgment of nonsuit 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.

2. Railroads—Master and Servant—Custom—Knowledge Implied—Duty of Master—Scope of Employment.

A custom of nine years duration, without objection, of a railroad company's employees riding between stations on the road some two or three miles apart, on the steps of the engines or elsewhere, so they would not be crowded off by others, going to and from the discharge of their duties as such, charges the company with knowledge of the custom and imposes the duty on it to transport them thus in safety; and while so riding they are engaged in their master's business and within the scope of their employment.

3. Same—Evidence—Nonsuit.

There was evidence tending to show that since defendant had erected a coal chute at one of its stations, some nine years before the time complained of, it had increased the width of its engines and the liability to injure an employee riding by on the steps of its engine in accordance with an established and known custom; traveling at night under the direction of his superior, plaintiff, an employee, was injured by a post supporting this chute, there being evidence that this particular post had been further moved toward the track, which had been reported to defendant; plaintiff did not know the exact location of the posts, that one had been jerked forward, and the darkness prevented his seeing them; the plaintiff was injured by being struck by one of the posts as the engine was passing: *Held*, (1) it was defendant's duty to move back the posts which increased plaintiff's hazard in riding on the engine's steps, and was liable to plaintiff for damages caused proximately thereby; (2) the rule applying when persons are injured by alighting from moving trains does not in strictness apply in this case, it not appearing that plaintiff was in the act of alighting.

APPEAL from *Webb, J.*, at November Term, 1909, of CABARRUS.

At the conclusion of plaintiff's evidence defendant moved for judgment as of nonsuit. Motion allowed. Plaintiff excepted, and appealed to this Court. This action was brought to recover damages for injuries received by plaintiff while in the service of defendant, the plaintiff alleging specifically the negligent acts of defendant resulting in his injury; the defendant denying any negligence and pleading the contributory negligence of the plaintiff. The evidence offered by plaintiff tended to show that, at the time of his injury and for eight months

(470) prior thereto, he was in the employ of the defendant at its shops at Spencer, N. C.; that he belonged to the floating gang, under the control and orders of Captain Howell, his foreman, and "boss man"; that he was to obey his orders and do what he directed; that on the afternoon plaintiff was hurt, 12 July, 1902, he was ordered by Captain Howell to go to Salisbury to help unload a supply car; that this was about 6 p. m.; that when the car was unloaded the engine on which he rode from Spencer to Salisbury had returned; that in a short time he caught another engine going to Spencer; that Captain Howell instructed him to come back on an engine; that it was the custom, and had been for nine years, for the employees to ride back and forth, from Spencer to Salisbury, on defendant's engines; that plaintiff got on the steps on the engine, in sight of the engineer, only about two feet from him; that plaintiff was dressed as an employee of defendant; that he was standing on the steps of the engine close to the cab; that he did not go in the cab because the engineer did not allow negroes in the cab; that it was the custom of defendant's employees to ride on the steps of its engines; that as he was riding down to Spencer, the night being dark, the engineer suddenly and rapidly ran his engine by a curved cross over to a sidetrack running next to a coal chute, not the usual track for engines running from Salisbury to roundhouse; the engine was a very large passenger engine and it passed within a few inches of the posts supporting the coal chute, almost touching the last one; these posts had been stationed about nine years before the accident and before defendant had begun to use engines as wide as the engine on which plaintiff was riding, and as he passed one of the posts, perhaps the first post, plaintiff was struck by the post and knocked to the ground, the tender running over his left foot, rendering amputation necessary. It appeared that for some time prior to the injury an apron over the pier or post had been knocked off and the post jerked out some three or four inches. This had been reported to the defendant. From the place where the plaintiff was found it is probable this post struck him. The darkness of the night prevented plaintiff from seeing the posts, and he did not know their exact location or that one had been jerked nearer the track. Several witnesses were examined, among them Captain Howell, whose testimony corroborated plaintiff's statement.

Montgomery & Crowell for plaintiff.
L. C. Caldwell for defendant.

(471) MANNING, J. This appeal being taken from the judgment of nonsuit entered on defendant's motion made at the close of plaintiff's evidence, it is well settled by the decisions of this Court that the evidence "must be construed in the view most favorable to the plaintiff,

and every fact 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 the facts from the testimony." *Freeman v. Brown,* 151 N. C., 111; *Morton v. Lumber Co., ante,* 54, and cases cited.

The recital of the evidence will be sufficient to show that the case ought to have been submitted to the jury. It is not our duty to determine its weight, or to pass upon the credibility of the witnesses.

It appears from the evidence that it had been the custom, for nine years, of the employees of defendant to ride on its engine passing from Salisbury to Spencer, and that no objection was made to this by the defendant; that it was customary for them to ride on the steps of the engine or anywhere else thereon, where "they would not be crowded off by others"; the distance was only two or three miles, and the usual track taken by the engines was not the one next to the coal chute.

We held, in *Farris v. R. R.,* 151 N. C., 483, that the defendant is charged with knowledge of a custom of its employees in crossing its tracks, where the custom had existed as long as six months. Likewise, it must be held charged with knowledge of a custom of its employees to ride on its engines running from Salisbury to Spencer, in the discharge of their duties, where such a custom is shown to have existed for *nine* years, without the slightest protest or objection. As the defendant has, therefore, permitted this custom to become established among its employees, it is clear that the defendant owed them the duty to use due and reasonable care to transport them in safety. It cannot permit obstacles to exist so close to the tracks traversed by such engines as to endanger the life and limb of its employees using its engines in accordance with a custom so long established. The hazard to employees riding on the engines traversing the track nearest the coal chute having been increased by the greater width of the engine, it became the duty of the defendant to move back from the track the piers or posts supporting the coal chute, which increased the peril to its employees, or to discontinue the use of that track for such engines.

If plaintiff had begun to alight from the engine, the rule that persons injured by alighting from a moving train cannot recover for injuries received, does not apply in this case with absolute strictness. *Reeves v. R. R.,* 151 N. C., 318. The evidence that this plaintiff (472) was so injured does not clearly appear; he says that he had put one foot on the stirrup of the engine preparatory to alighting, when he was stricken and knocked off.

In *Texas Pacific Ry. Co. v. Swearingen,* 196 U. S., 51, a case similar to this in the particulars of injury received by the appellee, the Court held: "Knowledge of the increased hazard resulting from the negligent

proximity to a railroad track of a structure will not be imputed to an employee, using ordinary diligence to avoid it if properly located, because he was aware of its existence and general location. It is for the jury to determine from all the evidence whether he had actual notice." The plaintiff in the present case testified that he was looking ahead, but on account of the darkness he could not see the post which struck him and did not know of its dangerous proximity to a passing engine. In returning from Salisbury, where he had been directed to go in the discharge of his duties, and in returning in the manner he was directed to return and as it was the custom of the employees to return, the master (the defendant) owed him the same duty as it did to provide a safe way for transporting him to Salisbury from Spencer, and in so returning he was doing the work directed by his superior to be done. He was still the servant engaged in his master's business and in the scope of his employment. The duty of the master under such conditions has been so frequently stated that it has become elementary.

In our opinion, the case ought to have been submitted to the jury, and in allowing the motion of nonsuit there was error.

New trial.

Cited: *Williams v. R. R.*, 168 N. C., 363.

ROANOKE RAPIDS POWER COMPANY v. ROANOKE NAVIGATION AND WATER POWER COMPANY.

(Filed 4 May, 1910.)

1. Water and Watercourses—Upper and Lower Owner—Navigation Purposes—Obstruction of Stream—Damages—Injunction—Interpretation of Statutes.

The charter of the defendant Roanoke Navigation Company by Laws 1812, ch. 848, provides only for improving the navigation of Roanoke River. In relation to this the Legislature passed an act in 1817 which provides that "Whereas, some of the places through which it may be necessary to conduct (said) canals may be convenient for erecting mills, forges, etc.," the corporation may, with the consent of the adjoining proprietors of the land and not otherwise, when it may conveniently be done, "to answer the purposes of navigation and the waterworks aforesaid, . . . enter into reasonable agreements with the proprietors of such situations . . . for making large canals or cuts capable of carrying such volume or volumes of water as may be sufficient for the purposes of navigation, and also for such waterworks as aforesaid; but in no case whatever shall the owner or proprietor of such land . . . withdraw from any canal cut by the aforesaid company, the water for the purpose

of working any mill, etc." Under the provisions of these two acts said corporation built a "wing dam" extending about 100 feet into the river for the purposes of supplying the water of a canal cut by it in 1824, but abandoned since 1854. In an action by the plaintiff to recover damages for a nuisance and to enjoin the continued obstruction of the waters of Roanoke River by defendants extending the "wing dam" across the river for supplying water power to mills with which the defendant had contracted: *Held*, (1) it was not the intent of the act of 1817 to enlarge the powers granted defendant under the act of 1812, so as to permit them to obstruct the river by extending the "wing dam" across it for the sole purpose of the use of its waters for manufacturing purposes, to plaintiff's damage as a lower riparian proprietor, by diminishing the volume of water which would otherwise flow by and through plaintiff's land; (2) and that the injunction to the extent of the waters thus diverted should be granted.

2. Same.

Laws 1885, ch. 57, in relation to the defendant navigation company, conferring the power and authority to erect buildings or make other improvements upon the canal for the purpose of manufacturing, and to use the water of Roanoke River, to be drawn through the canal for navigation, manufacturing, or other purposes, and forbidding the company from obstructing or interfering with the right of any lower riparian owner, etc., refers only to the same rights, privileges, and franchises that were given by the acts of 1812 and 1817, and confers no right to obstruct the river, for manufacturing purposes, to the damage of the lower riparian owner. In this case the right to erect the "wing dam" had been acquired either by prescription or purchase, but otherwise as to extending this dam across the stream.

3. Water and Watercourses—Obstruction of Stream—Damages—Lower Proprietor—Plaintiff's Rights—Matters Involved.

It being decided in this case that defendant had no authority to divert the flow of the waters of Roanoke River for manufacturing purposes to plaintiff's damage as a lower riparian owner, the question as to plaintiff's rights to the use of the waters as such owner for manufacturing purposes does not arise, this use by the plaintiff not interfering with the defendant's rights or interests.

4. Water and Watercourses—Obstruction—Cause of Action—Interpretation of Statutes.

The plaintiff is expressly given the right to use the waters of Roanoke River for manufacturing purposes by the act of 1891, and this right is not restricted by the various acts of the Legislature conferring certain powers upon defendant; and as the acts complained of are to plaintiff's damage, and unauthorized, the plaintiff's cause of action is established.

5. Water and Watercourses—Obstruction — Damages — Lower Proprietor — Temporary Agreement—Effect.

An agreement formerly made between the parties litigant in this action, to provide for a temporary adjustment of the matters in dispute until the courts should finally decide between them, does not change or affect the rights of either one in the course of the procedure or in its results.

6. Water and Watercourses—Obstruction—Damages — Arbitration — Boundaries—Matters Concluded.

When it appears from an award made in an arbitration submitted by the upper and lower riparian owners of land that only the question of boundary was determined, the award does not conclude or estop one of the parties from asserting his rights in an action brought by the lower owner involving the question of damages and an injunction against the upper owner in wrongfully diverting the waters of the stream.

7. Water and Watercourses—Stare Decisis—Different Matters.

The question of the rights of the lower riparian owner, as decided in this case, not being involved in or determined by the case of *Bass v. Navigation Co.*, 111 N. C., 439, the rule of *stare decisis* of the matters in the latter case has no application.

(474) APPEAL from *Guion, J.*, June Term, 1909, of HALIFAX.

This action was brought by the plaintiff to recover damages for the interference, by the defendant, with its water rights in the Roanoke River, and to enjoin the defendant from further interference therewith. The case was heard in the court below upon the following facts, which were agreed upon by the parties and submitted to the court for its decision:

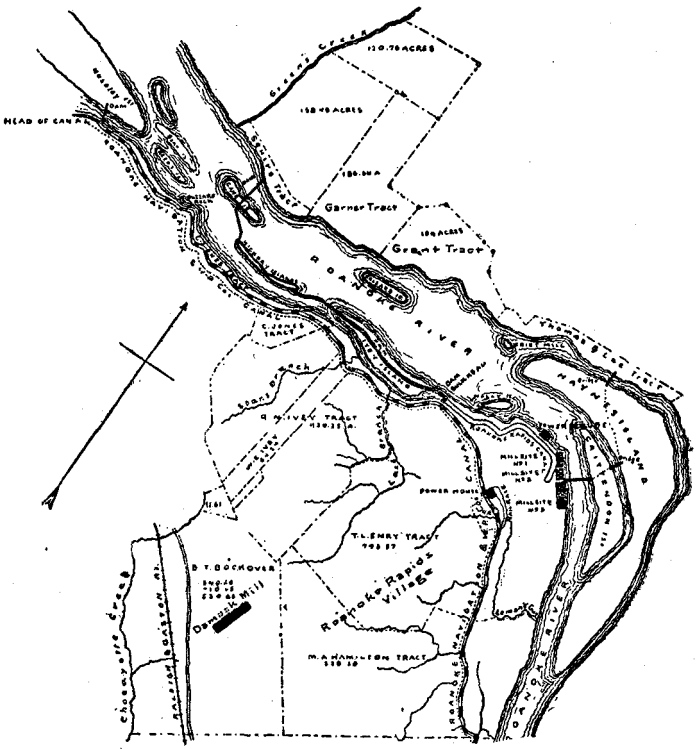
1. The plaintiff and the defendant are corporations duly chartered and organized under the laws of this State.

2. The plaintiff was originally chartered under the name of "The Great Falls Water Power, Manufacturing and Improvement Company," but its corporate name was changed to that which it now bears by an act of the General Assembly, passed at the session of 1895. With this change in its corporate name, it exists under and by virtue of letters of incorporation, granted 18 August, 1890, by the clerk of the Superior Court, and by an act of the General Assembly, amendatory of said letters, ratified 20 January, 1891, which act is to be considered as a part of this case.

3. The defendant company is successor to the Roanoke Navigation Company, which company derived its charter rights from the fol-
(475) lowing acts of the Legislature: (*a*) Acts of 1812, ch, 848; (*b*) Acts of 1815, ch. 896; (*c*) Acts of 1816, ch. 929; (*d*) Acts of 1817, ch. 959; (*e*) Acts of 1885, ch. 57.

4. On June 1st and 8th, 1880, in a *quo warranto* proceeding against the Roanoke Navigation Company, then pending in the Circuit Court of the city of Richmond, Va., which was instituted pursuant to a resolution of the General Assembly of Virginia, adopted at session of 1877 and 1878, judgments were entered, copies of which are hereto attached as a part of the facts agreed. There was no appeal from said judgments, and the court had jurisdiction to hear and determine said proceed-

ings, in so far is they affected the privileges and franchises exercised by said company within the State of Virginia, and no further. The effect of the proceedings and judgment in the said cause was to vacate and annul the charter of the Roanoke Navigation Company in Virginia and to restrain the said company from exercising any of the franchises, powers and privileges granted by the charter which it received from the Legislature of that State.



5. The navigation of Roanoke River was opened up by the Roanoke Navigation Company, pursuant to its aforesaid charters, from Weldon, N. C., westward to Clarksville, Va., and beyond. The boats used in this navigation were known as bateaux, from 60 to 65 feet long, 6 to 8 feet wide, drawing, when loaded, about 18 inches of water, with a capacity of from 5 to 8 tons each, and were propelled by poling.

6. The works and improvements of the Roanoke Navigation Company between Weldon, N. C., and Gaston N. C., consisted of two canals,

one around Eaton's Falls and the other, being the main canal, around the Great Falls. From the head of Eaton's Falls, which is a little over half a mile below Gaston, to the foot of the Great Falls at Weldon, the river falls about 104 feet, and from the head of the Great Falls to the foot thereof at Weldon, a distance of about 9 miles, and around which the main canal of the Roanoke Navigation Company was cut, the river falls about 90 feet. On account of these falls and other obstructions, there never has been, and cannot be, any water communication on Roanoke River between Weldon and Gaston, except by mans of said canals.

7. The obstructions to navigation between Gaston, N. C., and Clarksville, Va., were projecting ledges, points of rock, and steep slopes at falls or rapids occurring at intervals along said river, most of them being of minor importance, but several being of such character as to require considerable effort and expenditure to effect safe channels through or by them for the aforesaid bateaux. These obstruc-
(476) tions were removed by the Roanoke Navigation Company with the aid of wing dams, and by blasting and cutting sluices through them, so that channels were secured through or by them, sufficient for the safe passage of the bateaux heretofore described. Ordinarily, it required seven days for these boats to make a round trip between Gaston and Clarksville; occasionally it was done in five days. The navigation so established by the Roanoke Navigation Company, begun about 1824, continued for many years, and reached large proportions. The country along the river between said points was then, and is now, well settled and fertile and produced large quantities of tobacco, corn, wheat and cotton for market, practically all of which was transported over the river by bateaux until some time between 1850 and 1856, and during that period said boats carried into the adjacent country practically all of the goods, wares, etc., required for its use and trade; so that practically the entire commerce of said country, even be-
(477) yond Clarksville, up the Dan and Staunton rivers, was carried upon the river and canal. When said transportation was at its full height there were engaged therein on the river and canal about 353 of said bateaux, which carried a commerce of the estimated value of $6,000,000 per year. About 1854 or 1856, there having been built railroads to Gaston and from Manson, N. C., to Clarksville, Va., which furnished quicker or more expeditious transportation than said boats, the public ceased to patronize the boats on the canal from Weldon to Gaston, and navigation was discontinued. The canal ceased to be used thereafter, and the locks were not kept up, and got in such condition that boats could not pass through them, and have not since been used for navigation. At said time the transportation, by means of said boats from Gaston to Clarksville, also materially decreased until about 1864,

when the railroad from Manson to Clarksville was torn up. Thereafter the commerce upon said river by means of bateaux from Gaston, where they connected with the railroad, to Clarksville, again assumed large proportions, there being one firm of tobacco manufacturers at Clarksville who shipped by said boats one million pounds of manufactured tobacco a year during part of said time. There was also operated on Staunton River for several years, about 1875, a steamboat, *"Nellie,"* of about 12 tons capacity, which plied the river from Randolph, about 15 miles above Clarksville, to about 17 miles above Randolph, and sometimes as far as Brookneal, about 30 miles above Randolph. The bateaux had traffic connections with the railroads, and through bills of lading for freight were issued. The bateaux continued to navigate the river from Gaston to Clarksville until about 1887, after which time only about three of the boats continued said navigation for about six months in the year, carrying about 1,000 bales of cotton and about 400 tons of fertilizer per year, until about 1893 or 1894. After that time traffic was entirely discontinued, except from Clarksville down the river for 18 or 20 miles, where some of said boats are still operating. It has never been practicable for said boats to pass some of the obstructions in said river between Gaston and Clarksville, except through the channels made by the Roanoke Navigation Company; and at present it is not practicable for said boats, when loaded, to ascend and descend the river between the State line and Gaston, owing to the fact that several of the works erected by said company are not in sufficiently good repair to furnish a safe way through said obstruction. The Roanoke River is navigable by steamboats of considerable size from its mouth to Weldon. At its mouth it communicates, by Albemarle Sound, with the ocean, and by the Dismal Swamp Canal with Norfolk, (478) Va. The aforesaid obstructions in the river between Gaston and Clarksville would prevent the passage of steamboats, but the river between said obstructions, which consist of ledges and points of rock and steep slopes at the rapids, is of a character and depth sufficient for the navigation of such boats of from 20 to 30 tons capacity. The Roanoke River from Gaston to Clarksville is from 500 to 1,300 feet wide, the water varying therein from 1 to 10 feet in depth. The places where the depth is 1 foot are at several rapids or ledges, where water flows over the same. The average depth of the river between said points, at low water, is about 2½ feet. Congress has made appropriations which have been expended in the improvement of the navigation of the Dan and Staunton rivers above Randolph, which rivers by their conjunction form the Roanoke. A steamboat now runs on the river between Randolph and Brookneal, a distance of about 30 miles, over a part of the river so improved by the Government.

8. The distance by the river from Weldon, N. C., to Gaston, N. C., is 13½ miles; from Gaston, N. C., to the State line is 24 miles, and from the State line to Clarksville, Va., is 30 miles.

9. The General Assembly of North Carolina, at its session of 1874-'75, passed an act for the dissolution of the "Roanoke Navigation Company," which is to be taken as a part of this case.

10. The action for dissolution, which the Attorney-General, by said act, was authorized and directed to institute was brought in the Superior Court of Halifax County, and at the Fall Term, 1881, judgment of dissolution was rendered and a receiver appointed to take charge of and make sale of the property of the company. Said property was sold and conveyed by the receiver in 1883, the conveyance being to the purchasers under the corporate name of the "Roanoke Navigation and Water Power Company."

11. The General Assembly of North Carolina, at its session of 1885 (ch. 57), passed an act confirming said sale and conveyance, a copy of which act is herewith filed as a part of this agreement.

12. The defendant, so far as this action is concerned, has acquired no property other than that it acquired at the receiver's sale, except the purchase by it from Charles Shaw and wife, by deed dated 24 October, 1906, of the lower end of Moseley's Island, formerly known as Jones' Island, containing about 245 acres, which deed is recorded in Northampton County, in book 135, at page 218. The property acquired
(479) at the receiver's sale consists, so far as this controversy is concerned, of a strip of land 165 feet wide, through which its canal flows around the Great Falls and extending from the upper terminus of said canal to the town of Weldon, a distance of about 9 miles, and 4 acres of land at the "locks" of the canal, which property it owns in fee; it was purchased and condemned by the Roanoke Navigation Company under its charter, and through its entire length a canal was cut. The boundaries of said 165-foot strip, especially the northern boundary thereof, are described in the award of Lanier and Armfield, and the agreement of 28 May, 1897, hereinafter set out.

13. A controversy having arisen between the defendant and one George P. Phillips, the owner of the Cadwallader Jones tract of land, as to certain rights claimed by Phillips as incident to his said land, and in order to test the right of defendant to use its canal and the waters of the river for manufacturing purposes, as against the alleged rights of Phillips, as owner of said land, the same was by agreement submitted to Messrs. M. V. Lanier and R. L. Armfield as arbitrators, who rendered their final award on 30 August, 1889. The submission and award are made a part of this case. Under the award, George P. Phillips was declared to be the owner in fee of a parcel of land lying on the southerly

side of said canal property. It is a triangular piece of land, the location of which will appear from a map annexed as an exhibit to this agreement. It is also declared that Phillips was the owner in fee of all the land between the northerly boundary of said canal property and Roanoke River. This is a narrow strip of land extending from the upper terminus of the defendant's canal easterly to the eastern boundary. These two parcels of land are indicated on the map as the "C. Jones" tract. On 1 February, 1892, the plaintiff purchased this property from Eva P. Phillips, widow and sole legatee and devisee of George P. Phillips, who died in 1891, the deed for which was duly recorded in Halifax County. The plaintiff had full notice of said award at the time of purchasing said land, and all its other property.

14. The defendant did not repair, improve or develop its said property, owing to its controversy with Phillips, until the same was determined as aforesaid. In January, 1890, it started to work on its property, enlarging its said canal through its entire length, a distance of about 9 miles, and completed this work some time in 1892, at an expenditure of over $100,000. About the time defendant commenced its work negotiations were opened by it with one T. L. Emry for the purchase of the tract of land indicated on the map as the T. L. Emry (or Moore) tract; but a price could not be agreed upon, (480) and defendant declined to purchase. Shortly thereafter Emry sold said tract to other parties designated in the following section as "promoters."

15. About three months after the defendant commenced this work, negotiations were opened by Emry with the promoters of the plaintiff company for the purchase of the Moore or Emry tract of land, designated on the map, with a view of forming the plaintiff corporation for the purpose of developing the power now owned by the plaintiff. This purpose coming to the knowledge of the Hon. J. D. Cameron, then president of the defendant company, he, on 19 September, 1890, addressed a letter to the president of the plaintiff company, to which letter the president of the plaintiff company made two replies. The substance of this correspondence was that the president of the defendant company claimed that the said company had acquired the right to the exclusive use of so much of the waters of the Roanoke River as it might, at any time, need for navigation, manufacturing or other purposes, and he objected to any use of the waters of the said river, or the construction of any dam or other works, by the plaintiff company, which would, in any manner, injure, impair or interfere with the property rights, franchises or privileges of the defendant company. The president of the plaintiff company claimed that his company did not intend to interfere with any of the legal rights of the defendant company which it had acquired in the

waters of the Roanoke River, but he denied that it had any right, exclusive or otherwise, at that or any future time, to use the waters of said river for purposes other than those of navigation, and asserted the right of his company to use the waters of the river not required for the said purposes of navigation and to have them flow down the entire channel of the stream, so that the lower proprietors and owners of riparian or water rights, on the margin of the stream, might have the free and uninterrupted use of the same. At the time said letter of 19 September, 1890, of the Hon. J. D. Cameron was written, the plaintiff had acquired the said Emry or Moore tract, and shortly thereafter its other properties and rights, which it holds in fee. Its said properties consist of a large body of land lying in, on and along both sides of and bounded by Roanoke River, along that stretch of said stream known as the Great Falls, and divided by said stream into two unequal parts, the one situated in Northampton County, North Carolina, and the other part in Halifax County, North Carolina. Its lands in Northampton County contain about 400 acres, known as the Squire, Garner, Grant, Thomas and Lee tracts, and have a contin-
(481) uous river front of over 3 miles, extending from Green's Creek eastward down and along and bounded by the Roanoke River. Its lands in Halifax County contain about 2,300 acres, consisting of several tracts known as the M. A. Hamilton, T. L. Emry (also known as the Moore tract), B. T. Bockover, R. N. Ivey and C. Jones tracts, and have a continuous river front of between 4 and 5 miles, beginning at a point where the upper terminus of the defendant's aforesaid canal property (the aforesaid 165-foot strip of land) taps or touches Roanoke River, and thence eastwardly down and along and bounded by said river, and is divided by the aforesaid property of the defendant into two unequal parts or parcels. One of said parcels, and the smaller, is a narrow strip of land of varying width, lying between the northern boundary of defendant's canal property, which boundary has heretofore been defined, and Roanoke River. The other and larger parcel lies between the southern boundary of the aforesaid canal property of the defendant and Chocoyotte Creek. The plaintiff also owns in fee all the islands in Roanoke River, from Goat Island to Holly Island, inclusive of both; also Haynes and Crittendon Islands, below Holly Island. For a fuller description of the above-described properties, both of the plaintiff and the defendant, and for a better understanding of their location with reference to each other, reference is made to the map filed herewith as a part of this agreement. There are a number of small islands between Goat Island and Holly Island which are not shown on the map, it being considered necessary to give only the most prominent and important ones.

16. In the spring of 1891 the plaintiff began developing the water power of that part af Roanoke River flowing by and to its property. Its dams and other works for developing its said water power are located from 1 to 2 miles below the upper, and from 4 to 5 miles above the lower terminus of the defendant's canal so that all the water flowing into said canal is diverted entirely from plaintiff's property, works and dam, and carried past and beyond the same and discharged at the lower terminus of defendant's canal at Weldon. For a better understanding of the location of said dam and works, especially with reference to the aforesaid properties of the plaintiff and defendant, reference is hereby made to the aforesaid map or plat, marked "Exhibit P." Up to 1898, plaintiff had expended in the purchase of its property and rights and in developing its water power about $250,000, and since then it has expended about $200,000 more in such development.

17. The dimensions of defendant's canal, as constructed and used by its predecessors, the Roanoke Navigation Company, and which was cut and graded for navigation purposes, was about 25 feet (482) wide at the top of the water-level and 16 feet wide at its bottom, and from 2 to 3 feet deep and with a very slight fall or current. The quantity of water which was taken into and flowed through the canal did not exceed 50 cubic feet per second. The present dimensions of said canal are about 35 feet wide at the top of its water-level and 25 feet wide at its bottom, and about 4 feet deep, with an increased fall or current, it being enlarged and regraded for hydraulic purposes. In addition to such enlargement and gradation of the canal, the defendant, about the latter part of 1897, built a rock breakwater, constructed of loose stone piled together from or near the upper terminus of the canal and extending about one-third of the distance across Little River, and which was not further extended until some time in 1901, when the same was extended entirely across Little River. Plaintiff had no knowledge of the construction of said breakwater across said river until September, 1907, and on 30 October, 1907, it notified the president of the defendant company of that fact by letter, and threatened that unless the same was removed it would institute suit to abate the same and for damages. No dam or obstruction in and across said river or any part thereof was ever constructed by the Roanoke Navigation Company, except a wing dam, extending about 100 feet into said river at said point, and of less elevation than the aforesaid rock breakwater. By reason of the enlargement and gradation of said canal the greater part of the flow of said Little River, during the stages of low water, is diverted into the canal and from the property of the plaintiff. The defendant's canal, as enlarged and with said dam across Little River, diverts substantially a greater quantity of water than the old canal diverted. Little River is the smaller of the two

channels made by Roanoke River dividing and flowing around Moseley's Island. It carries one-fourth of the flow of the entire river whereas the other and larger channel carries three-fourths of said flow. The waters of the larger channel are made inaccessible to defendant's canal by said island, as their works are now constructed, but both channels unite at the lower end of said island and before reaching the mouth of the plaintiff's canal. All of which is shown by the annexed map or plat.

18. All the water drawn into defendant's canal is to develop power for manufacturing purposes, and is used solely for that purpose; the canal, by reason of the works of the defendant, is so disconnected from the river that boats cannot pass from one to the other, and defendant has
(483) no purpose of opening up or using said canal for navigation purposes, unless there should arise some public requirement therefor.

19. While before the erection of said dam by the defendant, plaintiff had expended over $300,000 in the purchase and development of its property, and was still making large expenditures in the development of its water power for future leases, the plaintiff and the few lessees of its water power had been little, if any, inconvenienced by the diversion of water by the defendant, and had sustained little actual damage thereby until within four or five months of the institution of this action. For these reasons the plaintiff had made no demand upon the defendant to abate such diversion. In 1902 the plaintiff was negotiating for other leases, and, actuated by this and also by the information that defendant contemplated increasing such diversion, the president of the plaintiff company, on 13 December, 1902, wrote the president of the defendant company, protesting against such action. During the year 1906 plaintiff succeeded in making large leases of its power, to be furnished, by 1 September, 1907. When demand was made upon it for such additional power it was unable to supply a large part thereof, on account of the diversion of water by defendant, and this inability continued for several months during the fall of 1907 and until the plaintiff could make large additions to its dam it was then extending across the river.

20. As shown by the map hereto annexed, plaintiff has now extended its dam entirely across the river, by which it is enabled to develop water power to the amount of 8,000 horse-power, but with its present works and developments it will require the entire flow of the river in its normal stages to enable it to do so. The defendant's canal, by reason of its said enlargement and grading and the extension of said breakwater or dam, diverts water from plaintiff's canal and works, which, if allowed to flow into them, would develop a large amount of power. Of this 8,000 horse-power, plaintiff has already leased 4,000, and the lessees thereof have been using the same since 1 January, 1908. The remaining 4,000 horse-power will be converted into electrical power, and the

plaintiff has erected and equipped a power house for generating the same. Of this electrical power it has leased about 800 horse-power and can dispose of the remainder within the next one or two years, unless the aforesaid diversion of the defendant continues.

21. The water which the plaintiff claims the right to draw into its canal to develop said 8,000 horse-power is for use in the manner and for the purposes following, to wit: A sufficient quantity of said water is to be delivered from its canal, through pipes or sluices, (484) to the wheels or turbines of the owners of the mill sites, Nos. 1, 2 and 3, on the lands of the said mill owners, to generate in conjunction with said wheels or turbines, under the head of water maintained in the canal, 4,000 horse-power. This power is for the operation of the mills and machinery of said mill owners upon their said lands. This is the 4,000 horse-power plaintiff has already leased, as aforesaid. Mill site No. 1 is owned by the United Industrial Company, No. 2 by the Roanoke Mills Company, and No. 3 by the Roanoke Rapids Paper Manufacturing Company, and are located as shown on the map herewith filed. They were originally parts of the Emry or Moore tract of land. Sites Nos. 1 and 2 were donated, and mill site No. 3 was sold and conveyed by plaintiff in consideration of the donees and grantees erecting mills thereon and leasing water power from the plaintiff to operate the same. The water taken by said mills from plaintiff's canal is discharged and returned to the river from said mills before passing the lands of any other riparian proprietor, and flows down the river, along plaintiff's lands. The remainder of the water is to be used to operate the electric-power plant located on plaintiff's lands, by which the plaintiff proposes to generate 4,000 horse-power. This power will be transmitted and used to operate machinery or mills to be erected by plaintiff, or used by other parties when plaintiff may be able to lease the same. The water used to generate said power is discharged on plaintiff's land and returned to the river before passing any other riparian owner. Eight hundred horse-power has been already leased, to be used in the operation of mills on mill sites Nos. 1 and 2. The plaintiff has now no mills or factories upon its lands, other than the said electrical power house.

22. The main contention of the plaintiff in this action is that it has the right to have abated or enjoined the alleged diversion by the defendant of the water of Roanoke River into its canal; and while it is admitted that plaintiff has thereby sustained such damages and will continue to sustain such damages so long as substantial diversion continues, if said diversion or any part thereof, is wrongful, it is agreed that there shall be no recovery of actual damages in this action, but this shall be without prejudice and with the reservation to the plaintiff of the right

to institute a separate action for any damages it has already or may hereafter sustain; but the aforesaid admission, which is made for the above purpose, that plaintiff has sustained actual damages, shall not be used as evidence against the defendant in any action it may hereafter institute against the defendant for the recovery of damages. It
(485) is further agreed that no such subsequent action shall be barred by the statute of limitations further than it already is.

23. In 1896 a controversy arose between the plaintiff and the defendant as to the location of 4 acres of land owned by the defendant at or near the locks, and as to other matters; and in order to adjust and settle the same the plaintiff and defendant entered into a written agreement for that purpose. When this agreement was entered into, the contentions of the plaintiff and the defendants as to their respective rights to the use of the water of Roanoke River were well understood by them. At the time of entering into this agreement plaintiff knew that defendant had enlarged its canal to its present dimensions and was using the water solely for manufacturing purposes. The plan adopted by the defendant and put into execution for developing its water power was to utilize the water drawn into its canal, first, at the "locks," about 4 miles below the upper terminus of its canal, where all the water so used was and is returned to said canal, from which point it flows through said canal to Weldon, and is used and discharged. The plan adopted by the plaintiff for developing its water power was in the manner and at the place its said power is now developed and used. These respective plans were known and understood by both parties before and at the time of the aforesaid agreement, and the same was entered into in furtherance of said plans.

24. At the time said agreement of 28 May, 1897, was entered into the defendant had not leased any of its water power. Its first lease of power was to the Weldon Cotton Manufacturing Company, on 1 February, 1899, when it contracted to furnish it with horse-power to an amount not to exceed 250 horse-power. Said company had never used to exceed 100 horse-power. In the summer of 1900 defendant commenced the erection of a power house at the "locks," located about 4 miles below the upper terminus of its canal. In contemplation of such erection, the defendant contracted with the Patterson Textile Company on 29 August, 1900, to furnish it with not exceeding 1,000 electrical horse-power, beginning on 1 January, 1901. It did not begin to furnish the power until 1 September, 1901, It has furnished at no time to exceed 800 electrical horse-power.

25. Defendant, relying on the decisions in the *George P. Phillips case* and the case of *Bass v. Navigation Company,* 111 N. C., 439, as a determination of its rights to enlarge its canal and use the water of the

river drawn through it for manufacturing purposes, did enlarge and repair the same, at the expense aforesaid, to wit, over $100,000, and built thereon a large corn and flour mill, at Weldon, an electric-power house at Weldon, which furnishes electric lights for said town, (486) its stores, factories and residences, and an electric-power plant at Roanoke Rapids, which furnishes electric lights to said town, and power, by transmission, for the operation of a large damask mill of the Patterson Textile Company at Rosemary. Said improvements cost about $300,000. Defendant's canal is so constructed that it can use the water drawn through the same to operate its power plant at its lock at Roanoke Rapids, under the fall of about 30 feet, and by reason of said locks return the same water to the canal, so that it is carried on to Weldon, where it is again used under a fall of 45 feet. Plaintiff has in its canal only one fall of about 30 feet. The Patterson Textile Company, heretofore referred to, desiring to build a large damask mill at Rosemary, to be operated by power from defendant's canal, and being advised of plaintiff's contentions that defendant had no right to draw water from the river in excess of that used by the Roanoke Navigation Company, or to apply the same to manufacturing purposes, before building said mill examined the decisions in said *Phillips* and *Bass cases*, and, being advised that they were, and relying on them as, adjudications of the said questions in favor of the defendant, erected said mill, depending upon the power of defendant's canal for its operations, and entered into a contract with defendant accordingly to furnish it not exceeding 1,000 electrical horse-power. Said mill cost about $350,000. The Weldon Cotton Manufacturing Company's mills were also built on defendant's canal, to be operated by its power. The aforesaid Patterson Textile Company's mills and the town of Roanoke Rapids can be served as readily from the power plant of the plaintiff as from that of the defendant. The corn and flour mill of the defendant was completed in 1892, and its power house at Weldon was erected in 1898.

It was further agreed by the parties that the presiding judge should hear and determine the matters in controversy upon the case agreed, and enter judgment accordingly. Judgment was rendered in favor of the defendant, denying the plaintiff's prayer for an injunction, and dismissing the action. Plaintiff, having duly excepted, appealed to this Court.

W. E. Daniel and Claude Kitchin for plaintiff.

E. L. Travis, George Green, J. H. Pou, and T. M. Mordecai for defendant.

WALKER, J., after stating the case: This action was brought by the plaintiff to recover damages for nuisance which, it alleges, was committed by the defendant, and to enjoin the continuance of the same,

which the plaintiff also alleges has caused special damage to (487) it by reason of the diversion of the waters of the Roanoke River from the usual and natural flow, by and along the lands of the plaintiff, which are situated below the intake or upper end of the defendant's canal.

The plaintiff bases its right to recover on the ground that as the owner of the land through which the river would flow in its natural state, it is a lower riparian proprietor, and that the defendant has no legal right to so obstruct the flow of the water in one of the prongs of the Roanoke River, known as Little River, as to diminish the volume of water which would otherwise flow by and through plaintiff's land, except to the extent that the defendant may have acquired the right, under the charter of its predecessor ,the Roanoke Navigation Company, to use the water and for that purpose to obstruct the flow of said stream in a reasonable manner and consistently with the rights and privileges granted to it.

We think the decision of the case must depend upon the construction of the charters of the Roanoke Navigation Company, under which the defendant claims, and all the acts of Assembly which relate to the rights and privileges of that company and of its successor, the defendant, with regard to the use of the waters of the Roanoke River for the purposes specified in the said act.

Laws 1812, ch. 848, provides only for improving the navigation of Roanoke River from the town of Halifax to the place where the Virginia line intersects the same. It is not necessary that we should refer to the acts of 1815 and 1816, which amended the act of 1812, because the provisions of those acts do not affect materially the decision of the question presented in this case. By the act of 1817 the Legislature of this State adopted an act which was passed by the General Assembly of Virginia in 1816, and which provided for improving the navigation of the Roanoke River and its branches. It is provided in sections 4 and 5 of the latter act as follows:

"Whereas some of the places through which it may be necessary to conduct the said canals may be convenient for erecting mills, forges and other waterworks, and the person possessing such situations may desire to improve the same:

"*Be it therefore enacted,* That the water, or any part conveyed through any canal cut or made by the said company, shall not be used for any purpose but navigation, unless the consent of the proprietors of the lands through which the same shall be led be first had; and the said president and directors, or a majority of them, are hereby empowered and directed, if it can be conveniently done, to answer (488) both the purposes of navigation and the waterworks aforesaid, to enter into reasonable agreements with the proprietors of

such situations, concerning the just proportion of the expenses of making large canals or cuts capable of carrying such volume or volumes of water as may be sufficient for the purposes of navigation, and also for any such waterworks as aforesaid; but in no case whatever shall the owner or proprietor of such land, through which any canal may be cut as aforesaid, withdraw from any canal cut by the aforesaid company the water for the purpose of working any mill, forges or other waterworks whatever."

The act of 1812 provided only for improving the navigation of the Roanoke River, and made no provision for the use of its waters for any other purpose. It is contended by the defendant that the act of 1817, the provision of which we have just quoted, enlarged the rights, privileges and franchises of the Roanoke Navigation Company so that, by the said act, it acquired not only the right to improve the navigation of the river, but also to use its waters for manufacturing and other purposes, and that by reason of the provisions of the said act it was not restricted in the quantity of water taken by it from the stream to so much as might be necessary only for the purpose of navigation, as it was by the act of 1812. In the exercise of the rights, privileges and franchises conferred by the said acts, the Roanoke Navigation Company constructed a canal and diverted the waters of the river into it by what is known in the case as a "wing dam," which extended about 100 feet into the river. The navigation of the river through the said canal began in 1824 and continued until 1854, when it was abandoned, and it has not since been resumed. The plaintiff has extended the said wing dam entirely across Little River, and has thereby practically obstructed the flow of the stream, so that the plaintiff does not receive any benefit therefrom, but the use of the said river by it, as a riparian owner or proprietor, if it is entitled to be so considered, has been totally destroyed.

It is clear from the statement of facts which we have made, that the defendant, by the dissolution and sale of the franchise and property of the Roanoke Navigation Company, under the act of the Legislature of 1874-'75, and by virtue of the judicial proceedings authorized by the said act, did not, by the deed of the commissioner, which was made under a decree of the court, acquire anything except "the rights, franchises, privileges, works and property of the Roanoke Navigation Company, between the towns of Gaston and Weldon and at Weldon." The deed of the commissioner, Mr. Hill, does not convey anything else, nor does Laws 1885, ch. 57, which ratified the sale and (489) conveyance of the commissioner, confer any other rights, privileges or franchises, or vest in the defendant any other property or effects than those which were acquired by the deed of the commissioner.

The primary object, and we may say, the chief purpose of the acts of 1812 and 1817 were to promote and improve the navigation of the Roanoke River by the construction of a canal, and the right to use the water of the canal for the other purposes mentioned in the act of 1817 was intended to be subsidiary or subordinate to the main purpose, and not to permit the Roanoke Navigation Company to take more water from the river through its canal than should be necessary for improving the navigation of the stream. The Legislature did not contemplate that a greater quantity of water should be taken from the river than would be necessary for the purpose of navigation, and within this prescribed limit the Navigation Company was authorized to contract with the proprietors of lands bordering on the canal for the use of the water in the canal when required to supply motive power for milling, manufacturing or other industrial plants mentioned in the act. It would seem that the company placed this construction upon the act, because it so cut its canal with reference to the diversion of water from the river as to supply a sufficient quantity for the purpose of navigation only by erecting the wing dam, and while the canal was in use and operation for thirty years, it did not assert the right to obstruct the flow of the water to any greater extent than had been done in the beginning, nor was any attempt made to do so by its successor until about the year 1897, when it built a rock breakwater, extending about one-third of the distance across Little River, and which was not further extended to the other bank of the river until some time in the year 1901.

In the construction of the legislative acts under which the defendant acquired its rights, privileges and franchises as the successor of the Roanoke Navigation Company, by virtue of the judicial sale to which we have referred, we can derive little or no aid from the authorities, nor did counsel cite any. The original company constructed the wing dam under the power given to it by the act of 1812, as amended by the act of 1817, and deemed it sufficient for all purposes of navigation and so used it for a period of thirty years. It does not appear in this case that it was necessary to extend that dam to the opposite bank of the stream, for the purpose of supplying an additional quantity of water for improving the navigation of the river, as contemplated by the said act. It is very clear, we think, the Legislature, by the acts of 1812 and 1817, did

(490) not intend to permit any obstruction of the Roanoke River for the sole purpose of using its waters for manufacturing purposes.

The title and the language of the two acts forbid any such construction. The right to establish manufacturing plants on the canal was intended to be incidental to the navigation of the river, and the latter could be obstructed only to the extent that it was necessary to improve its navigation. The defendant contends that it has acquired the

right to obstruct the river by virtue of the act of 1885, ch. 57; but we do not think that statute will bear any such construction. It is provided by section 6 of the act as follows: "This act shall not materially interfere with the legal or vested rights of any persons owning or operating mills in Northampton County, or prevent any person owning land on Roanoke River from operating or erecting any mill or other structure to be operated by water power, and using the water of said river for operating said mill or other structure: *Provided,* in so doing he shall not interfere with the legal or vested rights of any other person or corporation in any unreasonable manner." The right given to the defendant by section 7 to erect buildings or make other improvements upon the canal for the purpose of manufacturing, and by section 1, to use the water of the Roanoke River, to be drawn through the canal, for navigation, manufacturing and other purposes, refers only, as the context of the act clearly shows, to the same rights, privileges and franchises that were given by the acts of 1812 and 1817 to the Roanoke Navigation Company. This construction of these two sections is entirely consistent with the language of section 6, which forbids the defendant from obstructing or interfering with the right of any lower riparian proprietor on the Roanoke River from erecting and operating any mill by the use of the water of the said river. And any other construction would nullify that section. The plaintiff has complied with the proviso in that section, for it appears in this case that the water which passes through its canal is returned to the river before it reaches the land of any lower proprietor and, therefore, there has been no interference by it with the right of any other person or corporation.

The next question presented in the case is whether the plaintiff is in a position to challenge the right of the defendant to obstruct the flow of water in the Roanoke River. We do not think it is necessary for us to decide, in order to pass upon this question, whether or not the plaintiff is a riparian owner, in the sense that it has the right to use the water of the river for manufacturing purposes, though there are authorities for the contention of the plaintiff that it has such right and all the rights of a riparian owner, and especially that it had "a (491) right to the undisturbed flow of the river which passed along the whole frontage of its property in the manner in which it had formerly been accustomed to pass." *Land Co. v. Hotel Co.,* 132 N. C., 517; Gould on Waters, secs. 149 and 204; 1 Farnham on Waters, secs. 287-288 and 598-602; *Yates v. Milwaukee,* 10 Wall., 497; 29 Cyc., 333-335; *Webster v. Harris,* 59 L. R. A., 332; *Lamprey v. State,* 18 L. R. A., 670; *Ceburn v. Ice Co.,* 51 L. R. A., 829.

But whether or not the plaintiff had the right to use the waters of the Roanoke River, as claimed by it, we think that the act of 1891,

amending its charter, does expressly confer such right, and that the proviso in subsection 2 of section 2 does not restrict its right in this respect, as, if the defendant acquired only the property rights, privileges and franchises of the Roanoke Navigation Company, the operations of the plaintiff do not interfere with its rights, if it had no authority to extend its dam across the river to the bank on the other side, but only the right to obstruct the river by the wing dam, which was built by its predecessor.

Nor do we think that the rights of the parties were changed or affected by their agreement, dated 28 May, 1897, or the correspondence between them, as it is evident from their express language that they did not intend to waive or surrender any of their rights, which are now in controversy in this case, but the said rights are distinctly reserved. The said agreement and correspondence were intended merely to provide a temporary arrangement between the parties, which was to last until the matters in dispute between them should be finally decided.

The defendant further contends that the plaintiff is concluded or estopped by the award which settled the controversy between George P. Phillips and the defendant, concerning the boundaries of the property of the defendant and its rights in the canal, the plaintiff having afterwards purchased the Phillips land. The fourth section of the award is as follows:

"The Roanoke Navigation and Water Power Company has the right under its charter, without the consent of the said Phillips, to enlarge its canal as it may see fit upon its own land aforesaid, but not to condemn land for such purpose, and it has also the right, without the consent of the said Phillips, to own, use and enjoy the use of the water of the Roanoke River to be drawn into or through said canal, as well for navigation as manufacturing and other purposes, and to rent or lease the same, and to erect and operate manufacturing establishments upon its own land, both that now owned or hereafter acquired under its
(492) charter, or to rent or lease the same and to sell and alien any of its said property, all without the consent of the said George P. Phillips."

The arbitrators intended by their award merely to fix the boundaries of the defendant's property and to define its right to use the canal and the waters of the Roanoke River for navigation and manufacturing purposes, as conferred by the acts of 1812 and 1817, and to confine it within the limits prescribed by the said acts. This is apparent from the striking similarity between the words employed by the arbitrators in their award and the language of the two acts to which we have referred. They did not intend that the defendant should possess or enjoy any other rights, privileges or franchises than were acquired by the deed of

the commissioner, executed under the order of the court, and the act of the Legislature of 1885 which ratified the same. The question as to the quantity of water which the defendant was entitled to draw from the Roanoke River without the consent of Phillips was not submitted to the arbitrators for their decision, nor involved in the controversy between the parties, so far as appears from the submission or the award. The question which the arbitrators decided, and which was submitted to them, was whether the defendant, as between it and Phillips, had the right to divert any water from the river into its canal.

We have read carefully *Bass v. Navigation Co.,* 111 N. C., 439, upon which the defendant relies as deciding what rights it has in the waters of the Roanoke River by virtue of the statutes and proceedings to which we have referred. We find only two questions decided in that case, and they are: (1) Whether, by the dissolution of the corporation known as the Roanoke Navigation Company the property which it acquired by purchase or otherwise reverted to the original owners; and (2) whether the parol license to construct a bridge over the canal, which was formerly given by the Roanoke Navigation Company, was revocable. The Court decided that there was no reverter and that the license was revocable. We do not see how the questions now under consideration in this action were presented in that case, and the language of the Court excludes the idea that they were considered or decided. We are, therefore, of the opinion that neither the award in the *Phillips case* nor the decision in the *Bass case* adjudicated the rights of the parties which are involved in this suit, nor do they render applicable to this case the rule of *stare decisis,* as laid down in *Hill v. R. R.,* 143 N. C., 539, as they establish no rule of property, pertinent to the facts of this case, which require us to adhere to them as decisive of the questions we now have under consideration. If the arbitrators in the *Phillips case,* or the Court in the *Bass case,* intended to pass upon the question (493) as to whether the defendant had the right to extend its dam across Little River so as to completely obstruct the stream and thereby to prevent the use of the waters of the river by the lower riparian proprietors, they would have made some reference to the right of the defendant so to do, in plain language. Instead of doing so, it was assumed that the defendant possessed only the rights and privileges, with reference to the river and the diversion of its waters, which it acquired from the Roanoke Navigation Company, and which had been conferred upon the latter by its charter and the amendments thereof.

It appears in the case agreed that the defendant has acquired, by prescription if not by purchase at the judicial sale, the right to obstruct the flow of Roanoke River by continuing to maintain what is known in the case as the "wing dam," which was originally erected by its predecessor,

but it has no right to impede the flow of the stream beyond the end of said dam, that is to say, by any extension of the same, and to the extent that it has done so it should have been enjoined by the court below, as there has been no sufficient delay by the plaintiff in asserting its right to the removal of the obstruction to constitute an acquiescence on its part or an estoppel against it. *Pugh v. Wheeler,* 19 N. C., 50; *Emry v. R. R.,* 102 N. C., 232; *Greer v. Water Co.,* 127 N. C., 349. The plaintiff has acquired no easement, as against the lower proprietors on the river, to obstruct the same. *Griffin v. Foster,* 53 N. C., 337.

The question as to the amount of damages the plaintiff may be entitled to recover is not now before us upon the case agreed. Our conclusion is that the court erred in refusing the injunction, to the extent above indicated, and the case is, therefore, remanded to the court below, with instructions to issue an injunction against the defendant, restraining it from maintaining the dam across Little River, except that part of the said dam which was originally erected by the Roanoke Navigation Company, and which is known in the case as the "wing dam." The amount of damages which the plaintiff is entitled to recover will be determined hereafter, according to the stipulation contained in the case agreed.

Error.

Cited: *S. c.,* 159 N. C., 394; *R. R. v. Light Co.,* 169 N. C., 476, 478.

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(494)

DAN FORNEY v. POSTAL TELEGRAPH-CABLE COMPANY.

(Filed 4 May, 1910.)

Telegraphs—Reasonable Stipulations—Written Claim—Form Sufficient.

The stipulation printed upon a telegram requiring that claim for damages be presented within sixty days in writing, etc., is not a statute of limitation, and is upheld only as a requirement to afford the company reasonable opportunity to ascertain the facts and circumstances, connected with the transaction, from its employees who handled the message, and whether they had been negligent in forwarding or delivering it; and the written claim is in form sufficient when it sets out the telegram showing its nature, its date of filing, the party claiming to have been damaged, with the amount claimed.

APPEAL by defendant from *Webb, J.,* at October Term, 1909, of CABARRUS.

The facts are stated in the opinion of the Court.

Jerome, Maness & Sykes for plaintiff.
Montgomery & Crowell for defendant.

WALKER, J. This action was brought by the plaintiff to recover damages for delay in delivering a telegram, which was sent from Charlotte, N. C., 6 December, 1907, by Govan Reeves to Dan Forney, Concord, N. C. It was in the following words: "Jerry is dead. Tell Sye. Can you come at once? Answer." The message was not delivered until 9 December, 1907. No question is presented in this case as to the negligence of the defendant, and the jury found that there had been negligence in delivering the telegram, and assessed the plaintiff's damages at $100. The only point raised in the case is whether the plaintiff presented his claim within sixty days after the message was filed for transmission, as he was required to do by the terms and stipulations of the contract between him and the defendant, which stipulation we have held to be valid. *Sherrill v. Tel. Co.,* 109 N. C., 527. It appeared on that day, 9 December, 1907, the attorneys for Dan Forney addressed to the proper officer of the defendant company a letter as follows:

DEAR SIR:—On the 6th instant the following message was sent to Dan Forney, and delivered on 9 December, at 9 o'clock a. m.:

CHARLOTTE, N. C., 6 December, 1907.

DAN FORNEY, Colored, *Concord, N. C.*

Jerry is dead. Tell Sye. Can you come at once? Answer.

GOVAN REEVES.

Dan Forney is known by everybody in Concord, N. C.; lives (495) right here in town, with no earthly excuse why this message should not have been delivered at once, and we herewith file claim for $2,000 damage for failure to deliver the same.

You will please take the matter up, and if the same can be adjusted without suit, we shall be glad to do so; otherwise, suit will be entered at once. Very truly yours,

ADAMS, ARMFIELD, JEROME & MANESS.

This letter was received by the defendant and its receipt acknowledged on 13 December, 1907, which was eight days after the message was filed, and we are called upon to decide whether that letter was sufficient in form to apprise the defendant of the nature of the claim, in order that it might ascertain the facts. In *Sherrill v. Tel. Co., supra,* we held that the stipulation in regard to notifying the defendant of the plaintiff's claim did not restrict the liability of the telegraph company

for negligence, but that it was rather intended to afford to the company an opportunity to inquire into the nature of the claim and the facts and circumstances in regard to the alleged act of negligence on its part, "while the matter is still within the memory of witnesses," and the stipulation was held to be reasonable, because of the number of telegrams constantly passing over the wires, which rendered some such stipulation absolutely necessary to protect the company from imposition. *Bryan v. Tel. Co.,* 133 N. C., 603. It is not a statute of limitation and does not relieve the telegraph company of any part of its obligation to receive, transmit and deliver a telegram with the same degree of care and diligence as would have been required of it if no such agreement had been made. *Express Co. v. Caldwell,* 21 Wall., 264. The stipulation, of course, does not apply to a case of nondelivery. The sixty days should be counted, it would seem, from the time that the delayed message is delivered, or from the time that the plaintiff has notice of its nondelivery; but this question is not presented in our case, as the letter was mailed and received by the defendant within the sixty days after it had been filed for transmission. As to the sufficiency of the notice by the plaintiff to the defendant of its claim for damages, we are clearly of the opinion that it fully informed the defendant of the nature of the claim, so that it could have inquired into the facts and circumstances and ascertained from its employees who handled the message, whether there had been negligence in forwarding or delivering the same. We cannot imagine what other information the defendant could
(496) have required for that purpose. The correspondence between the plaintiff's attorneys and the defendant shows that the latter did make an investigation and ascertained the facts, and upon these facts it denied its liability, alleging that there had been no negligence in delivering the message. We can, therefore, see nothing in the contention of the defendant that the stipulation in the contract between the parties, which requires the plaintiff to present his claim within sixty days after the message is filed for transmission, had not been complied with. The jury have found against the defendant upon the issue as to negligence, and as we think the plaintiff has, in all respects, performed his part of the contract, we can find in the ruling of the court below,

No error.

Cited: *S. c., post,* 496; *Penn v. Tel. Co.,* 159 N. C., 314.

SYE FORNEY v. POSTAL TELEGRAPH-CABLE COMPANY.

(Filed 4 May, 1910.)

Telegraphs—Written Claim—Rights of Third Persons.

A written claim filed with a telegraph company in behalf of the sendee of a message only, is not sufficient in an action brought in behalf of Sye, the message reading, "J. is dead. Tell Sye. Can you come at once? Answer." Nor is this affected by an agreement between the sendee and Sye that the former would communicate the information to the latter, which was unknown to the company.

APPEAL from *Webb, J.*, at October Term, 1909, of CABARRUS.

The facts are stated in the case of Dan Forney against the same defendant, next above.

Jerome, Maness & Sykes for plaintiff.
Montgomery & Crowell for defendant.

WALKER, J. The facts in this case sufficiently appear in the opinion of the Court, *ante,* 494, in the case of Dan Forney against the same defendant. The question presented in this case is whether the letter sent to the defendant by the attorneys of Dan Forney was a sufficient notice of claim by Sye Forney, the plaintiff in this suit. The plaintiff alleges that he had an agreement with Dan Forney, to the effect that he would arrange with Govan Reeves in regard to sending a telegram concerning Jerry, who is named in the message which was actually sent to Dan Forney by Reeves, and that Dan Forney agreed to notify him when the message was received; that he got to Concord on Tuesday (497) after the message was sent, and Dan told him that he had filed a claim for him, as well as himself. The plaintiff introduced testimony to sustain this allegation.

We think the question, whether the plaintiff duly notified the defendant of his claim, must be determined, not by any secret agreement between him and Dan Forney, but by the terms of the letter which was addressed by the attorneys of Dan Forney to the defendant. The company had no knowledge of any agreement between Dan Forney and Sye Forney, and its liability to the plaintiff must be determined by the sufficiency of the letter as a notice of claim by him. We do not think it was sufficient for that purpose. It purports to be a notice of claim filed in behalf of Dan Forney alone, for the sum of $2,000, and there is no mention of any claim by Sye Forney, the plaintiff in this case, and no special demand for damages sustained by him. Any one reading the message would at once conclude that it was intended as a notice of claim for the amount specified in the message, by Dan Forney alone. The

two letters written by the defendant, one on 13 December, 1907, and the other on 21 January, 1908, in respect to the letter of Dan Forney's attorneys, plainly show that the company placed this construction upon the letter and considered it as a demand for damages by Dan Forney alone. We have not overlooked the fact that at the time the letter was mailed by the attorneys to the defendant Sye Forney could not have suffered any mental anguish, and, therefore, could not have had any claim for damages, as he did not then know of the death of Jerry, which is mentioned in the message, nor did he know of any delay by the company in delivering the message. It does not appear that Dan had any authority to give the company any notice of Sye Forney's claim for damages, as his agent. He had merely been requested to notify Sye Forney that the message was received from Govan Reeves. The ruling of the court was, therefore, correct.

No error.

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(498)

S. H. NEWKIRK v. H. L. STEVENS, L. A. BEASLEY AND C. D. WEEKS ET AL.

(Filed 4 May, 1910.)

1. Issues—Facts Admitted.

When some of the issues tendered embrace facts admitted by the parties and the others of them are fully covered by the issues submitted to the jury by the judge, it is not error for him to refuse the issues tendered.

2. Attorney and Client—Termination of Relationship.

The termination of the relationship of attorney and client depends upon the facts and circumstances and nature of the attorney's employment and the retainer he had received, and as a general rule, and in the absence of special circumstances to the contrary, the authority ceases with the termination of the suit for which his services are engaged.

3. Same—Subsequent Dealings.

The defendant having acquired an undivided one-half interest in the *locus in quo* as a contingent fee in successfully representing the plaintiff to final judgment in an action brought against him involving his title, may then deal with the plaintiff in any transaction respecting the sale of land to a third person, for the relationship of attorney and client ceased upon the rendition of the said judgment, and plaintiff is not entitled to any of defendant's personal profits in the sale of his own interests by reason of the former relationship.

4. Contracts to Convey Lands—Title in Trust—Parol Evidence.

The plaintiff and defendant held an undivided interest in the *locus in quo*. Plaintiff agreed by parol to sell his part, and conveyed it to defend-

ant to be held by him until his part of the purchase price had been paid, upon the payment of which defendant was to convey to the purchaser: *Held*, that evidence of the parol agreement of plaintiff to sell the land was not within the statute of frauds, and that it was competent, especially in this case, upon the allegations of defendant's fraud.

5. Issues—Unnecessary—Fraud—Issues Found.

The jury having found in this case that the plaintiff had himself previously contracted to convey his interest in certain lands held in common with defendant, at a certain price, and that the defendant had not agreed to divide the proceeds he had received from the sale of the land at an advanced price and alleged to have been in fraud of plaintiff's rights under an agreement with him, an issue as to the amount defendant had received for his own interest is immaterial, and it was not error for the lower court to refuse to submit it to the jury.

APPEAL from *W. R. Allen, J.*, at February Term, 1909, of DUPLIN.

The facts are stated in the opinion of the Court.

Rountree & Carr and Kenan & Herring for plaintiff. (499)
Aycock & Winston for defendant.

WALKER, J. This action was brought by the plaintiff against the defendant to recover what he alleges to be his share of the proceeds of the sale of certain timber upon the lands described in the complaint. The plaintiff, Swan Hill Newkirk, owned a life estate in the land, and the remaindermen brought a suit against him to declare the said estate forfeited by reason of waste alleged to have been committed by the said Newkirk. The case was tried, and Newkirk, in 1903, recovered a judgment, in which the jury found, and the court declared, that the estate had not been forfeited, and further adjudged that the plaintiffs pay the costs of the action. The plaintiff in this action alleges that he employed the law firm of Stevens, Beasley & Weeks, who are the defendants in this action, to appear for him in the suit brought by the remaindermen, to which we have already referred, and that he and the defendants entered into a written agreement, by which the defendants were to receive one-half of the land recovered by him in the action, and if he was cast in the suit, that they would not receive anything for their services as attorneys. The execution of this contract was admitted by the defendants. The plaintiff further alleged that in 1906, while the defendants were still his attorneys, he executed to the defendant Stevens a deed for his interest in the said timber, for a stated consideration of $800, but that no consideration actually passed to the plaintiff, and that the said deed was made upon an agreement between the plaintiff and the said Stevens and one Henry E. Shaw, who represented his wife, Virginia D. Shaw, in the said transaction, that the

timber should be sold, and each of the parties, that is, the defendant, H. L. Stevens, and Virginia D. Shaw, should receive one-third of the proceeds of sale. The plaintiff further alleges that the said Stevens and Shaw, at the time the deed was executed by the plaintiff to the said Stevens, had actually agreed to sell the timber to Caldwell Hardy, who was acting as trustee for the Carolina Timber Company, for the sum of $6,000, and that they fraudulently concealed the fact from him and represented that the land would be sold for $2,400, and by the agreement between them, that he would receive, as his share of the proceeds, the sum of $800.

The defendants in their answer deny the allegations of the complaint and the fraudulent representation and concealment, and averred the truth to be that the plaintiff, prior to the execution of the deed to Stevens for the recited consideration of $800, had agreed to sell
(500) his interest in the timber to Henry E. Shaw, acting in behalf of his wife, Virginia D. Shaw, who then owned an interest in the land, and that the deed was made to H. L. Stevens, with the express understanding and agreement that he would convey the land to H. E. Shaw, or his wife, when the purchase money should be paid by the latter, that is, the sum of $800. That no offer of $6,000 for timber on the land had been made by any one until after the plaintiff executed the deed to Stevens for the consideration of $800, on 12 February, 1906, and that the timber was purchased after that time by Caldwell Hardy, as agent for the Carolina Timber Company, and that there was no agreement as to the division of the proceeds of sale and no fraudulent representation by the defendant H. L. Stevens, or H. E. Shaw. That the deed was executed by the plaintiff to be defendant H. L. Stevens in order that he might hold the legal title until the purchase money was paid by H. E. Shaw, as the plaintiff was unwilling to make the title directly to H. E. Shaw, as agent of his wife, until the purchase money had been paid.

The plaintiff tendered certain issues, nine in all, which the court refused to submit to the jury, and instead thereof submitted the following:

1. Did defendant H. L. Stevens agree with plaintiff to pay one-third of the amount for which the timber was sold? Answer: No.

2. Did H. E. Shaw agree with the plaintiff to pay him one-third of the amount for which the timber was sold? Answer: No.

3. Did the plaintiff sell his interest in the timber for $800 to H. E. Shaw? Answer: Yes.

4. If so, did plaintiff execute the deed to H. L. Stevens with instructions to convey the timber to said Shaw upon the payment of $800? Answer: Yes.

5. Did defendant H. L. Stevens fraudulently represent to the plaintiff that the purchase price of the timber was $2,400, and fraudulently conceal the fact that the purchase price of the timber was $6,000, and thereby induce the plaintiff to execute his deed for said timber?

The plaintiff objected to the submission of the third issue, because there was no written contract between plaintiff and H. E. Shaw, and there is nothing in the pleadings which raised such an issue. The jury answered the fifth issue, No, but erased the answer and returned a verdict only upon the first four issues, and the court thereupon instructed the jury that it was not necessary to answer the fifth issue, as the plaintiff did not allege in his complaint that the deed had been procured fraudulently, but he sued for the recovery of his (501) share of the proceeds of sale, which had been actually received by H. L. Stevens and H. E. Shaw from the Carolina Timber Company. The court ruled that there were only two allegations made by the plaintiff: 1. That the defendants had agreed to pay him one-third of the amount received from the sale of the timber. 2. That H. L. Stevens was his attorney, and that he held any amount that was received from the proceeds of sale for the plaintiff. The court held that the fifth issue was immaterial or irrelevant to the controversy, the jury having found that the plaintiff had sold the land to H. E. Shaw, acting in behalf of his wife, before the deed of 12 February, 1906, was executed to the defendant H. L. Stevens. The plaintiff duly excepted to the ruling of the court in regard to the fifth issue, and to the refusal of the court to submit the issues tendered by him.

We do not think the court committed any error in refusing to submit the issues tendered by the plaintiff. Several of them embraced facts which had been admitted by the parties, and the others were fully covered by the issues which the court afterwards submitted to the jury and which virtually disposed of the real matters in controversy between the parties. We think that the ruling of the court as to the fifth issue was correct, for the reason which we will hereafter state.

The first ground upon which the plaintiff rests his case, namely, that he is entitled to recover one-half of the proceeds of the sale of the land, which were received by H. L. Stevens, because the said Stevens was, at the time, his attorney, appears to us to be untenable. It must be true that the relation of attorney and client in a case like this one does not last forever. It ends at some time, and the time that the relation terminates in any particular case will depend upon the facts and circumstances and the nature of the employment or retainer. In the absence of special circumstances, "the employment of an attorney continues as long as the suit or business upon which he is engaged is pending, and ordinarily comes to an end with the completion of the special

task for which he was employed. At common law, the obtaining of a final judgment was such a termination of a suit as brought the relation to a close." 4 Cyc., 952.

In *Treasurer v. McDonald,* 1 Hill (S. C.), 184 (26 Am. Dec., 167), it was held that, "the authority of an attorney, when considered with a view to the duties he is required to perform, is confined to the conduct and management of his client's case, in which his skill and learning only are put in requisition, and the right to receive his client's money with special authority is an interpolation, the policy of which (502) may well be questioned, however convenient it may be in practice, and ought not to be extended." So in *Dangerfield v. Thurston,* 8 Martin, N. S. (La.), 119, it is held to be a general rule that authority of an attorney ceases with the termination of a suit. See, also, *Mordecai v. Charleston,* 8 S. C., 100; *Hillegass v. Bender,* 78 Ind., 225; *Berthold v. Fox,* 21 Minn., 51; *Jackson v. Bartlett,* 8 Johnson (N. Y.), 281; *Kellogg v. Gilbert,* 10 Johnson, 221; *Kamm v. Stark,* 14 Fed. Cases, No. 7604.

In *Branch v. Walker,* 92 N. C., 90, this Court held that the relation of an attorney, with respect to the suit in which he is employed to prosecute or defend, "does not cease in any case until the judgment of the court, where it is pending, is consummated, that is, made permanently effectual for its purpose, as contemplated by law," citing *Walton v. Sugg,* 61 N. C., 98, and *Rogers v. McKenzie,* 81 N. C., 164. In appears in the case at bar, that a judgment for the plaintiff was entered in the suit against him to forfeit his life estate for waste alleged to have been committed by him as early as 1903. This was a final judgment and fully established the title to the life estate in him, the defendant having paid the costs, and the judgment having been "consummated and made permanently effectual for its purpose, as contemplated by law," the relation of attorney and client was terminated in 1906. We may safely assert that, in 1906, when the deed was made to H. L. Stevens by the plaintiff; and three years after the judgment had been entered in the suit against the plaintiff in this action, there was no relation subsisting between the plaintiff and H. L. Stevens as his attorney in this action, which made it unconscionable for H. L. Stevens to deal with the plaintiff in any transaction respecting the land, or which was calculated to give H. L. Stevens an undue influence or advantage over the plaintiff with respect to any such dealing. Besides, it appears by the verdict of the jury that the plaintiff had previously sold the land to H. E. Shaw, and the legal title was vested in Stevens for the purpose of securing the purchase money.

It is contended, though, that the agreement of the plaintiff to sell to H. E. Shaw not being in writing, was, for that reason, void, but this

contention is fully met by the case of *Sykes v. Boone,* 132 N. C., 199, and the authorities therein cited. That case has been approved by this Court several times since it was decided. *Avery v. Stewart,* 136 N. C., 441; *Davis v. Kerr,* 141 N. C., 11; *Chappell v. White,* 146 N. C., 571; *Gaylord v. Gaylord,* 150 N. C., 222. We are of the opinion, therefore, that the testimony tending to show the sale by the plaintiff in this case to H. E. Shaw, for his wife, was properly submitted to the (503) jury for their consideration. It would seem, at least, to have been competent with respect to the allegation of the plaintiff that H. E. Shaw and the defendant H. L. Stevens had made a fraudulent representation to the plaintiff and had agreed to divide the proceeds of the sale of the land equally, when made.

The fifth issue, which related to the fraudulent representation of H. L. Stevens as to the amount which had actually been received for the timber or agreed to be paid, became immaterial when the jury found, by their verdict, not only that the plaintiff had sold his interest in the timber for $800 to H. E. Shaw, but that Stevens and Shaw had not agreed with him to divide the proceeds of the sale, as alleged in the complaint. Besides, the fifth issue was not presented by the pleadings, as it is not alleged that the deed to H. L. Stevens by the plaintiff was procured by any false representation, and the plaintiff seeks only to recover his share of the actual proceeds of the sale. What we have said disposes of the defendant's prayers for instruction, and the ruling of the court below, upon the verdict as returned by the jury, and which embraced all the material issues between the parties, was correct.

No error.

Cited: *Trust Co. v. Sterchie,* 169 N. C., 22.

W. W. SMOAK ET AL. v. JOHN SOCKWELL.

(Filed 4 May, 1910.)

1. Mortgagor and Mortgagee—Vendee—Sale of Mortgaged Property—Trover.

The plaintiff who had sold a mule and had taken and registered a mortgage to secure the purchase price, may recover of the vendee of the mortgagor, who had disposed of the mule at the time of the suit, the balance of the purchase price the mortgagor owed him thereon; the registered mortgage constituted a valid lien on the mule and the mortgagor can maintain his action of trover against the defendant, who has wrongfully disposed of the mule and appropriated the proceeds of the sale to his own use.

2. Same—Joint Torts.

Evidence in this case that the defendant, in buying and reselling the mule, was acting for a firm consisting of the defendant and another, not made a party, does not affect the result; the objection should have been made by demurrer or answer, and this being a case of joint tort, the plaintiff may sue either one or both of the wrongdoers, at his election, though there can be only one satisfaction.

(504) APPEAL from *E. B. Jones, J.,* at December Term, 1909, of FORSYTH.

This action was brought by Smoak & McCreary, partners, against John Sockwell; action was brought for recovery in favor of the plaintiff against the defendant in the sum of $210 for the conversion of a mule, as alleged in complaint.

The jury rendered the following verdict:

1. Are plaintiffs the owners and entitled to the possession of the mule, buggy and harness, described in the pleadings? Answer: Yes.

2. Did the defendant receive into his possession the mule, buggy and harness, and convert them to his own use? Answer: Yes.

3. What was the value of mule, buggy and harness at the time of the sale by defendant and conversion of same to his use? Answer: $125.

4. In what amount, if anything, is defendant indebted to plaintiffs? Answer: $100.

Judgment on verdict for plaintiff, and defendant excepted and appealed.

L. M. Swink for plaintiff.
No counsel for defendant.

HOKE, J. On the pleadings there was a general denial of plaintiff's demand and claim, and on the trial it appeared in evidence that plaintiffs sold a mule to one O. P. Pegram, a resident of Guilford County, N. C., and took a chattel mortgage on the mule and some other personal property to secure the balance due on the purchase price to the amount of $145; that said mortgage was duly proven and registered in the county of Guilford, where the mortgagor resided; some time after the mortgage was due, and when there was considerable balance still unpaid, Pegram sold the mule to defendant John Sockwell; that plaintiffs, having ascertained that defendant had bought the mule, immediately notified defendant of their claim and mortgage, and, receiving no answer, went to see him, and after several efforts succeeded in getting an interview with Sockwell, who acknowledged that he had bought the mule of Pegram and sold him again to other parties.

There was evidence tending to show that the value of the mule at the time he was disposed of by defendant was $100, and the balance remain-

ing due on the note and mortgage, after crediting the cash payments and applying other property embraced within the mortgage, was $100 or $110.

Upon these facts, we are of opinion that the recovery had in (505) plaintiffs' favor should be sustained. There is evidence tending to show that the mule may have been disposed of by defendant after actual notice of plaintiffs' claim; but, whether this be true or not, the mortgage having been properly registered according to the statute, Revisal, sec. 982, constituted a valid lien on the mule wherever the same was found; and in such case, it is well established that the claimant can maintain trover against any one who has wrongfully disposed of the mule and appropriated the proceeds from same to his own use. *Jones v. Webster,* 48 Ala., 109; *McCandless v. Moore,* 50 Mo., 511; *Ross v. Menefee,* 125 Ind., 432.

In the *McCandless case* it was held:

"1. The vendee of a mortgagor of mortgaged personal property has only the rights of the mortgagor. The mortgagee in possession is not a naked depositary, but has possession coupled with an interest, and is damaged by an unlawful conversion of the property to the extent of that interest; and he can recover for such conversion against the mortgagor, or the mortgagor's vendee."

This position was not seriously controverted by defendant, but it was urged against the validity of the trial that there was evidence tending to show that in buying the mule and reselling the same, the present defendant was acting for a firm, composed of his brother and himself, and that the brother was a necessary party; but the objection is without merit. Apart from the fact that unless such an objection is raised by demurrer or answer, it may be considered as having been waived (Revisal, sec. 478), it is well established that in case of joint torts the plaintiff may sue either all or some of the wrongdoers, at his election, though there can be only one satisfaction. Hale on Torts, 123; Pollock, 194. There is,

No error.

R. B. NORRIS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 4 May, 1910.)

1. Railroads—Walkways—Duty of Pedestrians—Negligence—Warnings.

A person who travels a highway close to a railroad track and in such a position that the approach of a train should be adverted to in the exercise of reasonable care for his own safety, or who is on the track which travelers are habitually accustomed to use as a walkway, has a right to

rely, to some extent and under some conditions, upon signals and warnings usually given by trains at nearby public crossings where they are ordinarily required to be given; and a failure of the agents or employees operating defendant's train to give proper signals at such places is ordinarily evidence of negligence, and under some circumstances actionable negligence may be inferred by the jury.

2. Same—Questions for Jury.

When there is evidence tending to show that the employees of defendant company were running an engine and tender backward in the night-time at a very high rate of speed through a thickly settled community where large numbers of people were habitually accustomed to use the track for a walkway, giving no signals or other warnings at public crossings, and with just a lantern on the tender throwing light along the track a distance of only 10 or fifteen feet, there is an indication that the conduct of defendant's employees was more than likely to result in a collision by the tender with a pedestrain; and when it is shown that a person sitting on the track has been hurt in consequence and as a result of such conduct of defendant, it is sufficient evidence to take the case to the jury upon the question of defendant's actionable negligence.

3. Railroads—Walkways—Duty of Pedestrians—Negligence—Warnings—Evidence.

When there is evidence that plaintiff was injured while attempting to save his companion from injury, caused by defendant's negligently running its engine and tender backward, in the night-time, without customary signals and warning, and with only a lantern in front of its tender which threw a light along the track a distance of only 10 or 15 feet, and under circumstances and conditions where the injury would likely result, his evidence, "I saw the light far enough off to have saved my companion and myself, but did not know it was a train, and heard no bell or whistle, the train running very fast with little noise; when I saw the light and heard the whistle, I was standing near the end of the cross-ties; I called my companion; he did not notice me, and I jumped across and pulled him off," is not construed to mean that the light was adequate or at all sufficient to warn him that an engine was approaching, in time to have safely avoided the injury received by him.

4. Railroads—Negligence—Peril of Another—Contributory Negligence—Nonsuit.

When a life of a human being is suddenly subjected to imminent peril through another's negligence, either a comrade or a bystander may attempt to save it, and his conduct is not subjected to the same exacting rules which obtain under ordinary conditions; and when the evidence tends to show that plaintiff and his comrade were suddenly subjected to imminent peril by the defendant's employees negligently running its engine and tender at night, and that plaintiff, without sufficient forewarning of the approach of the engine and tender, attempted to rescue his companion and was injured by defendant's negligence, it is not sufficient evidence of contributory negligence on plaintiff's part to justify a judgment of nonsuit.

APPEAL from *W. R. Allen, J.,* at November Term, 1909, of (507) HARNETT.

There was evidence on the part of plaintiff which tended to show that on the night of 4 June, 1906, plaintiff, with a comrade, one J. H. Stewart, left the village of Benson, a station on defendant's road, and were walking along the track towards Dunn; that they left Benson about 10:30 p. m., just after the regular train had passed, and at a point about 2¾ miles from Benson, Stewart said, "Let's rest," and sat down on a cross-tie with his head a little dropped; that while Stewart was so placed, and plaintiff was standing across the track near the ties, an engine and tender of defendant company approached, the tender being in front as it was moving; that the engine was off schedule, going down the road to relieve a passenger train, which had been disabled and was waiting on the track some distance away; it had a lantern in front of the tender, which gave light, throwing a light on the track for 10 or 15 feet in front as it was moving; that there were several public crossings back of them, one of them a very much used crossing about 250 yards away and another 245 yards ahead; there were also two whistle-posts near, the point being in vicinity of Mingo, another station on the road; that when plaintiff realized it was a train, he called to Stewart, and then jumped across the track to pull him off, and, in the effort to save him, they were struck by the engine and Stewart was killed and plaintiff badly injured; that it was a thickly settled community where people were much accustomed to use the track, and the engine approached running very rapidly and without giving any signals.

Plaintiff testified that he saw the light on the tender in time to have saved Stewart, but did not realize it was a train till he called.

There was a signed statement by plaintiff, introduced by defendant, which had been made shortly after the occurrence, and tending, in some respects, to contradict his statement.

Some of the evidence pertinent to the issues is set out in the record as follows: Plaintiff testified:

"I and J. H. Stewart were coming from Benson on 4 June, 1906. We left Benson about 10:30 at night and traveled 3 or 3½ miles. We left after the shoofly and traveled on the railroad. Stewart sat down and said, 'Let's rest.' We had passed several crossings. Stewart sat down near a footpath, on the right side, on the end of a cross-tie, with his head a little dropped. I was standing on the east side of the track, at the end of the cross-tie. I saw a light and heard a train. Stewart did not notice it, and I jumped and caught him, and the train knocked me loose. I thought it was a box car in front, or an engine and (508) tender running backwards. The light showed to be like a lantern; it threw a light 10 or 15 feet in front. I could see the light a good

ways off; it was dim. I saw the light far enough off to have saved Stewart and myself, but did not know it was a train, and heard no bell or whistle. The train made very little noise and was running very fast. Everybody travels the railroad, night and day. It is a thickly settled community. All use it as a public footpath. There is a crossing 250 yards back toward Benson, and in front about 245 yards. We were 180 steps from a whistle-post. Cannot tell what happened for a short time after I was struck; part of the time I was sensible and part of the time not."

"I had taken one drink. I saw Stewart take one drink. He appeared sober. I had a pint of whiskey with me; took one drink on the way. It took us 40 or 45 minutes to go from Benson to the place where I was hurt. When I saw the light and heard the train, I was standing near the end of the ties. I called to Stewart; he did not notice me, and I jumped across to pull him off. I do not know whether or not the train struck Stewart. I was under the influence of drug when I signed paper for W. H. Pope. I get about same wages I did before."

Jesse McLamb, witness for plaintiff, testified as follows:

"I live between Dunn and Benson. I was going home from McLamb's; had been taking some bee-gums. The shoofly passed, and we started home. I was in some 50 yards of home and heard the roar of the train; it was going backwards; had a glimmer of light. I heard no whistle or bell. As I got home a clock struck 11. The train was going mighty fast—as fast as I ever saw one run. There is a public crossing before you get to the trestle, another after you pass, and at my house still another. Stewart's body was 200 or 300 yards from crossing at my house. Went to see Norris in two or three weeks; he was in bed and seemed to be suffering. People walk the railroad more than the county road. The community is thickly settled; has been so used ever since built, thirty years or more. There is a great deal of foot travel along this part of the track, both day and night."

W. L. Stewart testified:

"Got to railroad and saw glimmering light; it was very little, and I took it to be a switch light. Almost by the time I got off the track the train passed; no whistle or bell. It looked like an engine and tender running backwards, and was running very fast. The railroad is traveled a great deal, day and night, by pedestrains. Saw Norris (509) next morning; did not appear to know anything. He was suffering; he was feeble a long time. There are two whistle-posts near the place the injury occurred. The nearest crossing is 200 or 300 yards towards Benson and is used a great deal by the public."

Nazro Stewart, witness for plaintiff, gave substantially the same testimony as W. L. Stewart, and said he "saw a dim light that looked about

like a star; that train consisted of an engine, running backwards, with tender in front; no whistle or bell sounded; train making very little noise, and was running very fast. We hardly had time to clear the track before it passed. This part of track is used a great deal by the public as a footway."

J. A. Stewart, witness for plaintiff, testified:

"There has been a crossing near this place since I can remember. Railroad is used as a footpath; thickly populated community, and the railroad is used as a footway a great deal, both day and night."

A. W. Stewart, witness for plaintiff, testified:

"I was sitting on my piazza, 150 yards from railroad, about 11 o'clock at night. Engine and tender passed, running backwards; it had a little light in front; was running very fast; heard no signals. The train was running as fast as I ever saw one."

Among other witnesses for defendant, Captain Bullock testified:

"I was engineer on engine and tender; was running as a second section of 31, and 20 minutes behind it at Benson. Shoofly left Benson at about 11:15. We were running 20 miles an hour. Six trains passed this point that night. I saw no one. We had a headlight on rear and lantern on tender, running backward. I tried to ring bell at all crossings and blow whistle; cannot say positively as to this one. It was equipped as engines usually are when running backward. I was going to Wade, N. C., to the relief of a through passenger train which was disabled and waiting."

And Captain Howie, witness for defendant, testified:

"I was conductor on this train. We did not make schedule on account of running backward. (Testimony as to equipment same as witness Bullock.) We were going to Wade, N. C., to the relief of a through passenger train which was disabled and waiting. I told Captain Goodrich, the section master, that we came near striking some people that night, as I saw some persons right close to the track. We were running fast, but cannot say how many miles per hour; cannot say as to whether signals were given for crossings."

The jury rendered the following verdict:

"1. Was the plaintiff injured by the negligence of the defend- (510) ant? Answer: Yes.

"2. Did the plaintiff, by his own negligence, contribute to his own injury? Answer: No.

"3. What damage is the plaintiff entitled to recover? Answer: $1,500."

Judgment for plaintiff, and defendant excepted and appealed, assigning for error the refusal of the court to dismiss as on judgment of nonsuit.

R. L. Godwin and E. F. Young for plaintiff.
J. C. Clifford for defendant.

HOKE, J., after stating the case: It has been repeatedly held with us that where a person is traveling along a highway, so close to a railroad track and in such a position that the approach of a train should be adverted to, in the exercise of reasonable care for his own safety, or where a person is on the track, at a place where travelers are habitually accustomed to use the same for a walkway, they have a right to rely, to some extent and under some conditions, upon the signals and warnings to be given by trains at public crossings and other points where such signals are usually and ordinarily required, and that a failure on the part of the company's agents and employees operating its train to give proper signals at such points is ordinarily evidence of negligence; and where such failure is the proximate cause of an injury it is, under some circumstances, evidence from which actionable negligence may be inferred.

An instance of the first proposition will be found in the case of *Randall v. R. R.*, 104 N. C., 410, where plaintiff was driving an ox team at a point very near the track, importing menace to the safety of the team, and where an injury in fact resulted, and testified that he would not have driven the team into the dangerous place if he had been properly and adequately warned by the signal whistle at the station or crossing some distance ahead. In that case, as relevant to the question presented, the facts and the legal principle applicable are summarized and stated by *Associate Justice Avery,* delivering the opinion, as follows:

"The train passed at an unusual hour along a narrow canyon, where the wagon road ran, at some points, close beside defendant's track, and, at others, diverged a little distance from it.

The plaintiff had passed the station and then gone over a crossing, near which the wagon road, for a very short distance, was located in the narrow space between the mountain and the track, when he heard
(511) a slight blow from the engine, and, almost immediately, it passed around a curve on the mountain, only 60 or 70 yards ahead of him, and the noise and blazing headlight so frightened the oxen that, in attempting to get out of the way, three of them jumped upon the track and were killed. This occurred less than six months before the action was brought.

"The plaintiff further testified that, if the regular station blow, or the crossing blow, had been given at the usual point, he could have stopped his oxen behind a large pile of wood before he reached the narrow place, and could have saved them, but that because the blow was not given, he had advanced to the place where on the one side was the

steep mountain and on the other the track of the railroad company. The engineer testified that he blew the station blow, and as loud as usual, and at the usual place. On the decision of the issue of fact thus raised the whole controversy depends. *Troy v. R. R.*, 99 N. C., 298.

"When a person in charge of a wagon and team approaches a public crossing it is his duty to look and listen and take every prudent precaution to avoid a collision, even though the approach be made at an hour when no regular train is expected to pass. The same degree of care and caution should be exercised by one who is about to drive into such a narrow and dangerous pass as is described by the witnesses, if he would avoid the responsibility for any injury that may result from his carelessness. But it is the duty of the engineer to blow the whistle or ring the bell at a reasonable distance from such a crossing as was described by the witnesses, in order to give warning to travelers on the ordinary highway running across and near it, and enable them to guard against danger. It is always required of an engineer, if he would relieve the company from liability for negligence, to blow the whistle, as a warning, at a reasonable distance from the crossing of a public highway, or a station, which his train is approaching, and is doubly important where the track winds around curves, between a mountain and river, by the side of a public road; and, if travelers on such highway are subjected to loss by injury to their live stock at a crossing or narrow pass like that described by the witnesses, in consequence of his failure to give such warning as they had a right to expect, the company is liable in damages for such negligence. 2 Wood R. L., 323; *Kelly v. R. R.*, 29 Minn., 1; *R. R. v. Garty*, 79 Ky., 442; *Penn. Co. v. Krick*, 47 Ind., 368; *R. R. v. Jundt*, 3 Am. & Eng. R. Cases, 502; *Strong v. R. R.*, 61 Cal., 326; *Hoar v. R. R.*, 47 Mich., 401; *Troy v. R. R., supra.*"

And the second position suggested is sustained in the well-con- (512) sidered opinion of *Mr. Justice Walker*, in *Morrow v. R. R.*, 147 N. C., 623, in which it was held:

"1. The failure of the employees of a railroad company to give crossing signals at a public crossing does not constitute negligence *per se*, when the injury complained of occurred to a pedestrain while using the track at a different place, but is only evidence of negligence under certain conditions."

And delivering the opinion, *Judge Walker* said:

"But the fact that no such warning was given, while not negligence *per se* as to the pedestrain using the track for his own convenience, may be evidence of negligence as to him in the operation of the train, when it is run in the night-time without a headlight, and prudence requires a warning to be given. There was evidence in this case that the plaintiff, when he was injured, was where people in the vicinity were accustomed

to walk, and under the circumstances he was entitled to notice of the approach of the train, if there was no headlight and it was so dark that he could not see it in time to leave the track."

And the general principle has been frequently upheld in other cases. *Hinkle v. R. R.*, 109 N. C., 472; *Troy v. R. R.*, 99 N. C., 298.

Applying, then, the doctrine as it obtains with us, we are clearly of opinion that it was a negligent act to run an engine and tender backwards in the night-time at a very high rate of speed, through a thickly settled community where large numbers of people were habitually accustomed to use the track for a walkway, giving no signals or other warnings at public crossings, and with just a lantern in front of the tender as it was moving, throwing light along the track for a distance of only 10 or 15 feet. It was conduct that was more than likely to result in a collision, and, when it was shown as a result of such conduct that a person sitting on the track has been hurt, we think that actionable negligence against the company could very well be inferred.

It was suggested that the evidence showed that there was a sufficient light in front of the tender, because the plaintiff himself testified "that he saw the light a good ways off, and far enough to have saved Stewart"; but it is no fair deduction from this excerpt that the witness intended to say that the light was adequate or at all sufficient to warn him that an engine was approaching, or that an injury was likely; on the contrary, and by correct inference, a perusal of the testimony of the witness justifies the interpretation that he saw the light some distance off, but that no signals or warnings having been given, and very
(513) little noise having been made by the single engine and tender, the witness did not realize, and had no good reason to suppose, it was a train importing serious danger, until it was very near; and, as soon as he did realize this, he called to his comrade and then jumped to save him. Here is the entire statement of the witness relevant to this suggestion:

"Stewart sat down and said, 'Let's rest.' We had passed several crossings. Stewart sat down near a footpath on the right side, on the end of a cross-tie, with his head a little dropped. I was standing on the east side of the track, at the end of the cross-tie. I saw a light and heard the train. Stewart did not notice it, and I jumped and caught him, and the train knocked me loose. I thought it was a box car in front, or an engine and tender running backwards. The light showed to be like a lantern; it threw a light 10 or 15 feet in front. I could see the light a good ways off; it was dim. I saw the light far enough off to have saved Stewart and myself, but did not know it was a train, and heart no bell or whistle. The train made very little noise and was running very fast." And on cross-examination: "When I saw the

light and heard the train, I was standing near the end of the ties. I called to Stewart; he did not notice me, and I jumped across to pull him off."

There is no claim on the part of the defendant that the usual signals were given on this occasion; Captain Bullock, the engineer, testifying for defendant in reference to this question, said: "I tried to ring bell at all crossings and blow whistle; cannot say positively as to this one."

And Captain Howie, the conductor, said: "We were running fast, but I cannot say how many miles per hour; cannot say as to whether signals were given for crossings."

And, under the authorities heretofore cited, and others of like kind, we think that this failure to give the usual signals, with the absence of sufficient light to afford anything like adequate notice of the approach of the engine, in connection with the other facts heretofore stated, resulting in the killing of one man and the serious injury of another, made a case from which the jury were well warranted in rendering a verdict against defendant on the first issue.

This being true, it is well established that when the life of a human being is suddenly subjected to imminent peril through another's negligence, either a comrade or a bystander may attempt to save it, and his conduct is not subjected to the same exacting rules which obtain under ordinary conditions; nor should contributory negligence on the part of the imperiled person be allowed, as a rule, to affect the question. It is always required in order to establish responsibility on the part of defendant, that the company should have been in fault, but, (514) when this is established, the issue is then between the claimant and the company; and when one sees his fellow-man in such peril he is not required to pause and calculate as to court decisions, nor recall the last statute as to the burden of proof, but he is allowed to follow the promptings of a generous nature and extend the help which the occasion requires; and his efforts will not be imputed to him for wrong, according to some of the decisions, unless his conduct is rash to the degree of reckless; and all of them hold that full allowance must be made for the emergency presented.

This principle is declared and sustained in many well-considered and authoritative decisions of the courts and by approved text-writers, and prevails without exception, so far as we have examined. *Eckert v. R. R.*, 43 N. Y., 502; *Corbin v. Philadelphia*, 195 Pa. St., 461; *Steele Co. v. Marriers*, 88 Md., 482; *Pa. Co. v. Langendorf*, 48 Ohio State, 316; *R. R. v. Ridley*, 114 Tenn., 727; *Taylor v. Parsons*, 122 Iowa, 679; *Henry v. R. R.*, 67 Fed., 426; Shearman & Redfield (5 Ed.), sec. 85.

In *Eckert's case, supra,* it was said:

"The law has so high a regard for human life that it will not impute negligence in an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons."

In *Pa. Co. v. Langendorf, supra,* it was held:

"1. It is not negligence *per se* for one to voluntarily risk his own safety or life in attempting to rescue another from impending danger. The question whether one so acting should be charged with contributory negligence in an action brought by him to recover damages for injuries received in attempting the rescue, is one of mixed law and fact, and should be submitted to the jury upon the evidence, with proper instructions from the court.

"2. While one who rashly and unnecessarily exposes himself to danger cannot recover damages for injuries thus brought on himself, yet, where another is in great and imminent danger, one who attempts a rescue may be warranted by surrounding circumstances in exposing his limbs or life to a very high degree of danger; and in such cases he should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment."

In *R. R. v. Ridley, supra,* the same doctrine is thus stated:

"2. It is not only lawful, but a laudable act, to attempt to (515) save human life when it is imperiled by great danger, and in a sudden emergency, and in such cases the courts will not require the intending rescuer to stop, hesitate, and weigh probabilities until it is too late to make the rescue, but it is sufficient if he acts with such care as a reasonably prudent and careful person would use in such emergencies and under similar environments.

"3. Where a person, acting in a sudden emergency and using such care as a reasonably prudent and careful person would use in such emergencies and under similar environments, loses his life in attempting to save the life of another in imminent danger from the wrongful, careless, and negligent act or conduct of the defendant, he is not guilty of such contributory negligence as will bar a recovery for his wrongful death."

In Shearman and Redfield, sec. 85, the author well says:

"The plaintiff's right to recover is not affected by his having contributed to his injury, unless he is in fault in so doing. It is possible for the plaintiff not only to contribute to his own injury, but even to be himself its immediate cause, and yet to recover compensation therefor. Thus, he has a right to assume some risk of personal injury, when necessary to escape a greater risk. So, one who, seeing his property imperiled, hastens to protect it, and in doing so imperils his own person, is not necessarily deprived of his remedy thereby. It is his right and

duty to protect his own property, so long as he can do so without recklessly exposing himself to injury. One who imperils his own life for the sake of rescuing another from imminent danger is not chargeable, as matter of law, with contributory negligence; and, if the life of the rescued person was endangered by the defendant's negligence, the rescuer may recover for the injuries which he suffered from the defendant is consequence of his intervention. There need be no fear that this principle will make any one liable for the cost of volunteered benevolence, without being himself in fault. No one is liable at all, unless he is in fault."

Applying this principle to the facts presented, there was certainly no error to defendant's prejudice in submitting the question of contributory negligence on part of plaintiff to the jury, and the learned judge correctly held that, on the entire evidence, defendant's motion to nonsuit should be denied.

The authorities cited and relied on by the defendant are chiefly cases involving the proposition as to when and under what circumstances the employees of a railroad are required to stop its train in order to avoid a collision, and have no application here; for no such requirement was imposed on the company. In the present case responsibility on the first issue has been fixed on defendant, because of a breach of duty, on the part of its agents and employees, in running an engine back- (516) wards in the night-time, through a thickly settled community, at a high rate of speed, without any signals given at the usual places, and without adequate lights to warn one of its approach. There is

No error.

Cited: Exum v. R. R., 154 N. C., 418; *McKay v. R. R.*, 160 N. C., 262; *Barnes v. R. R.*, 168 N. C., 514; *Brown v. R. R.*, 172 N. C., 606.

CASE THRESHING MACHINE COMPANY v. G. F. FEEZER.

(Filed 4 May, 1910.)

1. Contracts—Pleadings—Fraud—Answer Sufficient.

An answer in an action upon notes given for the purchase of a certain machine, setting up as a defense that the notes were obtained through fraud and misrepresentations of the plaintiff and its agents, "in the manner and way set forth above," thus referring to a paragraph of the answer containing a detailed and elaborate statement of the representations complained of, is sufficient to raise the issue of fraud; and though the answer describes this misrepresentation as guaranties or warranties, evidence of

which would probably be excluded under a written contract of sale entered into between the parties, they will be sufficient upon the question as to whether the answer sufficiently alleges fraud.

2. Contracts—Fraud — False Representations — Sufficiency — Questions for Jury.

Positive statements made at the time of the sale of a certain machine as an inducement thereof, containing averments as to the weight and capacity of the machine, the quality of work it would do and the amount of power it would take to properly run it, are considered as material, and when there is evidence that they were falsely and fraudulently made to induce the sale, there is no error to vendor's prejudice in submitting them to the jury on the question of fraud in the treaty or negotiation between the parties, to avoid the written contract of sale.

3. Written Contracts—Fraud—Void in Toto—Stipulations.

When a sale has been effected by actionable fraud the purchaser may restore the consideration and rescind the trade in toto, and when he has so elected and has promptly acted, stipulations contained in the written contract of sale, requiring previous notice and certain tests of the article sold as a condition precedent, or that the vendor would not be bound by representations of the sales agent as an inducement to the sale, fail with the contract, and the defense indicated is open to the purchaser.

4. Contracts of Purchase—Subsequent Notes—Fraud in Treaty—One Transaction—Defenses.

Notes executed in pursuance of a previous bargain and sale of a certain machine, and secured by mortgage on the machine purchased, are to be regarded as the same transaction as the previous bargain in a suit to cancel the notes and mortgage for fraud in the treaty or negotiation between the parties; and evidence of such fraud in the previous bargain and sale is competent evidence in the suit to cancel the notes and mortgage made in accordance therewith, when the vendor had not previously discovered or had opportunity to discover the defects complained of, and before he was aware or had opporunity to inform himself concerning them.

(517) APPEAL from *Long, J.*, at Fall Term, 1909, of DAVIE.

The action was to recover on three notes, aggregating $365, the purchase price of certain threshing machinery, chiefly a steel separator and attachment, secured by chattel mortgage on the separator, etc.

The answer denied liability on the notes, set up in detail many instances in which the machinery had failed to come up to specifications, and alleged fraud in the procurement of the notes and mortgage, etc.

There was evidence offered by defendant, tending to establish fraud on the part of plaintiffs' agents who negotiated the trade and obtained the notes, etc.; that the machinery was delivered to defendant in the summer of 1906, and, after full and fair trial, the plaintiffs' agents and

representatives were notified in writing of defendant's position, and the machinery promptly returned; the evidence as to notice and return of machinery being, in part, as follows:

MOCKSVILLE, N. C., 3 July, 1906.

MESSRS. C. C. SANFORD & SON, *Mocksville, N. C.*

GENTLEMEN:—Take notice that I cannot take the machine (threshing) bought of the J. I. Case Threshing Machinery Company, through you as agent of said company, for the reason that the machinery is not what was recommended to me at the time of the contract; that after three fair trials, with steam and gasoline, the machine fails to do the work as recommended; therefore, I cannot take the machine, which I return to you in good order, and hereby demand a surrender of all notes and other papers that I signed and delivered to you for said machinery.

Respectfully, G. F. FEEZER.

"Machine returned to Stanford in as good condition as I got it. I signed Exhibit 'A.'"

On issues submitted, the jury rendered the following verdict:

1. Did the defendant execute the contract alleged in the complaint and replication? Answer: Yes.

2. Did the defendant execute the notes and mortgage alleged (518) in the complaint? Answer: Yes.

3. Were the notes and mortgage sued upon procured from the defendant by the false and fraudulent representations of the plaintiff, as alleged in the answer? Answer: Yes.

4. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: Nothing.

Judgment on verdict for defendant, and plaintiffs excepted and appealed.

McLaughlin & Nicholson for plaintiff.

E. E. Raper, T. B. Bailey, and E. L. Gaither for defendant.

HOKE, J., after stating the case: It was chiefly urged for error, on the part of the plaintiffs, that the plea of fraud was not properly alleged in the answer, but only appeared by way of general averment, entirely insufficient to sanction or justify the submission of the issue. The legal position, as stated by counsel in his learned argument before us, is well taken, and has been recently declared by this Court in the case of *Mottu v. Davis,* 151 N. C., 237, in which it was held:

"5. 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."

But we do not think that the facts disclosed in the record permit the application of the principle. Our statute on this subject provides, "That in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties" (Revisal, sec. 495); and applying this statutory rule, we are of opinion that, on a perusal of the entire answer, the plea of fraud has been sufficiently stated, and that the issue in question was properly submitted. Section 5 of the answer contains a detailed and elaborate statement of the representations made by plaintiffs' agents at the time of the trade as to the qualities, the structure and capacity of the machinery for the purposes designed. They are there described as "guaranties or warranties," and as such were probably excluded by the written contract subsequently entered into between the parties, but they are so stated as to permit and require, on the question we are now discussing, that they be regarded as representations made by plaintiffs' agents in the treaty or bargain, and are sufficiently full and specific to apprise the vendor of the facts relied upon in impeachment of the sale.

(519) After making these statements and alleging the absolute failure of the machinery to comply with the stipulations, the answer proceeds as follows:

"8. Defendant, further answering, says that in the manner and way set forth above the said notes and mortgage were obtained from him through fraud and misrepresentations of plaintiff and its agents, and, as he is advised and believes, are fraudulent and void."

True, if this section was taken alone, it would likely be too general, as containing only a legal conclusion; but when connected with the former statements of the complaint, as it is by the averment "That in the manner and way set forth above," the answer, we think, meets the requirements of the rule contended for, and the issue is properly joined.

It was further contended that, as representations made during the treaty or negotiation between these parties, the statements complained of should not be considered as material averments inducing the sale; but only as the ordinary assertions by which a vendor is at times accustomed and allowed to commend his wares, and which are not to be regarded as seriously made, and plaintiff relies upon the decision of *Cash Register Co. v. Townsend,* 137 N. C., 652, in support of his position. In that valuable and well-considered case it was held, among other things, that:

"3. Expressions of commendation or of opinion, or extravagant statements as to value, or prospects, or the like, are not regarded as fraudulent in law."

And *Associate Justice Brown,* delivering the opinion, said further:

"This evidence does not disclose any misrepresentations of a subsisting fact. The language of the agent, at best, was nothing more than 'dealer's talk' commending his wares, and possibly exaggerating what the machine could no. There is no evidence of any fraudulent misrepresentations," etc.

But the representations set out and relied upon in the defendant's answer come within no such description or principle. On the contrary, they are positive statements, made by the agents of the manufacturer at the time of the trade, and as an inducement thereto, and contained averments as to the weight and capacity of the machinery, the quality of the work it would do and the amount of power that would be required to run it properly, and are well within the principle declared and sustained in the opinion of *Whitehurst v. Ins. Co.,* 149 N. C., 273, in which statements of like kind were treated as material. In that case it was held:

"1. Declarations, though clothed in the form of an opinion or (520) estimate, made by a duly authorized agent to induce a contract or policy of insurance, accepted and reasonably relied upon by the other party as statements of facts, may be considered upon the question of whether fraud had been thereby perpetrated; and when there is a doubt as to whether they are intended and received as mere expressions of opinion, or statement of facts to be regarded as material, the question is one for the jury."

And delivering the opinion, the Court said:

"While it is a correct principle, as we have held in *Cash Register Co. v. Townsend,* 137 N. C., 652, that expressions of commendation and opinion, or extravagant statements as to value, or prospects and the like, are not, as a rule, regarded as fraudulent in law, it is also true that, when assurances of value are seriously made, and are intended and accepted and reasonably relied upon as statements of fact, inducing a contract, they may be so considered in determining whether there has been a fraud perpetrated; and, though this declaration may be clothed in the form of opinion or estimate, when there is doubt as to whether they were intended and received as mere expressions of opinion or as statements of fact to be regarded as material, the question must be submitted to the jury. 14 A. & E., page 35; 20 Cyc., page 124; *Morse v. Shaw,* 124 Mass., 59.

"In 20 Cyc., *supra,* it is said: 'Whether the representation was merely the expression of opinion and belief, or was the affirmation of a fact to be relied upon, is usually a question for the jury; so, ordinarily, it is for the jury to say whether representations as to value, solvency, or a third person's financial ability are statements of fact or opinion.'

"And it is not always required, for the establishment of actionable fraud, that a false representation should be knowingly made. It is well recognized with us that, under certain conditions and circumstances, if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, he may be held responsible for a falsehood; and this doctrine is especially applicable when the parties to a bargain are not upon equal terms with reference to the representation, the one, for instance, being under a duty to investigate and in a position to know the truth, and the other relying and having reasonable ground to rely upon the statements as importing verity. *Modlin v. R. R.,* 145 N. C., 218; *Ramsey v. Wallace,* 100 N. C., 75; *Cooper v. Schlesinger,* 111 U. S., 148; Pollock on Torts (7 Ed.), 276; Smith on the Law of Fraud, sec. 3; Kerr on Fraud and Mistake, 68."

(521) Applying the doctrine upheld by these authorities, there was no error to plaintiff's prejudice in referring the character of these assurances and statements to the jury.

Again, it is contended that the contract contains stipulations providing that claims for damages for breach of the various warranties expressed in the instrument, whether by way of action or counterclaim, shall not arise to the purchaser except after certain prescribed trials had and written notice of failure duly given both to the agents and the company at Racine, Wisconsin; and it is insisted that such stipulations are to be taken and construed as conditions precedent available for plaintiff's protection in the present case. This position might be sustained under certain conditions, but it involves and rests upon the proposition that the contract holds, and that the provisions referred to continue to express the obligations of the respective parties in reference to it. In that view, the effect contended for has been allowed in a decision on a contract exactly similar to this at the present term in the case of *Machine Co. v. McClamrock, ante,* 405, and the ruling is in accord with many authoritative decisions elsewhere, to which we were referred in the carefully prepared and learned brief of plaintiff's counsel; but when fraud in the procurement of the sale has been alleged and shown, and the purchaser has done nothing by conduct or laches which prevents his pleading it in annulment of the contract, the stipulations referred to as preventive conditions fail with the contract in which they are contained, and the defense indicated is open to the purchaser.

And the same answer may be made in reference to the stipulations of the contract restricting the power of the company's agents, and providing further in this connection, "That no representations made by any person as an inducement to give and execute this order shall bind

the company." It is well understood that when a sale has been effected by actionable fraud a purchaser has an election of remedies. If he acts promptly, and especially if he is in a position to restore the consideration, he is allowed to rescind the trade in toto; or he may retain the property and sue for damages arising by reason of fraud. Speaking to this question, in *May v. Loomis,* 140 N. C., 358, the Court said:

"Where a sale has been effected by an actionable fraud, the purchaser has an election of remedies. He may ordinarily, at least at the outset, rescind the trade, in which case he can recover the purchase price or any portion of it he may have paid, or avail himself of the facts as a defense in bar of recovery of the purchase price or any part of it which remains unpaid, or he may hold the other party to the contract and sue him to recover the damages he has sustained (522) in consequence of the fraud.

"In order to rescind, however, the party injured must act promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence; and he is not allowed to rescind in part and affirm in part; he must do one or the other. And, as a general rule, a party is not allowed to rescind where he is not in a position to put the other in *statu quo* by restoring the consideration passed."

In the case at bar, as soon as the purchaser discovered the defects complained of, and was aware of the facts relevant to the issue, he immediately restored the property to the company's agent, "in as good a condition as when he got it," and having done this, and pleaded and established the fraud in annulment of the trade, the restrictive stipulations are, as stated, no longer available. To hold the contrary would be to sanction the principle that the deeper the guile the greater the immunity, and enable fraud by its own contrivance to so entrench itself that its position would in many instances be practically unassailable.

Nor can the position be at all sustained that there was no evidence of fraud in the procurement of the notes and mortgage; but the testimony only bore on the validity of the bargain which had been entered into some time before. The notes were executed by defendant in pursuance of the previous bargain, and before defendant had discovered or had opportunity to discover the defects complained of, and before he was aware or had opportunity to inform himself of the facts pertinent to the inquiry and as to this charge, and, on the facts and circumstances presented here, they are to be regarded as one and the same transaction.

We find no reversible error in the record, and the judgment in favor of defendant is affirmed.

No error.

Cited: Unitype Co. v. Ashcraft, 155 N. C., 68; *Robertson v. Hatton,* 156 N. C., 220; *Machine Co. v. Bullock,* 161 N. C., 12; *Machine Co. v. McKay, ib.,* 588; *Pate v. Blades,* 163 N. C., 273; *Harvester Co. v. Carter,* 173 N. C., 231.

D. R. HUFFINES v. J. I. CASE THRESHING MACHINE COMPANY.

(Filed 4 May, 1910.)

Issues—Immaterial Matters—Narrative — Objections and Exceptions — Evidence Withdrawn—Error Cured.

The issue in this case being only as to whether the agent of defendant, sent on complaint of plaintiff to remedy defects in a machine purchased by him, had rendered the machine valueless and totally unfit to do satisfactory work, exceptions taken to matters of warranty in the original contract, etc., are irrelevant, for such matters were merely narrative leading up to the cause of action; and admission of improper evidence tending to show a verbal guarantee by the agent at the time of sale was cured by the court's striking it out and withdrawing it from the consideration of the jury.

(523) APPEAL by defendant from *G. W. Ward, J.,* at January Term, 1910, of GUILFORD.

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

A. L. Brooks and C. A. Hall for plaintiff.
King & Kimball for defendant.

CLARK, C. J. This is an action to recover $525 which had been paid as the purchase price of a threshing machine bought of the defendant in 1902. In 1904, and again in 1905, on complaint of the plaintiff, the defendant sent out an agent to correct defects which the complaint avers the agent was unable to do, and, indeed, that the agent sent by the defendant in 1905 made many changes in the construction of said machine, the result of which rendered it useless and totally unfit to do any satisfactory work. There was evidence to support this view of the case, and the jury, upon proper instructions from the court, found a verdict in favor of the plaintiff for $325.12. There were a great number of exceptions taken as to the matter of the warranty in the original contract of sale and a breach thereof, and a waiver by the plaintiff in not giving notice in the stipulated time and retaining the machine. But these were irrelevant, as such matters were merely narrative of the facts leading up to the cause of action stated in the complaint, which

was for the damage done the machine by the agent sent out in 1905. If there was error in these other respects it was harmless error. The real cause of action was properly submitted to the jury.

The admission of improper evidence tending to show a verbal guarantee by the agent at the time of sale was cured by striking out that evidence and withdrawing it from the consideration of the jury. *Medlin v. Simpson,* 144 N. C., 399.

No error.

(524)

E. N. DUVALL v. RECEIVERS SEABOARD AIR LINE RAILWAY.

(Filed 4 May, 1910.)

1. Railroad—Baggageman—Scope of Employment—Master and Servant.

The mere fact that plaintiff, a baggageman employed on defendant's train, received the injury complained of caused by a head-on collision, when he had stepped into the express car from the baggage car, does not affect his employment at the time, or the responsibility of the defendant.

2. Railroads—Negligence Presumed—Head-on Collision.

A presumption of defendant railroad company's negligence is raised from the fact that the injury complained of was received by an employee as baggageman in a head-on collision.

APPEAL from *Lyon, J.,* at January Term, 1910, of MOORE.

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

H. F. Seawell and Douglass & Lyon for plaintiff.

Walter H. Neal, U. L. Spence and Burwell & Cansler for defendant.

CLARK, C. J. The plaintiff was baggagemaster and flagman on the defendant's road. This action was brought for personal injuries sustained by him in a head-on collision near Sanford on a through train, going south. The exceptions are numerous, but the real points in the controversy lie within a small compass. The defendant contends that under the Federal Employers' Liability Act the plaintiff is not entitled to recover, for three reasons: 1. That at the time of the injury the plaintiff was not an employee of the defendant. 2. That he was not injured while engaged in interstate commerce. 3. That he was not injured as the result of the defendant's negligence.

The uncontroverted facts are that the plaintiff was baggagemaster and flagman, and was so employed at the time of the injury; he carried local baggage in the baggage car and through baggage in the express car; at the time of the accident the train was nearing Sanford, going south,

at which point this through train stopped and where through baggage might be taken on; the plaintiff stepped from the baggage car into the express car, and soon thereafter the collision occurred in which he was seriously injured.

The defendant contends that by going from the baggage car to the express car the plaintiff ceased to be an employee, and was not engaged in the scope of his employment. But the fact is that his duties called him to the express car as well as to the baggage car, and even if (525) it had not, the fact that the baggageman stepped into the adjoining express car for a moment would not have terminated his employment or put him out of the scope of his duties. There is no evidence that being in the express car in anywise enhanced his risk or contributed to his injuries. In fact, the probabilities are that had he remained in the baggage car he would have been more seriously injured or possibly killed by the trunks falling upon him. The evidence is that the baggage car was more seriously damaged than the express car. The plaintiff's going into the express car was not an unlawful act, and under the circumstances could not have affected his employment or the responsibility of the company. Besides, his duty lay in the express car as well as in the baggage car, for in the former the through baggage, which was part of his charge, was carried, and though there was none at that time, he might prepare to receive such at Sanford. As to negligence, the head-on collision raised a presumption of negligence (*Marcom v. R. R.*, 126 N. C., 200, and cited cases in the Annotated Ed.), and the issue of the negligence was found by the jury.

After full consideration of all the exceptions we have been unable to find any error prejudicial to the defendant.

No error.

T. L. DOWNING v. SCOTT STONE.

(Filed 11 May, 1910.)

1. Malicious Prosecution—Malice—Evidence Sufficient—"Personal Malice."

In an action to recover damages for malicious prosecution, it is not necessary to show personal ill-will or grudge, and it is sufficient if shown that in plaintiff's arrest and prosecution in the criminal action there was a wrongful act knowingly and intentionally done such plaintiff and without just cause or excuse.

2. Malicious Prosecution—Malice—Advice of Counsel—Evidence.

In defense to an action for malicious prosecution, the fact that the defendant acted in the criminal suit upon advice of counsel learned in the

law, on a full statement of the facts, does not of itself and as a matter of law, constitute a complete defense; for such advice is only evidence to be submitted to the jury on the issue of malice.

3. Malicious Prosecution—Indictment—Final Judgment—Evidence.

The plaintiff in his action for damages for malicious prosecution may show in evidence the docket and judgment of the justice of the peace having final jurisdiction of the offense, in this case, of obtaining advances and supplies from the landlord with intent to cheat and defraud (Revisal, sec. 3431), but for the purpose only of showing that the prosecution upon which damages are sought in the civil suit had terminated; in such instances the judgment should be restricted to that purpose, and it is error to allow it as evidence upon the question of probable cause. It is competent, however, when a committing magistrate, as such, examines a criminal case and discharges the accused.

4. Malicious Prosecution—Malice—Landlord and Tenant—Intent to Defraud—Commencement of Work—Completion—Evidence.

Upon the question of malice, in an action for damages for malicious prosecution in arresting the plaintiff under Revisal, sec. 3431, for obtaining advances and supplies from his landlord with intent to cheat and defraud, it was error for the court to charge the jury that, it being admitted that plaintiff (the defendant in the criminal action) commenced the work and labor according to the contract of employment, he was not indictable for failure to complete the work, as by the express language of the statute he is indictable if he unlawfully and willfully fails to complete it.

APPEAL from *Lyon, J.*, at December Term, 1909, of ROBESON. (526)

Action to recover damages for malicious prosecution.

There was evidence tending to show that on or about 25 April, 1908, the defendant had caused the arrest and imprisonment of plaintiff on a charge of having obtained from said defendant, as landlord, with intent to cheat and defraud, advances and supplies to plaintiff as tenant. The prosecution having been instituted under section 3431 of Revisal, which gives a justice final jurisdiction, the evidence further showed that the plaintiff had been acquitted by the justice who tried the case.

There was evidence on the part of plaintiff tending to show that he had acted throughout in good faith; that he had left defendant's premises for good cause, and that, as a matter of fact, he did not owe defendant anything for advancements or supplies at the time he moved away.

There was evidence on the part of defendant that plaintiff, having agreed to become tenant of defendant, obtained goods and money by way of advancements, and had shortly thereafter abandoned the place without cause or excuse, and defendant, having consulted counsel, placing the facts truthfully and fully before him, and being advised that on the facts as stated a prosecution would lie under the statute, had instituted the same, etc.

The jury rendered the following verdict:

1. Did the defendant, Scott Stone, cause the arrest and prosecution of the plaintiff, T. L. Downing, as alleged? Answer: Yes.

2. Was the same done without probable cause? Answer: Yes.

3. Was the same done with malice? Answer: Yes.

4. Has the criminal action terminated? Answer: Yes.

5. What damages, if any, has plaintiff sustained thereby? Answer: $1,250.

Judgment on verdict for plaintiff, and defendant appealed.

McLean, McLean & Snow, and W. H. Kinlaw for plaintiff.

Wishart, Britt & Britt, and McIntyre, Lawrence & Proctor for defendant.

(527) HOKE, J., after stating the case: The defendant excepted for that the court refused to charge the jury as requested, "that in order to answer the issue as to malice for the plaintiff, it was required that plaintiff should establish particular malice against the defendant," insisting that the term "particular malice," in this connection, should be understood in the sense of personal ill-will or grudge towards the defendant, and charged instead:

"Particular malice means ill-will, grudge, a desire to be revenged. Malice within the meaning of this issue does not necessarily mean ill-will, but a wrongful act knowingly and intentionally done the plaintiff without just cause or excuse will constitute malice; and should you find from the evidence, and by the greater weight thereof, the burden being on the plaintiff, that the defendant Stone was actuated by malice towards the plaintiff in taking out the warrant and causing the plaintiff's arrest, you will answer the third issue 'Yes.' If you do not so find, you will answer the third issue 'No.'"

The rulings of the court below, on both of these questions, find support in an express decision of this Court, *Stanford v. Grocery Co.*, 143 N. C., 419, 426 and 427, and the position is supported by the better reason and is in substantial accord with the great weight of authority. *Wills v. Noyes*, 29 Mass., 324; *Vinal v. Core*, 18 W. Va., 1; *Burhaus v. Sandford*, 19 Wen., 417; *Frowman v. Smith*, Little Sel. Cases, 7; *S. c.*, 12 American Decisions, 265, note 1; *Gee v. Culver*, 13 Ore., 598; *Pullen v. Sadden*, 66 Me., 202; *Harpham v. Whitney*, 77 Ill., 32; *Hadrick v. Hestop*, 64 E. C. L., 266; *Johnston v. Ebberts*, 11 Fed., 129; 19 A. & E., 675; 26 Cyc., 48-49; Hale on Torts, 354; Cooley on Torts, 338.

In Hale on Torts, *supra*, treating of malicious prosecution, it is said:

"'Malice,' as here used, is not necessarily synonymous with 'anger,' 'wrath,' or 'vindictiveness.' Any such ill-feeling may constitute malice. But it may be no more than the opposite of *bona fides*. Any prose-

cution carried on knowingly, wantonly, or obstinately, or merely (528) for the vexation of the person prosecuted, is malicious. Every improper or sinister motive constitutes malice, in this sense. The plaintiff is not required to prove 'express malice,' in the popular sense. The test is, Was the defendant actuated by any indirect motive in preferring the charge or commencing the action against the plaintiff?"

In Cooley, *supra*, the author says:

"Legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive, and it is not essential that actual malevolence or concept design be shown."

In *Vinal v. Core, supra,* the Court, on this question, held:

"6. By the last requisite, malice, is meant, not what this word imports when used in common conversation, nor yet its classical meaning, but its legal and technical meaning, that is, some motive other than a desire to secure the punishment of a person believed by the prosecutor to be guilty of the crime charged, such as malignity, or a desire to get possession by such means of the goods alleged to be stolen, when the charge is larceny, or any other sinister or improper motive."

In *Gee v. Culver, supra,* it was held:

"1. Malice, in the enlarged sense of the law, is not restricted to anger, hatred, and revenge, but includes every unlawful and unjustified motive. And in an action for malicious prosecution any motive, other than that of simply instituting a prosecution for the purpose of bringing a party to justice, is a malicious motive.

"2. In actions for malicious prosecution there is no such thing as implied malice, but malice in fact must be proved, and its existence is purely a question of fact for the jury; but such malice may be inferred from any improper or unjustifiable motives which the facts disclose influenced the conduct of the defendant in instituting the prosecution. And the act itself, with all the surrounding facts and circumstances, may be inquired into for the purpose of ascertaining such motive."

And *Lord, J.,* delivering the opinion, said further:

"But the term 'malicious' has in law a twofold signification. There is what is known as malice in law, or implied malice, and malice in fact, or actual malice. Malice in law denotes a legal inference of malice from certain facts proved. It is a presumption of malice which the law raises from an act unlawful in itself which is injurious to another, and is declared by the court. Malice in fact, or actual malice, relates to the actual state or condition of the mind of the person who did the act, and is a question of fact upon the circumstances of each (529) particular case to be found by the jury. In actions for malicious prosecution there is no such thing as malice in law, but malice in fact must be proved, and its existence is purely a question of fact for the

jury. (*Ritchey v. Davis,* 11 Iowa, 124.) But in this form of action malice is not considered in the sense of spite or hatred against an individual, but of *malus animus,* and as denoting that the party is actuated by improper and indirect motives. (*Mitchell v. Jenkins,* 5 Barn. & Adol., 394.) To prove actual malice, it is not necessary, therefore, that the prosecution complained of should proceed from hatred or ill-will to the plaintiff; but it may be inferred from any improper and unjustifiable motives which the facts disclose influenced the conduct of the defendant in instituting the prosecution. 'But it is well established,' said *Libby, J.,* 'that the plaintiff is not required to prove express malice in the popular signification of the term, as, that defendant was promoted by malevolence, or acted from motives of ill-will, resentment, or hatred towards the plaintiff. It is sufficient if he prove it in its enlarged sense.' 'In a legal sense, any act done willfully and purposely to the prejudice and injury of another, which is unlawful, is as against that person, malicious.' (*Commonwealth v. Snelling,* 15 Pick., 327.) 'The malice necessary to be shown in order to maintain this action is not necessarily revenge, or other base or malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is, in legal contemplation, malicious. (*Wills v. Noyes,* 12 Pick., 324.)'"

We were referred by counsel to *Savage v. Davis,* 131 N. C., 162, and *Brooke v. Jones,* 33 N. C., 260, as authorities in support of their position, and in which it is said that "particular malice" must be established in cases of this character. In so far as these cases hold that a malicious or wrongful purpose must exist prompting the particular prosecution, which is the subject of inquiry, the decisions may be upheld, but, to the extent that they countenance the position that on an issue of this character it is necessary to show there was personal ill-will or malevolence existing with the plaintiff towards the original defendant, the cases are not well considered.

Nor was there any error in refusing to give another instruction prayed for by defendant, as follows:

"If the jury find from the evidence that the defendant, Scott Stone, before causing the warrant to be issued for the arrest of the plaintiff Downing, consulted a reputable practicing attorney, making to (530) him a full and fair disclosure of the facts, and was advised by said attorney to procure a warrant for Downing's arrest; and that the defendant acted in pursuance of said attorney's advice in causing the warrant to be issued, this would constitute probable cause for issuing the warrant, and you will answer the second issue 'No.'"

The decisions of this State have uniformly held that advice of counsel, however learned, on a statement of facts, however full, does not of itself

and as a matter of law afford protection to one who has instituted an unsuccessful prosecution against another; but such advice is only evidence to be submitted to the jury on the issue as to malice. *Smith v. B. & L.*, 116 N. C., 74; *Davenport v. Lynch*, 51 N. C., 545; *Beal v. Robeson*, 30 N. C., 276. And where it is proven that legal advice was taken by a prosecutor, this too is a relevant circumstance in connection with other facts, admitted or established, to be considered by the court in determining the question of probable cause. *Morgan v. Stewart*, 144 N. C., 424; *R. R. v. Hardware Co.*, 143 N. C., 58.

This restriction as to the advice of counsel learned in the law on facts fully and fairly stated does not seem to be in accord with the weight of authority as it obtains in other jurisdictions (Cooley on Torts, 328; Hale on Torts, 357), but it has been too long accepted and acted on here to be now questioned, and we are of opinion, too, that ours is the safer position. The exception, therefore, is overruled.

Again, it was objected that the court, having admitted the docket and judgment of the justice who tried and disposed of the case, refused on request to confine such evidence to its proper effect as testimony for the purpose only of showing that the action had terminated, but allowed it to be used on the issue as to probable cause. We think this objection must be sustained. It is well established with us that when a committing magistrate, as such, examines a criminal case and discharges the accused, his action makes out a *prima facie* case of want of probable cause; that is the issue directly made in the investigation; but no such effect is allowed to a verdict and judgment of acquittal by a court having jurisdiction to try and determine the question of defendant's guilt or innocence; and the weight of authority is to the effect that such action of the trial court should not be considered as evidence on the issue as to probable cause or malice. In this case the justice had final jurisdiction to try and determine the question. The judgment is necessarily admitted, because the plaintiff is required to show that the action has terminated; but it should be restricted to that purpose, and the failure to do this constituted reversible error. *Morgan v. Stewart*, 144 N. C., 424; *Bell v. Pearcy*, 33 N. C., (531) 233; *Bekkeland v. Lyons*, 96 Tex., 255; *Philpot v. Lucas*, 101 Iowa, 478; *Anders v. Frund*, 85 Ill., 135; Taylor on Evidence, sec. 1667; 19 A. & E., 665.

There was further error in charging the jury as follows:

"It being admitted in this case that plaintiff Downing commenced the work and labor according to the contract of employment, the court charges you that he was not indictable for failure to complete the work."

The language of the statute is, "If any person with intent to cheat and defraud another shall obtain advances under a promise to begin work or labor," etc., "and shall then unlawfully and willfully fail to commence or complete said work, shall be guilty," etc. To allow the commencement of work by plaintiff to operate as an absolute protection to him is thus in direct contravention of the express provision of the statute, and must be held erroneous. It is, no doubt, an inadvertence on the part of the court, but the objection is distinctly and explicitly made.

These are the principal questions presented and argued on the appeal. Most of the other exceptions are to rulings of the court on questions of evidence. They do not seem to be in any way controlling or determinative, and, as they may not arise in another hearing, it is not considered necessary or desirable that they be now passed upon.

For the errors indicated, defendant is entitled to a

Venire de novo.

Cited: *Warren v. Lumber Co.*, 154 N. C., 38; *Wilkinson v. Wilkinson*, 159 N. C., 270; *Humphries v. Edwards*, 164 N. C., 156; *Motsinger v. Sink*, 168 N. C., 550; *Holton v. Lee*, 173 N. C., 107.

ALICE BOST v. CABARRUS COUNTY.

(Filed 11 May, 1910.)

1. Procedure—Remedies—Vested Rights—Relief.

No one has a vested right in any special remedy given by a legislative act, and procedure is always subject to be changed by the Legislature, with the limitation that one having a vested right in a cause of action must be left with some procedure reasonably adequate to afford relief.

2. Counties—Roads—Construction—Damages—Repealing Statute—Interpretation of Statutes.

Chapter 201, Laws of 1907, repeals chapter 420, Laws of 1903, in reference to the assessment of damages caused to a landowner in building a county road, and affords effective and adequate means of redress to such owner who is damaged in his land by reason of the building of the road thereon under the provisions of the act repealed.

3. Counties—Roads—Construction — Damages—"Established"—Limitation of Actions—Interpretation of Statutes.

In reference to the assessment of damages, chapter 420, Laws of 1903, provides, that "any person aggrieved . . . may, within six months after said change of road, or new road has been opened and completed, apply to the clerk . . . for an order appointing a jury to assess damages, etc." With reference to the time in which the party aggrieved may

apply to the clerk, chapter 201, Laws 1907, provides that if he cannot fix the amount of the damages he has sustained, if any, with the superintendent of the roads with the consent of the board of commissioners, "for the changing, locating, etc., or the opening or "establishment" of the road, he may apply to the clerk, etc., who shall appoint a jury to assess the damages: *Held*, the word "established," by correct interpretation, refers to the road in its completed state, and a proceeding instituted within six months from the completion of the road, in accordance with the provisions of the latter statute, is brought in time.

4. Counties—Roads—Construction—Benefits—Measure of Damages.

In an action to assess damages to plaintiff's land by the construction of a county road, under chapter 201, Laws of 1907, it was not error in the court below to modify a question asked of the witness by his attorney, "Has plaintiff received any special and peculiar benefits to her property on account of the construction of the road?" so as to direct it to such benefits as were "not common to her," the modification being more explicit of the accepted principle relating to the reduction of damages in an action of this character. *R. R. v. The Platt Land*, 133 N. C., 266, cited and approved.

5. Same—Proper Placing—Torts.

In an action against the county to assess damages to plaintiff's land caused by the location thereon of a county road, evidence is competent to show that the road as constructed destroyed plaintiff's valuable spring and interfered with the approach to her residence, there being nothing of record tending to show that the road was not properly placed or was negligently constructed, and, therefore, not being objectionable as evidence of a tort by reason of the negligent construction of the road.

APPEAL from *Jones, J.*, at January Term, 1910, of CABARRUS. (532)

Proceedings to recover damages caused by the building of a road, instituted by petition of plaintiff to the clerk of the Superior Court, 16 April, 1909.

The jury rendered the following verdict:

1. Did the plaintiff institute this proceeding to recover damages within six months after the road in controversy was completed across and over plaintiff's lands? Answer: "Yes."

2. What damage, if any, has the plaintiff sustained? Answer: (533) "$150."

Judgment on the verdict for plaintiff, and defendant appealed.

Montgomery & Crowell for plaintiff.

H. S. Williams for defendant.

HOKE, J. The order condemning the plaintiff's land for the purpose of the proposed change in the road was made in July, 1905, under the provisions of the act of the Legislature then controlling the matter,

being chapter 420, Laws 1903, and in reference to the assessment of damage, that act provided: "That if any person be aggrieved, he may, within six months after said change of road, or new road has been opened and *completed,* apply to clerk of Superior Court for an order appointing a jury to assess the damages," etc. Prior to the filing of the present petition, and more than eighteen months before the completion of the road, as established by the verdict, the General Assembly enacted the statute, chapter 201, Laws of 1907, on the question of obtaining damages by persons injured. The latter act makes provision as follows:

"And if after the changing, locating or relocating of any public road or opening and establishing any new public road, any person be aggrieved, and if he and the superintendent of roads, with the approval of the board of commissioners of said county, cannot agree and fix the amount of damages, if any, for the changing, locating or relocating of any public road, or opening and establishing any new public road, he may then, within six months after said change, location or relocation of the public road, or the opening and establishing of a new public road, apply to the clerk of the Superior Court, who shall appoint a jury to consist of five freeholders to assess the damages; and the said jury in determining said damages shall take into consideration the benefits made to the property and the damages sustained by the property, subtract one from the other, and the result shall be their verdict; and the said damages, if allowed, shall be paid out of the general fund of the county; and if the jury award no more damages than the amount offered by the said board of commissioners, then the party aggrieved shall pay all costs for making said assessment of damages: *Provided further,* that the board of commissioners or the persons so aggrieved shall have the right of appeal to the Superior Court after giving good and sufficient security for costs."

And it is urged for error by defendant that the latter statute controls, and as the words contained in the former law, "within six
(534) months after said road shall be opened and *completed,*" have been omitted in the present one, that the time within which proceedings shall be instituted under the latter act shall be construed and held to be within six months from the time the change of an old or the opening of a new road shall have been ordered and the route determined on; but the position cannot be successfully maintained.

It is true, as defendant contends, that no one has a vested right in any special remedy, and that procedure is always subject to be changed by the Legislature, with the limitation that one having a vested right in a cause of action must be left with some method of procedure reasonably adequate to afford relief. Black on Constitutional Law, 432; Cooley on Constitutional Limitations, 406 *et seq.* It is true, also, that

the present law does afford effective and adequate means of redress, and it is furthermore evident that the Legislature intended the latter statute as the only rule available to the claimant, and covering as it does the entire subject, it may be taken as repealing the former law. Sedgwick on Statutory and Constitutional Construction, p. 124. But we do not assent to the position of defendant that in changing the verbiage the present statute has wrought the change of meaning contended for. The word changed, which is the controlling word in reference to the alteration of an old road, might refer to a change completed or a change contemplated and directed, but its primary and natural meaning would seem to be a change accomplished; and the words "after the opening and establishment of a new road," by correct interpretation, should rather refer to the road in its completed state.

While the question decided is not directly apposite, some comments on the proper significance of this word "establish," appearing in *Dickey v. Turnpike Co.*, 37 Ky., 113-125, are not irrelevant. Delivering the opinion in that case, *Chief Justice Robertson* said:

"Whether we consider the popular use of the word 'establish,' or the definition of it by the most approved lexicographers, or the admitted import of it in the preamble and in the fourth clause of the eighth section of the Federal Constitution, it must be understood to mean, not merely to designate, but to create, erect, build, prepare, fix permanently. Thus, to establish a character, to establish oneself in business, to establish a school, or manufactory, or government—all common and appropriate phrases—is not to assume or adopt some preëxisting character, or business, or school, or manufactory. To establish, in each of those uses of the phrase, clearly expresses the idea of creating, preparing, founding, or building up. In the same sense, too, it is (535) used and understand in the Bible; thus, it is said, 'The Lord by wisdom hath founded the earth; by understanding hath he established (prepared) the Heavens.' Proverbs 3:19.

"Just so, also, is it used and understood in the Federal Constitution. Thus, we find in the preamble these words, 'establish justice,' 'establish this Constitution'; and in the fourth clause of the eighth article, power given to Congress 'to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States.'

"Thus, we might present almost endless illustrations of the fact that the popular and philological, sacred and profane, oracular and political import of 'establish' is not to designate, but to found, prepare, make, institute and confirm."

A perusal of the entire section gives clear indication also that the limitation as to the time for instituting a claim for damages in the last

act, as in the first, must be referred to a completed change in the case of an old road, as well as the establishment of a new.

Thus, before instituting suit, a person aggrieved is required to make an effort to adjust his claim for damages with the superintendent of the road, this officer acting subject to the approval of the board of commissioners, and if he fails in this effort, he may then commence proceedings within six months, etc.; and a jury may then be obtained to assess the damages, etc. How can a claimant or a road superintendent bargain intelligently on this question, or a jury so act thereon, until the road is physically completed, and the damages thus made manifest? We think, therefore, the chairman was right and gave expression to the proper construction of the act when he said in the presence of his assembled board, in response to demand preferred by plaintiff for her damages in December, 1908, "That they had not completed the road over her lands, and, just as soon as they did, they would send a jury to assess her damages." On the verdict, therefore, the proceedings were instituted within the time required by law, and this objection of defendant is overruled.

It was further contended that the judge below committed error in modifying a question proposed to several witnesses by defendant as to special and peculiar benefits arising to plaintiff by reason of the building of the road, the question being as follows: "Has Mrs. Bost received any special and peculiar benefits to her property on account of the construction of the road?" and the same was permitted by the court, when modified, as follows: "Has Mrs. Bost, the plaintiff, received any special or peculiar benefits, not common to her and others in the
(536) vicinity, by reason of the construction of the road over her lands?" Both of these questions recognize the accepted principle that benefits special and peculiar to the claimant's land shall ordinarily be considered and allowed in reduction of damages arising by reason of an improvement of this character; but the modification of his Honor, being, as it is, more explicit, is better calculated to direct the mind of the jury to an intelligent and correct conclusion, and is in exact accord with the rule as sanctioned by this Court in *R. R. v. Platt Land,* 133 N. C., 266, and in which it was held:

"1. In the assessment of land taken for railroad purposes, special benefits to the land and not benefits received in common with other property should be considered in reduction of the award for damages."

And this is the generally prevailing principle.

The opinion cited and relied upon by defendant as militating against this position, *Miller v. Asheville,* 112 N. C., 759-768, was a case involving the construction of a statute widely variant from the one presented here. In that case, the statute controlling the matter (Pr. Laws 1891,

ch. 135, sec. 16) provided that the jury in assessing damages "shall consider all benefits special to said land, and also all benefits, real or supposed, which the parties may derive from the construction of the said improvements, whether it be *common* to other lands or only *special* to their own, and such benefits so assessed shall be deducted," etc.; and the decision was made to rest on this express provision of the law; but in our case, the statute being general in its terms, Laws 1907, ch. 201, sec. 16, permits and requires the application of the general principle as stated in the case referred to of *R. R. v. Platt Land,* and justifies and sustains the modification made by his Honor on the question as proposed by defendant.

It was further objected that the court made an erroneous ruling in allowing a witness for plaintiff to testify that the effect of the new road as constructed was to destroy plaintiff's spring, and to interfere with the approach to her residence, the testimony directly involved being as follows:

E. G. Lipe testified: "That the alteration or relocation had damaged the plaintiff to the amount of $500 or $600. That they placed a fill 19 or 20 feet high, so that plaintiff could not reach her home from the public road without going over somebody else's land. That she had a good spring, which had been destroyed by the construction of this road; that they left no way for her to get to her house. She has to come through her orchard from back of her house and go over my land to get to new public road."

The exception being noted as follows "Defendant in apt (537) time objected to all questions and answers pertaining to the filling of the spring and the way of getting to her house. Objection overruled. Defendant excepts."

The position of the defendant in reference to this exception, as we understand it, is that the testimony only tends to establish a tort by reason of the negligent construction of the road, and that damages arising from an ordinary tort are not to be included in the assessment under proceedings of this character. It is ordinarily true, as said by *Douglas, J.,* delivering the opinion in *Mullen v. Canal Co.,* 130 N. C., 496-503, "that no damages are contemplated in original condemnation, except such as necessarily arise in the proper construction of the work." A statement that has been cited with approval in a more recent decision of the Court, in *Davenport v. R. R.,* 148 N. C., 291. But in this case there is no testimony tending to show that the road is not properly placed, or that there has been any negligence in the construction. So far as the record discloses, it is located and built in the only feasible way as to route or method, and the testimony, in our opinion, is clearly competent and directly relevant to the issue.

We find no error in the proceedings below to defendant's prejudice, and the judgment in plaintiff's favor will be affirmed.

No error.

Cited: Phifer v. Comrs., 157 N. C., 152; *R. R. v. McLean*, 158 N. C., 501; *Campbell v. Comrs.*, 173 N. C., 501.

WILSON LUMBER AND MILLING COMPANY v. HUTTON & BOURBONNAIS ET AL.

(Filed 11 May, 1910.)

1. Deeds and Conveyances—Description—Calls—Natural Boundaries—Interpretation—Exception to Rule.

A natural boundary called for in the description of land in a grant controls course and distance, for the reason that it is usually considered more certain; but when the course, distance, number of acres and plat given are more definite, and the application of the general rule inconsistent, the latter must give place to the former, the reason for the rule ceasing, and presenting a case which forms an exception to the rule.

2. Same—Established Boundaries.

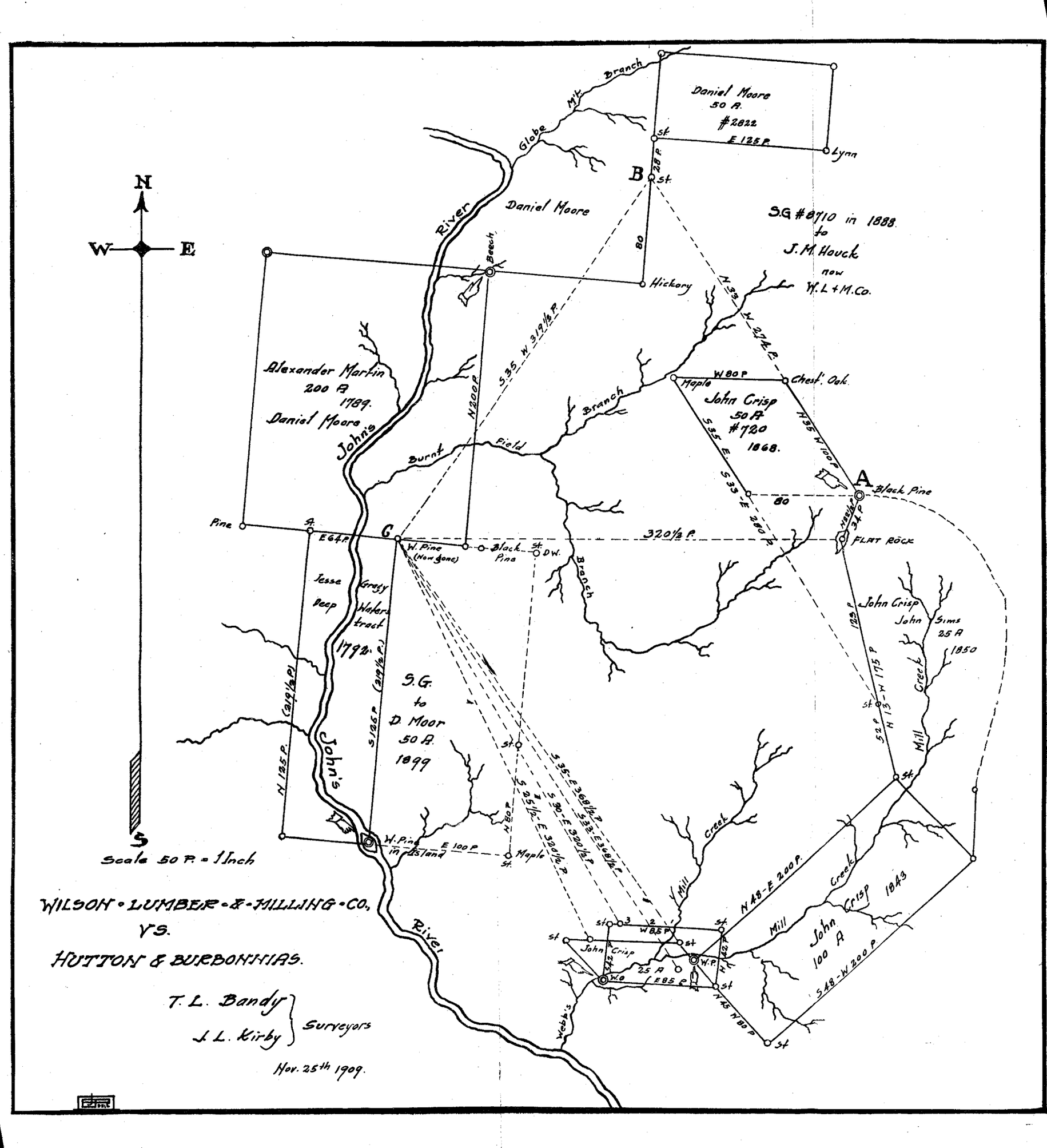
The first call in a grant of lands being 100 poles from an established corner to a stake in the line of M., and it appearing that the surveyor and grantee did not know at the time where that line was located, and there was no actual survey, the M. line will not be regarded as established so as to control the call and extend the line 274 poles in disregard of the call sufficiently established by the description in the grant.

3. Same.

When the course and distance of a grant, purporting to convey 50 acres of land, are clear and definite, the adjoining owners being given, and from the plat attached it appears that the acres granted were in the form of a parallelogram 80 by 100 poles, with boundaries and acreage exactly corresponding to those of the grant, the record call, "80 poles W. to a stake," cannot be filled by running from a stake, an unknown point, "S. W. 319 poles" to the third call, which was a point in dispute and unsettled at the time of the survey, and which would cut in half a tract of an adjoining owner; nor can the third call be filled by running from a disputed point a greater number of poles than that given by the grant; nor the last call, "then E. (with a certain line) to the beginning," be filled by running 400 poles, the description contended for embracing an acreage of fourteen times that which the grant purports to convey.

4. State's Lands—Grants—Maps Attached—Evidence.

The statutes require that the surveyor make two plats of the land granted by the State, and record thereon the courses, distances, etc., one of which shall be attached to the grant and the other filed in the office of the Secretary of State (Revisal, secs. 1716, 1734). Such plats are evidence of description, boundaries, etc., in an action involving those questions.



WILSON • LUMBER • & • MILLING • CO.,

VS.

HUTTON & BURBONNAIS.

T. L. Bandy
J. L. Kirby
} Surveyors

Nov. 25th 1909.

5. Same—Acreage.

The number of acres of land which the grant purports to convey is evidence in aid of courses and distances, when the courses and distances given in the grant of a tract of land, not actually surveyed at the time, exactly agree with the quantity of land described as conveyed and with the plat attached to the grant, and to discard them would increase the quantity of land to fourteen times that for which the State was paid.

6. State's Land—Grants—Acreage—Tax Books—Corroborative Evidence.

The tax list is competent evidence to show that the grantee of State's land gave in the tract granted as 50 acres, in corroboration of his testimony that he entered only that quantity of land, in an action wherein the number of acres given in the grant is allowed as evidence to establish the courses and distances therein given.

HOKE, J., dissenting; WALKER, J., concurring in the dissenting opinion.

APPEAL from *Council, J.*, at November Term, 1909, of CALDWELL.

The facts are stated in the opinion of the Court.

Jones, Whisnant, Finley & Hendren for plaintiff.

Mark Squires, W. C. Newland, M. N. Harshaw, E. B. Cline, and J. T. Perkins for defendant.

CLARK, C. J. On 30 June, 1868, the State issued to John (539) Crisp a grant for "50 acres of land" in Caldwell Conuty, described as follows: "On dividing ridge between John's River and Mulberry Creek, adjoining his own land. Beginning on a black pine near the flatrock, and runs N. 35 degrees W. 100 poles to a stake in Daniel Moore's line; then W. 80 poles to a stake in Jesse Gragg's line, then S. 35 degrees E. 100 poles to stake in his own line; then E. with said line to the beginning." The beginning corner of said grant is not in dispute, but is admitted to be at the black pine "A," as shown on the map. The line of said grant, if run according to the contention of the plaintiff—that is, by course and distance—would embrace 50 acres. If run according to the contention of the defendants, the grant would cover about 700 acres, or fourteen times as much as was granted. The grantee, John Crisp, testifies that he took out a grant for only 50 acres with the view of adding a flat cove to his adjoining land. He stated that he never claimed more than 50 acres; that he had listed the land and paid taxes for only 50 acres; that he paid the State for only 50 acres and in conveying it he only conveyed it for 50 acres. At the time the survey was made for the grant, no lines were in fact run, and the land was platted merely from the courses and distances recited in the entry and grant.

The defendants contend that course and distance should be disregarded and the acreage also and all the above facts, and that the first

line should be extended to Daniel Moore's line, though this would be 274 poles instead of 100 poles, as stated in the grant; that, instead of the second call in the grant, 80 poles W. to a stake in Jesse Gragg's line, "the second line should be run S. 35 degrees W. 319½ poles to a corner of Jesse Gragg's line," though the evidence is that this corner was in dispute at the time that the grant was taken out, and therefore not *established.* In running this second line as contended by the defendants it would cross through two older tracts of lands which belonged at the time of the survey to Daniel Moore, showing that the surveyor did not know where either Moore's or Gragg's line was. Indeed, John Crisp expressly so testified. The third line, according to the grant, is S. 35 degrees E. 100 poles to a stake in Crisp's own line. Running by this course and distance it would strike a point in Crisp's line which would run thence E. to the beginning. But, run as contended by the defendants, it would cut in half another tract of Daniel Moore's and run 338 poles instead of 100 poles, as called for in the grant. The fourth line, according to the grant, would be with Crisp's line E. to the beginning.

But if run according to the defendants' contention, instead of
(540) running E. 80 poles to the beginning (as called for in the grant), the line would run five different courses with Crisp's line, and in all about 400 poles, to get back to the beginning. Instead of the 50 acres granted Crisp, the defendants would get 700 acres, 650 of which the plaintiff has paid the State for, and for 50 of which only the grantor of the defendants paid the State.

It is true that the general rule is that course and distance must give way to a call for a natural boundary, and that the line of an adjacent tract, if well known and established, is a natural boundary. But this is because such natural boundary is usually more certain, being at a fixed and definite place, if "established and known," and therefore unchangeable and more likely to be the true call in the deed than course and distance, which may, by inadvertence, be incorrectly written down. The reason of the law is the life thereof. *Ratione cessante, cessat ipsa lex.* The rule of construction which ordinarily prefers the call for the boundary of another tract to course and distance is based upon the reason that the former is usually more certain than the latter, and only applies when the boundary of the other tract is established and well known.

It will be noted that the first call in this grant is for 100 poles, whereas to go to the Daniel Moore line would be 274 poles. In *Brown v. House,* 116 N. C., 859, and *S. c.,* 118 N. C., 870, the Court refused to extend a 20-mile line 1¼ miles beyond the distance called for because of a call for a stake "in Stokely Donelson's line" (an extension of 1-16 of the distance). Here the defendants asked to extend the distance from 100 poles to 274 poles, and there is not even the further provision, which

there was in *Brown v. House,* "and thence with Daniel Moore's line." Then, in this case, there is the evidence that as matter of fact the line was never run to Daniel Moore's line, and that neither the grantee nor the surveyor knew where it was. The call is not even for a monument or a marked tree in Daniel Moore's line, but only for a stake. If Daniel Moore's line was established at that time, it was not known to the surveyor and grantee where it was, and hence it was not established so far as they were concerned.

The second call of the grant, "80 poles W. to a stake in Jesse Gragg's line," cannot possibly be filled by running from a stake, an unknown point, "S. W. 319½ poles to Gragg's corner" (a point which was in dispute and unsettled at the time of the survey) and cutting in half a tract of Daniel Moore's to do so. The third call in the grant, "S. 35 degrees E. 100 poles to a stake in John Crisp's line," cannot be filled by running from a disputed point of Gragg's line "338 poles to a stake in John Crisp's line." Nor can the last call, "then E. with (541) Crisp line to the beginning" (which by the course and distance in the grant would be 80 poles, for the grant by the plat attached thereto and the acreage is a parallelogram), be filled by running five different courses 400 poles to the beginning, as the defendants contend.

The plat which is attached to the grant shows a parallelogram 80 poles by 100 poles, with boundaries and acreage exactly corresponding to those set out in the grant.

The statute, Rev., 1716, requires the surveyor to make two plats and record thereon the courses, distances and watercourses crossed; and section 1734 requires that one of these plats shall be attached to the grant and the other filed in the Secretary of State's office. This makes the plats evidence. *Redmond v. Mullenax,* 113 N. C., 512; *Higdon v. Rice,* 119 N. C., 631. When these plats, the courses and distances and the acreage all correspond, as they do in this case, they are more certian than the wild result which would be obtained by departing from them in attempting to give a preference to the call of Daniel Moore's line when there was no actual survey, and the surveyor and grantee did not know where it was.

While acreage is usually postponed to other descriptions, there are cases in which the Court has held that it was a potent, if not a conclusive factor. It was so held in *Cox v. Cox,* 91 N. C., 256. In *Baxter v. Wilson,* 95 N. C., 137, it was held that the number of acres in some cases may have a controlling effect. In *Peebles v. Graham,* 128 N. C., 227, the Court says: "The general rule is that the quantity of land stated to be conveyed will not be considered in determining locations or boundaries. But there is a well-known exception to this rule, that is as firmly established as the rule itself; and that is this: "Where the loca-

tion or boundary is doubtful, quantity becomes important. *Brown v. House,* 116 N. C., 866; *Cox v. Cox,* 91 N. C., 356." The Court further said, quoting from *Mayo v. Blount,* 23 N. C., 283: "A perfect description which fully ascertains the *corpus* is not to be defeated by the addition of further and false descriptions." Certainly, no stronger case for the application of this principle can be found than in this, where the courses and distances given in the grant of the tract which was not actually surveyed are found to agree exactly with the quantity of 50 acres described as conveyed, and with the plat attached to the grant, and where to discard them would increase the quantity of land to fourteen times that for which the State was paid.

(542) In *Brown v. House,* 116 N. C., 866, where to extend the line to a stake in the boundary of another tract which was called for would have increased two to three times the acreage stated in the grant (which also corresponded with the acreage obtained by following the courses and distances), the Court refused to discard course and distance and follow the call for a stake in the boundary of another tract, "and thence with such boundary." In the same case on rehearing, 118 N. C., 870, the Court reaffirmed its ruling and cited *Harry v. Graham,* 18 N. C., 76, "where the distance called for gave out 30 poles short of the line of the other tract, the Court refused to extend the line 30 poles and held that it must terminate at the end of the distance called for." It also cited *Carson v. Burnett,* 18 N. C., 546, which held that "the course and distance called for must control unless there is another call more definite and certain than course and distance," and cited *Kissam v. Gaylord,* 44 N. C., 116; *Spruill v. Davenport, ib.,* 134; *Cansler v. Fite,* 50 N. C., 424, and *Mizell v. Simmons,* 79 N. C., 182, all to the same effect. The facts of this case are entirely different from those in *Whitaker v. Cover,* 140 N. C., 280, which recognizes merely the general rule, which is not denied, but to which the facts make this case an exception.

The tax list for 1873 was competent to show that John Crisp gave in the tract of land for taxation for 50 acres and to corroborate his testimony that he entered only 50 acres and had never claimed any more.

The plaintiff asked the court to charge: "1. If there be more than one description in the deed or grant and they turn out upon evidence not to agree, that is to be adopted which is the most certain. Course and distance from a given point is certain description in itself, and therefore not to be departed from, unless there be something else which proves the course and distance stated in the deed or grant was thus stated by mistake. *Harry v. Graham,* 18 N. C., 80.

"2. If the jury shall find from the evidence that the grantee at the time of taking out the grant did not know where the Moore line was, and there was no general reputation at the time of its location, the call for

such line would not displace course and distance, although it can now be ascertained mathematically, because it does not furnish as probable and rational evidence as course and distance; it would be appealing from evidence, certain to a common intent, to a thing altogether unknown to the parties at the time. *Carson v. Burnett,* 18 N. C., 558.

"3. If the jury shall find from the evidence that at the time of making the survey and taking out the grant, the location of the Daniel Moore line was unknown to the grantee, John Crisp, (543) and there was no general reputation of such location, although John Crisp may have known that Daniel Moore had land somewhere in that direction and may have supposed the line of the same to be at the end of 100 poles from the black pine, whereas, as has been since ascertained, it is 274 poles to Daniel Moore's line, then the court charges you that the course and distance is more certain than the call for Daniel Moore's line, and the termination of the first line would be at the end of 100 poles marked 'Chestnut Oak' on the map.

"8. In doubtful cases, quantity may have weight over circumstances in aid of the description, and in some cases may have a controlling effect.

"9. The first call in defendants' grant being North 35 W. 100 poles to stake in Daniel Moore's line, and the distance from the point of beginning being nearly three times as far, or 274 poles, and the testimony of John Crisp being that at the time of the survey that no line was actually run, except for the distance of a few poles, and that he did not know where the Daniel Moore line was, the jury are instructed that this call is too vague and uncertain to vary the distance called for in the grant, and the first line should terminate where the 100 poles give out.

"10. The second call in defendant's grant being W. 80 poles to a stake in Jesse Gragg's line, and Jesse Gragg's line being unknown at the time and it being necessary in order to reach any line of Jesse Gragg's from a point where defendants claim their first line should run, to change this course and distance from due W. to S. 35 W., or almost at right angles, and to run 319½ poles instead of 80 poles, or nearly four times as far, and so doing to cross the lines of older grants twice, the jury are instructed that this call is too vague and uncertain to vary the course and distance called for in defendant's grant, and that defendants' second line should run 80 poles W. as called for in the grant.

"11. The third call in defendants' grant being S. 35 E. 100 poles to stake in his own line, and it being necessary, in order to reach the nearest point in his own line, to run 338 poles instead of 100 poles, or more than three times as far, and in so doing again cross the line of an older tract, providing the line is run from a point in Jesse Gragg's line where defendants claim their second line terminates, the jury are in-

structed that this call is too vague and uncertain to vary the course and distance called for in the defendants' grant, and the defendants' third line should run S. 35 E. 100 poles, as called for in the grant, from a point 80 poles W. of the point marked 'Chestnut Oak' on the map.

"12. To vary the course and distance as called for in defendants' (544) grant, so as to increase the distance of the first line from 100 poles to 274 poles; to change the course of the second line from due W. to S. 35 W., or nearly turn at right angles, and to increase the distance of said line from 80 poles to 319½ poles, or nearly four times as far; to increase the distance of the third line from 100 poles to 338 poles, with the result that the lineal measurement of defendants' fourth line, or southern boundary thereof is practically 354 poles instead of 80 poles, said southern boundary being changed from a line 80 poles long running due E. to an irregular line, and with the further result that the quantity of land embraced in defendants' grant would be increased from 50 acres to 700 acres, or practically fourteen times the amount called for in the grant—such a variation from course and distance is so great as to shock probability, to sacrifice the certain for the uncertain, and the jury are instructed that the boundaries of defendants' grant are to be located with reference to the courses and distances named therein."

In failing or refusing to give above prayers, there was

Error.

HOKE, J., *dissenting:* As I understand and interpret the testimony, it shows that both the lines of the Daniel Moore tract and of the Jesse Gragg tract called for as indicating the termini of two of the lines of defendants' grant were *fixed* and established; and where this is true our decisions have been well-nigh uniform to the effect that such calls as a rule will control course and distance; and applying this generally accepted principle, I am of opinion that, according to our precedents, the case was correctly tried below and the judgment should be affirmed.

WALKER, J., concurs in dissenting opinion.

Cited: Bowen v. Lumber Co., 153 N. C., 369; *Lumber Co. v. Hutton,* 159 N. C., 446-447, 452; *Lumber Co. v. Bernhardt,* 162 N. C., 469; *Power Co. v. Savage,* 170 N. C., 628.

WILSON LUMBER AND MILLING COMPANY v. H. D. L. CLARKE AND D. B. KIRBY.

(Filed 11 May, 1910.)

State's Lands—Right of Protest—Interest or Title—Description—Locus in Quo—Grant to a Stranger—Evidence.

The right of one to protest an entry of State's land depends upon a claim by the protestant of title to, or an interest in, the land covered by the entry; and when he sets up his title and confines it to the lands described in the grant under which he claims, which the protestee admits, but contends that it does not cover the *locus in quo*, the protestant may not put in evidence a grant to another covering the lands outside of his grant, under which he claims no interest or title, for the purpose of disproving the protestee's right to enter the land not claimed by protestant.

APPEAL from *Councill, J.*, at November Term, 1909, of CALDWELL. This is a proceeding under the entry laws. This issue was submitted: (545)

1. Is the land described on the map as the Clarke & Kirby entry, vacant and subject to entry? Answer: Yes.

The court rendered judgment for Clarke & Kirby, the entrants, from which the protestant, the Wilson Lumber Company, appealed.

M. N. Harshaw and Mark Squires for defendant, entrants.
Jones & Whisnant for plaintiff, protestant.

BROWN, J. The record discloses that Clarke & Kirby on 25 April, 1908, made entry in due form of certain alleged vacant lands described in the boundaries set out in the entry. On 23 May, 1908, the Wilson Lumber Company filed with the entry taker a protest, protesting the entry "for the reason that the above boundary of land is not subject to entry, having heretofore been granted to William Puett by the State, and by mesne conveyances conveyed to the protestant, the Wilson Lumber and Milling Company, and the said above-described land is now owned by the said Wilson Lumber and Milling Company."

On the trial the claimant, or protestee, as called in the record, offered in evidence their entry, No. 6695; also, grant 865 to William Puett, dated 6 June, 1874, for 193 acres; also, grant 994 to William Puett, dated 2 February, 1882; also, deed from Gordon Morrow to W. M. Puett dated 21 June, 1883.

Here the protestees admitted that the protestant Wilson Lumber and Milling Company is the owner, through mesne conveyances, of the lands embraced in grants Nos. 865 and 994 to William Puett.

There was evidence on the part of both protestant and protestees as to the correct location of grant No. 865, as shown by court map—the yellow lines representing protestees' claim, and the blue lines the protestant's claims.

The whole contest turned upon the location of the grant 865. The jury located it according to the contention of the protestees or claimants.

The protestant offered in evidence grant No. 12222 to W. H. (546) Barlow, but disclaimed any interest in the land covered by it.

The court excluded it, and protestant excepted. This is the only assignment of error discussed in the briefs.

We sustain the ruling of the court, for two reasons:

1. The protestant confined the protest to the allegation that the boundary included the grants to William Puett, which protestant owned. The ownership of the Puett grants was admitted by the entrants, but upon locating one of the Puett grants, it was determined by the jury that the lands claimed in the entry were not covered by it. The protestant claimed no other interest in the entry.

2. The protestant, on the trial, disclaimed all interest in the Barlow grant. The statute giving right to file a protest provides: "If any person shall claim title to or an interest in the land covered by the entry, or any part thereof, he shall, within the time of advertisement as above provided, file his protest in writing."

The right to file the protest is made dependent upon a claim of title to, or an interest in, the lands covered by the entry.

The protestant comes into court defining the interest claimed as being under a grant to W. M. Puett, or William Puett.

That is conceded to protestant by the entrant, but in locating the Puett grants the entrant has satisfied the jury that there are other lands within the boundary of his entry than those.

As no one else has filed a protest except the Wilson Lumber Company, which disclaimed all interest in any other except the Puett grants, we think his Honor properly excluded the Barlow grant. So far as that grant is concerned, the Wilson Lumber Company is an officious intermeddler. Its existence gave the Wilson Lumber Company no ground for protest and no standing in court.

There is nothing in *Walker v. Carpenter,* 144 N. C., 677, which holds that any person claiming no interest in an entry can successfully protest it. If the owners of the Barlow grant did not see fit to protest, we see no reason why the Wilson Lumber Company can do it for them.

No error.

Cited: *Walker v. Parker,* 169 N. C., 153.

(547)

W. C. DOWD v. W. E. HOLBROOK.

(Filed 11 May, 1910.)

1. Principal and Agent—Agents—Purchasers—Principal's Business—Title.

The title to property purchased by an agent which he is authorized to purchase for his principal, and used in the business of the latter, vests in the principal.

2. Principal and Agent—Purchaser for Principal—Title.

The title to property purchased by an agent with his own funds for his principal's business, of which agent has charge, vests in the principal.

3. Same—Principal's Liability.

The principal is liable to the agent for the value of goods purchased by the latter personality, but under circumstances which vest the title to the goods purchased in the former.

APPEAL from *Councill, J.*, at November Term, 1909, of CATAWBA.

Action to recover possession of a newspaper, called *The Hickory Democrat*, together with the printing plant described in the complaint.

These issues were submitted:

1. Is the plaintiff the owner and entitled to the possession of the property described in the complaint? Answer: Yes.

2. What is the value of the property described in the complaint? Answer: $1,800.

From the judgment rendered defendant appealed.

Witherspoon & Witherspoon, McNinch & Justice, and W. C. Feimster for plaintiff.

E. B. Cline, W. A. Self, and C. L. Whitener for defendant.

BROWN, J. An examination of the pleadings and evidence shows quite clearly that the controversy involves almost exclusively a question of fact, and that it is settled against the defendant by the verdict of the jury.

We are of opinion that the numerous exceptions are without merit and that a discussion of them is unnecessary.

The case of defendant is based largely upon the theory that he purchased certain additions to the newspaper equipment and paid for them out of his own funds, and that he was a part owner with the plaintiff. The plaintiff claims that defendant was his agent and in charge of the business, and that he purchased such additions for plaintiff, and while he may have a debt against plaintiff, the property became that of the plaintiff.

There is evidence to prove that the printing plant in question was from time to time added to and paid for out of the pro- (548)

ceeds of the business; that the defendant was managing agent of the plaintiff, and that he made some purchases for this plant out of his own funds.

His Honor, we think, clearly and correctly instructed the jury on this feature of the case. It is well established that where an agent purchases, for himself, property he is authorized to purchase for his principal, that the title to the same immediately vests in the principal. *Mining Co. v. Fox,* 39 N. C., 61; *Carroll v. McKale,* 69 N. W., 644; *Edwards v. Dobley,* 120 N. Y., 540; *Bergner v. Bergner,* 67 Atl., 999; Cyc., vol. 31, p. 1471.

The principle is equally true where the agent makes such purchase with his own private funds for the principal's benefit. 31 Cyc., 1441; *Bergner v. Bergner,* 219 Pa., 113; *Oliver v. Kastor,* 101 S. W., 563.

The defendant handed up three prayers for instruction, which were given by the court and upon which the defense was based. After reading them to the jury his Honor stated clearly and correctly: "I conceive that to be the law, gentlemen of the jury, that where two people are joint owners of a piece of property neither one can maintain an action for the exclusive possession against the other. So if the plaintiff has failed to satisfy you that he is the sole owner of the property, then, whatever his rights may be as a partner, you should answer the first issue 'No.'"

We think the case has been well and fairly tried, and we are unable to find any error in the record of which the defendant can justly complain.

No error.

JOHN T. PULLEN AND THE RALEIGH SAVINGS BANK v. CORPORATION COMMISSION.

(Filed 11 May, 1910.)

1. Taxation—Banks—Real and Personal Property—Nontaxable State Bonds.

All bank stock is taxable at its value, less the assessed value of the bank's real and personal property, although the capital is invested in North Carolina State bonds.

2. Taxation—Banks—Surplus—Nontaxable State Bonds—Assessment.

So much of the surplus of the bank as is not invested in the nontaxable bonds of the State of North Carolina issued in pursuance of the act of the General Assembly of 1909 is to be considered in assessing the value of shares of stock for taxation.

3. Same—Exemption.

Under the provision of said act so much of the surplus, over and above capital, as is invested in such nontaxable bonds is exempt and must be deducted from the surplus in assessing the value of the stock for taxation.

CLARK, C. J., and HOKE, J., dissenting.

CONTROVERSY without action submitted to *Guion, J.,* from (549) WAKE, from a judgment adverse to the plaintiffs, filed 19 April, 1910, and they have appealed to this Court.

Omitting the merely formal parts of the submission, the facts agreed to as determining this controversy are thus stated:

1. That the Corporation Commission is a department of the State Government, created by law and charged with certain duties, among which duties is exercising the powers and duties of State Tax Commissioners; that their office is in the city of Raleigh, Wake County, N. C.

2. That the Raleigh Savings Bank and Trust Company is a bank and savings institution, duly created by law, having a capital and a surplus, whose office and place of business is in the city of Raleigh, and that John T. Pullen is a stockholder therein, as shown by the books of the company, and is a citizen of Wake County.

2 (*a*). That the asylum or 1949 bonds, herein referred to, were sold by the State of North Carolina at a price of 103, the same bearing 4 per cent interest per annum, payable semiannually, and not due until 1 July, 1949, as expressed in said bonds, and that said bonds were sold upon the faith of the State, as pledged in the act authorizing their issue. That at the time of such sale the legal rate of interest for money loaned in North Carolina was 6 per cent per annum, all banking institutions being authorized to take interest in advance, and that at the time of such sale the outstanding bonds of the State of North Carolina bearing 4 per cent interest were sold on the financial markets at 102, such sales being below the price brought by the bonds above referred to.

3. That John T. Pullen is interested directly in the assessment of the stock, as the failure to deduct these asylum or 1949 bonds from the surplus in arriving at the assessment of the stock will directly affect to his injury and loss that amount of State, county and city taxes paid by him on said stock.

4. That on 5 March, A. D. 1909, the General Assembly of North Carolina enacted "An act to issue bonds to carry out the act of 1907, for the care of the insane of the State," which act is known as ch. 510, Laws 1909, a copy of which act is hereto attached and (550) marked "Exhibit A," said act reading in section 4 as follows:

"SEC. 4. The said bonds and coupons shall be exempt from all State, county or municipal taxation or assessment, direct or indirect, general

or special, whether imposed for purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation."

5. That on or about 1 July, 1909, the State of North Carolina, acting through its Governor and State Treasurer, issued five hundred thousand dollars ($500,000) of asylum bonds, now known as 1949 bonds, authorized by the act just above referred to, and sold the same to various parties, both within and without the State of North Carolina.

6. That at the session of the Legislature of 1909, the General Assembly passed the Revenue and Machinery acts, known respectively as chapters 438 and 440, the same regulating the listing and collection of taxes levied and imposed for raising revenue for the State of North Carolina; the said chapter 440, among other things, providing in section 33 (in part), relative to taxation of banks, banking associations or saving institutions, as follows:

"The value of such shares shall be determined as is hereinafter in this section provided. Every bank, banking association or saving institution (whether State or National) shall list its real estate in the county, city or town in which such real estate is located, for the purpose of State, county and municipal taxation. Every such bank, banking association or savings institution shall, during the month of June, list annually with the Corporation Commission, in the name and for its shareholders, all the shares of its capital stock, whether held by residents, or nonresidents, at its market value on the first day of June, or, if it have no market value, then at its actual value on that day, from which market or actual value shall be deducted the assessed value of the real and personal property which such bank, banking association or savings institution shall have listed for taxation in the county or counties where such real and personal estate is located. The actual value of such shares, where such shares have no market value, shall be ascertained by adding together the capital stock, surplus and undivided profits and deducting therefrom the amount of real and personal property owned by said institution on which it pays tax, and dividing the net amount by the number of shares in such institution. Insol-
(551) vent debts due said institution may be deducted from the items of undivided profits or surplus, if itemized and sworn to, and forwarded to the Corporation Commission by the cashier of such institution. If the Corporation Commission shall have reason to believe that the market or actual value as given in is not its true value, it shall ascertain such true value by such examination and investigations as to it seems proper, and change the value as given in to such amount as it

ascertains the true value to be, which action on the part of the Corporation Commission may be reviewed by the Superior Court, by an action brought against the Corporation Commission in its official capacity by the party aggrieved."

7. That the Raleigh Savings Bank and Trust Company is a bank and savings institution, having a capital and a surplus, and that a part of said surplus is invested in the bonds issued under Laws 1909, ch. 510, commonly known as the asylum bonds or 1949 bonds, and that it bought the same upon the faith of the State of North Carolina, as pledged in chapter 510 of the Public Laws of 1909, paying for the same out of its surplus.

8. That the said Raleigh Savings Bank and Trust Company has made return to the Corporation Commission, as is required in section 33 of the Machinery Act of 1909 (Laws 1909, ch. 440), for the assessing of the shares of stock held by the stockholders in said corporation, in accordance with law, which said assessment the Corporation Commission is directed to make and certify to the several counties where the stockholders reside, as the value of said stock for taxation.

9. That the Corporation Commission, in accordance with the statute providing for the assessment of capital stock of banks, have assessed and appraised the value of the shares of stock of the Raleigh Savings Bank and Trust Company by adding together the capital stock, surplus and undivided profits, and deducting therefrom the real and personal property owned by said institution, on which it pays tax, and dividing the net amount by the number of shares in said institution. That the said Corporation Commission did not deduct from the surplus the asylum or 1949 bonds (those authorized by chapter 510 of the Public Laws of 1909) owned by the said Raleigh Savings Bank and Trust Company, they holding that the same was not deductible, as a matter of law, in arriving at this assessment; to which assessment the said Raleigh Savings Bank and Trust Company and John T. Pullen, a stockholder of said company, have excepted and announced their intention of bringing an action against the Corporation Commission in the Superior Court of Wake County in its official capacity, to review the ac- (552) tion of the said Corporation Commission.

10. That a tender of all taxes, admitted by the aggrieved parties to be due, has been made before the submission of this controversy without action.

11. With a view of facilitating the arriving at a determination of the rights of the parties, it has been agreed to present the submission of this case, containing the facts upon which the controversy depends, to the Superior Court of Wake County for its determination and rendition of judgment thereon, as if the action were pending.

The judgment rendered by his Honor, upon the above facts is as follows:

NORTH CAROLINA—Superior Court.

(*Title of Cause.*)

The court, by consent of parties, having heard argument in this case agreed, is of opinion, and so adjudges, that the ruling of the Corporation Commission herein be and the same is hereby affirmed, and it is adjudged that the $55,000 of surplus invested in these bonds should not be and shall not be deducted in arriving at the value of each share of stock for the purpose of taxation. The plaintiff will pay the cost hereof. Plaintiffs except. Appeal by the plaintiffs. Bond of $50 adjudged sufficient, on appeal, and the case agreed on, the entire papers in this controversy without action, and this judgment will, by consent, constitute the case on appeal. 19 April, 1910.

The plaintiffs appealed.

W. H. Pace, A. B. Andrews, Jr., and R. H. Battle & Son for plaintiffs.

Aycock & Winston for defendant.

MANNING, J. The General Assembly of this State, at its session in 1909, authorized (ch. 510, Public Laws 1909) the issue of $500,000 of bonds of the State to pay the expenditure of that sum, authorized by the General Assembly of 1907, for the enlargement of the State institutions for the care of its mental defectives. Section 4 of that act provides: "The said bonds and coupons shall be exempt from all State, county or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds or coupons be subject to taxa-
(553) tion when constituting a part of the surplus of any bank, trust company or other corporation."

The uniform and well-settled policy of the State, certainly since 1852—and its power to do so seems never to have been doubted or questioned—has been to exempt its own bonds and certificates of debt from taxation. Laws 1852, ch. 10, sec. 4; Rev. Code, ch. 90, sec. 5; Laws 1879, ch. 98, sec. 3; Code, sec. 3573; Laws 1905, ch. 543, sec. 4; Rev. 1905, secs. 5022, 5031. In the act herein quoted (sec. 4, Laws 1909, ch. 510) this purpose and intent is expressed in language so clear and unambiguous that it can admit of no uncertainty.

The particular inhibition of this section, which is presented for our interpretation, and *which is not found in any preceding act authorizing the issue of State bonds,* is the last clause, in these words: "Nor shall

said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation." Omitting these words from the section, it is clear that the bonds and coupons and interest paid thereon are exempted from all State, county or municipal taxation or assessment, direct or indirect, general or special, whether imposed for general revenue or otherwise; and this is true regardless of their ownership, whether by individuals, partnerships, joint-stock associations or corporations, and whether constituting a part of the capital, surplus or undivided profits of the corporation. In the hands of the owner, and however held; and regardless of what part of his money is invested in them, the State bonds issued under this act are clearly exempted from all taxation, general or special, direct or indirect. This being the clear intent and policy of the State speaking through the legislative department, and exercising a power uniformly recognized and conceded, it is our plain duty to uphold the will of the State and not to be astute to search for ways to evade it.

It is likewise well settled by the language of our State Constitution, by many decisions of this Court, and of the Supreme Court of the United States, and now generally accepted law, that the property of a shareholder of a corporation in its shares of stock is a separate and distinct species of property from the property, whether real, personal or mixed, held and owned by the corporation itself as a legal entity. It would be useless to cite authority to support a proposition so well established and generally accepted. The Constitution, Art. V, sec. 3, commands that: "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property ac- (554) cording to its true value in money." It is apparent from an examination of the taxing laws of the State, that the legislative department has attempted to observe and enforce the mandate of the Constitution.

In *Comrs. v. Tobacco Co.*, 116 N. C., 441, in discussing the several forms of taxation to which corporations were subject under the Constitution, this Court said: "As to corporations, by all the authorities, it is in the power of the Legislature to lay the following taxes two or more of them in its discretion at the same time: (1) To tax the franchise (including in this the power to tax, also, the corporate dividends); (2) the capital stock; (3) the real and personal property of the corporation. This tax is imperative and not discretionary under the *ad valorem* feature of the Constitution; (4) the shares of stock in the hands of the stockholder. This is also imperative and not discretionary."

In that case the Court also held that it was competent for the Legislature, in the method adopted by it, to tax the shares of stock in the

hands of shareholders, to require the corporation by its proper officer to file a list of the shareholders and the corporation to pay the taxes assessed against the shares of stock, and "this does not affect the liability of the shares to tax as the property of the shareholders, but is simply for the convenience of the State in collecting the tax. The effect is merely to change the *situs* of the shares for taxation from the residence of the owner to the locality where the chief office of the corporation is situated, as held in *Wiley v. Commissioners,* 111 N. C., 399." In *Bank v. Des Moines,* 205 U. S., 503, the Court, speaking through *Justice McKenna,* said: "It, however, is not an uncommon, and is an entirely legitimate method of collecting taxes, to require a corporation, as the agent of the shareholders, to pay in the first instance the taxes upon shares, as the property of the owners, and look to the shareholders for reimbursement." The tax in such cases would be a tax upon the shares of stock, and not a tax upon the corporation. It would be a mere method of collecting the tax, and not a change of the subject-matter of taxation.

It is, likewise, within the power of the Legislature under the Constitution, to prescribe the method by which the value of all property subject to taxation is to be ascertained and determined: and the method prescribed by the Legislature, and which has been prescribed for many years, for fixing the value for taxation of bank shares, is found in ch. 440, sec. 33, Laws 1909, and is as follows: "Every bank, bank-
(555) ing association or savings institution (whether State or National) shall list its real estate in the county, city or town in which such real estate is located, for the purpose of State, county and municipal taxation. Every such bank, banking association or savings institution shall, during the month of June, list annually with the Corporation Commission, in the name and for its shareholders, all the shares of its capital stock, whether held by residents or nonresidents, at its market value on the first day of June, or, if it have no market value, then at its actual value on that day, from which market or actual value shall be deducted the assessed value of the real and personal property which such bank, banking association or saving institution shall have listed for taxation in the county or counties wherein such real estate is located. The actual value of such shares, where such shares have no market value, shall be ascertained by adding together the capital stock, surplus and undivided profits, and deducting therefrom the amount of real and personal property owned by said institution on which it pays tax, and dividing the net amount by the number of shares in said institution. Insolvent debts due said institution may be deducted from the items of undivided profits or surplus, if itemized and sworn to, and forwarded to the Corporation Commission by the cashier of such insti-

tution." It is further provided that the Commission may, if it desire, make such examination and investigation as it may believe to be advisable to ascertain the market or actual value, and its action may be reviewed by an action, such as the present case is, in the Superior Court.

This has been for many years substantially the method prescribed by the Legislature of the State for ascertaining the taxable value of the shares of stock in banking institutions, whether State or National, and the only change of note was made by the Laws of 1909, in changing the authorities to appraise the stock from the Auditor of the State to the Corporation Commission. In speaking of this section, this Court, in *Lumber Co. v. Smith,* 151 N. C., 70, through *Mr. Justice Hoke,* said: "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 stockholders, is certified by the commissioners to the county authorities, to the end that the proper amount may be assessed against the individual holders of the 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 order to make the taxation equal and uniform throughout the State on all institutions of that class. There is much to be said (556) 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 not dwelt upon, the only question for us being the power of the Legislature to enact the law, and its correct interpretation."

It will be observed that, in the section of the Machinery Act under consideration, it is made the duty of the defendant commission to deduct from both the market and the actual value of the shares of stock, as ascertained by it, before fixing the taxable value of such shares, the aggregate of the real and personal property listed by the banking institution. The principle of deduction is further recognized in the cases of individuals and corporations, when they come to list their solvent credits, in that from their solvent credits they are authorized to deduct their obligations or debts due by them, and the balance is to be listed as taxable solvent credits. This principle is recognized by the Supreme Court of Illinois as constitutional, in *Loan Assn. v. Keith,* 153 Ill., 609. The Legislature has for many years recognized this as an equitable system of taxation; it has been incorporated for more than twenty-five years in our system of taxation, and this notwithstanding that it has been well settled by repeated decisions of this and other courts that shares

of stock are, in the hands of the shareholder, separate and distinct property from the property of the corporation.

The fairness and justness of the principle of deductions in the method of ascertaining the taxable value of the subjects of taxation, in order to avoid the essential harshness and inequity of double taxation, was, we think, distinctly sanctioned as long ago as 1882, in *R. R. v. Comrs.*, 87 N. C., 414. That case was presented to this Court on appeal by both parties from the judgment of the Superior Court, and in delivering the unanimous opinion of the Court, *Chief Justice Smith,* as pertinent to the present matter, said: "The commissioners object further that the assessed value of the proferred stock should be reduced by the value of the real estate and franchise as taxed separately in the several counties traversed by the road. The ruling of the Court in directing the reduction is obviously made to avoid the imposition of a double tax, since the value of all property owned by a corporation, in whatever consisting, and including the franchise, is the true and fair measure of the value of all its stock, and hence the General Assembly permits
(557) stockholders, in valuing their shares, to 'deduct their ratable proportion of tax paid by the corporation upon its property as such in this State.' Sec. 8, par. 6. The section leaves it somewhat uncertain whether the value of stock is to be reduced by the value of corporate property taxed, and the tax levied upon the difference, or the tax upon the former is to be abated to the extent of the tax upon the latter; but we interpret the latter to be the meaning. The effect of the ruling of the Court is to deprive the counties through which the road passes of assessments of the corporate property in each, and transfer them to the county of Wake, while it is, in our opinion, the purpose of the statute to allow the taxpaying shareholder to deduct from the tax on his shares a ratable part of the tax paid upon the corporate property elsewhere by the corporation itself, but not to withdraw from taxation in other counties such property of the corporation therein as is liable to assessment and taxation."

Again, in *R. R. v. Comrs.*, 91 N. C., 454, this Court said, speaking through the Chief Justice, interpreting chapter 117, Laws 1881, sec. 8: "In the concluding clause, amended by the act of 1883, ch. 363, sec. 8, to remove the obscurity pointed out in *R. R. v. Comrs.*, 87 N. C., 426, it is provided that 'stockholders in valuing their shares may deduct their ratable proportion of the value of taxable property, the tax whereof is paid by the corporation.'"

The power of the Legislature to authorize deductions to be made by the taxpayer in the method it has prescribed for ascertaining the taxable value of some of the subjects of taxations has been continuously exercised under the interpretation of the Constitution by this Court in the cases cited above.

If the reason moving the Legislature to concede a deduction was based upon a desire to avoid apparently double taxation, and this was a legitimate exercise of its discretion, we cannot see why it could not be moved to exercise a similar discretion in favor of a species of property which the fixed policy of the State, for more than half a century, has been to exempt from taxation, which the Legislature by its act in 1909 has, in the most unequivocal terms, forbidden to be taxed by the State, county, city or town, generally or specially, directly or indirectly. This inhibition of taxation can only be of advantage to the State's own citizens and corporations; to the stranger it can be of no advantage, as living beyony the territorial limits of the State, he is beyond the reach of its taxing power.

The State and its taxpayers are not without compensating advantage for this exemption from taxation conferred upon the bonds issued by the State, because it is thereby enabled to sell its bonds, (558) bearing interest at only 4 per cent, not only at their par value, but at a premium, and thus if residents and citizens of the State—those liable to pay it tribute in taxes—own the bonds of the State, what the State and its taxing subdivisions, created by it, may lose in revenue by permitting the bonds to be taxed, is saved by the State and its taxpayers in having to pay a much reduced rate of interest on the bonds.

The only remaining question, presented by the argument and arising upon the record, to be determined by us, is: Does the act authorize the deduction of these bonds to be made when constituting a part of the surplus of any bank, trust company or other corporation? Does this plainly appear to be the meaning of the act and the legislative intent?

The settled rule of statutory construction is that a statute should be construed with reference to the intended scope and purpose of the Legislature, and in order to ascertain the purpose, the courts must give effect to all of its clauses and provisions unless to do so would violate the provisions of the fundamental law or produce irreconcilable conflicts in the statute itself; nor will the use of inapt, inaccurate or improper terms or phrases invalidate a statute, when the real meaning of the Legislature can be gathered from the context or from the general purpose and tenor of the enactment. *Spencer v. R. R.*, 137 N. C., 119; *Fortune v. Commissioners,* 140 N. C., 322; *Board of Education v. Commissioners,* 137 N. C., 63; Black on Interpretation of Laws, 56. It is also said in Mordecai's Law Lectures, p. 22: "The construction given to a statute by the executive officers of the Government contemporaneously with its passage is entitled to great weight with the courts."

It appears from the public records of the State that for many years prior to 1909, and while the Auditor of the State was the authority authorized to ascertain and appraise the value of stock in banking in-

stitutions, he deducted, under the advice of the law officer of the State, the State bonds held by the banks from their total assets. Some doubt was suggested as to the validity of this uniform practice of the Auditor's office. The Legislature, in enacting the act now under consideration, added to section 4 these words: "Nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation." This same language will also be found in sec. 4, ch. 399, Laws 1909, being the act "to authorize the issue of State bonds to pay off the State bonds which fall due on the first day of July, 1910." These words will be found in no other act authorizing the issue of State bonds. We must assume that (559) these acts of such public importance, affecting the credit of the State and authorizing the issue of its bonds, received the careful examination and scrutiny of the General Assembly; and that provisions incorporated in them not found in other similar acts could not pass unobserved and would not have been adopted unless they expressed some new and distinct legislative intent. The acts were required by the Constitution and were passed with distinct formality. The bills had to be read on three several days in each branch of the General Assembly and on the second and third readings the ayes and noes were recorded, as required, on the journals of each house.

In Laws 1905, ch. 543, sec. 5, in the legislation authorizing the issue of bonds in settlement of the South Dakota judgment and the Schafer bonds, the only language used is, "Said bonds shall be exempt from all taxation, including income tax." The language used in other acts authorizing the issue of State bonds will be found in sections 5022 and 5031, Rev. 1905. In using the language in the act now under consideration there must have been, as hereinbefore observed, some distinct legislative intent, and we think this will be found in the Machinery Act. The fact that the property exempt from taxation is made exempt by another act different from the Machinery Act does not support the argument that it is not exempt from taxation; nor does the fact that the Machinery Act in terms does not authorize the bonds to be deducted, support the argument that it was not the legislative intent to have them deducted; for in section 32, ch. 440, Laws 1909, that section which specifies what property the taxpayer shall list for taxation, and calls specifically for the listing of the amount of credits, there is no reference whatever to State bonds or other bonds of the State's subdivisions that are legally exempt from taxation. To ascertain this exemption the taxpayer and the tax lister must each look elsewhere, to other acts whose provisions will be considered *in pari materia*. *Wilson v. Jordan*, 124 N. C., 683, and cases cited in Anno. Ed.

Looking to and examining the Machinery Act, we find that the only connection in which the word "surplus" is used is in ascertaining the taxable value of shares of stock in a corporation, whether the entire tax is to be paid by the corporation for its shareholder or in part by the shareholder himself. This is true not only of the act of 1909, but of all previous acts extending over a period of many years, since the Legislature adopted the present method of ascertaining and appraising the shares of stock for taxation. So, then, it seems to us in our scheme of taxation the word "surplus" has a distinct legal signification, and it must have been used with that signification in the act now (560) under review by the legislative branch of the Government, which has created and established our taxing system, and which alone has the power to do so. Unless we so interpret the statute, we shall fail to give any force and effect to this language. This we cannot do, under a well-settled rule of statutory interpretation. These words were not needed in addition to the other clear and unambiguous language of the section to exempt these bonds from taxation as the property of a bank, whether consisting of a part of its capital, surplus or undivided profits; the other words of the section were plenary for this purpose. But it is objected that the Supreme Court of the United States has held in *Bank v. Tennessee,* 161 U. S., 134, that the surplus of a bank may be taxed as a distinct species of property; but that decision does not hold that when that surplus consists of nontaxable bonds, it may be taxed. We do not think that case decisive of the present question. The facts presented in it are substantially these: The State of Tennessee in granting a charter to the Bank of Commerce stipulated that "said institution shall have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the State for taxes, and shall pay to the State an annual tax of one-half of one per cent on each share of capital stock, which shall be in lieu of all other taxes." Subsequently the State passed an act providing that "the surplus and undivided profits in such bank, banking association, or other corporation shall be assessable to said bank or other corporation, and the same shall not be considered in the assessment of the stock therein." Previous to this act the State had attempted to tax the shareholders upon their shares of stock in addition to the amount provided in the charter above quoted, and in a suit brought to test the validity of this tax, and which suit finally reached the Supreme Court of the United States, as *Farrington v. Tennessee,* 95 U. S., 679, it was held that "the exemption was a contract between the State and the bank limiting the amount of tax on each share of stock, and that a subsequent revenue law of the State which imposed additional taxes on the shares in the hands of the shareholders impaired the obligation of the contract, and was void." In the *Bank of*

Commerce case, supra, the Court, in referring to the *Farrington case,* said: "We do not think under the circumstances that we ought to come to a different conclusion upon the question of exemption from that which was arrived at by this Court in the *Farrington case.*" And the Court held that the provision of the bank charter having been (561) construed to be a contract limitation of the power to tax the shares of stock as the property of the shareholder, it would not extend its benefits to exempt the corporate property from taxation, and as the revenue act only taxed the surplus and undivided profits of the corporation, such tax did not impair the obligation of a contract and was within the power of the State; and therefore the State could tax the entire capital, surplus and undivided profits of the bank. We do not think that case authority against our interpretation of the act now under consideration.

The primary purpose of a bank surplus is the accumulation of a sum against which bad debts may be charged, so that at all times the capital may be kept unimpaired. This is required by the National Banking Act. The only connection in which, as we have observed, the word surplus is used in our taxing system, now established for more than a quarter of a century, is that it appears in the method prescribed for ascertaining the taxable value of shares of stock. We think, therefore, that it was within the power of the Legislature to authorize a deduction of the bonds issued under the provisions of this particular act of the General Assembly when they constituted a part of the surplus of a banking institution, in ascertaining the taxable value of the shares of stock, and that the legislative intent to have such deduction made is expressed with sufficient clearness for this Court to discover such intent, especially when this act is construed in connection with section 33, chapter 440, Laws 1909, known as the Machinery Act. By such interpretation we give effect to the legislative intent without disregarding any clause of the act, which we could not do by any other interpretation; and at the same thing we give effect to the well-settled policy of our plan of taxation, to tax the shares of stock in banking institutions as a separate and distinct species of property. The deduction of investment in these bonds by a bank can be made only when the bonds constitute a part of the surplus of such institution. If a part or all of the capital stock or undivided profits are invested in these bonds, the claim of the shareholder for a deduction cannot be sustained, as the language of the fact comprehends only the surplus. If all the surplus is invested in these particular bonds, and there are no undivided profits, then the shares of stock would be appraised at not over their par value, subject to the deduction of the value of the real estate and personal property owned by the bank and already taxed. As to the validity of the deduction of the

real estate and personal property, no question seems to be raised. If a less amount than the entire surplus is invested in these bonds, then the appraisement of the shares of stock for taxation would (562) be correspondingly increased. We do not think that this interpretation of the act in anywise impairs the right of the State, under the consent of Congress given in section 5219 of the Revised Statutes of the United States, to tax the shares of stock in National banking associations; for our interpretation in no way violates either of the two restrictions imposed by that section of the Revised Statutes. We say this much in reference to the effect upon the taxation of the shares in National banks, because the question was suggested on the argument and in the brief of counsel for the defendant.

We conclude, therefore, that the judgment of the Superior Court sustaining the ruling of the Corporation Commission in appraising the stock of the plaintiff Pullen in the Raleigh Savings Bank and Trust Company is erroneous, in that the investment of a part of the surplus by the said bank and trust company in these bonds, known as the asylum bonds, should have been deducted from the aggregate value of the assets of the said bank and trust company in ascertaining and appraising the value of the shares of stock in said corporation for taxation. The judgment is reversed and the cause remanded for further proceeding in accordance with this opinion.

Reversed.

BROWN, J., *concurring:* I agree fully to the views so lucidly and strongly presented in the opinion of the Court by *Mr. Justice Manning.*

I agree, also, that it is well settled that the shares of stock in any corporation, when owned by individuals, are separate and distinct property from the assets of the corporation and may be taxed as such. But it must be conceded that it rests exclusively with the Legislature to determine how and by what method such shares are to be valued for taxation, as much so as to provide a method for valuing lands and all other property.

The right upon the part of a State to exempt its own bonds from all taxation is universally conceded, and when the General Assembly declared expressly that they should not be taxed when constituting a part of the surplus of a bank, it exercised an undoubted power, which heretofore has never been denied to it. It remains only to determine why were such words employed in the statute and what end were they intended to accomplish. That has been clearly demonstrated, I think, in the opinion of the Court.

No such language is contained in any act of Congress relating to National bonds, nor in any of our own statutes heretofore, and

(563) hence the cases cited are of no value. This new provision introduced in this State no new method of valuing bank stock. It was plainly intended to give legislative sanction to a practice which had been followed here for many years up to 1909.

Under the ruling of the former Attorney-General, the Auditor of the State in assessing the value of bank stock for taxation always deducted from the bank's surplus all North Carolina bonds, because they were nontaxable, and that was the only way under our system of bank taxation of obeying the law exempting them from taxation.

It is well known that when the General Assembly of 1909 was considering this act for refunding a large part of the State debt, it intended to incorporate in the bill a provision which would make that practice mandatory in the future. Hence that provision was put in the bill and drawn expressly for that purpose, as is generally understood, by the present Attorney-General at the instance of the Committee on Finance.

It is also well known that the same construction we are giving to this statute has been given to it by the present State administration under the opinion of the Attorney-General, and that the bonds were purchased and paid for in reliance upon that construction.

If I were doubtful about the true meaning and purpose of the General Assembly, I should solve it in favor of that construction by which the good faith of the State is maintained. As it is, I have no doubt that the State administration, under the advice of the Attorney-General, has construed the act correctly.

Any other construction, in my opinion, destroys the purpose of the Legislature and converts its language into foolish and meaningless terms, a snare with which to trap the unwary purchaser. The charge that we are exempting bank stock from taxation is without any foundation to support it. As pointed out in the opinion of the Court, such stock cannot possibly escape taxation at its full par value. This, however, is not a matter of such grave importance to the State as we are led to believe.

I have it from the Treasurer of the State, that although for years past our State bonds have invariably been deducted from the surplus of banks in assessing shares of stock for taxation, yet not more than 10 per cent of the State debt has at any time been owned in North Carolina.

I quote *verbatim* from the opinion of the State Treasurer: "At no time has more than 10 per cent of the bonds been held inside of
(564) North Carolina, and I do not think there is any probability in the future of more than that amount being held in the State, and only a part of that by the banks. I do not think this State can absorb

four million dollars' worth of 4 per cent securities, but the increased value of a part of these bonds in the State will in my judgment affect the value of the entire issue, as the outside bidders will always regard the value in the home market." This statement from the efficient and experienced Treasurer of the State, Mr. Lacy, shows how utterly groundless is the assertion that the construction we place upon the statute will exempt four millions of property from taxation.

The wisdom and policy of this legislation is not a matter for our consideration. We should not destroy an act of the General Assembly because we do not approve of it. It is for us to declare the law, not make it.

But I am of opinion that this legislation is in line with a wise and enlightened public policy. Our recognized State debt is over seven million dollars, which will not be paid off for many generations to come. The debt will from time to time be refunded and new bonds issued. The wisdom of the General Assembly prompted it to create, if possible, a reliable home market for our bonds, so that the large sums paid out by the State as interest may be kept at home. It therefore offered the stockholders of banks and other corporations of this State an inducement to purchase its bonds by exempting them from taxation when the surplus earnings of the bank over and above its capital shall be invested in them. The stockholders of a bank will not permit its surplus to be invested in these low rate interest bonds if thereby their shares of stock are to be valued for taxation just as high as if the surplus was invested in more productive investments. Therefore it is perfectly manifest to me that the General Assembly intended to provide that in valuing the shares for taxation State bonds must be exempted by deducting them from the surplus.

It is a matter of common knowledge in the financial world that commercial banks do not, as a rule, invest in such bonds. Their deposit accounts are too active and discounting short-time paper is much more lucrative. It is generally the savings institutions that invest their deposits in State bonds.

In the New England and other States, where savings banks are greatly fostered, they have been encouraged to invest their funds in the securities of their own State, not only because such institutions are productive of thrift and prosperity among a people, but because such investments are the safest and best for their depositors' funds.

Such has been the enlightened policy of the statesmen of (565) France, a most thrifty nation, and as a result of which it was enabled, without outside help, to pay off at once the most stupendous fine ever imposed upon a conquered people in the history of the world.

The stockholders of the plaintiff bank, having purchased these bonds,

admittedly at a large premium, relying upon the language of the statute and the opinion of the State's officials, are entitled to have them deducted from the surplus in valuing their stock. With perfect deference to others, I think that good faith and fair dealing require it.

CLARK, C. J., *dissenting:* Though much has been said on the argument in regard to this decision affecting the price of State bonds, reference to the complaint and the judgment of the Corporation Commission discloses that the sole purpose of the action, and the only point presented, is as to whether the *stockholders* in a bank which holds State bonds are exempt to the amount of these bonds from the payment of taxes on their individual property—the shares which they buy and sell at will and which is as much their private property (though paying larger profits) as the horses and plows with which the farmer makes his living or the taxed tools which a mechanic uses. When the State issues its bonds, it has never been denied that it can exempt them from taxation by State, county and municipal authorities. This is on the principle that the issuance of bonds is an agency of government. Besides, the State in effect does collect tax by deducting it in the rate of interest which the bonds bear.

The $55,000 of State bonds in this case are owned by the Raleigh Savings Bank and Trust Company and have not paid one cent of tax to the State, county or city, and no one has ever suggested, or does now suggest, that they should. By reason of such exemption from taxation the bank saves some $1,375 annually, which swells to that extent the fund annually available to be divided among its stockholders. Not content with that, the *stockholders* in this case are asking for a second exemption, another $1,375 annually, by again deducting the same $55,000, in assessing the value of their private property, the shares of stock, for taxation. The shareholders do not own these bonds. They are owned by the bank itself, and the bank has been already exempted from taxation on $55,000 on account of the bank's ownership of them.

Nothing is better settled by the uniform decisions of this Court and of the United States Supreme Court than that the property of a (566) bank and the shares of the stockholder are entirely separate and distinct, and that the taxation, or exemption, of the one is in nowise a taxation or exemption of the other. *Belo v. Commissioners,* 82 N. C., 415; *Commissioners v. Tobacco Co.,* 116 N. C., 446. Indeed, so thoroughly is this principle settled by repeated decisions of the Supreme Court of the United States that in *Shelby Co. v. Bank,* 161 U. S., 140, it is declared that *no one now disputes that they are separate and distinct classes of property.*

In numerous cases in which stockholders in banks, holding United States bonds, have contended that their shares in such bank were exempt

from taxation to the extent of such United States bonds and that the value of their bonds should be deducted in assessing the shares of stock for taxation, that Court has uniformly rejected the contention upon the ground that the bonds were the property of the bank and exempt as such, and that the shares were the property of individuals and not entitled to any exemption in assessing their value on account of the bonds so held by the bank. This is the very contention which the plaintiffs are making in this case and which has been rejected whenever presented by the highest Court in the land. *Van Allen v. Assessors,* 3 Wall., 573; *Bradley v. People,* 4 Wall., 459; *Trust Co. v. Lander,* 184 U. S., 111.

In *Commissioners v. Tobacco Co.,* 116 N. C., 447, folowing the decisions of the Supreme Court of the United States and the previous decisions of this Court, it was said: "The capital stock belongs to the corporation. The shares of certificates of stock are entirely a different matter. They belong to the shareholders individually, and under the Constitution must be taxed *ad valorem* like other property belonging to the holder, independently of the taxation upon the corporation, its franchises, etc."

If it is now held otherwise as to the plaintiffs, shareholders in a bank, as to our State bonds, in this case reversing all previous decisions, we may not only strike from the tax books $4,000,000 in value of shares of stock in State banks, but we may very probably be exempting all National banks from any taxation whatsoever. The State cannot discriminate against United States bonds.

The act before us exempts three classes of property: 1. The bonds themselves are exempt from all taxation, direct or indirect, general or special. 2. The dividends paid on such bonds are not subject to taxation as an income tax. 3. The surplus of any bank, when consisting of such bonds, shall be exempt from taxation. Not a word is said about exempting shares of stock.

The argument that the shares of stock in the plaintiff's bank (567) are nontaxable because their value is due in part to the fact that if the bank was wound up and the surplus divided, the proceeds of such nontaxable bonds, derived from the sale thereof, would be divided among the shareholders, is fallacious because it confounds the surplus, owned, held and controlled by the bank, with the shares of stock, which are owned, held and controlled by individuals. The Corporation Commission is required by law to assess the value of shares of stock in all banks for taxation. When this matter was presented to that body, it assessed the value of the plaintiff's shares of stock at $104.40 per share, and its decision was in the following words:

"In assessing the shares of stock in this bank the Corporation Commission followed the direction of the statute, as it did not appear such

shares had a market value, by adding together the capital stock, surplus and undivided profits and deducting therefrom the amount of real and personal property owned by said institution on which it paid taxes, as follows:

Capital stock	$15,000.00
Surplus	60,000.00
Undivided profits	342.25

making a total of $75,342.25, and deducting therefrom the assessed value of real and personal property, as follows:

Office furniture	$3,000.00
Commercial National Bank Stock	8,700.00
Fidelity Bank stock	1,000.00

making a total of $12,700, leaving a balance of $62,642.25, which divided by 600, the number of shares of stock of said bank, ascertained the value of each share to be $104.40, subject to taxation.

"There was no allegation that there was any insolvent debt due this institution.

"This assessment is not satisfactory to John T. Pullen, who owns fourteen shares of stock in this institution. He contends, and the report on which this assessment is based shows, that the bank has a surplus of $60,000, and has invested $55,000 of this surplus in North Carolina State bonds, issued under chapter 512, Laws 1909, and he claims that this amount should also be deducted from the aggregate value of all the shares of stock. In other words, the contention is that, in addition to the assessed value of real and personal property on which the corporation pays taxes, $55,000 should be deducted, because this much of the surplus of the bank was invested in the above-named (568) bonds.

"The Corporation Commission failed to see the force of this contention, as they were not assessing the capital stock, or surplus, or undivided profits of the bank, but a distinct species of property, to wit, the *shares of stock* of the bank *in the hands of the shareholder*. The bank is not required by law to list any of its property, whether capital stock, surplus, undivided profits or other property, except so much of it as is invested in real estate inside of the State. And this bank has already had the full exemption from taxation of its North Carolina State bonds. The only property listed by the bank for taxation was office furniture, $3,000; Commercial Bank stock, $8,700; and Fidelity Bank stock, $1,000, and these amounts were deducted.

"The General Assembly did not intend that the value of the property exempt from taxation which is owned by a corporation should be de-

ducted from the aggregate value of all the shares of stock in said corporation in order to ascertain the value of such shares for taxation, as appears from the plain directions of the statute: 'The value of such shares of stock in the hands of shareholders shall be the market value. If they have no market value, the value shall be ascertained by adding together the capital, surplus and undivided profits and deducting therefrom,' not such property as is exempt from taxation, but 'the amount of real and personal property owned by said institution on which it pays taxes.' See Machinery Act, Laws 1909, ch. 440, sec. 33. There is no conflict between this statute and chapter 512, Laws 1909.

"That the *shares of stock* in the hands of shareholders are a distinct species of property from that owned by the corporation, and that the General Assembly can require it to be taxed at its value, notwithstanding that a part or the whole of the bank's funds are invested in property exempt from taxation, has been held in our courts in *Belo v. Commissioners,* 82 N. C., 415; *Commissioners v. Tobacco Co.,* 116 N. C., 441, and numerous other cases; and by the Supreme Court of the United States in *Trust Co. v. Lander,* 184 U. S., 111. Notwithstanding the number of words used to exempt the same, namely, 'The bonds and coupons shall be exempt from all State, county and municipal taxation or assessment, direct or indirect, general or special, whether imposed for general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as income, nor shall State bonds or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation,' we are of the opinion that the same cannot be construed so as to authorize the deduction contended for by the plaintiff, in view of the authorities cited (569) above.

"FRANKLIN MCNEILL,
"Chairman."

The statute requires that taxation on the *shares of bank stock* in the hands of individual owners shall be laid upon the value of such stock, which valuation shall be reached: (1) Taking the market value of the stock; (2) Deducting the value of the real and personal property of the bank, which has been already taxed; (3) by dividing the remainder thus left by the number of shares. By these processes the Corporation Commission found that the balance was $62,672 and that the shares of stock are worth $104.40 per share. The plaintiffs are seeking, in this case, to deduct $55,000 (on which *its owner,* the bank, has already had exemption), leaving the taxation value of the total shares in this bank for taxation $7,642, being a little more than $12 a share.

It is a matter of universal knowledge that within the last three months a large part of this stock—in fact, more than five-sixths thereof—has

been purchased by another bank at $175 per share, or seven times its par value ($25). On the shares for which the purchasers paid $175 it is now asked that assessment for taxation against said purchasers shall be laid at a little more than $12 per share.

The statute law of the State, Laws 1909, ch. 440, sec. 33 (p. 705), provides: "The residents of this State who are shareholders in any bank, banking association or savings institution (whether State or National) shall list their respective shares in the county, city or town, precinct or village where they reside, for the purpose of county, school or municipal taxation. . . . All shares, whether owned by residents or nonresidents, shall be listed at the time for listing taxes. The county commissioners, list takers and other county and municipal officers shall have the same power to enforce the listing of shares of stock in any such bank, banking association or savings institution, whether held by residents or nonresidents, as they have for enforcing the listing of their personal property. The taxation of shares of any such bank, banking association or corporation, or savings institution, shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens, whether such taxation is for State, county, school or municipal purposes." And the next section provides that in assessing the value of the shares of stock the highest price of sales of stock during the year and the average price of sales of stock
(570) during the year shall be taken into consideration. These provisions show that the lawmaking powers are at one with the decisions of the courts in considering that the shares of stock are entirely separate and distinct property from the property held by the bank itself.

The Constitution of the State, Art. V, sec. 3, provides: *"Taxation shall be by uniform rule ad valorem.* Laws shall be passed taxing by uniform rule all moneys, credits, investments in bonds and personal property according to its true value in money." And then follows section 5 of the same article, which authorizes the General Assembly to exempt cemeteries and property held by schools, churches, charities, and the like, and also personal property, not to exceed $300 to each taxpayer.

The statute law of the State, Laws 1909, ch. 440, sec. 63, in accordance with the provisions of the Constitution, provides (p. 725): "The following personal property *and no other* shall be exempt from taxation, State and local." Then follow the exemptions of property, school and charity property and an exemption (p. 726) "not exceeding $25" of wearing apparel, etc., to each taxpayer. And then, to prevent any possible misunderstanding, Laws 1909, ch. 438, sec. 5, repeals all other exemptions of any other kind than that above enumerated which have

heretofore been granted. This legislation shows conclusively that there was no intention on the part of the Legislature to extend an exemption to the shares of bank stock held by the plaintiffs. Such property is proverbially the best in the State, and the shareholders of a bank whose stock, by good management and exemption from taxation, has increased in value to "7 for 1," certainly do not own an interest in "an infant industry" requiring a subsidy from the State in the shape of exemption from taxation. Owing to increased demands for public purposes, the Legislature has not felt that the State was able to grant to less prosperous taxpayers the exemption of $300 per head, which it is authorized to do by the Constitution, but restricts the exemption to $25. It is not reasonable to assume that it intended to exempt many thousands of dollars from taxation in the shape of shares in the banks.

As the statute, Laws 1909, ch. 440, sec. 14½ (p. 696), defines the market value as the amount for which property is sold for cash in the ordinary course of dealing, it would seem that the error in the action of the Corporation Commission is in not assessing this property at $175 instead of $104.40, and the shareholders certainly cannot complain, as they have thus, already, received an exemption of $70 per share deducted from the "true value," or a 40 per cent exemption.

It was further argued by the plaintiff that, inasmuch as the (571) statute provided that in assessing the value of the shares in the hands of the shareholders, the Corporation Commission should deduct "the real and personal property on which the bank *has paid* taxes," that *therefore*, the Corporation Commission should also deduct the property on which the bank *has not paid* taxes. It is impossible to adopt this as logic. If the Legislature had meant to do so, it would certainly have said it, and in a simpler way, by saying that "all shares of bank stock shall be exempt from taxation," since that is what it would amount to.

But the Corporation Commission, in this case, have deducted the value of such real and personal property "on which the bank has paid taxes," to wit, $12,700, before arriving at the amount at which the plaintiffs' shares were assessed. Though the point is not presented, it is well to call attention, here and now, to the fact that unless we deny, what all the courts have held, that the shares of stock in the hands of individuals are separate and distinct from the property of the corporation, the exemption in favor of the *shareholders* of the value of the property on which the *bank* has paid taxes is in violation of the provision of the Constitution which forbids exemption, and the State has lost many thousands of dollars in taxation annually by this point not having been considered. It is very clear that one man cannot have an exemption on his property because another man has paid taxes on his own property.

It was contended in the argument, by the plaintiffs' counsel, that the effect of a decision by this Court that the stock in the hands of shareholders would be exempted from taxation to the amount of the State bonds owned by the bank, would create a demand which would take up possibly the whole of the issue of $4,000,000 of bonds. It is no part of the province of a court of justice to render decisions because of the effect, one way or another, on the financial market in which bonds and stocks are traded for. The questions before us are only, whether the Legislature attempted, and had the power, to exempt the shares of stock in the hands of the shareholders when it provided that "the bonds and coupons shall be exempt from all State, county and municipal taxation or assessment, direct or indirect, general or special, whether imposed for general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation." These bonds have not been subject to any tax, direct or indirect, general or special, either as surplus or in any other way. The exemption is to the *bonds* and is given
(572) to the *owner,* whether an individual or a bank, and when constituting a part of the surplus of the latter.

But it is contended that the word "indirect" should be construed to extend the exemption, not only to the bank which has already had the benefit of exemption, but further to the shareholders. There is no such intimation in the statute. The expression "indirect taxes" is well known, and in this connection it can only mean taxes "direct or indirect, general or special," *on the bonds* themselves in the hands of the owner, to wit, the bank. To give it the construction contended for would give the word "indirect" a construction which has never been placed upon it by any court. A tax on the shares in the hands of the owner cannot possibly be a tax on the property of the bank.

If the plaintiffs' contention is correct, the Legislature has passed an act which has this singular effect: If any individual or corporation other than a bank owns one of these bonds it is exempt from all taxes in the *owner's* hands— a single exemption; but if a bank owns it, as part of its surplus, the shareholders get an exemption to the like amount on their individual property, their shares of stock—a *double exemption* from taxation.

The owner of more than five-sixths of the shares of the Raleigh Savings Bank and Trust Company is another bank, and the only effect of the decision, if rendered in favor of the exemption, would be to increase vastly the value of the shares of stock in the Raleigh Savings Bank and Trust Company, and also the value of the shares of stock in the bank which now holds five-sixths of the shares of the former bank.

The complaint frankly avers the true object of this suit, which is to obtain a coveted and most valuable exemption from taxation of the shares in the hands of the shareholders. It does not aver that the plaintiffs are seeking to benefit the State by raising the value of the State bonds, nor that they are here to advance the interests of the State. They are seeking an exemption of their shares because of State bonds which the bank has already bought, and it is not reasonable to suppose that they should wish to advance the value of State bonds which either bank may hereafter desire to purchase. Counsel for the plaintiffs, however, have contended that such would be the effect. If it is proper for the Court to consider such matter, it may be well to insert here, from the defendant's brief, the answer which they make to the suggestion:

"The capital stock of the plaintiff's bank is $15,000. Its surplus is $60,000. It holds $55,000 of these nontaxable bonds as a part of its surplus. The life of these nontaxable bonds is forty years. Let us see what would be the result to the State if the law requires (573) the taxing power to deduct these $55,000 of bonds from the actual value of the capital stock of this bank in order finally to ascertain the value of the *shares* of stock therein:

"The total tax rate in Raleigh is about $2.50. Two and one-half per cent of $55,000 equals $1,375. Forty times $1,375, that is to say, the loss of taxes each year, multiplied by the number of years that the bonds run, equals $55,000. So the State in forty years would lose the principal of the bonds; and for what?—to gain one point by way of premium when first sold (record, p. 2). A pretty costly whistle, to be sure. It will be noted that the 'controversy without action' states that by exempting the shares of stock from taxation the premium upon the bonds will be increased one point. Taking, therefore, these $55,000 of bonds as a basis, the State would receive by way of extra premium, if sold with the exemptions contended for, 1 per cent, or $550. But at the end of forty years the State, etc., would lose, as above, $55,000, and under the contention of exemption, if allowed because the tax is not on the shares but on the corporation, all National banks would go scot free of all taxes. And yet we are authorized to state from the Corporation Commission that it is not the financial view of this matter which they would call to the attention of the Court, but the legal phases of the same. We simply contend that a statute which results in such disastrous consequences financially to the State should not be, by the Court, interpreted as contended for by the appellant, unless the meaning of the statute is clear beyond doubt, without inference and without presumption. And we maintain that the plaintiffs have not shown and cannot show that the intention of the Legislature is clear beyond all doubt in respect to this matter."

In reply to that, the plaintiff's counsel subsequently contended that only a very small part of the bonds would be bought by the banks in this State. If so, such a very small demand could not materially affect the price of the bonds. Indeed, the only evidence adduced before the Corporation Commission, that the exemption of the *shares* of stock would affect the price of these bonds, is that of a witness who thought, perhaps, the price would be raised ¾ of 1 per cent. That was only his opinion, and the contrary opinion that the price of the bonds would not be affected at all is probably entertained by a large majority of the bank officials of this State.

Exemption of any property from its fair and just share of public burdens increases the taxation paid by all other property. Such (574) exemption has, therefore, been expressly prohibited by the State Constitution. Indeed, it may with truth be said that no legislation can be more unjust or more odious. For many years the State contended for the annulment of an exemption from taxation which had been granted to two great railroads in the State. Such grant had been made at a time when railroads were an "infant industry," and the State thought their construction should be encouraged by contribution from the other taxpayers by exempting those railroads from taxation. Besides, at that time there was no provision in the Constitution, as now, forbidding the exemption of any property. Yet the State strongly contended for years that the exemption was unjust and illegal, and finally the repealing act was held valid by this Court in *R. R. v. Allsbrook,* 110 N. C., 137, which opinion was affirmed upon a writ of error by the United States Supreme Court. In that opinion by this Court, 110 N. C., p. 147, it was said, quoting from *Chase, C. J.,* and *Miller* and *Field, JJ.,* in *Washington v. Rouse,* 8 Wall., 441: "We do not believe that any legislative body, sitting under a State Constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. . . . If the Legislature can exempt, in perpetuity, one piece of land, it can exempt all land. It can as well exempt persons as corporations. They go on to say that rich men and rich corporations with the appliances they are known to use, may obtain perpetual exemption 'from taxation and cast the burden of government and the payment of debts on those who are too poor or too honest to buy such immunity'; and they say further, 'with as full respect for the authority of former decisions as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies which can never be finally closed by the decisions of the courts, and the one we have here considered is of this character.' We are strengthened in this view of the subject by the fact that a series of dissents from this doctrine by

some of our predecessors shows that it has never received the full assent of this Court, and referring to those dissents for more elaborate defense of our views, we content ourselves with thus renewing the protest against a doctrine which we think must be finally abandoned."

In the above case we were holding invalid an exemption from taxation granted under a Constitution which did not forbid such exemption, and purely on the ground that the Legislature could not grant an irrevocable exemption. In the present case the exemption is not given by any words which refer to shares of stock or to shareholders, and is a most far-fetched deduction from the use of the word "indirect," (575) and if it can be construed to convey the meaning the plaintiffs contend, then the exemption is in direct violation of the Constitution of the State.

It has been uniformly held by the United States Supreme Court, by courts of other States, and by this Court, that in respect to corporations "the Legislature can levy any two or more of the following taxes, simultaneously: (1) on the franchise (including dividends); (2) on the capital stock; (3) on the tangible property of the corporation; and (4) on the shares in the hands of the shareholders. *The tax on the two subjects last named is imperative." Commissioners v. Tobacco Co.*, 116 N. C., 441, and cases there cited. That action was brought by an eminent lawyer, now a member of this Court, whose contentions to the above effect were sustained. Notwithstanding that it was there held that a corporation must pay tax on all its property, like every one else, the counsel for defendant says truly that *"not a bank in North Carolina to-day pays one cent of tax to the State, county or town, for franchise tax, income tax, nor any tax whatever upon its capital stock (which taxes are optional with the Legislature), nor upon any of its property (which last tax is imperative by the Constitution), save the tax on its banking house and furniture and the like"* (in this *case* $12,700), *and even that tax is recouped by unconstitutionally deducting the amount of the property thus taxed from the assessment of the shares against the shareholders.* This is in direct violation of the Constitution. If the farmers, and other citizens and all other corporations, were treated to a like total exemption from all taxation, they, too, would show a great degree of prosperity. Neither railroads, cotton mills nor any corporation, other than banks, are thus practically exempted from all taxation, nor are shareholders in any corporations other than banks authorized to deduct in estimating the value of their shares for taxation the amount of property on which the corporation has paid any tax.

To sum up: "Exemptions from taxation are regarded as in derogation of the sovereign and of the common right, and, therefore, not to be extended beyond the exact and express requirements of the language

used, construed *strictissimi juris.*" *R. R. v. Thomas,* 132 U. S., 174. Here there are no words conferring an exemption upon stockholders in the banks, and it requires an ingenious and most unusual interpretation of the words "indirect tax" to confer an exemption upon the plaintiffs.

"Where a doubt arises as to the existence of the exemption, it is to be decided in favor of the State." *Bank v. Tennessee,* 104 U. S.,
(576) 495. Here it requires an ingenious construction, an unusual one, of a single word to raise a doubt in favor of the exemption.

"The exemption must be clearly stated and will not be inferred from facts which do not irresistibly point to the existence of a contract." Judson on Taxation, sec. 86. There can be no lawful contract of exemption made, even if the Legislature had so intended, because their action would be in violation of the Constitution.

"No claim of exemption from taxation can be sustained unless established beyond all doubt." *R. R. v. Supervisors,* 93 U. S., 595; *R. R. v. Missouri,* 120 U. S., 569. In this case, of the nine judicial officers to whom, under the laws of this State, this matter has been submitted, only three, a bare majority of this Court, considered that such exemption has been granted. The three Corporation Commissioners, the judge of the Superior Court, and two judges of this Court, have a contrary opinion. Surely, the point is not "established *beyond all doubt*"—the test which the Supreme Court of the United States applies.

Such exemptions must be expressed in clear and unambiguous terms. *R. R. v. Allsbrook,* 110 N. C., 158. Can any one claim that such is the case here when neither "shares" nor "shareholders" nor exemption to them are named in the statute, which only refers to exemption of the *bonds* when owned as the surplus of the bank?

The buyers of the bonds, upon the holding of the Court that the shareholders are exempt on their stock, may claim that the decision of this Court is a contract, an exemption of bank shares annexed to the exemption of $4,000,000 of bonds, being a *double exemption,* for forty years, and that such exemption is irrevocable, even though the Legislature should strike out the act, or the Court should hereafter express a contrary opinion, either in another suit or by a rehearing in this case and change of opinion by one member of the Court, as now constituted, or by a change in its personnel. The dissenting opinions will not be without value, for they put the bond buyers upon notice that if the act, as thus construed, is unconstitutional, no valid contract of exemption of shares has been granted. There is nothing in the judgment of the Corporation Commission of which the plaintiffs have a right to complain.

HOKE, J., *dissenting:* I am constrained to differ from the Court in its decision of this case, and the question presented being a matter of im-

portance both to the parties litigant and to the public, I deem it proper that I should state briefly the reasons for my position.

It has been long an accepted principle that shares of stock in (577) a bank, when owned by individuals, are entirely separate and distinct from the corporate property and assets. This was held for law in *Van Allen v. Nolan,* and several other cases of like import, sometimes called the bank tax cases, decided as far back as 1865, and reported in 70 U. S., p. 573. The question there chiefly determined was whether the bonds of the United States Government should be first deducted in estimating the value of shares of stock in the hands of individual owners for the purpose of State taxation, permissible under the Federal statute; and it was held that while the bonds of the Federal Government were exempt from any and all forms of taxation, direct or indirect, yet the shares of stock owned by individuals being an entirely distinct and separate species of property, the Government bonds, though held and owned by the bank, should not be deducted in determining the value of these shares.

In the case referred to, *Associate Justice Nelson,* delivering the opinion, thus states the principle and the reason for it as follows:

"But in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations.

. . . . . .

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him." *Van Allen v. Nolan,* 70 U. S., 573.

While this principle was originally established by a divided Court, it has been since repeatedly affirmed and applied by the Supreme Court of the United States, as in *Bank v. Tennessee,* 161 U. S., 134; *Bank v. Des Moines,* 205 U. S., 518, and many other cases; and has been so long recognized and acted upon by courts and Legislatures that in the impressive language of *Associate Justice Moody,* delivering the opinion in the case last cited, "It has come to be inextricably mingled with all

taxing systems and cannot be disregarded without bringing them
(578) into confusion that would be little short of chaos."

The decisions of our own State are equally pronounced in recognition of this principle. *Commissioners v. Tobacco Co.*, 116 N. C., 441; *Belo v. Commissioners*, 82 N. C., 415. In the last case, *Chief Justice Smith*, speaking to this question, said:

"In an able opinion of the author of that valuable work on railways, commenting on the law, he says: 'We here find the clear recognition of this kind of corporate property, taxable to the corporation, and the shares in the hands of the corporators, distinctly defined as a *fourth species of corporate property, taxable only to the owners or holders:* (1) The capital stock; (2) the corporate property; (3) the franchise of the corporation, all of which is taxable to the corporation; and the shares in the capital stock, which are taxable only to the shareholders.' 1 Red. Am. R. Cases, 497.

"A tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself, or its stock, and may be laid irrespective of any taxation of the corporation where no contract relations forbid it. Cooley Const. Lim., 169; Field on Corp., 521.

. . . . . .

"In *Van Allen v. Assessors*, 3 Wall., 573, it is held that shares in a National bank may be taxed to the holder, although the whole capital is invested in securities of the National Government, which an act of Congress declares to be exempt from taxation by State authority."

This being the doctrine as it now universally prevails, the Revenue Acts of the State establishing the method of taxation applicable to banks provide that the shares of stock of all banks of this State, both State and National, shall be taxed as the property of the individual owners, and for that purpose said shares shall be assessed at their market value, if they have no market value, then at their actual value; that this actual value, when there is no market value, shall be ascertained and determined by adding together the capital stock, surplus and undivided profits and deducting therefrom the value of the real and personal property on which it pays tax under local assessment, and insolvent debts, if properly itemized and sworn to, may also be deducted.

It will be noted here that the shares of stock are assessed and taxed, and the deductions are to be made only in determining the value of *these shares* as property of individual owners, and separate and distinct from the property and assets of the bank, and the only deductions
(579) allowed by the law are the real and personal property locally assessed and taxed and insolvent debts.

This, then, being the provision of the law under which the taxes are assessed, the Legislature of 1909 enacted chapter 510, Laws 1909, en-

titled, "An act to issue bonds, etc., to care for the insane of the State"; and, after providing for such issue to an amount of $500,000, the statute contains the following section:

"SEC. 4. The said bonds and coupons shall be exempt from all State, county or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation."

It is contended that under and by virtue of this provision, the bonds to be issued under this act shall not be considered in determining the value of shares in the hands of individual owners for purposes of taxation under the revenue laws above referred to.

This being a claim for exemption from taxation, it can only be allowed in case the claim is clearly established. *R. R. v. Allsbrook,* 110 N. C., 137; *R. R. v. Missouri,* 120 U. S., 569; *R. R. v. Supervisors,* 93 U. S., 595; Judson on Taxation, sec. 86.

In *Allsbrook's case, supra,* it was held:

"2. The grant of an exemption from taxation must be expressed by words too plain to be mistaken; if a doubt arise as to the intent of the Legislature, that doubt must be resolved in favor of the State."

In *R. R. v. Missouri, supra,* it was held:

"Immunity from taxation will not be recognized unless granted in terms too plain to be mistaken."

These decisions, while quoted as indicating the only condition under which an exemption from taxation should ever be allowed, can hardly be considered apposite to the question presented; for, bearing in mind that cardinal principle that shares of stock in the hands of individual owners are entirely distinct from property of the bank, the statute in question nowhere provides that the valuation of these shares, as the property of the individual holders, should be in any way diminished by reason of the ownership of the bonds in question on the part of the banks, nor in my opinion does it use words that justify or permit of any doubt on that question. The section quoted provides:

1. That the bonds shall be exempt from all taxation, direct or indirect, etc.

2. That the interest thereon shall not be subject to taxation as (580) for income.

3. Nor shall they be taxed when constituting a part of the surplus of the bank.

And in language both plain and explicit these are all the exemptions which the statute sanctions or allows. There is nothing obscure or

ambiguous in them, and in such case the courts have no power to add what is to my mind, an entirely distinct provision, to wit: "Nor shall said bonds be considered in determining the value of the shares when assessed and taxed as the property of the individual stockholders."

The first exemption specified in the law, "shall not be subject to taxation, direct or indirect," comes clearly under the decisions referred to, which hold that United States Government bonds shall not be deducted in estimating the value of the shares in National banks for purposes of taxation. An exemption by statute cannot be expressed in terms more comprehensive and searching than that which arises from the principle that the bonds of our National Government may not be taxed by the States. Such a power involves its very existence as an independent sovereignty, and, notwithstanding this, these bonds, when owned by a bank, are not deducted in determining the value of the shares, because, as stated, the shares are an entirely distinct and separate species of property.

The terms of the second exemption in the statute are not relevant to the discussion, and the third, "Nor shall the bonds be taxed when constituting part of the surplus of the bank," in clear and express terms applies to the bonds when constituting part of the corporate property, and in no way affects the valuation of the shares, which are the property of the individual.

It is insisted, in support of the proposed change from the express terms of the law, that unless it shall be interpreted as affecting the valuation of the shares it would be meaningless; and it is further urged that the history of this legislation and the action of the Executive Departments of the State Government should lend force to the position taken in the principal opinion; but these are considerations and rules of construction and interpretation permissible only when the language of a statute is of doubtful meaning, and have no place when its expressions are plain and do not permit of construction.

In Black on Interpretation of Laws, sec. 26, quoted with approval *In re Applicants for License,* 143 N. C., 3, it is said:

"SEC. 26. The meaning of a statute must first be sought in the language of the statute itself.

"And further: 'If the language is plain and free from ambi-
(581) guity and expressed a simple, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey.'

"And in Lewis' Southerland Statutory Construction (2 Ed.), sec. 267, it is said: 'When the intention of the Legislature is so apparent from the face of the statute that there can be no question as to its meaning, there is no room for construction.' "

In *McCluskey v. Cornwell,* 11 N. Y., 601, *Allen, J.,* quotes with approval the rule as expressed by *Johnson, J.,* in *Newell v. The People,* 3 Selden, 1897, as follows:

"Whether we are considering an agreement between parties, a statute or a constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses. To ascertain this, the first resort, in all cases, is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If thus regarded the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed."

And in the same opinion it is said further:

"In the construction both of statutes and contracts, the intent of the framers and parties is to be sought first of all in the words and language employed, and if the words are free from ambiguity or doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation, or when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation."

These views are quoted with approval both in the opinion and dissenting opinions in *Nance v. R. R.,* 149 N. C., 366, and express a well-recognized principle of law. As heretofore stated, there is nothing in the statute which in express terms, or by any permissible intendment, refers to the omission of these bonds in determining the value of shares when taxed as the property of individual holders, and the courts, in my opinion, are without power to add such a provision to the law.

Speaking generally to the question presented, *Associate Justice Peckham,* delivering the opinion of the Court in *Bank of Commerce v. Tennessee,* 161 U. S., 146-147, says:

"These cases show the principle upon which is founded the (582) rule that a claim for exemption from taxation must be clearly made out. Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon

which the claim to the exemption is founded. It has been said that a well-founded doubt is fatal to the claim; no application will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power.

"The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. *Van Allen v. Assessors,* 3 Wall., 573; *People v. Commissioners,* 4 Wall., 244, cited in *Farrington v. Tennessee,* 95 U. S., 687.

"This statement has been reiterated many times in various decisions by this Court, and *is not now disputed by any one.*

"The surplus belonging to this bank is 'corporate property,' and is distinct from the capital stock in the hands of the corporation. The exemption, in terms, is upon the payment of an annual tax of one-half of one per cent upon each share of the capital stock, which shall be in lieu of all other taxes. The exemption is not, in our judgment, greater in its scope than the subject of the tax. Recognizing, as we do, that there is a different property in that which is described as capital stock from that which is described as corporate property other than capital stock, and remembering the necessity there is for a clear expression of the intention to exempt before the exemption will be granted, we must hold that the surplus has not been granted exemption by the clause contained in the charter under discussion. The very name of surplus implies a difference. There is capital stock and there is a surplus over, above and beyond the capital stock, which surplus is the property of the bank until it is divided among stockholders."

There is no one who is more jealous for the honor and reputation of this State and its government than the writer. I know full well that it is their desire and fixed purpose to meet every obligation and duty incumbent upon them as an enlightened, progressive and Christian people, and where such purpose has been enacted into law their
(583) courts should at all times and under all circumstances be swift to enforce it; but this sentiment, deep as it is, does not permit—on the contrary, it forbids—that in expounding their laws we should depart from fixed principles of interpretation, or read into their statutes an effect and meaning contrary to the clear import of their terms. I am of opinion that the judgment below should be affirmed.

Cited: Trust Co. v. Mason, post, 661; *S. v. Morison,* 155 N. C., 56; *Murphy v. Webb,* 156 N. C., 408; *Comrs. v. Webb,* 160 N. C., 596; *Toomey v. Lumber Co.,* 171 N. C., 182.

T. B. PHILLIPS, ADMINISTRATOR, v. W. S. ORR ET AL.

(Filed 11 May, 1910.)

1. Nonsuit—Evidence, How Construed.

The rule of the construction of evidence on motions to nonsuit, as laid down in *Morton v. Lumber Co., ante,* 54, affirmed.

2. Bathing Resorts—Duty of Owners—Who Are Not Liable—Police Regulations—Officers.

In an action for damages for negligently permitting the drowning of plaintiff's intestate while swimming in a lake in a park, it appeared that the defendants had no control over the lake or park, except, under the police regulations of the town, to prevent nude persons from bathing therein, and were without control over the bathers and received no toll from them for bathing, though the defendants did rent a limited number of bathing suits to those who came unsupplied: *Held*, under the evidence no actionable negligence was shown and a judgment of nonsuit was properly allowed. The decisions laying down the rule of duty owed by owners and proprietors of public bathing resorts, cited and distinguished.

APPEAL from *Webb, J.*, at November Term, 1909, of MECKLENBURG.

At the close of plaintiff's evidence defendant moved for judgment as of nonsuit, and renewed this motion at the close of the entire evidence. The motion was allowed, and plaintiff excepted and appealed.

The facts established by the evidence are as follows: Horace Phillips, the plaintiff's intestate, a boy between 15 and 16 years of age, of good size and apparently sound and healthy, a good swimmer, was drowned on the afternoon of 5 July, 1908, in a lake or pond in Latta Park, in the city of Charlotte. The park is open to the white public, and so is the lake or pond; the only restriction placed upon the use of the lake was that bathers should not go in nude. The lake was about 100 yards long by about 100 feet wide, and was situate in a part of the park frequented by ladies, children and men. Driveways and (584) walkways were around and near the pond, so that the lake was easily visible to persons in the park. In 1907 complaint was made that the boys were bathing in the pond in a nude condition, and the defendant Orr, then chief of police, was directed by the board of public safety of the city, having charge and direction of its police force, to put a stop to nude bathing in the lake. The defendant stationed a policeman in the park to prevent this. Being appealed to by some young men, the defendant Orr bought a half-dozen bathing suits and put them in charge of the policeman in charge of the park, and these were rented for 25 cents each. Any bather having his own suit went in the lake without charge. The defendant Orr had no further or other control of the lake than to prevent nude bathing. In 1908 the same status

continued, except that a rough shack was put up for a dressing-room; theretofore the bathers concealed themselves in the bushes while dressing and undressing; a spring-board and three rough canoes were put on the lake and a rope 300 feet long provided; for the use of a boat a charge of 10 cents per hour was made; there were no other appliances for the safety of the bathers provided. The lake varied in depth from 6 or 8 inches to 12 feet.

On the afternoon of the drowning, the intestate, in company with other boys and some men, was in bathing. The intestate rented his suit, but there were other bathers who were using their own suits. After having been in for nearly two hours, the defendant Phillips, the policeman then in charge, saw deceased standing in water about 8 inches deep, and observing that he seemed to be cold, that his lips were blue, told him to come out and put on his clothes; that, apparently obeying him, the intestate came out, went in the direction of the dressing-room, but instead of dressing, went to another part of the lake where he was concealed from the view of the defendant Phillips and went in the pond again; that he had been in only a few minutes when he told a companion that he had cramp in his left arm and leg; that this companion was about 20 feet away, sitting on the dam, and as deceased indicated a purpose to come to him, told him not to do so, but that he would come to the deceased; disregarding this warning, the deceased started to swim to his companion, when, after going about 10 feet, he sank, called, and, before he could be rescued, was drowned.

Deceased was a good swimmer and had that afternoon been swimming all over the lake.

Lester Ross, the youth who was sitting on the dam, gave the
(585) alarm; the defendant Phillips came out in a boat in two or three minutes; the other bathers came, but they were unable, by diving and feeling with a paddle, to locate the body. In a short time the defendant Orr, who had been called by phone, came out with a fire pole or hook, and the body being located, one of the bathers dived for it and brought it up. This was about thirty minutes after the disappearance of the deceased under the water. The efforts to resuscitate him were unavailing.

The plaintiff, having qualified as administrator of the deceased, his son, brought this action against Orr and Phillips, to recover damages for the death of the deceased, which he alleges to have been caused by a breach of duty of the defendants, in that they were running a bathing establishment for profit at this pond and did not provide the necessary appliances and supervision for guarding and protecting the safety of the bathers, who came there by the invitation of the defendants; and failed to post signals at the deep places in the lake to warn the bathers

of the danger; that no means were provided for recovering quickly drowning bodies, or rescuing the bathers in distress, or resuscitating the bodies recovered.

The above statement presents the facts upon which his Honor allowed the motion of nonsuit.

J. D. McCall, Brevard & Nixon, and Clarkson & Duls for plaintiff.
Maxwell & Keerans and Stewart & McRae for defendants.

MANNING, J. This case coming to us by appeal from a judgment of nonsuit at the close of all the evidence, we must, as has been frequently said by this Court, construe the evidence "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 might have found those facts from the testimony." *Morton v. Lumber Co., ante,* 54, and cases cited. The theory upon which plaintiff seeks to recover, as appears from the complaint, the evidence and briefs filed, and the only theory upon which he could recover, is that defendants were engaged in the business of carrying on a public bathing resort, and were negligent in performing the duties imposed upon them as such proprietors. The cases relied upon by plaintiff not only to show the extent of the duty imposed upon defendants, but to suport his contention that his Honor erred in not submitting the case to the jury are *Barrett v. Imp. Co.,* 40 N. Y. Supp., 764; *Brotherton v. Imp. Co.,* 101 Ia., 700; 48 Neb., 563; ibid., 479; *Larkin v. Saltair Beach Co.* (Utah), 3 L. R. A., (N. S.), 982; *Boyce v. R. R. Co.,* (586) (Utah), 19 L. R. A., 509; *McGraw v. District of Columbia,* 25 L. R. A., 691; *Bass v. Rietdorf,* 25 Ind. App., 650; 29 Cyc., 466. These cases deal with the duty owing by the owners or proprietors of public bathing resorts.

In the view which we regard as decisive of this appeal, we deem it unnecessary to determine the extent of duty or measure of liability of a person or corporation maintaining a public bathing resort. The initial question to be determined is whether, upon the evidence, the defendants were maintaining a public bathing resort, and we think the evidence, considered in its most favorable view for the plaintiff, fails to show that the defendants were operating such a resort, or in fact were conducting any kind of a bathing resort. They had no control over the park or the lake, by lease or otherwise, except to prevent nude persons from bathing in the lake, itself a public nuisance. Any person desiring to bathe in the lake properly clothed could do so, without the permission of either of the defendants, and without paying toll to them. The defendants had no lease upon the lake or the park, nor any exclusive privileges of bathing, furnishing bathing suits, or any control over those bathing in the lake.

The fact chiefly relied upon by plaintiff is that the defendants had six bathing suits, which they rented to persons desiring to bathe, at 25 cents each; but this is wholly insufficient to entitle the defendants to be designated as the proprietors of a bathing resort, in view of the other facts presented by plaintiff through Mr. Latta. They could as well have furnished these from an office or store in the city a half mile away. The defendants did no advertising, by poster or in newspaper, nor does it appear that they even solicited any person to bathe in the waters of the lake. Those who had their own bathing suits bathed in the lake *ad libitum* and without price. The defendant Phillips was present as a public officer to prevent those, so evilly inclined, from bathing nude in the water.

Further, it clearly appears from the evidence that the defendant Phillips, observing the appearance of the intestate, directed him to come out and to dress. The intestate did come out; went towards the "dressing-room"—a rude structure built by nailing a few planks to some trees, to screen the bathers while dressing and undressing—and entered the lake again at a place concealed by bushes, out of the sight of the defendant Phillips, when soon after, unfortunately, he was drowned.

Promptly upon the alarm of danger, the policeman Phillips (587) went to the rescue of the drowning youth; so did all those in bathing, and they attempted by every means at their command to find his body. The accident was unfortunate, but taking that view of the evidence most favorable to the plaintiff, and regarding as established every essential ingredient of the cause of action that is permissible by the evidence, we think it fails to show any breach of duty owing by the defendants, or either of them, to the deceased, and hence, to establish facts sufficient in law to fix upon them liability to the plaintiff for the death of his intestate. In our opinion, there was no error in sustaining the motion for judgment as upon nonsuit, and the judgment is

Affirmed.

J. D. HELMS v. C. E. HOLTON.

(Filed 11 May, 1910.)

1. Pleadings—Motion for Judgment—Facts Admitted—Effect.

A motion by plaintiff for judgment upon the pleadings is in effect a demurrer to the answer, and admits the truth of the facts therein alleged, except only as to their legal sufficiency.

2. Contracts—Fraud—False Representations—Sureties—Consideration of Release—Damages—Causal Connection.

Plaintiff and defendant agreed to organize a corporation and take certain proportions of the capital stock. In pursuance of their plans, large sums of money were borrowed on the corporation's note with their indorsements. The defendant fulfilled his agreement to take the stock, and called upon plaintiff to fulfill his part, but by the false and fraudulent representations of the plaintiff that he was utterly insolvent and unable to do so, the defendant was induced to solely assume the corporation's liability and take over the property, in which transaction the notes in controversy were given by him to the plaintiff. The corporation was rendered insolvent by plaintiff's failure to take the stock he had agreed to take. The defendant acknowledged the execution of the notes, but sets up the fraudulent matters, as stated, as a defense and a counterclaim for damages: *Held*, (1) the gain and loss by the plaintiff and defendant respectively, in the fraudulent transaction, whereby the former procured the notes sued on, is a sufficient causal connection between the false representations and the damages sought by way of counterclaim; (2) the joint and several liability on the corporation's notes was not available to plaintiff in justification of his false representations in avoiding equal responsibility; (3) the false representations constituted actionable fraud.

3. Contracts — Fraud — False Representations — Financial Responsibility — Equality.

When a party to a contract has induced the other party, by false and fraudulent representations as to his own financial condition, to assume all liability under the contract, the other party will not be presumed to deal upon equal footing, for the party making the representations will be presumed to know his own financial condition.

4. Same—Measure of Damages.

In this case, as the defendant cannot rescind the contract and restore the *status quo* existent at the time of the false representations, the courts hold the measure of damages to be the difference between the value of the assets of the corporation, with full performance of his part by the plaintiff, and the value thereof with plaintiff's obligations unperformed.

APPEAL from *Ward, J.*, at January Term, 1910, of GUILFORD. (588)

Judgment was rendered for the plaintiff upon the pleadings. Defendant excepted and appealed to this Court. The plaintiff sued to recover $6,000, evidenced by three notes, for $1,000, $2,000 and $3,000, each dated 1 October, 1902, and interest from 1 October, 1904. Defendant admitted execution of the several notes and that he had paid no part of the principal and no interest since 1 October, 1904.

The defendant alleged matters in defense and as a counter-claim, which may be thus summarized:

He alleged that, in July, 1901, plaintiff and himself agreed to embark in the wholesale drug business in Greensboro, and to that end they agreed to organize a corporation to be known as the Holton-Helms Drug Company; that plaintiff stated that he was able to, and

would, take stock therein to the amount of $10,000 in cash, and appellant being then engaged in the retail drug business in Greensboro, also agreed to take $10,000 of stock in said company, putting in said retail drug business at its inventory value, and agreeing to make up any deficiency in his said subscription, in cash; that said corporation was accordingly organized with an authorized capital stock of $100,000, and a subscribed capital stock of $25,000, consisting of the two subscriptions above mentioned and a subscription of $5,000 by another person. That said corporation in supposed furtherance of the said business venture, leased from W. D. McAdoo a lot in Greensboro, next to the McAdoo Hotel, and undertook to erect a building thereon, part of which was to be used for the business of said corporation and part for hotel purposes; that in order to carry out this building scheme, said corporation agreed to take over and did take over from the lessee of said

McAdoo Hotel, the unexpired portion of the lease upon said
(589) hotel, then having several years to run, in order to avoid complications arising from the interference with said lessee's rights to light and air, likely to be caused by the erection of said new building adjacent to said hotel. The first of these leases was executed by the Holton-Helms Drug Company, and by W. D. McAdoo, and the second by the same parties and C. E. Holton and J. D. Helms, individually; that plaintiff and defendant agreed, in order to raise the money to erect said building, that said corporation should borrow the necessary funds from certain banks, upon its note, indorsed by both plaintiff and defendant, and they agreed to defer calling for the payment of said subscriptions to said capital stock until after the completion of said building, and this was accordingly done; that said J. D. Helms had then in his hands as guardian the sum of $6,000, and this sum he agreed to loan and did loan to said corporation upon its note payable to him as guardian, and indorsed by both J. D. Helms and C. E. Holton, "and in this way the funds represented by the notes sued on were first evidenced." That upon the completion of said building, appellant requested of respondent that he pay his said subscription of $10,000, but respondent delayed doing so, and finally stated to appellant that he, respondent, "was utterly without assets of his own of any kind, and was utterly unable to pay his said subscription of $10,000 to the capital stock of said corporation, or any other sum, stating at the time that all the assets he possessed of every kind and nature, even including his policies of life insurance, had been theretofore encumbered by mortgage to their full value." That at that time the indebtedness of the corporation was $27,699.51, incurred almost wholly on the indorsements of the plaintiff and defendant. That believing these statements to be true, and in reliance upon them, with the consent and

at the suggestion of plaintiff, the defendant took the property of the corporation, assumed all its indebtedness (including that due plaintiff as guardian), and has paid the same or by executing new notes has relieved the plaintiff from liability to the holders; that new notes were executed to plaintiff; that the statements made by plaintiff were false and fraudulent; that they were cunningly devised to deceive and defraud defendant, and a trick and device conceived by plaintiff to escape his equal liability upon the notes, and his payment of his stock subscription; that the corporation was thereby rendered insolvent; and that defendant, relying upon these false and fraudulent statements, was induced to, and did, pay out large sums of money; that the falsity of plaintiff's statements and the fraud imposed upon defendant by plaintiff was not discovered until the fall of 1904, when defendant declined to pay the notes sued upon, then held by plaintiff.

Stedman & Cooke and R. C. Strudwick for plaintiff. (590)
W. P. Bynum and King & Kimball for defendant.

MANNING, J. This appeal coming to us from a judgment granted to the plaintiff upon the pleadings, we must, of course, assume that his Honor held that the facts set up in the answer did not constitute, in law or equity, a defense to the notes or a counterclaim or set-off available to the defendant. The motion of the plaintiff for judgment upon the pleadings was, in effect, a demurrer to the answer, and, being such, admitted the truth of the facts alleged in the answer, and denied only their legal sufficiency. Considering the facts alleged in the answer to be true, we think they amount to an actionable fraud, resulting directly in such damages to the defendant as are capable of admeasurement under accepted and established rules. The chief contention relied upon by plaintiff is that there is "no legal causal connection between the alleged false representations and the alleged damages." The defendant alleges that, by reason of the false representations, believed by him and relied upon by him, he was induced to relieve the plaintiff of his liability on notes aggregating several thousand dollars, and himself alone to assume the payment of these notes. The plaintiff and defendant occupied to these notes the relation of cosureties or coindorsers for an insolvent corporation, in which plaintiff and defendant owned equal interests. The plaintiff never paid a dollar of his subscription, while the defendant had performed, in every particular, his obligation. By his misrepresentations the plaintiff has avoided the payment of his stock subscription and the payment of his one-half of the balance on the notes unpaid by the corporation, and has cast upon the defendant the entire burden of liability jointly incurred by the plaintiff and defendant.

The advantage which the plaintiff sought is apparent; and the disadvantage and loss to the defendant must be equally clear, for what the plaintiff escaped by his false representations has fallen upon the defendant.

It is alleged that the insolvency of the corporation was well known to the plaintiff; the enterprise jointly underaken by plaintiff and defendant had failed, and in order to escape a liability then fixed, and which plaintiff would be called upon to meet equally with defendant, the plaintiff, it is alleged, resorted to the device of falsely pleading his own insolvency, and in the presence of the common disaster appealed to the defendant to save himself as best he could.

It is no answer to the false statements to say that as defend-
(591) ant was bound on the notes, and, under our statute, his liability was both joint and several, he might eventually have been forced to pay the full amounts; this eventuality did not justify the plaintiff in resorting to a falsehood to avoid his equal responsibility. *Wilbur v. Prior,* 67 Vt., 508. Were the false representations of plaintiff of such character as to constitute actionable fraud? In *Richards v. Hunt,* 6 Vt., 251, 27 Am. Dec., 545, the facts were that plaintiffs, as creditors, had been induced, by the debtor's false representations of insolvency and poverty, to compromise their claim and to discharge the defendant from their debt, and the Court said: "That the defendant intended his representations should be relied upon is evident from the circumstances under which, and the purpose for which, they were made. That they were relied upon by the orators is equally evident, from their conduct in accepting so small a portion in lieu of their whole debt. And that they were injured is equally apparent, from the obvious ability of the respondent to pay the whole debt, which is disclosed by the case. There is in this case no ground for supposing the respondent ignorant of his own affairs. He must, therefore, be held to strict truth in his representations. Were these representations true? The tenor of them is that the respondent was poor and destitute, that he had no resource for the maintenance of a numerous family but his personal labor; that he had not the means of paying the debt; and that, if payment was insisted on, he should be driven to take advantage of the poor debtor's oath. Now, the reverse of all this was true. The case falls, then, within the ordinary rules for equitable relief in other cases. Is there any reason why these rules should not be applied? If equity requires good faith in all business transactions, why not in this? Can any reason be given why an appeal to the humanity and charitable feelings of a creditor should not be conducted with truth and honesty? Or shall we deny to the party defrauded of his property, through the medium of his benevolent and honorable feelings, the relief which we

should afford to him if overruled in the competitions of avarice?" *Reynolds v. French,* 8 Vt., 85; 30 Am. Dec., 456; *Phettiplace v. Sales,* 4 Mason, 312; *Irving v. Humphrey,* 1 Hopk., 284.

In *May v. Loomis,* 140 N. C., 350, *Mr. Justice Hoke,* in commenting upon the facts presented in that case, said, and we now quote it as applicable to the present case: "Accepting the testimony favoring defendant's claim as true, and we are required so to accept it, where a nonsuit is directed against the party who offers it, the facts disclose a clear case of deliberate fraud in which there appears every element of an actionable wrong—false representations as to ma- (592) terial facts, knowingly and willfully made as an inducement to the contract, and by whch the same was effected, reasonably relied upon by the other party, and causing pecuniary damage."

It is further contended by the plaintiff that "the parties stood on equal footing, the means of correct information were equally open to both, no artifice to conceal the true state of facts is alleged."

We may assume as true that both plaintiff and defendant had not only equal means of information, but equal knowledge of the affairs of the corporation in which they were both equally interested, but we cannot assume that defendant was equally cognizant with plaintiff of his private affairs and his financial condition. The plaintiff must be presumed to know his own financial condition.

The defendant alleged that the representations made to him by plaintiff that he was utterly insolvent, that even his life insurance policies were pledged for their full value, were false and knowingly false, and that he discovered their falsity about two years thereafter. How can we assume that of these things defendant had equal information with the plaintiff? In *Linnington v. Strong,* 107 Ill., 295, the Court said: "While the law requires of all persons the exercise of reasonable prudence in the business of life, and does not permit one to rest indifferent in reliance upon the interested representations of an adverse party, still there is a certain limit to this rule, and as between the original parties, when it appears that one has been guilty of an intentional and deliberate fraud, by which, to his knowledge, the other has been misled and influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable care and diligence." In 1 Jaggard on Torts, pp. 595 and 596, the author says: "There is, indeed, a strong inclination on the part of the courts to hold, without any qualification, that a person guilty of a fraudulent misrepresentation cannot escape the effects of his fault on the ground of the injured party's negligence. The doctrine is well settled, as a rule, that a party guilty of fraudulent conduct shall not be allowed to cry 'neg-

ligence,' as against his own deliberate fraud." *Blacknall v. Rowland,* 108 N. C., 554; *S. c.,* 116 N. C., 389; *May v. Loomis, supra.*

In determining this appeal, it is not necessary that we should lay down the rule for measuring the damages sustained by the defendant; but it seems proper for us to discuss this to some extent. In
(593) *Irving v. Humphrey,* 1 Hopk., 284, the Court held that the defendant should be required to make his representations *good.* In *Crater v. Binninger,* 33 N. J. L., 513, the Court held: "In cases of fraud, the true rule of damages is, that the wrongdoer must answer for those results, injurious to the other party, which must be presumed to have been within his contemplation at the time of the commission of the fraud. The plaintiff having been enticed by the deceit of the defendant to enter into an oil speculation, the defendant was responsible for the moneys put into the scheme by the plaintiff in the ordinary course of the business, and which moneys were lost, and that from such moneys must be deducted the value of the interest which plaintiff retained in the property held by those associated in the speculation."

As defendant, under the doctrine laid down in *May v. Loomis, supra,* and since then approved by this Court, cannot rescind the contract and cannot restore the *status quo* existent at the time of the false representation, we think the proper measure of defendant's damage is the difference between the value of the assets of the corporation with full performance of his obligations by the plaintiff and the value at the time with plaintiff's obligations unperformed. All that plaintiff could have been required to do was to perform his obligations; if he escaped these by fraud, and the burden of the entire responsibility was assumed by defendant—the victim of the fraud—the plaintiff would have no just ground to complain that he should be required to answer in damages for a difference in value directly caused by his own fraud and deceit. This rule would eliminate the contention of plaintiff that the damages suffered by the defendant are damages resulting from a bad business venture. We think, therefore, that his Honor erred in rendering judgment for the plaintiff upon the pleadings. The judgment so rendered is vacated, and the case is remanded that the matters pleaded as a defense and counterclaim shall be submitted to a jury upon proper issues.

Reversed.

(594)

G. M. SIMPSON v. J. C. SCRONCE ET AL.

(Filed 11 May, 1910.)

Trial by Jury—Consent Reference—Waiver.

By consenting to and requesting an order of reference a party elects to waive a trial by jury, and will not be permitted to repudiate his voluntary action and demand a jury trial upon the findings of the referee; and in this case the trial by jury was further waived under the rules of practice, as to exceptions, etc.

APPEAL by plaintiff from *Councill, J.*, at November Term, 1909, of CATAWBA.

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

W. A. Self and Witherspoon & Witherspoon for plaintiff.
M. H. Yount and W. C. Feimster for defendant.

WALKER, J. This action was brought to recover damages for the conversion of cotton. At the request of the plaintiff, the case was referred by the court to C. M. McCorkle, to hear the evidence and pass upon the issues of fact and questions of law raised by the pleadings. The referee made his report to the court, and the plaintiff filed several exceptions thereto.

It further appears that, "upon said exceptions, the plaintiff demanded a trial of the same by a jury." He did not tender any issue as to any controverted fact which he desired to be submitted to a jury, but simply asked, in a general way, for a jury trial upon the exceptions filed by him. Some of the exceptions involved questions of law, and of course they could not be tried by a jury, and if, upon any exceptions which involved an issue of fact, the plaintiff wished to have a jury trial, he should have tendered the proper issue. The practice in such cases has been well settled by adjudications of this Court. *Driller Co. v. Worth,* 117 N. C., 515; *Ogden v. Land Co.,* 146 N. C., 443. In the last case the matter is fully discussed, with a citation of authorities.

We have not overlooked the fact that the order of reference was made, not only with the consent of the plaintiff, but at his request. This was an election on his part to have the case tried by a referee. He could have insisted upon a trial by jury of the issues of fact raised by the pleadings, but he preferred not to do so, thinking, perhaps, that the result would be more favorable to him if the case should be referred. Having made his election and thereby waived a jury trial, he should not now be permitted to repudiate that which he voluntarily elected to do. In the appellant's brief there is no reference to (595)

any exception taken by him to the referee's report, which was affirmed by the court, upon a full consideration of the facts found and the conclusions of law stated therein.

There was no error in the ruling of the court.

Affirmed.

W. W. FOY v. BLADES LUMBER COMPANY.

(Filed 11 May, 1910.)

1. Deeds and Conveyances—Fraud—Cancellation—Plaintiff's Title—Defendant's Possession—Procedure—Evidence—Nonsuit.

When defendant has entered upon and cut timber from plaintiff's land under plaintiff's deed to the land, which, by the verdict of the jury and judgment entered accordingly, have been set aside for fraud, it is error for the lower court to nonsuit the plaintiff, upon the question of plaintiff's damage, on the ground that he has failed to show title in himself, when the defendant has failed to show a title in itself superior to that acquired by the void deeds; for it would be inequitable to permit the defendant to thus take advantage of its own fraud and wrongful act and assail the plaintiff's title until it had surrendered the possession which it had obtained of plaintiff by fraud. Whether the defendant may show that plaintiff is not the owner of the land in reduction of the damage is not presented in this case.

2. Deeds and Conveyances—Title—Common Source—Timber Rights.

When defendant takes as plaintiff's grantee a restricted interest in plaintiff's land under his deed, in this case standing timber of a given dimension, and enters upon the land and cuts the timber accordingly, his motion to nonsuit upon the ground that plaintiff has not shown title thereto will be denied, as defendant will not be heard to deny or question the validity of the title of the plaintiff, having acquired possession under and by virtue of the deed.

APPEAL from *Cooke, J.*, at June Term, 1909, of JONES.

The facts are sufficiently stated in the opinion.

T. D. Warren and Simmons, Ward & Allen for plaintiff.

W. W. Clark and Moore & Dunn for defendant.

WALKER, J. This action was brought by the plaintiff to recover $25,000 as damages for unlawfully and wrongfully cutting and removing from his land a large quantity of trees, wood and lightwood. (596) The plaintiff alleges that on 27 May, 1904, he executed to the defendant a deed for a part of said lands, and on 21 October,

1904, he executed a contract, in the form of a deed, to the defendant, by which, for the nominal consideration of $1 and the further consideration of $1 per 1,000 feet for all timber cut and delivered by the defendant, he sold to the defendant all the timber on the other tract of land described in the pleadings, above the size of 12 inches at the base when cut, and which was then, or which may be during the next ten years, standing and growing on said land. The timber was to be cut within ten years unless the time was extended. Rights of way over and through said land and all other lands of the plaintiff were granted, with the right to build any structure, railroad or tramways for the purpose of cutting and removing the timber.

In 1907 the plaintiff brought an action against the defendant, and in his complaint alleged that the said deeds were obtained from him under false and fraudulent representations of the defendant's agent, to the effect that the lands which the plaintiff claimed to own did not contain the number of acres set forth in said deeds, to wit, 437½ acres, but only 125 acres. That the plaintiff was ignorant as to the number of acres in the said tracts of land, and the defendant, by its agent, taking advantage of the plaintiff's said ignorance, by the said false and fraudulent representations, and by other false and fraudulent representations then and there made, induced the plaintiff to execute the said deeds to the defendant. That the said agent also falsely and fraudulently represented, in the manner aforesaid, that the defendant did not own but 125 acres of the said land, and that, taking advantage of the ignorance of the plaintiff as to the extent of his ownership, and well knowing that the representations made by him as to the ownership and the acreage, and the other representations then and there made, were false, and the plaintiff really owned about 437½ acres, unlawfully and wrongfully induced the plaintiff to execute the said deeds to the defendant. The plaintiff, in his said complaint, prayed that the deeds be declared fraudulent and void and that they be adjudged to be canceled. The defendants denied the material allegations of the complaint, and the issues raised by the pleadings were submitted to the jury, as follows:

1. Was the deed from the plaintiff to the defendant, dated 27 May, 1904, procured by misrepresentation and fraud, as alleged in the complaint?

2. Was the deed from the plaintiff to the defendant, dated 21 October, 1904, procured by misrepresentation and fraud, as alleged in the complaint?

The jury, for their verdict, answered the first issue Yes, and (597) the second issue Yes, and thereupon the court adjudged the said deeds to be null and void, and that they be canceled.

There was evidence in the case tending to show that the said deeds covered the land described in the complaint in this action, and that the defendant cut the timber on the said land and removed the same therefrom after the said deeds were executed.

At the close of the plaintiff's evidence the court entered a judgment of nonsuit, on the motion of the defendant, upon the ground that the plaintiff did not show any title or right of possession to the land, or any ownership of the timber thereon, by estoppel or otherwise; and this was the question presented and argued before us.

We think that there was some evidence upon which the plaintiff might have recovered, and that he was entitled to have the same submitted to the jury, in order that they might find the facts.

Let it be conceded, for the sake of argument and for the present, that the defendant was not estopped by merely receiving the deeds from the plaintiff. *Averitt v. Wilson,* 4 Barbour, 180. It sufficiently appears in the case, we think, that it obtained the possession, or cut the trees from the land, by virtue of the deeds which it had fraudulently procured from the plaintiff, and good faith requires that the defendant should surrender the possession of the land to the plaintiff and not be permitted to contest his title until he has done so, as the deeds through which he obtained possession of the land have been set aside and canceled, because of the false and fraudulent representations of defendant's agent that the plaintiff was not the owner of the land claimed by him, and the jury found, and the court has adjudged in the former suit between the same parties, that the said representations were false and fraudulent, and that the plaintiff was, in fact, as between him and the defendant, the owner of the land described in his complaint. It would be inequitable for the defendant to obtain possession of land or the permission or right to cut trees thereon and remove the same for the purpose of profit, upon the false and fraudulent representation of its agent, and then be allowed to contest the title of the plaintiff to the land or the trees, and continue to hold the possession or right thus fraudulently acquired. Assuming even that no estoppel is created, as against the grantee, by the mere execution of the deeds, even if thereunder the defendant entered upon the land and cut the trees, it appears that the deeds were procured by a false and fraudulent representation.

(598) The question of the plaintiff's ownership of the trees cut by the defendant was directly involved in the issues submitted to the jury in the former suit in this way. If the plaintiff was not the owner, then the representation was not false and fraudulent, but true; but if he was the owner, then the verdict was right and the representation was false and fraudulent. As the deeds have been canceled, it would be permitting the defendant to take advantage of its

own fraud and wrongful act to permit it to assail the plaintiff's title until it had surrendered the possession which it had obtained by the same fraud of its agent, for which it is responsible.

Whether the verdict and judgment in the former suit constitute an estoppel of record as to the ownership of the land, we need not decide, but we think there was some evidence in this case that the possession of the land was wrongfully obtained by the defendant through its agent's acts, and that it is under a duty to surrender the possession to the plaintiff, and is liable for any damages which the plaintiff may show he sustained by the cutting of the timber.

Whether the defendant may show, in reduction of the damages, that the plaintiff is not the owner of the land or the trees, is a question which may arise at the next trial, but it is not presented now. It will depend somewhat upon the nature of the findings in the other suit and the conclusiveness of the verdict and judgment therein upon the plaintiff.

There is some evidence in this case, fit to be considered by the jury, that the plaintiff was induced by the representations of the defendant's agent to execute the deeds, surrender the possession of the land and permit the defendant to cut the timber. To allow the defendant now to dispute the plaintiff's right to the possession and to damages, when he gained possession in such a way, would be as inequitable as to permit a tenant to deny his landlord's title. *Dills v. Hampton,* 92 N. C., 566. It may be true that the two cases are not strictly analogous in law, as, in the case of landlord and tenant, there is the relation of tenure, and the tenant owes fealty to his landlord, but he acquires his possession by means of the lease, and the same principle of morality is common to both cases.

As we are reviewing a judgment of nonsuit, we leave open and undecided the question whether the defendant can show in diminution of damages, or for any other purpose, that the plaintiff did not have the title, either by showing title in another or in itself. We do not think the defendant has succeeded in its attempt to show title in itself. The evidence is too vague and uncertain and lacks the probative force which entitles it to be considered by the jury. *Byrd v. Express Co.,* 139 N. C., 273. It has not shown an adverse and continuous possession of seven years by Rebecca Oldfield under color of (599) title.

It may be that the jury will find, upon the evidence introduced at the next trial, that the defendant did not acquire possession by fraudulently obtaining the deeds from the plaintiff. As the case now stands, there is some evidence of that fact.

As to the second tract of land, we do not see why the principle stated in *Sample v. Lumber Co.,* 150 N. C., at p. 164, does not apply. The

Court there says: "In *McCoy v. Lumber Co.*, 149 N. C., 1, this Court held, in effect, that where one having a deed for real property, or being in possession, claiming to own the same in fee, conveys or grants to another a lesser estate in the property or a restricted interest therein, and there is evidence tending to show that the grantee took in recognition of the grantor's right as the true owner, the parties to such a transaction, in any litigation between them involving the title, come within the principle very generally recognized, that when it appears that both parties to a suit claim under the same title, neither, as a general rule, shall be heard to deny or question the validity of the common source of their respective claims. In the present case there is, on the face of the instrument, evidence which tends to show that the plaintiff, claiming to be the owner of the property, sold to the defendant a restricted interest therein, to wit, the standing timber of a given dimension, and that defendant bought the timber in recognition at the time of plaintiff's claim as owner of the land, and there was no error, therefore, in denying the motion for nonsuit, made by defendant on the ground that there was no evidence tending to sustain plaintiff's claim of title."

In any view of the case, the Court erred in adjudging, at the close of the evidence, that a nonsuit be entered against the plaintiff.

Reversed.

Cited: *Bowen v. Perkins,* 154 N. C., 452; *Coxe v. Carson,* 169 N. C., 135.

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(600)

PAYNE & DECKER BROS. v. L. D. FLACK AND WIFE.

(Filed 17 May, 1910.)

Liens—Material Men—Husband and Wife—Agency—Subcontractor—Notice.

In an action to enforce a lien for material furnished for the house of a *feme covert*, being repaired on her land with her assent (Revisal, 2016), it may be shown in defense that she had contracted with her husband for the repairs; and when there is evidence tending to show that plaintiff furnished the husband with the materials, the plaintiff is a subcontractor, and her payment to the husband in full before notice given by the material men (Revisal, 2020) frees her from liability to them.

APPEAL from *Webb, J.*, at February Term, 1910, of RUTHERFORD.

Action commenced before a justice of the peace to foreclose a lien for material furnished for the repair of a house of a *feme covert*. The facts are sufficiently stated in the opinion of the Court.

J. L. C. Bird and J. T. Perkins for plaintiff.

Pless & Winborne and D. F. Morrow for defendant.

CLARK, C. J. In *Weir v. Page,* 109 N. C., 220, the Court felt constrained to hold, as the law then stood, that where a party under contract with the husband did work and furnished material in the construction of a building on the wife's property, that he could file no valid lien against the house, though the wife, knowing that the work was being done and material furnished, had made no objection. This was because of the fact that "the work and labor had not been done and the material furnished under a contract allowed by law." But the Court, speaking through *Judge Davis,* in order to prevent further frauds of this kind being perpetrated, suggested in the opinion to the consideration of the Legislature whether a married woman's liabilities might not be "made commensurate with her rights and whether such alterations in the law (in this particular) would not prevent much injustice and many frauds." The result was the enactment of a statute (which is now the last paragraph in Rev., 2016) which is as follows: "This section shall apply to the property of a married woman when it shall appear that such building was built or repaired on her land with her consent *or* procurement, and in such cases she shall be deemed to have contracted for such improvements."

This statute does not make her house liable to lien only upon (601) a contract by her, but provides that when she "consents or procures" the building to be erected or material furnished, she shall be *deemed to have contracted* for such improvement, and that her property thereupon becomes subject to lien, if filed. In *Finger v. Hunter,* 130 N. C., 529, this statute was held constitutional and was enforced, and that case has been approved in *Ball v. Paquin,* 140 N. C., 96, and other cases.

In the present case, however, the plaintiffs put in evidence the *feme* defendant's testimony, in another trial, that she made a contract with her husband to put these repairs upon the building and had paid him the full amount due on such contract before the plaintiffs gave her notice of their claim. This evidence was furnished by the plaintiffs and was not contradicted, and therefore must be taken as true. It was also in evidence, without contradiction, that the plaintiffs sold the material to the husband. Therefore the plaintiffs were subcontractors, and having failed to "give notice before settlement," Rev., 2020, the defendant contends, in his brief, that the wife is not liable any more than any one else would be.

This is not a case of a married woman standing silent when improvements are being placed upon her house, receiving the benefit, and then defying the contractor because she had made no valid express contract. In such case the statute now makes her property subject to lien, upon the implied contract arising upon her conduct, as it would in regard

to any one else under the same circumstances. But here she paid the contractor in full before receiving notice from the subcontractors, the material men, and is freed from liability to them, as any one else would be upon the same state of facts. *Pinkston v. Young,* 104 N. C., 102.

Upon the plaintiffs' evidence, the judgment of nonsuit was proper. Affirmed.

Cited: Finch v. Cecil, 170 N. C., 74.

(602)

ELIZABETH BOWMAN v. W. C. WARD AND A. M. BLACKWELL.

(Filed 17 March, 1910.)

Vendor and Vendee—Void Judgment—Execution Sale—Restraining Order—Cloud on Title.

Though it appears from the face of the proceedings that a judgment and levy of attachment on lands is void for the lack of service of summons, the vendee of the judgment debtor may restrain to the final hearing a sale under the execution and levy; for the vendee should be afforded an opportunity to pay off the judgment if it should finally be held valid, and not forced to take chances of losing the land under a forced sale.

APPEAL from *Justice, J.,* at November Term, 1909, of HENDERSON.

Civil action heard upon motion for injunction until the final hearing. The judge dissolved the restraining order theretofore issued. The plaintiff appealed.

Brown Shepherd, George A. Shuford, and C. F. Toms for plaintiff.
Defendants not represented in this Court.

BROWN, J. The plaintiff sues to restrain the selling of her land under execution upon a judgment rendered by a justice of the peace and docketed in the Superior Court of Henderson County in a cause entitled W. C. Ward *v.* A. C. Peacock. Plaintiff claims under a deed from said Peacock dated 2 September, 1909.

It appears that on 29 March, 1909, the aforesaid action before the justice of the peace was commenced by issuing a summons returnable 30 March. This summons was not served, as appears by the return on it. A warrant of attachment was issued; returnable 30 March, and on 2 April it was levied on the land by defendant Blackwell, sheriff.

No service of the summons or of the attachment has ever been made, either personally or by publication, and no publication made. On 30

September, 1909, after plaintiff had purchased the land and had her deed recorded, the justice rendered final judgment against Peacock, although it appears of record that no publication or service of any kind had been made either of the summons or attachment. The judgment was docketed, execution issued and levied upon the land conveyed to plaintiff and the same advertised for sale.

His Honor denied the injunction upon the ground that the proceeding was void on its face. We agree with him that the judgment is void, because it appears affirmatively upon the face of the (603) record that no service, personally or by publication, has ever been made, either of the summons or attachment. The proceeding was discontinued before the judgment was rendered. *Etheridge v. Woodley,* 83 N. C., 11; *Best v. British and American Co.,* 128 N. C., 352; *Penniman v. Daniel,* 91 N. C., 431; *S. c.,* 93 N. C., 336; *Finch v. Slater, ante,* 155. To same effect are decisions in other States having statutes similar to ours. *Taylor v. Troncoso,* 76 N. Y., 599; *Dist. Co. v. Ruser,* 58 How. Pr., 505; *McLaughlin v. Wheeler,* 2 S. D., 379; *Millar v. Babcock,* 29 Mich., 526.

We think, however, his Honor should have restrained the sale, as the plaintiff is entitled to have the question finally determined as to the liability of her land for the judgment, and not be made to take the chance of losing it by forced sale under execution. If her land is liable for the judgment she should have the opportunity to pay it after a judicial determination. This question is fully and lucidly discussed by *Mr. Justice Manning* in the recent case of *Crockett v. Bray,* 151 N. C., 617, and need not be further discussed now. Let the injunction issue from the Superior Court of Henderson County enjoining the sale.

Reversed.

Cited: *Banks v. Lane,* 171 N. C., 510.

W. D. BAILEY v. THE MEADOWS COMPANY AND CAROLINA, CLINCHFIELD AND OHIO RAILWAY COMPANY.

(Filed 17 May, 1910.)

Railroads—Construction—Personal Injury—Fellow-servant—Nonsuit.

It appearing in this case from the evidence that plaintiff was employed loading rails for the construction of a railroad not in operation, and was injured either by the negligence of a fellow-servant or the result of an unavoidable accident, a motion to nonsuit upon the evidence should have been sustained.

APPEAL from *James L. Webb, J.,* at February Term, 1910, of McDOWELL.

The usual issues of negligence, contributory negligence and damage were submitted. There was a verdict and judgment for plaintiff, and defendants appealed.

Pless & Winborne for plaintiff.
Hudgins, Watson & Johnston for defendants.

(604) BROWN, J. Taking the plaintiff's evidence in the most favorable view for him, we are of opinion that the motion to nonsuit should have been sustained. The plaintiff was working on the construction force engaged in building a railroad. The railroad was not in operation, as the rails were then being laid. Plaintiff and two fellow-servants were engaged in loading rails on a car by order of a foreman. Plaintiff states that, "We had our hands under the rail and they were so close that they dropped the rail on my hand before I could get it out." It is plain from plaintiff's own evidence that his injury was caused by the negligence of his fellow-servants, or else that it was the result of an unavoidable accident. In neither event would defendant be liable.

As the road was being constructed and not operated, the principles laid down in *Nicholson v. R. R.,* 138 N. C., 516, and reiterated at this term in *O'Neal v. R. R., ante,* 404, bar a recovery. The motion to nonsuit is sustained.

Reversed.

Cited: *S. c.,* 154 N. C., 71.

V. B. BOWERS v. BRYAN LUMBER COMPANY.

(Filed 17 May, 1910.)

1. Principal and Agent—Scope of Authority—Surety Bond—Seal—Regular on Face—Innocent Stranger.

A bond signed as surety by the agents of a surety corporation, the agents living and doing business in Tennessee as such agents, by means of which goods held under a warrant of attachment were released, is binding upon the surety company as principal, the acts of the agents being within the apparent scope of their authority; and the principal, having furnished its agents with the form of the bond, signed and sealed by it, awaiting only the signature and delivery of the agents for apparent validity, are also held liable thereon for having put it within the power of the agents to cause loss or disadvantage to innocent third persons.

2. Principal and Agent—Judgment—Lower Court—Validity Presumed—Statement of Facts.

Error in the judgment of the lower court will not be presumed on appeal, and when it appears that a surety bond under seal given by a surety company has been delivered for the purpose of vacating an attachment, and its execution appears to be sufficient, the judgment of the Superior Court, establishing its validity, will be sustained, and not declared void for the alleged want of authority of the agents in signing and delivering it, in the absence of any statement of facts by the lower court upon which its judgment was declared.

3. Principal and Agent—Surety Bonds—Ratification.

A surety company by accepting the premium on a bond issued by its agents to vacate a warrant of attachment, ratifies the act of the agent and cannot be heard to contest the validity of the bond on the ground that its agents had therein exceeded their authority.

APPEAL from *Councill, J.*, at November Term, 1909, of (605) MITCHELL.

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

L. D. Love and C. E. Greene for plaintiff.
Hudgins, Watson & Johnston for defendant.

WALKER, J. This was a civil action prosecuted by the plaintiff against the defendant for a debt of $1,650. A warrant of attachment was levied upon 125,000 feet of lumber which belonged to the defendant, and while the property so levied upon was in the custody of the sheriff, the defendant filed with the clerk of the Superior Court a bond in the sum of $3,700, executed by the defendant as principal, and the Title Guaranty and Surety Company, by D. H. Willard and D. A. Vines, who professed to be its agents. This bond was approved by the clerk of the Superior Court and filed as a part of the record, and thereupon the attachment was dissolved and the lumber was released and shipped out of the State by the defendant. At July Term, 1909, of the Superior Court, when the case was called, it appeared that the plaintiff had filed a verified complaint, and the defendant had filed no answer. The court rendered judgment by default in favor of the plaintiff and against the defendant, for the amount of the debt and the costs of the action, and also against the Title Guaranty and Surety Company for the amount of its bond, to be discharged upon the payment of the judgment, that is, the debt and costs.

At November Term, 1909, the Title Guaranty and Surety Company moved to strike out or set aside the said judgment, so far as the same affected the said company, and assigned as the ground for its motion that D. H. Willard and D. A. Vines were the agents of the said com-

pany in Tennessee and did not reside in this State, but at Johnson City in the said State of Tennessee, and that Willard and Vines acted without authority in executing the said bond. Affidavits were filed by the parties and an order was granted staying the execution until the motion of the Guaranty and Surety Company could be heard. At the hearing of this motion, *Judge Councill* rendered a judgment denying the same and dissolving the restraining order; but in his judgment there are no findings of fact, nor does it appear anywhere (606) in the record that the appellant requested the judge to find and state the facts. In what is termed a case on appeal, there appears to have been some colloquy between the court and counsel as to the ground of the motion and as to the reasons why the Guaranty and Surety Company was entitled to have the judgment against it vacated; but there are no findings of fact which relate to the authority of Willard and Vines to act in behalf of the said company in the execution of the bond by it as surety. This Court ordered the original bond to be sent up, in order that it might ascertain, from an inspection of it, whether the corporate seal of the company had been affixed thereto, and we find, upon an examination of the bond, that the corporate seal of the company had been affixed.

In the present state of the case we are of the opinion that the Guaranty and Surety Company is bound by the act of Willard and Vines, because the corporate seal was affixed to the bond, and in the absence of any statement of facts we must presume that his Honor found such facts as would support his judgment, and, therefore, found that Willard and Vines were invested with the necessary authority to execute the bond. We do not presume that error was committed in the court below, and the burden is on the appellant to show error.

The Guaranty and Surety Company entrusted Willard and Vines with a bond, to which its corporate seal had been affixed, and it was licensed to do business, that is, to execute an idemnity bond, in this State. When this was done, the Guaranty and Surety Company put it in the power of Willard and Vines to induce others to believe that they had the power and authority to execute a bond in its behalf as surety, even if the signatures of the said agents were necessary to make it a valid bond as against the company after it had thus affixed its corporate seal and its corporate name had been signed to the bond.

This case is not, in principle, unlike *Havens v. Bank,* 132 N. C., 214, in which it appeared that spurious bank certificates had been issued by the cashier of the defendant bank, they having been left with him after having been signed in blank by the president and secretary. In that case, and with reference to its facts, we held that the bank was legally responsible for the fraudulent acts of its cashier, and that the

mere fact that he was not in the performance of his master's business, but was acting outside of the scope of his agency, did not alter the case nor change the result, for "this would be true as to all fraudulent acts and as to all acts done not strictly within the line of duty. The correct principle is that it will be quite sufficient to charge the employer with liability, if all the acts of the employee are done within the apparent, though not real, scope of his agency." We further (607) said that as the certificates had been signed by the president and delivered to the cashier, the bank had given to the latter the power to commit the fraud, and must answer for its negligent act, upon the principle that "whenever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it." *Lickbarrow v. Mason,* 2 T. R., 70. It was said by *Lord Holt,* in *Hearn v. Nichols,* 1 Salk., 289: "For as somebody must be a loser by this deceit, it is more reasonable that he who employs and puts a trust and confidence in the deceiver should be the loser, than a stranger." In *R. R. v. Kitchin,* 91 N. C., 39, we held that "where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposed a confidence or by his negligent act made it possible for the loss to occur, must bear the loss." The principle is well stated in the case of *R. R. v. Bank,* 60 Md., 36, as follows: "It may be conceded, and was doubtless the case, that the agent had no authority in fact to issue such certificate; he had no real authority as between himself and his principal, or other parties cognizant of the facts, for doing the particular acts complained of, but the company by its own act and, as it turned out, misplaced confidence, placed the agent in the position to do, and procure to be done, that class of acts to which the particular act in question belongs; and in such case where the particular act in question is done in the name of and apparently in behalf of the principal, the latter must be answerable to innocent parties for the manner in which the agent has conducted himself in doing the business confided to him. Upon no other principle could the public venture to deal with an agent. In such case the apparent authority must stand as and for real authority." And again: "Where he issued such a certificate and delivered it to a third party, who acted without knowledge and in good faith, paying value for it, such party had the right to act upon the presumption that the representations of such certificates were truthful, and not false and fraudulent. Having confided to him the said trust of executing the business, the agent was held out to the public as competent, faithful and worthy of confidence; and though he deceived both his principal and the public, by forging and issuing false certificates, it is but reasonable that the principal, who

placed him in the position to perpetrate the wrong, should bear the loss." We think the principle is also well supported by the reasoning of the Court in *McNeill v. Bank,* 46 N. Y., 325.

(608) Willard and Vines, who professed to act as agents of the corporation in executing the bond for it as surety, must be taken, under the facts and circumstances of this case, so far as they appear, to have had full authority to do and perform the act which the Guaranty and Surety Company now attempts to repudiate, for they were acting apparently within the scope of their authority, the company having placed in their possession evidence which would indicate to an innocent person dealing with them that they had the necessary power to act as they did. It is sufficient to charge the principal, if his agent is acting within the apparent scope of his authority. *Bank v. Hay,* 143 N. C., 326.

We cannot examine the affidavits with a view to finding the real facts in this case, as it has been well settled that the facts upon a motion to set aside a judgment must be found by the court below. We said, in *Oldham v. Sneed,* 80 N. C., 15, that "in the absence of any facts found, we only see from the case sent up that the judge refused to vacate the judgment, but why he did so, or whether with or without any mistake or misapplication of the law, cannot be seen."

The Guaranty and Surety Company received the premium or consideration for this indemnity bond, and, having done so, it was put on inquiry as to whether Willard and Vines had acted within the scope of their authority, and in such a case it must be held to have ratified what they had done. It is not permissible, nor is it sound morality, for the company to accept the benefit of what they did in executing the bond for it as surety, and when a liability is incurred on the bond, to repudiate what their alleged agents had done in their behalf.

We find no error in the record.

Affirmed.

Cited: Taranlt v. Seip, 158 N. C., 372; *Stewart v. Realty Co.,* 159 N. C., 233; *S. v. Bailey,* 162 N. C., 585; *School Trustees v. Board of Education,* 166 N. C., 467.

JESSE MILLER AND WIFE v. CAROLINA MONAZITE COMPANY AND W. F. SMITH.

(Filed 17 May, 1910.)

1. Deeds and Conveyances—Execution Denied—Burden of Proof—Statute of Frauds—Plea Sufficient.

Whether the written contract to sell mineral interests in land is an option of purchase or a contract to sell, the party seeking its enforcement must introduce sufficient evidence tending to show its execution by the vendor; and when the vendee, the defendant in the action, by answer denies the execution of the paper-writing, it is sufficient to protect him under the statute of frauds without specially pleading the statute.

2. Same—Findings of Court—Evidence—Nonsuit.

When there appears in the record on appeal no sufficient evidence of the execution of the paper-writing which the plaintiff seeks in his action to enforce for the conveyance of mineral interest in lands, and the court below has held there was no such evidence, and it appears that the statute of frauds has been sufficiently pleaded in the answer, the judgment of the lower court sustaining defendant's motion to nonsuit upon the evidence will not be disturbed on appeal.

3. Deeds and Conveyances—Vendor and Vendee—Statute of Frauds—Party to be Charged.

A suit against the vendee to recover the purchase money agreed to be paid for land, or any interest therein, is one against the party to be charged within the meaning of the statute of frauds, and the defendant can plead the statute in order to defeat a recovery.

APPEAL from *Justice, J.*, at December Term, 1909, of BURKE. (609)

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

S. J. Ervin and J. M. Mull for plaintiff.
Avery & Ervin for defendants.

WALKER, J. This action was brought by the plaintiff to recover of the defendant the purchase money for certain mineral interests in the land which is described in the pleadings, and which the plaintiff alleges he contracted to sell to the defendant. It was contended by the latter that what the plaintiff alleges was the contract to sell the mineral interests was merely an option or a unilateral contract, which was never signed nor executed by the defendant, and that the time limited in the option for the payment of the purchase money had expired. Whether it was an option or a contract to sell is not material to the decision of the question which was argued before us, and which is presented by the record, as it appears in the statement of the case on appeal that no proof of the execution of the contract by the defendant was shown, nor attempted to be shown. As the defendant denied the execution of the contract, it was

incumbent upon the plaintiff to introduce evidence to the effect that the contract had been signed by the defendant, as a denial of the execution of the contract in the answer was sufficient to protect the defendant from liability under the statute of frauds, and it was not necessary to plead the statute specially. *Morrison v. Baker,* 81 N. C., 76; *Browning v. Berry,* 107 N. C., 231; *Haun v. Burrell,* 119 N. C., 544; *Winders v. Hill,* 144 N. C., 614.

At the close of plaintiff's evidence the court, on motion of the defendant, ordered a judgment of nonsuit to be entered under the statute, upon the ground that the execution of the contract by the defendant
(610) had not been shown. In the case of *Winders v. Hill, supra,* we held that as the defendant had taken issue with the plaintiff, concerning the execution of the contract, by denying the allegation to that effect in the complaint, he could avail himself of the statute of frauds without specially pleading it, as it had been settled by numerous adjudications of this Court, which are cited in the opinion, that if a contract is denied, or a contract different from that alleged is set up, or if the contract is admitted and the statute of frauds is specially relied on by plea, or now by answer, parol evidence of the contract is incompetent, and, as the contract cannot be proved, it cannot be enforced.

The court states as a fact, in the record, that there was no evidence of the execution of the contract by the defendant, and we must accept this as true. An examination of the testimony which is set out in the case will show that there was, in effect, no sufficient evidence that the defendant had executed the instrument which had been lost, even if it contained a contract between the parties, and was not a mere option to buy the mineral interests in the land.

It has been settled by this Court that in a suit against the vendee to recover the purchase money agreed to be paid for land, or any interest therein, he is the party to be charged within the meaning of the statute of frauds and can plead the same in order to defeat the plaintiff's recovery, the party to be charged within the meaning of the statute being the person against whom it is sought to enforce the obligation of the contract. *Hall v. Misenheimer,* 137 N. C., 183. There was no error in the ruling of the Court, and we affirm the judgment.

Affirmed.

Cited: Poe v. Smith, 172 N. C., 74.

GEORGE R. CALVERT v. C. B. ALVEY.

(Filed 25 May, 1910.)

1. Principal and Agent—Subsequent Declarations—Res Gestæ—Evidence.

Evidence of declarations of an agent to be competent must be made at the time of the transaction complained of, so as to constitute them a part of the *res gestæ*.

2. Deeds and Conveyances—Trust Deeds—Fraud—Cestui Que Trust—Book Evidence—Res Inter Alios—Incompetency.

In an action to set aside a deed of a purchaser at a sale of land under a deed of trust made to an officer of a bank to secure a bank loan, the books of the bank are incompetent to show fraud in the dealings of the officer with his bank, without evidence of agency existing between the purchaser and such officer, it being *res inter alios acta*.

3. Deeds and Conveyances—Trust Deeds—Fraud of Grantor—Grantee—Burden of Proof.

In an action to set aside a deed for fraud, it is necessary for the plaintiff to show that the grantee was guilty of the fraud, or that he knew of, or participated in, the fraud of the grantor.

4. Deeds and Conveyances—Trust Deeds—Fraud—Bona Fide Debt—Cestui Que Trust—Purchaser at Sale—Title.

A *cestui que trust* of a deed conveying a naked title to land to a trustee to secure a *bona fide* debt, without knowledge at the time of its execution of fraud of the trustee practiced upon the grantor, may thereafter, with knowledge of such fraud, bid in the property at a sale, under a power in the deed, to save his debt.

5. Deeds and Conveyances—Trust Deed—Fraud—Knowledge of Trustee—Evidence—Cestui Que Trust.

The knowledge of fraud sufficient to avoid the deed of one holding a naked trust to foreclose a deed of trust on lands in default of the payment of a loan, whose duties are merely nominal, except in case of foreclosure, and then clearly marked and defined in the deed, is not imputable to the *cestui que trust*.

6. Deeds and Conveyances—Trust Deeds—Bona Fide Debt—Fraud—Relationship—Presumptions—Burden of Proof.

In an action to avoid a deed of trust on lands given to secure a loan made by the *cestui que trust*, and alleging fraud on the part of the grantor, the burden of proof is not on the *cestui que trust* to show the *bona fides* of the transaction, there being no averment or evidence of kinship or other relationship between them to raise a presumption of fraud; and even if it were otherwise here, the plaintiff's evidence has established its *bona fides* by producing the paid check given for the loan secured.

APPEAL from *Justice, J.*, at March Term, 1910, of BUNCOMBE. (611)

The action is brought by the assignee of certain judgments against W. H. Penland and others to set aside, on ground of fraud, a

certain deed in trust dated 20 July, 1897, executed by W. H. Penland, Mary B., Althea M., and Mary C. Penland to Joseph E. Dickerson, trustee, covering nine tracts of land, securing the payment of a note to Mrs. C. B. Alvey in the sum of $10,000. It appears on the face of the deed in trust that it is made subject to a mortgage to J. E. Rumbough, trustee, for $8,000, and also a deed in trust to Jacob Friedman, trustee, for $7,000.

On 31 October, 1898, the deed in trust was foreclosed under the power of sale and the nine tracts of land were purchased by and conveyed to C. B. Alvey, in consideration of $5,000.

This action is brought to set aside said deed in trust to Dicker-
(612) son, trustee, and the subsequent conveyance under it to Mrs. Alvey, and for an accounting from her for rents and profits and proceeds of sale of lands sold by her over and above the amounts disbursed in the discharge of the prior encumbrances on the land.

At conclusion of plaintiff's evidence a motion to nonsuit was sustained. Plaintiff appealed.

Frank Carter and H. C. Chedester for plaintiff.
Moore & Rollins and Locke Craig for defendants.

BROWN, J. This action is brought by a judgment creditor to set aside certain conveyances alleged to be fraudulent and to subject the property so conveyed, together with the rents and profits thereof, to the payment of the plaintiff's judgments, and to reach and subject in the hands of the defendant Alvey lands which are alleged to belong to certain of the defendants in said judgments, with an accounting for the rents and profits thereof and the proceeds of lands so held which are alleged to have been sold by said defendant.

The judgments sued on were taken on notes due the First National Bank of Asheville by W. H. Penland, J. E. Dickerson, Mary C. Penland, Margaret P. Smith, Althea M. Penland, and Anna K. Smith. The bank failed 30 July, 1897, and the receiver recovered judgments upon the notes and assigned them to plaintiff.

W. H. Penland and J. E. Dickerson were directors in the bank, and the former was its cashier. Mrs. Alvey resided in Richmond, Va., and is the sister-in-law of Dickerson, who managed certain property owned by her in Asheville and attended to certain business matters for her.

It is contended that the deed in trust of 20 July, 1897, was fraudulent, that no real consideration passed, and that its purpose was to cover up the property of the grantors therein from the payment of their debts to the bank.

It is contended that his Honor erred in excluding the declarations of Dickerson made subsequent to the conveyance, as evidence against Mrs. Alvey.

We think the ruling correct. There is no evidence or admission that Dickerson was the agent of Mrs. Alvey in making the loan or in procuring the execution of the deed in trust, or, if so, it is not contended that the excluded declarations were made at the time of the transaction so as to constitute them a part of the *res gestæ*.

Where the acts of the agent will bind the principal, there his (613) declarations, representations and admissions respecting the subject-matter will also bind the principal, if made at the same time and constituting a part of the *res gestæ*. This seems to be well settled. 2 Taylor on Ev., sec. 602; Story Agency, sec. 134.

The court also properly excluded the books of the insolvent bank. As to Mrs. Alvey, they were clearly incompetent, as she was in no wise responsible for them or privy to them. *Res inter alios acta alteri nocere non debet.* The other exceptions to evidence are equally as untenable, and need not be discussed.

The last exception to the nonsuit brings up the question as to the sufficiency of the evidence of fraud to be submitted to the jury. We agree with his Honor that there is no evidence showing or tending to show that the defendant C. B. Alvey was guilty of any fraud, or that she knew of or participated in any fraud on the part of the grantors in the deed. There is nothing in the way of proof to indicate that Mrs. Alvey knew of or participated in any fraudulent intent on the part of the Penlands, assuming their purpose was to delay, hinder, and defraud the bank in the collection of its debt. It seems to be settled beyond controversy that knowledge of or participation therein by the grantee of fraud of the grantor is essential to set aside or vacate a deed. *Lassiter v. Davis,* 64 N. C., 498; *Allen v. McLendon,* 113 N. C., 321; *Rose v. Coble,* 61 N. C., 517; *Trust Co. v. Forbes,* 120 N. C., 355; *Reiger v. Davis,* 67 N. C., 185; *Osborne v. Wilkes,* 108 N. C., 651; *Haynes v. Roger,* 111 N. C., 228; *Riggan v. Sledge,* 116 N. C., 93; *Savage v. Knight,* 92 N. C., 493; *Peeler v. Peeler,* 109 N. C., 628; *Wolf v. Arthur,* 118 N. C., 890.

It is true that the evidence discloses a large indebtedness upon the part of the Penlands to the bank, and that its affairs were in a very insolvent condition; but Mrs. Alvey had no knowledge of these facts. Assuming that she did, she had a right to secure any *bona fide* existing indebtedness, if possible, and it would not be fraudulent for her to do so.

But it is contended that the trustee in the deed in trust had knowledge of such conditions, and that such knowledge affects his *cestui que trust.*

There are authorities to the effect that although a *preferred* creditor in a trust deed is himself innocent of fraud, yet his trustee's participation therein destroys the security. But those authorities have no application to an instrument or transaction of this character. Dickerson was merely the temporary repository of the legal title in an instrument securing a

single debt. He had no previous connection with the trust property and had no active duties whatever to perform in connection with
(614) it. He held as a naked trustee, whose duties were nominal except in case of foreclosure, and then they are clearly marked and defined in the deed. In such cases the secured creditor must be fixed with notice, and the knowledge of the trustee is not imputable to him. *Bank v. Ridenour,* 26 Am. Stat., 167; *Batavis v. Wallace,* 102 Fed., 240, 20 Cyc., 479, and cases cited.

It is contended that the burden of proof is on the defendant Alvey to show to the satisfaction of the jury the *bona fides* of this transaction.

It is true, as contended, that where a creditor shows facts that raise a strong presumption of fraud in a conveyance made by his insolvent debtor, the history of which is necessarily known to the debtor only, the burden of proof lies on him to explain it. That would undoubtedly be true here if the Penlands were the interested defendants; but Mrs. Alvey occupies a different attitude. She claims as a mortgagee who has innocently made a loan upon property, and not as an insolvent debtor who is charged with conveying her property absolutely for her own benefit.

There are no ties of kinship between Mrs. Alvey and the Penlands, and none of the well-known and definite fiduciary relations exist which raise either a presumption of fraud to be decided by the court, or a question of fraud, as matter of fact, to be submitted to and passed on by the jury for what it is worth. *Lee v. Pearce,* 68 N. C., 87. The proof is singularly free from any suspicious facts calculated to put Mrs. Alvey on inquiry as to the purposes of the Penlands in executing the trust, assuming that such purpose was fraudulent. She resided a long distance from them, was not related or even a very intimate friend, and, so far as the evidence discloses, had no motive to participate in fraudulent conduct for their benefit.

Assuming, for argument's sake, that Mrs. Alvey could be called upon to offer proof of the *bona fides* of her debt, the plaintiff himself has offered evidence which establishes it for her. He introduced her check for $10,000 on a bank in Richmond, together with the declarations of Dickerson in regard to the check and the debt, which tend strongly to prove a *bona fide* debt as the basis of the deed in trust. In view of that evidence, the defendant Alvey might well rest her case upon plaintiff's proofs.

Upon a review of the record we find no reversible error, and the motion to nonsuit was properly sustained.

Affirmed.

HOKE, J., concurs in result.

(615)

J. D. PITTS v. JOHN CURTIS ET ALS.

(Filed 25 May, 1910.)

1. Deeds and Conveyances—Timber—Description Indefinite—Voidable—Identification.

A conveyance of "all my pine, oak, and poplar timber that J. D. P. may want for lumber," of a certain measure across the stump, is an insufficient description to pass the title, and will not support an action brought by the grantee for damages for the cutting of such timber, in the absence of evidence tending to show that at the time of the conveyance the grantor and grantee in the deed had marked or otherwise sufficiently identified the timber trees for the cutting of which the damages are sought.

2. Deeds and Conveyances—Timber—Description—Lands.

Growing timber is a part of the realty, and deeds and contracts concerning it are governed by the laws applicable to that kind of property.

APPEAL from *Councill, J.*, at January Term, 1910, of MCDOWELL.

Action to recover damages for the cutting and removal of timber claimed by the plaintiff. These issues were submitted:

1. Is the plaintiff the owner of the timber trees sued for, as alleged? Answer: Yes (by court).

2. What damage has plaintiff sustained by reason of the defendants' cutting and removing said timber trees? Answer: $1,333.

From the judgment rendered, the defendants appeal.

Pless & Winborne for plaintiff.

J. F. Spainhour, Hudgins, Watson & Johnston, and W. T. Morgan for defendants.

BROWN, J. Plaintiff claims title under a deed dated 15 January, 1901, executed by S. C. McNeely to plaintiff, purporting to convey the timber alleged to have been wrongfully cut and removed by defendant Curtis. The descriptive part of this conveyance is as follows:

"I, S. C. McNeely, of the first part, do this day sell and convey to the party of the second part all my pine, oak, and poplar timber that the said J. D. Pitts may want for lumber, that will measure 16 inches across stump and upward, at 40 cents per tree; all under that size that said Pitts may want, at 30 cents per tree."

Defendant Curtis claims under a deed executed by S. C. McNeely to his wife Mary, dated 23 October, 1897, and recorded 29 August, 1904, fully and particularly describing and conveying the lands (three tracts) upon which the timber in controversy was growing. On

— October, 1909, Mary McNeeley and her husband conveyed the (616)

timber upon these lands to defendant by deed fully describing the lands and timber and referring specifically to the above-named deed to the wife.

Assuming, for the sake of argument, that the deed to plaintiff is not absolutely void for indefiniteness and insufficiency of description, there is no evidence in the record which identifies the timber upon which the instrument could operate. It does not undertake to convey all of grantor's timber, but only such portion of it as the grantee may want for lumber. Even if the instrument is not wholly void, it could only be made effective by evidence that at the time of its execution, and accompanying the act of selling, the parties entered upon the grantor's land, selected and plainly marked the trees which the grantee then and there selected.

The precedents sustain the general proposition that a sale of part of a larger number of articles of property, not distinguishable upon the face of the contract, will be operative to pass title if at the time they are separated and understood by the parties. *Goff v. Pope,* 83 N. C., 123; *Harris v. Woodard,* 96 N. C., 232; 1 Greenleaf Ev., secs. 287-288.

Professor Greenleaf lays down the general doctrine in these words: "If the language of the instrument is applicable to several persons, to several tracts of land, to several species of goods, parol evidence is admissible of any extrinsic circumstances tending to show what person or persons or what things were intended by the party or to ascertain his meaning in any other respect." This language, of course, is not intended to apply to an indefinite and uncertain description that fits no property, but where its uncertainty arises from the fact that it fits more than one article of property, and there such evidence is admitted to show what is meant.

In respect to personal property, *Chief Justice Pearson* states the rule in the "buggy case," *Blakely v. Patrick,* 67 N. C., 40, wherein he says: "To vest the title and ownership in any particular buggies, it was necessary to set them apart, so as to make a constructive delivery and effect an executed contract; in the absence of such identification, the agreement, as we have seen, was executory only."

The case is cited, approved, and the same principle applied by *Chief Justice Smith* in *Carpenter v. Medford,* 99 N. C., 499, to the sale of timber trees, wherein he says: "It is very clear that the selection and marking of the trees accompanying the sale separates and distinguishes the subject-matter of the contract from all other trees of the same (617) kind upon the premises, so as to transfer the property therein. The trees were designated, after examination, by marks of identification, the only way in which it could be done."

We have in recent years settled upon and adhered to the theory that growing timber is a part of the realty, and deeds and contracts concerning

it are governed by the laws applicable to that kind of property. *Hawkins v. Lumber Co.*, 139 N. C., 160. It may be, as contended by defendants, that upon that principle the deed to plaintiff is absolutely void for uncertainty of description as to the "thing granted"; but it is unnecessary to pass on that contention, as the only evidence that could possibly help out the conveyance is entirely lacking.

Therefore, his Honor should have sustained the motion to nonsuit.

Reversed and dismissed.

WALKER A. SMITH v. THE TOWN OF HENDERSONVILLE.

(Filed 25 May, 1910.)

Cities and Towns—Discretion—Bond Issues—"Streets"—Scheme of Streets—Lawful Expenditures.

When under the authority of a legislative power a town issues valid bonds in the aggregate of $20,000 for the improvement of its "streets," the term "streets" will be held to include sidewalks or driveways within its meaning; and when the petition upon which the election was ordered, the bonds sold and the proceeds received for expenditures, particularly desired the commissioners "to adopt a general scheme of street and sidewalk improvement for the town," it is left to the discretion of the commisssioners to employ competent engineers for the proper grading of the streets and sidewalks, to determine how much grading any particular street shall receive, how its natural configuration shall be graded, etc., have the work done, and pay for such expenses out of the funds received from the sale of the bonds.

APPEAL from *Councill, J.*, from HENDERSON, heard by consent at chambers, 27 April, 1910.

Controversy without action. The agreed facts are thus stated:

1. That the General Assembly of North Carolina, session of 1901, passed an act (see ch. 97, Private Laws 1901), entitled "An act to amend the charter of the town of Hendersonville," which act forms a part of the charter of the town of Hendersonville, reference to which is hereby made; that sections 5, 6, and 9 of said act form a general scheme for the paving of the streets and sidewalks of the said (618) town.

2. That on or about 1 September, 1909, the people of the said town decided to lay cement sidewalks, under and by virtue of the said charter, and, through their commissioners, duly elected and qualified, they called an election to vote upon the question of the issuance of bonds for the said purpose, which call for election is hereto attached, marked "Exhibit

A," and prayed to be taken as a part of this petition; that the election was carried, and $20,000 worth of the said bonds were duly issued and sold, and the money therefrom has been placed in the treasury of said town. A copy of the said bonds is hereto attached, marked "Exhibit B," and prayed to be taken as a part of this petition.

3. That after the sale of the said bonds and the receipt of the said money, the commissioners of the town of Hendersonville passed an order as to how said moneys should be spent in said work, and how said work should be prosecuted, which order of the board is hereto annexed and marked "Exhibit C," and prayed to be taken as a part of this petition.

4. That the commissioners of the town of Hendersonville, as outlined in their said order, have proceeded to hire engineers to lay out and establish the grades on said streets and sidewalks, and have employed a contractor to grade the same and lay said cement sidewalks. That, acting under the orders of the said board and their employment by the said board, the said engineers and contractor are now at work on what is known as Academy Street in said town. That the town of Hendersonville is a mountain town, having many hills inside of said town, and in many places great excavations are called for by the engineers' survey, with fills on either side, which excavations and fills will cost much money to complete.

5. That the said board of commissioners propose to pay:

(*a*) The grading of the sidewalks out of said funds;

(*b*) The grading of the streets, as distinguished from the sidewalks, out of said funds derived from said bond sale;

(*c*) To pay the said engineers out of the funds derived from said bond sale for the establishment of the grades of the sidewalks;

(*d*) To pay the said engineers out of the funds derived from said bond sale for the establishment of the grades of said streets as distinguished from said sidewalks.

6. That a great controversy has arisen in the said town, among the lawyers and citizens, as to whether, under the said charter and call
(619) for election, etc., the commissioners have the power to do such grading, employ such engineers, to pay for the grading of the sidewalks and streets, and said engineers, as aforesaid, out of the money derived from the said bond sale.

7. That the plaintiff, Walker A. Smith, who is a resident and taxpayer of the town of Hendersonville, contends that, under the plain terms of the charter, the call for said election, and the plain letter of the law, the said commissioners have no power (1) to pay for the grading of the sidewalks out of said money; (2) to pay for the grading of the streets between the sidewalks out of said money; (3) to pay the engineers out of said money to establish the grade of said sidewalks; (4) to pay the

engineers out of said money to establish the grade of the streets, as distinguished from the sidewalks; all of which aforesaid things the town claims it can lawfully do.

And he further contends that under the plain letter and meaning of the law, as set forth in said charter and statutes amendatory thereof, and the said call of election, that the money derived from the sale of these bonds can only be spent for actual cement and the work of laying it down.

Upon the above facts agreed, his Honor rendered the following judgment:

"This case coming on to be heard before his Honor, *W. B. Councill, J.*, at chambers, and being heard, by consent, the court is of the opinion, and so adjudges:

"First. That the board of commissioners of the town of Hendersonville had and now have a legal right to pay for grading the streets (as distinguished from sidewalks) in the town of Hendersonville, from the funds now in hand derived from the sale of $20,000 bonds issued 1 January, 1910, in accordance with and by authority of an election held in said town 28 September, 1909.

"Second. That the board of commissioners of said town had and now have a legal right to pay for grading the sidewalks in said town from said fund.

"Third. That the board of commissioners of said town had and now have a legal right to employ and pay competent engineers to ascertain the proper grades of said streets in said town.

"Fourth. That the board of commissioners of said town had and now have a legal right to employ and pay competent engineers to ascertain the proper grades of said sidewalks in said town.

"Fifth. That the plaintiff pay the costs of this action, to be (620) taxed by the clerk."

From which judgment plaintiff appealed to this Court.

Charles F. Toms for plaintiff.
Michael Schenck for defendant.

MANNING, J. In *Commissioners v. Webb,* 148 N. C., 120, a case involving the interpretation of the same sections of the charter of the town of Hendersonville as the present case (ch. 97, Private Laws 1901), this Court said: "The term 'streets' may, and frequently does, include both sidewalks and driveways, and, while there are many decisions which, under certain facts and conditions, distinguish and separate the two, we are clearly of opinion that in an undertaking of this magnitude, involving an expenditure of $18,000 in paving sidewalks, both the purpose of the law and its correct interpretation require that the term 'streets'

in this connection should include sidewalks, bringing the proposition within the provisions of section 9 of the charter, requiring that a vote of the people should be taken." In *Hester v. Traction Co.*, 138 N. C., 288, it is said: "The rights, powers, and liability of the municipality extend equally to the sidewalk as to the roadway, for both are parts of the street. *Tate v. Greensboro*, 114 N. C., 392; 2 Smith Mun. Corp., sec. 1304; Elliott Roads and Streets, sec. 20."

The petition upon which the election was ordered, the bonds sold and the proceeds received for expenditure, particularly desired the board of commissioners of Hendersonville "to adopt a general scheme of street and sidewalk improvement for the town." In adopting such a general scheme *in limine*, it is assuredly the part of a wise administration to engage the services of a competent, experienced and skillful engineer. It would be unwise and unsightly to have the sidewalks graded to an established grade and then paved with cement, and to leave the driveways or roadways of the streets in their natural condition and with their natural configuration undisturbed. It is left to the sound judgment and discretion of the board of commissioners, aided by the advice of a competent engineer, to determine how much grading any particular street shall receive, and how much its natural configuration shall be varied.

It has been repeatedly held by this Court, as well as other courts, that such matters are legislative and rest exclusively in the discretion of the governing authorities of the municipalities, and their decisions cannot be interfered with or controlled by the courts. *Meares v. Wilmington*, 31 N. C., 73, and the numerous cases cited in Anno. Ed. Under sections 5, 6, and 9 of the town charter, it was permissible to adopt a
(621) general scheme of improvements of its streets and sidewalks, as requested in the petition and approved at the election by the voters of the town, and proceed to carry it out. We, therefore, discover no error in the judgment appealed from, and it is

Affirmed.

SECURITY LIFE AND ANNUITY COMPANY v. JOSEPHUS FORREST ET AL.

(Filed 25 May, 1910.)

1. Insurance—Life Policy—False Representations—Material—Inducement—Intent.

In an action by an insurance company to avoid its policy of life insurance for false statements made by the insured in his application, the statements being that he had no bowel trouble and had not consulted a physician in five years, two issues, among others, were submitted: 1. Did

the assured, in his application, make material representations that were untrue? 2. Did the representations as made induce the policy? *Held*, no error (irrespective of any fraudulent purpose of assured, or lack of honest intent) for the trial court to charge the jury, the evidence being conflicting, that if they found from the evidence these representations were untrue, they should find the first issue "Yes"; and, if untrue, they were material, and they should answer the second issue "Yes."

2. Insurance—Life Policy—False Representations—Issues, Immaterial—Evidence—Harmless Error.

When the pleadings in an action by an insurance company to avoid a life insurance policy raise issues only as to false material statements made by the assured in his application for the policy, and the plaintiff proceeds in the trial upon the theory that there was a scheme to get as much life insurance upon the life of the assured as he could, who was then in ill health, in order to defraud the life insurance companies, it was not reversible error, if error at all, to permit a witness to testify that a certain company had paid up its policy, the plaintiff having shown that several companies had not paid, and gone fully into the evidence that various companies had insured the life of the deceased.

3. Insurance—Evidence—Policy—Prima Facie Case.

The insurance company in seeking to declare a policy of life insurance void, which had matured on the death of insured, alleged that it had issued and delivered the policy, received the first premiums, and declined to receive the second premiums; a *prima facie* case for defendant was made by the production of the policy declared on.

4. Instructions, Requested—Substantially Given.

There is no error in the failure of the trial judge to give correct prayers for instruction requested, when he substantially does so in his charge.

APPEAL from *Councill, J.*, at December Special Term, 1909, (622) of PAMLICO.

The action was begun in GUILFORD County 27 July, 1908. The defendant moved to remove the action for trial to CRAVEN. Pending the motion, J. Barrom Forrest died, and his wife, having qualified as executrix, was made party defendant. The order of removal was made to PAMLICO.

The plaintiff alleged in its complaint that it had issued, on 23 August, 1907, two policies of $1,500 and $1,000 upon the life of J. Barrom Forrest, the beneficiary named in each being Josephus Forrest, his son; that the policies were issued upon written applications; that the representations made therein as to his condition of health were false; that he had chronic bowel trouble; that the statement that he had not consulted a physician in five years was also false; that these representations were material and were relied on, and that plaintiff had no information that the representations and statements were not true; that it had tendered,

in June or July, 1908, the premiums paid, and demanded a return of the policies, which tender and demand had been refused; that defendants had tendered the second annual premiums, but plaintiff had declined to accept them. The plaintiff prayed judgment that the policies be surrendered for cancellation.

The defendant denied the allegations of the false representations and statements as to the health of J. Barrom Forrest, the assured. After the death of the assured, the beneficiary, Josephus Forrest, instituted action against the plaintiff in Craven County to recover upon the policies. The Annuity Company made a motion to remove to Pamlico County, which motion was allowed, and the two actions were, by consent, consolidated and tried as one action, the Security Life and Annuity Company being plaintiff and the Forrests being defendants. The issues submitted by the judge and the answers of the jury are as follows:

1. Did Barrom Forrest in his application make material representations and warranties that were untrue as alleged? Answer: No.

2. Did the representations as made induce the plaintiff to issue to Barrom Forrest the insurance policies referred to in the pleadings? Answer: No.

3. Has the defendant Josephus Forrest complied with the terms
(623) and conditions of the policy for $1,500, being No. 9338? Answer: Yes.

4. Has the defendant Josephus Forrest complied with the terms and conditions of the policy for $1,000, being No. 9339? Answer: Yes.

5. What amount, if any, is the defendant Josephus Forrest entitled to recover on the policy for $1,500, being No. 9338? Answer: $1,500, with interest from 19 September, 1908.

6. What amount, if any, is the defendant Josephus Forrest entitled to recover on the policy for $1,000, being No. 9339? Answer: $1,000, with interest from 19 September, 1908.

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

Simmons, Ward & Allen, and A. L. Brooks for plaintiff.

D. L. Ward, Stedman & Cooke, C. L. Abernethy, and H. L. Gibbs for defendant.

MANNING, J. We have carefully examined the record and the brief and authorities cited therein by the learned counsel of the plaintiff, and we do not discover that his Honor committed, in the rulings excepted to, any error which entitles plaintiff to a new trial. As determined by the pleadings, the principal controverted fact was presented by the first issue—the truth of the representations and statements by the assured as to the condition of his health. His Honor instructed the jury that if

they should find from the evidence that these representations and statements were untrue, then they would answer the first issue "Yes"; and if untrue, they were material, and they should answer the second issue "Yes."

Upon the condition of the health of the assured, there was much evidence offered by the plaintiff, tending to support its contentions, and by the defendants in contradiction and in support of the truth of the representations in the applications for the insurance. The assured was examined three times within thirty days by Dr. Diuguid, the local medical examiner of plaintiff, and certificate of the examinations for plaintiff made upon blanks furnished by it. This physician had known assured for two years, was his family physician and lived near him. He certified that he had made careful examination and, in his opinion, he was a first-class risk. This statement was confirmed by the physician as a witness at the trial.

The theory upon which the plaintiff developed its case at the trial was that the sons of the assured, appreciating his bad health and that his life would not be long prolonged, obtained policies of insurance upon the life of their father for many thousand dollars, and this was done in carrying out a common plan and scheme to defraud the (624) insurance companies, among them the plaintiff. The plaintiff, on cross-examination of a witness for defendant—one of his brothers—elicited testimony which supported this theory, by examining the witness specifically as to the several policies upon his father's life, the beneficiaries named, the companies issuing them, etc. Upon redirect examination, in rebuttal of plaintiff's theory of a common fraudulent scheme or plan to defraud the insurance companies, "by overloading" (to quote the language of plaintiff's counsel) "a decrepit father, sick with a fatal malady, with life insurance policies," the defendant was permitted to ask the witness if any of the insurance policies so issued under plaintiff's theory had been paid. The plaintiff objected to this testimony, and excepted to its admission.

While the theory upon which plaintiff was proceeding was of doubtful relevancy to the issue, the sole inquiry being as to the truth or falsity of the statements, and it being immaterial whether they were fraudulent or not, and while such evidence would be ordinarily incompetent as obnoxious to the maxim, *"res inter alios acta,"* we are not convinced that its admission, under the circumstances of this case, was erroneous; at most, if error, it was harmless error, in view of the latitude allowed plaintiff in the development of its theory. In *Miller v. Miller,* 89 N. C., 209, this Court said: "Great latitude is sometimes allowed by the court in the trial of issues by the jury, and it must be largely left to it to see that the parties have equal latitude and advantage, as was the case here. Green. Ev., sec. 48; Steph. Ev., 36 *et seq.*"

Under the theory advanced by plaintiff, each policy issued during the year 1907 upon the life of the assured was a link in a chain of a fraudulent scheme, entered into by the defendant Josephus Forrest and his brothers. We are not convinced that it was error of which plaintiff can justly be heard to complain, when his Honor permitted the defendant to controvert this theory of the plaintiff. The record shows that subsequently during the trial, the plaintiff examined other witnesses as to the several policies, and probed much into the details, showing other companies had and were contesting payment of their policies.

The plaintiff excepted to certain parts of his Honor's charge, and to his refusal to give certain special instructions. We have carefully examined the charge as given, and the refused instructions, and we do not think plaintiff's exceptions can be sustained. In the charge to the jury, his Honor followed the decision of this Court in *Alexander v. Ins.* (625) *Co.*, 150 N. C., 536, placing the right of the plaintiff to avoid the policies upon the ground of the falsity of the representations and statements in the applications for insurance, irrespective of any fraudulent purpose or lack of honest intent.

The other exceptions are covered in large measure by the decision of this Court in *Perry v. Ins. Co.*, 150 N. C., 143, where it is said: "If there has been an actual delivery of the policy, nothing else appearing, the production of it at the trial presents a *prima facie* case for the plaintiff. *Kendrick v. Ins. Co.*, 124 N. C., 315; *Grier v. Ins. Co.*, 132 N. C., 542; *Rayburn v. Casualty Co.*, 138 N. C., 379; *Waters v. Annuity Co.*, 144 N. C., 663." In the present case, the plaintiff alleged that it issued and delivered the policies and received the first annual premiums, and that it declined to receive the second annual premiums tenderd by defendant. Some of the prayers requested by plaintiff, while not given in the very language requested, were substantially given, and when this is done, it is not error. The plaintiff, after full investigation before action begun, selected its own grounds upon which it sought to avoid the policies issued by it, and having so selected, without requesting an amendment of its pleadings either before or at the trial, it cannot be unjust to require it to adhere to them. In our opinion, no error was committed at the trial which entitles plaintiff to a new trial.

No error.

Cited: Gardner v. Ins. Co., 163 N. C., 374; *Carter v. R. R.*, 165 N. C., 253; *Schas v. Ins. Co.*, 166 N. C., 58.

T. M. MORSE ET AL. v. A. S. HEIDE.

(Filed 25 May, 1910.)

1. Pilots—Local Boards—Cruising Grounds—Legislative Authority.

The Legislature may confer upon a local board of commissioners of navigation and pilotage authority to mark out cruising grounds for pilot boats.

2. Same—Pilots—Services—Tender—Regulations.

Under the legislative authority conferred upon the Board of Commissioners of Navigation and Pilotage of Wilmington (ch. 625, Laws 1907), that they "shall from time to time make and establish such rules and regulations respecting the arrangement and station of pilots for the purpose of compelling them to be on duty at all times," a rule and regulation of the board to the effect that no pilot, except under certain unusual circumstances, shall be entitled to his fee for such services if they be tendered beyond the cruising ground they had laid off, for pilots, is valid and reasonable.

APPEAL by plaintiff from *O. H. Allen, J.*, at October Term, (626) 1909, of NEW HANOVER.

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

Herbert McClammy for plaintiff.
Rountree & Carr for defendant.

WALKER, J. This action was brought by the plaintiff to recover pilotage fees alleged to be due him, and which were held by the defendant to abide the judgment of the court as to whether said Morse is entitled to recover the same. The suit was commenced in the court of a justice of the peace. The defendant filed an answer, to which the plaintiff demurred. The justice gave a judgment for the plaintiff, and the defendant appealed to the Superior Court, where the case was heard upon the answer and demurrer.

The facts disclosed by the record are, that the plaintiff, who was a duly licensed pilot of the Cape Fear bar and river, sailed from Southport for Charleston, S. C., on the boat *Herman Oelrichs,* and that at or near Charleston and far beyond the bounds or station established by the Board of Commissioners of Navigation and Pilotage for the Cape Fear bar and river, and pretending to be in the performance of his duty as a pilot, spoke the ship *Soutra* off the lightship near Charleston harbor, and the plaintiff was taken aboard said ship for the purpose of piloting her over the Cape Fear bar at the mouth of the river. When the said vessel had reached the cruising grounds established by the said board of commissioners for the Cape Fear River and bar, L. J. Pepper, who was also a licensed pilot of the said river and bar, spoke the vessel *Soutra* and de-

manded the right to pilot her in, which demand was refused, on the ground that the *Soutra* already had a pilot on board, that is, the plaintiff T. M. Morse. When the *Soutra* had passed over the bar, certain licensed pilots, including L. J. Pepper, filed a complaint against the plaintiff for violating the rules and regulations of the said board of commissioners with reference to the station or cruising grounds for pilots and their boats, and the matter was heard, and the commissioners decided that the plaintiff had violated said rules and regulations, and ordered that the plaintiff should not pilot the said vessel out to sea, and further decided that he was not entitled to the pilotage fees, either inward or outward, and adjudged that L. J. Pepper was entitled to pilot the vessel out to sea, which was done by him. By agreement, the amount of the fees was deposited with the defendant, who was the agent of the ship, to await the result of this action.

It is conceded that the plaintiff is not entitled to recover if the (627) commissioners acted within the scope of their power in making the rules and regulations as to the station of pilots and their cruising grounds, because the plaintiff had transgressed these rules and regulations, which are as follows:

"1. No pilot will be permitted to leave his station to go to a neighboring port for the purpose of piloting a vessel bound from that port for the Cape Fear River, unless under peculiar circumstances, at the discretion of the chairman of this board. And every licensed pilot is expected and required to provide the means of boarding and leaving vessels at sea by pilot boats or cutters. Arrangements with tugboats or fishing boats or any other means of approaching or leaving vessels at sea will not be permitted under penalty of the revocation of license at the discretion of the board.

"2. The cruising grounds of the Cape Fear pilots shall in future (after 24 April, 1908) be restricted to that area bounded on the south by Little River and an imaginary line drawn directly southeast from Little River, and bounded on the north by Bogue Inlet and an imaginary line drawn directly southeast from Bogue Inlet, and in such area only shall Cape Fear pilots cruise and offer their services for pilotage."

The defendant contended that the Legislature had conferred authority upon the Board of Commissioners of Navigation and Pilotage, by Laws 1907, ch. 625 (Pell's Revisal, ch. 104, sec. 4957b), to adopt said rules and regulations. That section is as follows: "The commissioners shall from time to time make and establish such rules and regulations respecting the arrangement and station of pilots, for the purpose of compelling them to be on duty at all times, as to them shall seem advisable, and shall impose reasonable fines, forfeitures and penalties for the purpose of enforcing the execution of such rules and regulations."

We have held in *St. George v. Hardie,* 147 N. C., 88, that the act of 1907 is constitutional and is a lawful exercise of the power vested in the Legislature. It is customary to confer upon such boards of navigation and pilotage the power to make reasonable and proper rules and regulations for the government of those who are licensed as pilots, and we can see no reason why this custom is not sanctioned by law, or why the Board of Commissioners of Navigation and Pilotage may not, in the exercise of the power thus vested in them, prescribe the limits of cruising grounds and the stations of pilots. 30 Cyc., p. 1611. Nor do we see how any person who accepts a license which confers upon him the privilege of piloting ships on their inward or outward passage on the river and over the bar can well complain of the conditions upon which (628) such license is granted, provided they are reasonable; and it must necessarily be that the rules and regulations adopted by the Board of Navigation and Pilotage for the Cape Fear River and bar, to which we have referred, were not only reasonable, but necessary for the safety of vessels and the convenience of navigation. The plaintiff's counsel, in his brief, as we construe it, deems the general policy of the law to be that there should be an early tender of pilotage services, and that a pilot may, therefore, in the absence of statutory prohibition, cruise for incoming vessels beyond the pilot waters or pilotage grounds of his port. He argues that this prohibition must be by statute directly, but no reason appears to us why the Legislature, if it has the right to prescribe the limit of cruising or pilotage grounds, may not confer authority upon a local board, better acquainted than itself with the nature of the service to be rendered and the conditions and circumstances of the particular case, to carry out the legislative will by marking out the grounds and adopting such rules and regulations as in its judgment will best promote the object and purpose of providing for such a service. No authority was cited to us which sustains the contention of the plaintiff that the Legislature cannot confer such power upon a local board.

The only question, therefore, which is now presented for our consideration, is whether such authority was conferred by Laws 1907, ch. 625, and of this we have no doubt. It is true that, as said in some of the decisions, the policy of the law is to induce pilots to cruise somewhat largely, for the purpose of speaking incoming vessels at an early period; but it is also true that it is more important they should not cruise so far afield as to be absent from their post of duty—that is, the proper cruising ground at the mouth of the Cape Fear River—so that there may not be a sufficient number always present to pilot vessels which require their services to cross the bar. If a pilot can go as far from Wilmington as the port of Charleston, how much farther south or north on the coast can he go in order to obtain an advantage over other pilots? If the law

permitted such a course to be pursued, it would seriously interfere with the safe and prompt navigation of vessels plying between the different ports. It is much better and safer to hold that the Legislature can, either directly or indirectly, provide for the stations and cruising grounds for pilots somewhere near the port for which vessels are bound.

So far as we can see from the facts of this case, the Legislature has made a wise provision in conferring authority upon the Board of Navigation and Pilotage to fix the limits of cruising grounds and to (629) establish pilotage stations, and there has been, in this case, no abuse of the authority thus conferred, but it seems to have been reasonably exercised. 30 Cyc., 1611, and notes.

The authority of the Legislature to act in such matters, and to prescribe rules and regulations for the government of pilots, seems to have been settled. *The Whistler,* 13 Fed. Rep., 295; 30 Cyc., 1615.

There is a provision in the statute that the commissioners shall have power to grant permission in writing to any pilot in good standing and authorized to pilot vessels, to run regularly as pilot on steamers between the port of Wilmington and other ports in the United States, and that he shall have all the rights and emoluments that belong to the river and bar pilots. Laws 1907, ch. 625, sec. 9 (Pell's Revisal, sec. 4957j). We think from the provision of this section, and the general scope of said act as gathered from the terms in which it is expressed so clearly, that it was the intention of the Legislature that pilots at the Cape Fear bar should be allowed to speak vessels only within the cruising grounds, and that their right to recover fees for their services, when tendered and refused, depends upon their compliance with the provisions of the act as thus construed.

Our conclusion is that T. M. Morse, and the other plaintiffs associated with him in the case, are not entitled to recover the fees which they now demand of the defendant and, therefore, that the judgment of the court below was correct.

Affirmed.

Cited: Davis v. Heide, 161 N. C., 479.

L. H. MILLER v. ABEL PITTS AND T. L. EPLEY.

(Filed 25 May, 1910.)

Principal and Surety—Distiller's Bonds—Judgment in Federal Court—Certified Records—Indebtedness—Evidence.

A duly and properly certified copy of the record of the United States District Court of a judgment had against a surety on a distiller's bond is *prima facie* or presumptive evidence of the stated indebtedness of the principal, in an action subsequently brought by the surety against his principal and cosurety thereon; and in the absence of evidence in rebuttal, when it is admitted that the plaintiff has paid the judgment, he may recover from the principal the entire debt which he has paid, or from the surety his ratable part, it appearing of record that there is no real dispute between the parties as to the truth of the matters set out in the record, if the judgment in the District Court is held to be evidence against the defendants.

APPEAL from *J. S. Adams, J.*, at January Term, 1910, of (630) MCDOWELL.

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

Sinclair & Carlton for plaintiff.

W. T. Morgan and T. A. Morphew for defendants.

WALKER, J. This action was brought by the plaintiff, as a surety on the distiller's bond of the defendant Abel Pitts, to recover the amount which he was compelled to pay under a judgment recovered in the United States District Court for the Western District of North Carolina, against Pitts as principal and himself as surety, for $500, the amount or penalty of said bond. The parties waived a trial by jury and agreed that the judge might find the facts, and it appears from his findings that the bond was executed by Abel Pitts as principal and the defendants Lee Miller and Thomas Epley as sureties. It further appears that an action was brought upon the said bond for a breach thereof by Pitts, which breach consists in his failing to pay the taxes due from him by law, on 363 gallons of spirits, which he had removed from the premises where said distillery was operated, without complying with the law by paying the taxes assessed against him. Issues were submitted to the jury at the trial of said case, which, with their answers, are as follows:

1. Did the defendants execute the bond sued on? Answer: Yes.

2. Did the defendants commit a breach of said bond? Answer: Yes.

3. What amount of damages, if any, has the plaintiff sustained on the bond sued on? Answer: $374.88, with 5 per cent penalty and interest 12 per cent from 1 October, 1896; $53.68, with 5 per cent penalty and interest 12 per cent from 1 March, 1896; $26.91, with 5 per cent penalty and interest 12 per cent from 1 March, 1897.

The United States Court rendered judgment upon the verdict for an amount in excess of the penalty of the said bond. Execution was issued upon the said judgment, and the amount of the bond and the costs were paid by the plaintiff Miller. He brought this action to recover the said amount so paid by him, and offered in evidence a certified copy of the record in the District Court, showing the amount of the recovery there against him and the payment of the same. He contended in the court below, and also in this Court, that this record, which showed a (631) verdict and judgment against him for the amount which he was compelled to pay, under the execution thereafter issued upon the judgment, was, at least, *prima facie* evidence that Pitts, as principal, owed the amount, and that he had been compelled to pay it by judicial proceedings in the United States Court. There was no controversy as to the fact that the plaintiff had paid the amount of the bond and the costs, but this fact was admitted. The court below ruled that the record of the proceedings in the United States Court was not *prima facie* evidence of the debt and the payment thereof by the plaintiff as a cosurety of the defendant Epley, and it was thereupon adjudged that the plaintiff take nothing by his action, and that the defendant Epley recover his costs. The plaintiff excepted to this judgment and appealed to this Court.

We think his Honor erred in holding that the record of the United States District Court, which was duly and properly certified, was not *prima facie* evidence of the indebtedness of Pitts as principal, under the distiller's bond, to the Government. The case in that court was tried upon issues submitted to the jury, who found the fact of indebtedness, and judgment was rendered thereon. The plaintiff was thereafter compelled, by the execution issued from that court, to pay the sum of $500, which was the penalty of the bond, and the costs of the suit. It is true that Epley, by his answer in this case, denies that there was any breach of the bond, but he offered no proof in the court below to that effect, and there is no suggestion by him or his counsel that there was any collusion between the Government and the defendants in the prosecution of the action in the United States Court upon the bond to recover the penalty thereof, or in obtaining the judgment.

In 2 Brandt on Suretyship and Guaranty (3 Ed.), sec. 807, it is stated that "in an action for contribution between cosureties, the record of a judgment recovered by the creditor against the principal and one of the sureties, to which the other surety is not a party, is competent evidence to prove the rendition of such judgment by way of inducement to further evidence that the surety, against whom it was rendered, has paid it." See, also, sec. 805, where it is said that "In an action of *assumpsit* by a surety against his principal, to recover indemnity for money paid for the latter by the former, the record of a judgment against the surety,

although rendered without notice to the principal, is *prima facie* evidence of the sum due by the principal, of the obligation of the surety to pay, and of the assent of the principal to the payment." *Presler v. Stallworth,* 37 Ala., 402.

This Court, in *Armistead v. Harrimond,* 11 N. C., 339, held (632) that a judgment against an administrator is evidence against his surety of the existence of the debt upon which the judgment was recovered, though it was not at that time evidence against the surety that the administrator had sufficient assets with which to discharge the indebtedness. This case was cited with approval in *Brown v. Pike,* 74 N. C., 531.

In consequence of prior decisions of this Court, ch. 38, 1844, was passed, and in the construction given to that act in *Brown v. Pike, supra,* the judgment was made evidence against the surety, both as to the existence of the debt and of assets sufficient to pay it; but by the act of 1881, ch. 8, the Legislature amended the act of 1844, so as to make such a judgment only presumptive evidence against the sureties, whether they were parties to the action in which the judgment was recovered against the principal or not. Revisal, sec. 285. We think, therefore, it is settled as a general principle of the law, that a judgment recovered against a surety is, at least, *prima facie* evidence, or presumptive evidence, of the debt in an action afterwards brought by him against his principal or cosurety to be indemnified, provided that the payment by him of the amount so recovered is either shown or admitted. *Leak v. Covington,* 99 N. C., 559. He recovers of the principal the entire debt which he has paid, and of the surety his ratable part. It was admitted in this case that the principal, Abel Pitts, is insolvent.

It is true, the court ruled that the record of the United States District Court was not evidence against the defendant; but it is apparent, from the pleadings and findings of fact, that there is no real dispute between the parties as to the truth of the matters set out in the record, if it is evidence against the defendant.

We, therefore, hold that there was error in the ruling of the court as to the effect of the record, and reverse the judgment. The case will be remanded with directions to enter a judgment for the plaintiff.

Reversed.

Cited: Jones v. Balsley, 154 N. C., 66.

(633)

GRESHAM MANUFACTURING COMPANY ET AL. v. CARTHAGE BUGGY COMPANY.

(Filed 25 May, 1910.)

Corporations—Contract—Informalities — Ratification — Receivers —Vendor's Lien—Status.

Among goods taken over by the receiver of an insolvent corporation were those acquired by the corporation under an offer to buy upon condition that title remain in the vendor until the purchase money had been paid: *Held*, any informalities in the corporation's signature, or in the absence of the seal to the contract, were waived by the acceptance of the goods by the corporation; and the receiver, in taking them over, was bound by the conditions creating the vendor's lien. The lower court being overruled in this case, it is suggested that a sale of the corporate property be made by the receiver, and that the proceeds be distributed in accordance with the principles declared.

APPEAL by plaintiffs from *Lyon, J.*, at January Term, 1910, of MOORE. The facts are sufficiently stated in the opinion of the Court.

Aycock & Winston and Cox & Cox for plaintiff.
H. F. Seawell and U. L. Spence for defendant.

WALKER, J. This action was brought by R. W. Pleasants and others, creditors of the Carthage Buggy Company, to recover judgment on their several claims against the Buggy Company, which they alleged to be insolvent, and to wind up and settle its affairs, the Buggy Company having been duly incorporated under the laws of this State. C. S. Brewer was appointed receiver of the assets of the Buggy Company, and afterwards the Gresham Manufacturing Company intervened in the cause and alleged that it had contracted to sell to the Buggy Company certain articles of personal property which are described in the pleadings, and that the Buggy Company was indebted to it at the time of the intervention in the sum of $1,725. It also alleged that, at the time of the sale, it had retained the title to the said goods so sold by it to the Buggy Company, the contract between the two companies having been reduced to writing and executed on behalf of the Buggy Company by its secretary and treasurer, and on behalf of the Manufacturing Company by E. W. Becky. Execution of the contract was proven before a justice of the peace as to the Carthage Buggy Company, by Charles A. Jones, its secretary and treasurer, and purported to have been executed by authority of the board of directors. The plaintiffs in the action claimed that the receiver acquired title to the property and held the same for the

(634) payment of the general debts of the corporation, and that the

Manufacturing Company had no prior lien or right thereto by virtue of the contract of sale and the registration of the same. The issues submitted to the jury, with their answers thereto, were as follows:

1. In what sum is the Carthage Buggy Company indebted to the Gresham Manufacturing Company? Answer: $1,496.86, with interest from 8 November, 1908.

2. Is the Gresham Manufacturing Company, at this time, entitled to a lien on the materials mentioned in the complaint in preference to all other creditors of the Carthage Buggy Company and the receiver of the Carthage Buggy Company? Answer: No.

3. Is the Gresham Manufacturing Company, at this time, entitled to a lien on the materials described in the complaint as against the Carthage Buggy Company? Answer: Yes.

There was evidence tending to support the contentions of the parties as above stated. The court charged the jury that if they believed the evidence, they would find, in answer to the first issue, that the Buggy Company was indebted to the Gresham Manufacturing Company in the sum of $1,496.86, with interest from 8 November, 1908. This issue was answered by consent of the parties. The court further charged the jury that if they believed the evidence, they should answer the second issue "No." To this instruction the Gresham Manufacturing Company excepted. As to the third issue, the court charged the jury that if they believed the evidence, they would answer that issue "Yes." The court refused to adjudge that the Gresham Manufacturing Company was entitled to a lien on the property which it had contracted to sell to the Buggy Company, but adjudged that the Buggy Company was indebted to the Gresham Manufacturing Company in the sum of $1,496.86, and that the latter was entitled to a lien on the property sold by it to the Buggy Company, as between it and the said Buggy Company, and further adjudged that the debt due by the Buggy Company to the Manufacturing Company should be paid by the receiver *pro rata* with the other debts due by the Buggy Company, out of the proceeds of the sale of said property, upon which the Manufacturing Company claimed a lien. The court also directed the property to be sold and the proceeds of sale to be held by the receiver for the purpose of distribution under its order, and further adjudged that certain costs of the action should be paid by the Gresham Manufacturing Company to the other creditors, and that the Manufacturing Company should recover its costs against the Buggy Company, to be taxed by the clerk and to be paid by the (635) receiver after all the debts of the Buggy Company shall be satisfied out of the proceeds of the sale of the property. The Gresham Manufacturing Company excepted to the said judgment and appealed to this Court.

We think the court erred in its charge to the jury upon the second issue. This case is governed by *Mershon v. Morris,* 148 N. C., 48. The paper-writing upon which the Gresham Manufacturing Company relied as creating a lien upon the property was nothing more than an offer by the Buggy Company to buy the goods and an agreement by the Manufacturing Company to sell the same, upon condition that the title should remain in the seller until the purchase money had been paid. As said in that case by *Justice Connor:* "The contract was simply an order for a machine, with the terms or proposition to purchase set out, among others, that the title to the property was to remain in the vendor until paid for. It would be a singular result if the corporation or its receiver could retain the property thus coming into its possession without paying for it, and repudiate so much of the president's proposition as secured to the vendor payment of the purchase money because he did not put the corporate seal to the proposition to buy. If he had no authority to make the contract, or did not observe the form prescribed in doing so, no title passed to the corporation. By ratifying his act and taking the property, it waived any informality, if there was any, in the form of making the contract. It is immaterial whether the paper was recorded. The receiver takes whatever title the corporation had, and nothing more. In no point of view is there any error in his Honor's judgment."

Duke v. Markham, 105 N. C., 131, which was cited by the plaintiffs, has no application to the facts of this case. There the officers of the company, without having had a sufficient corporate meeting for the purpose, and without having any authority so to do, executed a mortgage upon the company's property, while in our case, if the officer did not have the power to execute the instrument, no title passed to the Buggy Company, and consequently none to its receiver. If by receiving the goods, the Buggy Company ratified the act of the officer in executing the contract, it was bound by its provisions in every respect, including the reservation of title to the Gresham Manufacturing Company until the purchase money had been paid.

The error committed by the court, as above indicated, entitles the Gresham Manufacturing Company to a new trial; but if the parties see fit to do so, they can have a sale of the property by the order (636) of the court, and a distribution of the proceeds, according to the principles declared in this opinion. The judgment as to the costs will also be modified in accordance with our view of the case.

New trial.

WHITE BLAKESLEE MANUFACTURING COMPANY v. E. J. RHODES.

(Filed 25 May, 1910.)

Claim and Delivery—Prosecution Bond—Plaintiff's Default—Inquiry—Assessment of Damages—Judgment—Procedure.

The plaintiff in claim and delivery proceedings, having filed his complaint, given the bond, and obtained the property sought therein and having failed to appear at the trial and prosecute his action, judgment of nonsuit was entered, and the jury having ascertained on issue submitted the amount of damages defendant had sustained by reason of the seizure and detention of the property: *Held*, no error in the judgment of the lower court, in effect, that the property seized under claim and delivery be returned to defendant, and if this could not be done, that defendant recover of plaintiff and his surety the penal sum of the bond, to be discharged upon payment of the damages assessed by the jury, with order that execution issue to enforce the judgment.

APPEAL by plaintiff from *Joseph S. Adams, J.*, at September Term, 1909, of BUNCOMBE.

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

S. G. Bernard for plaintiff.

Frank Carter and George A. Shuford for defendant.

WALKER, J. This action was brought by the plaintiff for the recovery of certain machinery described in the complaint. The plaintiff caused to be instituted proceedings in claim and delivery, and gave an undertaking with the usual condition in the sum of $1,000 for the prosecution of the action by the plaintiff, in the Superior Court of said county, against the defendant, for wrongfully seizing and detaining the said property, and for the return of the property to the defendant or for the payment of damages for the detention and deterioration of the property, if return thereof cannot be had, in case the plaintiff should fail to prosecute the action without success.

It is stated in the case that the plaintiff filed a complaint, but failed to appear and prosecute the action when the same was called for trial, and judgment of nonsuit was thereupon entered against the plaintiff after he had been called and failed to answer. The court (637) thereupon submitted an issue to the jury as to the damages the defendant had sustained by reason of the seizure and detention of the property, and the jury assessed the damages at $590, with interest from 5 April, 1905. The court further adjudged that the property seized by the sheriff and delivered to the plaintiff be returned to the defendant, and if upon execution issued it cannot be seized thereunder and returned as required by the order of the court, that the defendant recover of the

plaintiff and its surety, the American Bonding Company, the sum of $1,000, which was the penalty of the plaintiff's bond, to be discharged upon the payment of the sum of $590, with interest thereon, that being the amount of damages assessed by the jury. The court further ordered execution to issue for the enforcement of its judgment. The American Bonding Company alone appealed from the judgment of the court. A motion was made in this Court to dismiss the appeal, as the Bonding Company was not a party to the suit and, under the facts and circumstances as they appear in the record, had no right to appeal from the judgment of the court. No question was raised as to the costs which were adjudged to be paid by the plaintiff and its surety.

Manix v. Howard, 82 N. C., 125, settles the question presented in the case against the contention of the appellant, and it is only necessary for us to refer to what is therein said by *Justice Dillard* for the Court, which is as follows: "It is settled that whenever a party is deprived of the possession of property by the process of the law in proceedings adjudged void, an order for restitution will be made as a part of the judgment. *Perry v. Tupper,* 70 N. C., 538; *Dulin v. Howard,* 66 N. C., 433. Upon the same reason, if a plaintiff, in the action of claim and delivery, in which action both parties are actors, procured property to be taken out of the hands of the defendant and put into his possession, and then dismiss his action, it ought to be a part of the judgment to put the parties *in statu quo.* Such a course of proceeding seems to be necessary; otherwise, the plaintiff, under color of legal process, will perpetrate a fraud on the law and be allowed to keep property the title to which was *prima facie* in the defendant, from whom it was taken at the beginning of the suit. In all cases where issue is joined on pleadings filed, the defendant on the trial may have a verdict on the right, and fixing the value; or, if plaintiff neglect or refuse to come to trial of the issue joined, the defendant may have judgment as of nonsuit for the property, with an assessment of value on a writ of inquiry, followed by a judgment in either case in the alternative: that is to say, for the property, if to be (638) had, and if not, then for the value. And it is equally necessary in all cases, whether issue be joined or not, in prevention of fraud, to provide, on plaintiff's motion to dismiss or discontinue, for a like judgment in the alternative."

Phipps v. Wilson, 125 N. C., 106, upon which the appellant relied in this Court, presented a very different state of facts from those we find in the record now before us. In that case the court rendered judgment upon a counterclaim pleaded by the defendant, without any inquiry into the lawfulness of the seizure by the plaintiff of the defendant's property. The pleadings or proceedings in that case, as will appear by reference thereto, presented this issue, and the Court decided that it should have

been determined in favor of the defendant before he was entitled to a judgment upon his counterclaim. That is not our case, for here the plaintiff has failed to comply with the express condition of its bond, and failed to appear and prosecute its action as it was required to do. The defendant did not ask for any judgment on the counterclaim he had pleaded in the case, but merely for judgment according to the condition of the plaintiff's bond, that is, for a return of the property unlawfully seized by the plaintiff, and in case such return could not be had under the process of the court, then the recovery of the damages assessed by the jury. In any view of the case, there was no error in the judgment of the court below, even if the Bonding Company had the right to appeal therefrom.

No error.

J. G. McCORMICK, TRUSTEE, v. S. B. WILLIAMS.

(Filed 25 May, 1910.)

1. Principal and Agent—Declarations—Evidence.

Before the declarations of an alleged agent are competent, the fact of agency must be at least *prima facie* shown by other evidence; and when a purchaser at a mortgage sale, in an action for damages arising from his failure to comply with his bid, relies upon a release of his bid by the agent of the one holding the notes thereby secured, the agency must thus be established before the agent's declarations are competent.

2. Same—Mortgage Sale—Release.

When upon demand made of the last and highest bidder at a sale of land, under a deed of trust, he fails or refuses to comply with his bid and make a payment accordingly, and the sale is a valid one, the trustee may sue such bidder for the full amount of the bid and recover it with interest and cost; but when the trustee elects to resell the land for the bidder and at the second sale it brings a less price, the amount of damages recoverable is the difference between that bid at the first sale and the market value of the property, in arriving at the determination of which the jury may consider as evidence the amount bid at the second sale.

APPEAL by defendant from *Lyon, J.*, at December Term, 1909, (639) of ROBESON.

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

McLean & McLean for plaintiff.
McNeill & McNeill and Shaw & Johnson for defendant.

WALKER, J. This action was brought by the plaintiff for the recovery of the sum of $585, it being the difference between the amount bid by the

defendant at a sale made by the plaintiff, as trustee, of certain property conveyed to him by deed of trust, and the amount bid at a second sale of the same property, which was made necessary by the failure of the defendant to comply with his bid which was made at the first sale.

It appears in the case that H. D. Williams executed several deeds of trust to the plaintiff to secure certain debts therein described, each of which said deeds contained a power of sale, to be exercised by the trustee in case of default in the payment of the debts. The trustee, in accordance with the terms of the deeds of trust, and after default in the payment of the debts, sold the property at public auction after due advertisement, and the defendant, S. B. Williams, purchased, at the sale, a sawmill plant for the sum of $785, to be paid in cash. After demand made upon him for a compliance with his bid and the payment of the purchase money, and the refusal to comply, the plaintiff, as trustee, resold the sawmill plant, when it was purchased by T. R. Toler, at the price of $200.

The defendant claimed that he had been released from his bid by the Akers Lumber Company, the owner of the notes secured by the deed of trust. It is not contended that he was released otherwise than by J. T. Burrus, who, defendant alleges, was acting, at the time, as agent of the lumber company, but we find no evidence in the case to establish the agency of Burrus.

It is well settled by the authorities that an agency cannot be established by the acts or declarations of the person who is alleged to be agent. The agency must first be shown, at least *prima facie,* by other evidence, before the acts and declarations of the agent become competent evidence
(640) against the alleged principal. *Jackson v. Tel. Co.,* 139 N. C., 347; *Francis v. Edward,* 77 N. C., 271; *Daniel v. R. R.,* 136 N. C., 517.

In this case the court charged the jury to disregard all the testimony as to any conversation or agreement between the defendant and J. T. Burrus, upon the ground, of course, that there was no evidence which tended to show that Burrus was authorized to act for the Akers Lumber Company, and to release the defendant from the obligation which he had incurred by bidding for and buying the property at the first sale. We can see no error in this instruction, as there was no evidence introduced by the defendant to sustain his allegation that Burrus had the authority to release the defendant, even if what was said by him in his conversation with the defendant could have the effect in law of discharging the defendant of his obligation as purchaser at the sale.

As to the damages, when the defendant failed or refused to comply with his bid and pay the amount thereof to the trustee, the sale being a valid one under the deed of trust, the latter could have sued the defend-

ant for the full amount of the bid and recovered the same with costs. He elected, though, to resell the property for the benefit of the defendant, and it is not disputed that the sale was properly made in accordance with the terms of the deed of trust, and that defendant had notice of the sale. The court charged the jury upon the issue as to damages, that they might allow the plaintiff the difference between the amount bid at the first sale and the market value of the property, as they might ascertain it to be, considering the price it brought at the second sale, if the jury should find that the second sale was made fairly and in accordance with the requirements of the deed of trust. This charge seems to be in accordance with what was said by this Court in *Register Co. v. Hill,* 136 N. C., 276. The verdict was for an amount much less than the sum which the defendant had bid at the first sale, and which could have been recovered by the plaintiff, as we have already said, if he had elected to sue for the same upon tendering the property to the defendant, if the facts and circumstances of the case required such a tender.

We have examined the record carefully and have concluded that the case was fairly and correctly tried in the court below, and that consequently there was no error in the rulings and judgment of the court.

No error.

Cited: *Realty Co. v. Rumbough,* 172 N. C., 747.

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(641)

W. A. UNDERWOOD v. TOWN OF ASHEBORO.

(Filed 25 May, 1910.)

1. Cities and Towns—Bond Issue—Water System—Necessary Purpose.

An issue of bonds for water-works and sewerage in a town where the wells are contaminated with typhoid germs, and there is no adequate protection from fire, and no other supply of water, is for a necessary purpose.

2. Same—Taxation—Limitation of Levy—Injunction—Burden of Proof.

The limitations of Revisal, secs. 2974, 2977, 2924, 5110, do not apply to a tax levy for the necessary municipal purpose of a water and sewer system; and, if otherwise, the party seeking to restrain a bond issue for such purpose has the burden of proof that after deducting rentals and profits of the water system, the levy to pay interest on these bonds would probably swell the total levy, for other than special purposes, authorized by statute, beyond the limitations in either Rev., 2924 or 5110.

APPEAL by plaintiff from *Biggs, J.,* from RANDOLPH, heard at chambers in Asheboro, 10 May, 1910.

On 10 February, 1910, the board of commissioners of the town of Asheboro passed a resolution, without submitting the same to a vote

of the people, to issue $50,000 in bonds of the town, due thirty years after date and bearing 5 per cent interest, for the purpose of providing a system of waterworks and sewerage for said town. The plaintiff, a taxpayer of said town, brought this action to restrain the issuing of said bonds. The court decided that the purpose contemplated by the resolution was a necessary expense, and there being no limitation in the charter or by any statute, general or special, upon the power of the town to contract for necessary expenses, adjudged that the town commissioners had authority to incur said indebtedness and issue bonds therefor, and denied the injunction. Plaintiff appealed.

R. C. Kelly and H. M. Robins for plaintiff.
J. A. Spence for defendant.

CLARK, C. J. Upon the facts agreed, which the judge found to be true, it appears that the population of the town of Asheboro is about 2,000; that the assessed value of the real and personal property in the town is $752,767 and there are 312 taxable polls; that the bonded indebtedness already existing is $15,000; that by virtue of special elections authorized by the General Assembly, the town levies 50 cents on the $100 of property and $1.50 on the poll for graded-school pur-
(642) poses, and 25 cents on the $100 and 75 cents on the poll for general, street and other purposes.

It is further agreed and found as facts by the judge, that the present source of water supply for the inhabitants of the town is surface wells, and water from four of these have been analyzed and all four were found to be infected with typhoid germs; that the town has no provision for protection from fire; that the town is lighted by electric lights, but it has only about 100 yards of paved streets; that the cost of putting in the proposed water and sewerage system will be between $40,000 and $60,000.

The protection of the town from fire and disease is of the first importance, and his Honor properly adjudged that this provision for water and sewerage was a necessary expense. By the terms of the Constitution, Art VII, sec. 7, Rev., 2974, a vote of the people is not required before incurring an indebtedness and issuing bonds for "necessary expenses" in the absence of statutory restriction. Const., Art. VIII, sec. 4.

The existing indebtedness is $15,000 and the assessed valuation of property, real and personal, in the town is $752,767. The proposed issue of $50,000 bonds would, therefore, not violate the 10 per cent restriction in Rev., 2977, if it applied to indebtedness for necessary expenses, which it does not. *Wharton v. Greensboro,* 146 N. C., 356.

The limitation in Rev., 2924, of a levy of more than 50 cents on the $100, and $1.50 on the poll, applies to "municipal purposes," *i. e.*, for ordinary purposes of city or town government. The limitation in Rev., 5110, that the town shall not levy to exceed $1 on the $100 has this proviso, "except by special authority from the General Assembly." Though the town already levies 75 cents on the $100, so much thereof (50 cents) as is levied for special purposes (school, etc.) under elections authorized by special statutes is to be deducted from the 75 cents, which leaves ample margin between the 25 cents now levied for general purposes and the $1 limitation in Rev., 5110, for a levy to pay the interest on these bonds, though that would not be necessary to the validity of the bonds. *Commissioners v. McDonald,* 148 N. C., 125. Besides, it does not appear that after deducting rentals and profits of the water system the levy to pay interest on these bonds would probably swell the total levy for other than special purposes (which are authorized by special statute) beyond the limitation in either Rev., 2924 or 5110. The burden to show this was on the plaintiff asking an injunction.

Towns in Randolph County are exempted from the very com- (643) mendable provision in Laws 1907, ch. 935, Pell's Rev., 2924, which restricts the total municipal poll tax in all cases to $2. The excessive poll tax levied in many towns before the passage of this act was a great hardship on the poorer classes.

The judgment refusing the injunction is

Affirmed.

Cited: Hotel Co. v. Red Springs, 157 N. C., 139; *Pritchard v. Comrs.,* 160 N. C., 479; *Robinson v. Goldsboro,* 161 N. C., 673; *Bain v. Goldsboro,* 164 N. C., 104; *Swindell v. Belhaven,* 173 N. C., 4.

D. A. GARRISON v. VERMONT MILLS (INCORPORATED).

(Filed 25 May, 1910.)

1. Contracts of Sale—Commission Man—Advances—Executory Lien—Title.

A contract between a commission company and a manufacturing plant whereby the former was to have exclusive sale of the product of the latter at an agreed commission, and to advance a certain per cent of the value of the goods on hand stored in the mill, which were to be billed to it and kept stored in a separate warehouse and insured for its benefit, does not of itself create a lien on the goods for advances made; (*a*) the contract is executory, that the goods should be shipped for sale on commission; (*b*) there is no lien given or recorded; (*c*) an invoice alone does not transfer title, and marking and invoicing the goods does not create a lien for the advances.

2. Contracts—Commission Man—Advances—Liens—Possession.

Possession, actual or constructive, is necessary to create a lien on goods in favor of a commission man who, under the terms of his exclusive contract of sale, has advanced money thereon.

3. Same—Acquiescence—Silence.

A commission man claiming a lien under the terms of his contract of exclusive sale by reason of having advanced money on goods manufactured by a corporation and stored at its mills, does not show the possession necessary to his lien by establishing as a fact that after making the advances he went to the mill and asked the superintendent of the mill to take charge of the goods for him, the president of the latter standing by, but not dissenting.

4. Contracts—Commission Man—Advances—Superintendent—Agency—Possession.

The superintendent of a manufacturing company has no authority to transfer possession of the company's property to a stranger, unless authorized by the company; and when a commission man has made advances on the goods of the company without taking possession, but by verbal agreement with him the superintendent has attempted to give him possession, with the understanding that it should be held for him, it is insufficient for the purpose of creating a lien for the advances made.

MANNING, J., dissenting; HOKE, J., concurring in dissenting opinion.

(644) APPEAL by defendant company's receiver, from *Webb, J.*, heard on exceptions to referee's report, by consent at Charlotte, 7 February, 1910, the proceedings being instituted in GASTON.

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

Burwell & Cansler and O. F. Mason for plaintiff.
King & Kimball and J. H. Pou for defendant.

CLARK, C. J. On 25 January, 1907, L. L. Jenkins, the appellee, was appointed receiver of the Vermont Mills in Gaston County, and took possession of all its property and effects. Among the effects so taken possession of by the receiver were a number of bales of cloth. Some of these bales were in the warehouse of the company and some in the basement. The appellant, the Cone Export and Commission Company, on 26 February, 1907, having made claim to said bales of cloth, entered into an agreement with the receiver by which said bales were sold and the proceeds were to be held to abide the decision of the court whether they should be paid to the receiver for distribution according to law among the creditors of said company, or should be paid over to the appellant.

The facts found by the referee, and approved by the court, are, that on 15 March, 1906, the Vermont Mills made a contract with the Cone

Export and Commission Company, "whereby the latter was to have exclusive sale of the products of the mill at a stipulated commission and would advance 75 per cent of the net cash value of the goods on hand stored in mill; that the goods thus advanced upon were to be billed to the Cone Company and stored in a separate warehouse and insured by the mill for the benefit of the claimant. The claimant agreed to guarantee the payment of the amount for which the goods were sold by it. The mills reserved the right to sell at its own store and to fill any contracts then in force. On 15 January, 1907, one Vaught, agent of the claimant, visited the mills in the company of its president and the superintendent (Coble), and took an inventory of all the cloth on the looms, and also that in the basement and in the warehouse, and thereupon stated that he took possession of all the cloth as the property of the said Cone Export and Commission Company, and appointed said Coble as its agent to take charge of all the cloth. At that time the Vermont Mills were indebted to the Cone Export and Commission Company in an amount in excess of the value of said cloth, and (645) was also largely indebted to other creditors, and insolvent. The judge finds as a fact that the said president of the Vermont Mills did not give his consent to the taking of the goods by Vaught, though he was present. The cloth remained in its then position till the receiver took charge on 26 January, as above stated.

The claim of the appellant, the Cone Export and Commission Company, is that by virtue of its contract and the action of the said Vaught on 15 January it is entitled to the proceeds of the sale of these goods.

The Cone Export and Commission Company acquired no lien by virtue of its contract of 15 March, 1906, for that was purely an executory contract that goods should be shipped to said company for sale on commission. It acquired none by virtue of its advances, for there was no lien given or recorded. Nor did the fact that the Vermont Mills had marked the goods and invoiced them to the appellant have that effect, for an invoice does not transfer the title. *Dows v. Bank,* 91 U. S., 630; *Sturm v. Baker,* 150 U. S., 328, 23 Cyc., 351.

A factor has no lien upon the goods of the principal unless he holds possession of the goods. "Possession, actual or constructive, is an essential element in the factor's lien." 19 Cyc., 160, and numerous cases there cited. The appellant's claim depends, therefore, upon whether the action of Vaught on 15 January, 1907, amounted to a taking possession of said goods. We do not think that it can be so held. He appeared on the premises of the debtor, took an inventory of the cloth, whether in the looms or baled up and lying in the basement and in the warehouse. Possession was not surrendered by the company, nor by any one authorized to act for it. The court finds that the president of

the company, who was present, did not assent to Vaught taking possession. He did not obtain possession with the consent of the company nor without it, for he had no process of any court. He contented himself with directing the superintendent to take possession of the goods and hold them as agent of the Cone Company. There was no physical change in the status of the goods. The superintendent had no authority to transfer the possession of the goods, which he held as a servant for the company, to a stranger. The president so testifies without contradiction, and we know it to be so as a matter of law. The superintendent is not an officer of the company, but merely an employee. The servant could not assent to transfer the goods he held for the master to another. Vaught thereafter exercised no dominion over the goods nor took any actual possession. They remained just as they lay, (646) none the worse and none the better for the declaration of Vaught, and unmoved by anything he said or did; they remained untouched until the receiver, by the authority of the court, took possession of them as the property of the company, which had not till then voluntarily or by order of any court lost possession of them.

When the receiver took possession of them, he did not take them from Vaught, but as the property of the company and lying in its mill. There being no lien upon them, the judge properly held that the claimant had no priority over the proceeds in the distribution of the proceeds by the receiver.

Affirmed.

MANNING, J., *dissenting:* I regret at all times not to be in agreement with the majority of this Court, in cases submitted for our decision; but I am constrained to dissent from the conclusion reached in the disposition of this appeal. In 1 Pomeroy Eq. Jur. sec., 155, the learned author says: "It is well established that where a court takes possession of the property of a party, and appoints a receiver to administer the trust for the benefit of all interested parties, the court receives such property impressed with all existing rights and equities, and the relative rank of claims and standing of liens remains unaffected by the receivership. Every legal and equitable lien upon the property is preserved, with the power of enforcing it. The receivership does not destroy any liens that may have been acquired before the appointment." Applying this principle, stated with such admirable clearness, I think the contract between the Vermont Mills and the Cone Export and Commission Company created in the latter, upon making the advances to the former, as stipulated in paragraph 5, a right in equity against the mills, which was completed by the delivery of the baled goods, the subject of this action. It is admitted that the mills suspended manufac-

turing before the acts were done, which, in my opinion, constituted a delivery to the commission company, under the contract and before the appointment of the receiver. During this period, advances to an amount more than double the value of the particular goods having been made theretofore, an agent of the commission company visited the Vermont Mills, and in the presence of its president, of the man who was by him thought to be its secretary and had been up to three days prior thereto, and of its superintendent, made invoices of the bales of manufactured goods, by numbers and marks which had been placed thereon for the commission company, and in the presence of the president, the plaintiff Garrison, and of Durham, the supposed secretary, and without objection or protest from either, requested Coble, the super- (647) intendent, to take charge of them as agent of the commission company, and he assented to do so. There was no removal of the goods, nor in view of the above do we think removal necessary to complete delivery. The mills were shut down and suspended; they did not again resume manufacturing, and there was no commingling of these goods with others. There was no word of objection or protest by the officers of the mills to what was said and done; it is true, there was no positive assent. The officers saw; they heard; they were witnesses; but they stood mute.

It is admitted in the opinion of the Court that the equitable lien of the commission company would have been complete by delivery, and this principle is well established. So the decisive question is, Did the acts narrated constitute a delivery? I cannot think that a change of physical location in view of the actual occurrences was required to complete the equitable lien of the commission company. It was acting strictly within its rights under the contract; the taking possession of the goods was not tortious, but under and by virtue of its contract; and the delivery by the mills was in accordance with its obligation under the contract. If a corporation makes a valid agreement to sell a horse for $150, and the other party subsequently pays the price to the treasurer of the corporation, I cannot think the law requires a meeting of its board of directors to authorize the delivery of the horse, or that the taking possession of the horse by the purchaser in the presence of the president and without objection is an unlawful or tortious act. Nor can I see that it is material that the absolute title does not pass by the delivery, but that the delivery is for the purpose of sale and an application of the proceeds to the payment of advances made on them. My conclusion is supported by the following cases and authorities: *Kollock v. Jackson,* 5 Ga., 153; *Campbell v. Penn,* 7 La., 371; *Hamilton v. Campbell,* 9 La., 531; *Jackson v. Rutherford,* 73 Ala., 155; *Hanselt v. Harrison,* 105 U. S., 401; *Gregory v. Morris,* 96 U. S., 619; *Yeatman v. Sav-*

ings Institution, 95 U. S., 764; *Walker v. Brown,* 165 U. S., 654. In this last case the Court quotes with approval section 1235, 3 Pomeroy Eq. Jur., where this doctrine is stated: "The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer (648) the property as security, creates an equitable lien upon the property so indicated, which is enforcible against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice. . . . The ultimate grounds and motives of this doctrine are explained in the preceding section, but the doctrine itself is clearly an application of the maxim, 'equity regards as done that which ought to be done.'"

I do not think that the principle settled in *Brem v. Lockhart,* 93 N. C., 191, and the numerous decisions of the Court since approving it, is contravened, for the reason that the court, in the present case, through its officer, is administering the assets of the defendant corporation "in trust for the benefit of all its creditors, impressed with the existing rights and equities, and the relative rank of claims and standing of liens remains unaffected"; nor is the doctrine declared in *Duke v. Markham,* 105 N. C., 131, and since then repeatedly approved, contravened; that doctrine being that the power given by a corporation to execute a mortgage on, or make other conveyance of, corporate property can only be given at a corporate meeting duly held. In this present case it is not questioned that the contract between the Vermont Mills and the commission company received proper corporate authorization. I am, therefore, of the opinion that the commission company was entitled to the proceeds of the sale of the manufactured goods, upon the facts found, and that his Honor should have so adjudged.

HOKE, J., concurs in the dissenting opinion.

Cited: *S. c.,* 154 N. C., 4.

J. B. McCALL v. TOXAWAY TANNING COMPANY.

(Filed 25 May, 1910.)

Damages — Personal Injury — Written Release — Fraudulent Inducements— Calculated to Deceive—Evidence Sufficient.

The defendant in an action to recover damages for personal injury alleged by reason of its negligence, sets up plaintiff's written release in defense. There was evidence for plaintiff tending to show that soon after the injury and when plaintiff was suffering from its effect, defendant's manager sent for him and induced the execution of the release by falsely representing that it was only a receipt necessary for defendant to have in order to collect insurance money due to it by reason of the injury, and that it did not affect plaintiff's claim: *Held*, evidence sufficient to avoid the release, if the jury should find, under the circumstances, that the representations were calculated to and did deceive the plaintiff, whether he at the time had mental capacity to understand it or not; and it was error, therefore, to put the burden upon plaintiff of showing both actual fraud and mental incapacity.

APPEAL from *Joseph S. Adams, J.*, at August Term, 1909, of (649) TRANSYLVANIA.

Action to recover damages for alleged negligent injury.

The plaintiff alleged, and offered evidence tending to show, that he had suffered physical injury caused by negligence of defendant company. Defendant denied negligence and pleaded a release of all claim for damages, signed by plaintiff, and offered evidence tending to support the defense. Plaintiff replied, alleging that this release was obtained by false and fraudulent statements as to its contents on the part of one J. S. Silverstein, vice president and general manager of defendant company, and alleged further, that at the time he signed the release he was in such a condition of bodily suffering and mental anxiety that he was not able to understand or comprehend the meaning or effect of same; and offered evidence tending to show the false representation, etc.

On the sixth issue, that as to obtaining the release by fraud, the court, among other things, charged the jury as follows:

"Before you can find the sixth issue 'Yes,' you must be satisfied by a preponderance of evidence that at the time it was signed the plaintiff did not understand what he was signing, and that he was misled by fraudulent misrepresentations of defendant, and that he was in such a condition from ignorance or mental and physical suffering that he was at the time incapable with reasonable care and caution to understand the contents of the paper.

"If, however, you are satisfied by the greater weight of the evidence, that the defendant, through its agent, Silverstein, represented to plain-

tiff that plaintiff was merely releasing an insurance company and was not releasing the defendant company, and that the plaintiff was in such a condition of suffering, from the effects of his wounds, that he could not comprehend the meaning of the writing, then you should find this issue 'Yes.'"

The jury rendered a verdict that plaintiff was wrongfully injured by defendant's negligence and damaged thereby $150; that plaintiff had released the claim, and said release was not procured by fraud. Judgment for defendant, and plaintiff excepted and appealed.

George A. Shuford and Brown Shepherd for plaintiff.
Welch Galloway for defendant.

(650) HOKE, J., after stating the case: In *Gray v. Jenkins,* 151 N. C., 80, the last expression of the court on the question directly presented, the judge delivering the opinion said: "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 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." Citing *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.

This, we think, correctly states the doctrine relevant to the inquiry, and its proper application to the case requires that the plaintiff be awarded a new trial.

There was evidence on the part of plaintiff tending to show that plaintiff had been injured by defendant's negligence, and while he was still suffering pain and anxiety from his hurt, he was sent for by J. S. Silverstein, vice president and general manager of defendant company, and was induced to sign the release in question by false and fraudulent representations on the part of said Silverstein to the effect that the release in question was a receipt to enable Silverstein to obtain an amount of insurance arising by reason of the injury, and that same had no bearing on his claim for damages. If such repre- (651) sentations were made under circumstances calculated to mislead plaintiff, and did mislead him, the effect under the doctrine referred to would be to avoid the release, whether plaintiff at the time had mental capacity to understand its purport or not.

The charge of his Honor, therefore, contained error to plaintiff's prejudice, in imposing on plaintiff more exacting conditions than the law requires. The jury were told, in effect, that in order to avoid the release it was incumbent on plaintiff to establish both actual fraud and mental incapacity.

For the error indicated, there will be a new trial on all the issues,

New trial.

A. N. DALE ET AL. v. GAITHER LUMBER COMPANY.

(Filed 25 May, 1910.)

Contracts—Statute of Frauds—Debt of Another—Consideration—New Promise.

The defendant contracted with W. that the latter should cut, saw, log, and stack certain timber; the plaintiff did the logging work for W. under this contract, and there was evidence tending to show that subsequent to the original agreement the parties agreed that the defendant should retain for plaintiff, under contract with W. and with the consent of W., certain moneys earned by the plaintiff under his agreement with W. to do this work. Defendant finally refused to pay these moneys to plaintiff, alleging and contending that W. was indebted to it, that he had been overpaid, and setting up the statute of frauds: *Held*, the promise of defendant to retain the moneys for plaintiff under the circumstances does not fall within the meaning of the statute of frauds, that to answer the debt, default or miscarriage of another the promise must be in writing, (*a*) the defendant had a direct pecuniary interest in the work to be performed by plaintiff and received the benefit of it; (*b*) the promise was, in effect, to see the plaintiff's claim paid out of the amount to be earned under the contract of W., the original debtor, and the amount so earned becomes a fund applicable, by the agreement, to plaintiff's debt, affording the consideration to support the defendant's promise as a new and original obligation.

APPEAL from *Justice, J.*, at December Term, 1909, of BUNCOMBE.

There was evidence tending to show that one L. L. Wood had contracted in writing with defendant company to "cut, saw, log and stack in a workmanlike manner" for defendant company the timber (652) growing on a tract of land of 888 acres, and was engaged in the performance of said contract; that the plaintiff had agreed with L. L. Wood to do the logging for this job at $3 per thousand feet; that plaintiff went to work under this agreement, and after a short time, not receiving any money and not being satisfied with the arrangements for his pay, he saw the manager of defendant company and told him that plaintiff was to have $3 per thousand for doing the logging, and that he wanted the company to hold back that amount for plaintiff out of the money to be earned by Wood under his contract; that the manager agreed to do this, and, under and by reason of this agreement, plaintiff went back to work and did logging to the amount of $400 and over, for which he had not been paid; that this arrangement and agreement as to holding back the $3 per thousand was made with the knowledge and assent of Wood; that after this agreement on the part of the manager, a large amount of the lumber was cut and turned over to the company by Wood, the amount thereafter earned by Wood under the contract being near $2,000, and that plaintiff had applied to the company for his money and it had failed and refused to pay the amount or any part of it, claiming that they had paid Wood in full and that he was indebted to them several hundred dollars on an old debt, etc.

Defendant's evidence tended to show that they had the written contract with Wood to do the work, and they did not know plaintiff in the transaction; that the first they knew of plaintiff making any claim against the company was when he presented an order from Wood for the company for $416; that they had paid Wood something over $2,000, all they owed him for work done under the contract, and he was indebted to the company for more than $200 on an old debt. There was also evidence of some payments by Wood to Dale on the amount due him for logging. It appeared that R. A. Gaither was secretary and treasurer, having power as general manager to bind the company.

On the issue as to the liability of the defendant company, the court charged the jury as follows:

"The court charges you (*a*) that if you find from the evidence that R. A. Gaither, who is admitted to be the secretary and treasurer of the Gaither Lumber Company, agreed with plaintiff, A. N. Dale, that he would hold back $3 per thousand feet out of the money due or to become due L. L. Wood for sawing for said company, and that he would pay the same to said plaintiff for cutting and logging done by him for said Wood, and if you find from the evidence that plaintiff was in-

duced thereby to go on with the logging, then the defendant the (653) Gaither Lumber Company, would be liable to pay plaintiff at that rate for all timber cut and logged by plaintiff for said Wood after the time such agreement was made, and you will therefore allow plaintiff $3 per thousand feet for whatever amount of timber you find was so cut and logged, in your answer to the second issue (*b*)."

There was verdict against the company for $393.90. Judgment on the verdict and defandant excepted and appealed, assigning for error chiefly that the demand of plaintiff against defandant company was avoided under the statute of frauds, Revisal, 974, requiring agreements to answer for the debt, default or miscarriage of another to be in writing, and that all oral evidence tending to support the claim should have been excluded.

J. M. Mull and J. T. Perkins for plaintiff.
Avery & Ervin for defendant.

HOKE, J. We are of opinion that the case has been correctly tried, and the charge of his Honor is in accord with the better-considered precedents.

In *Emerson v. Slater,* 63 U. S., 28-43, a decision on this section of the statute of frauds, the Court said:

"But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." This position has been sustained and applied in other cases of the same Court, notably in *Davis v. Patrick,* 141 U. S., 479, in which it was held:

"In determining whether an alleged promise is or is not a promise to answer for the debt of another, the following rules may be applied: (1) if the promisor is a stranger to the transaction, without interest in it, the obligations of the statute are to be strictly upheld; (2) but if he has a personal, immediate and pecuniary interest in a transaction in which a third party is the original obligor, the courts will give effect to the promise. The real character of a promise does not depend altogether upon form of expression, but largely upon the situation of the parties, and upon whether they understand it to be a collateral or direct promise."

This rule has prevailed in many well-considered cases in other courts construing this section of the statute, as in *Crawford v.* (654)

Edison, 45 Ohio St., 239; *Pront & Robertson v. Webb,* 87 Ala., 593; *Commissioners v. Heating Co.,* 128 Ind., 247, and the same general principle has been recognized and approved with us, as in *Deaver v. Deaver,* 137 N. C., 241; *Voorhees v. Porter,* 134 N. C., 591-605; *Whitehurst v. Hyman,* 90 N. C., 587; *Mason v. Wilson,* 84 N. C., 51; *Threadgill v. McLendon,* 76 N. C., 24.

A doctrine resting upon the same basic principle appears in several of these cases from our own Court, to the effect that where a debtor places a fund, money or property in the hands of a third person, who agrees to pay the debt out of the fund, the said agreement is not within the statute.

The position is stated in *Mason v. Wilson, supra,* as follows: "A parol promise to pay the debt of another out of property placed by the debtor in the hands of the promisor, who converts the same into money, is not within the statute of frauds. It is an original and independent promise founded upon a new consideration."

And in either class of cases the promise on the part of the third person is held to be a binding obligation, whether the original debtor continues liable or not; this by reason of the new consideration moving between the parties.

Referring to this question in *Whitehurst v. Hyman, supra, Merrimon, J.,* said: "It is settled by many judicial decisions in construing this statute, and others substantially like it, that where there is some new and original consideration of benefit or harm moving between the party to whom the debt to be paid is due, and the party making the promise to pay the same, such case is not within the statute; as where a promise to pay an existing debt is made in consideration of property placed by the debtor in the hands of the party promising, or where the party to whom the promise is made relinquishes a levy on the goods of the debtor for the benefit of the promisor, or where the party promising has a personal interest, benefit or advantage of his own to be subserved, without regard to the interest or advantage of the original debtor, as, for example, if a creditor has a lien on certain property of his debtor to the amount of his debt, and a third person who has an interest in the same property promises the creditor to pay the debt in consideration of the creditor's relinquishing his lien. Such promises are not within the statute, because they are not made 'to answer the debt, default or miscarriage of another person.'

(655) "It may be, the performance of the promise will have the effect of discharging the original debtor; but such discharge was not the inducement to or the consideration to support the promise.

"The moving, controlling purpose of the promisor in such cases is his own advantage, not that of the debtor. It not infrequently happens

that in a great variety of business circumstances it becomes important in a valuable sense to third parties to discharge the debt of a debtor, or relieve his property from liability to the creditor for the benefit of such third parties, without regard to the benefit, ease or advantage of the debtor.

"The advantage to the third party, the promisor, is a sufficient valuable consideration to support a contract separate from and independent of the debt to be discharged."

And to like effect, delivering the opinion in *Voorhees v. Porter, supra. Associate Justice Walker* said: "But we think the case of *Mason v. Wilson,* 84 N. C., 51, 34 Am. Rep., 612, is directly in point. The doctrine there stated is that if a third person promises the debtor to pay his antecedent debts in consideration of property placed in the hands of the promisor by the debtor for the purpose, which is afterwards converted into money, the creditors may recover on the promise or for money had and received, 'for although,' says the Court, 'the promise is in words to pay the debt of another, and the performance of it discharges that debt, still the consideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an original and distinct cause of action'; and it is immaterial, as is further said by the Court, whether the liability of the original debtor is continued or not, the promise being an independent and original one founded upon a new consideration and binding upon the promisor. In our case, though the property was not received for the purpose of being converted into money in order to pay the debt out of the proceeds, the promise to purchase it at a fixed price and to pay the amount of that price to the creditors of the vendor amounts to the same thing, and brings our case within the principle of the third class mentioned in *Mason v. Wilson* (which authorizes the creditor to sue directly), namely, 'when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the original contracting parties.' In such a case the creditors may sue the promisor, whether his debtor remains liable to him or not."

In the case before us the defendant company had a direct pecuniary interest in the work to be performed by plaintiff, and received the benefit of it, and its obligation comes clearly within the first principle as it appears in *Emerson v. Slater, supra,* and we see no reason why (656) the promise of defendant does not come also within the second principle referred to. The company's agreement was, in effect, to see the claim paid out of the amount to be earned under the contract by L. L. Wood, the original debtor. This was entered into with the sanction and approval of Wood, and, as this amount was earned by Wood,

it would seem to become a fund applicable, by the agreement, to plaintiff's debt, and affording the consideration to support the company's promise as a new and original obligation.

There is no error in the rule laid down by the court which gives defendant any just ground of complaint, and the judgment in plaintiff's favor is affirmed.

No error.

Cited: Peele v. Powell, 156 N. C., 558, 564; *Whitehurst v. Padgett,* 157 N. C., 427; *Partin v. Prince,* 159 N. C., 555; *Powell v. Lumber Co.,* 168 N. C., 638; *Holland v. Hartley,* 171 N. C., 378; *Handle Co. v. Plumbing Co., ib.,* 501.

J. A. VOLIVAR v. RICHMOND CEDAR WORKS.

(Filed 27 May, 1910.)

Foreign Corporations—Process Agents—Statute of Limitations—Judgments—"Full Faith and Credit"—Constitutional Law.

A foreign corporation which had complied with the requirements of Revisal, sec. 1243, in maintaining an agent in this State upon whom process may be served, together with public-service corporations doing business in this State, may plead the statute of limitations. The test of the availability of the plea is whether they were amenable to the process of our State courts.

WALKER and MANNING, JJ., concurring, except as to the retroactive effect of the decision.

APPEAL by defendant from *Ward, J.,* at Fall Term, 1909, of TYRRELL.

The facts are sufficiently stated in the opinion of the Court by *Associate Justice Brown.*

Aydlett & Ehringhaus for plaintiff.

W. W. Starke, W. M. Bond, Brown Shepherd, Aycock & Winston for defendant.

BROWN, J. The defendant is a foreign corporation owning property and doing business in this State prior to the act complained of and up to this time.

The alleged damage occurred in 1904, and this action was commenced 12 November, 1908. The defendant at all times maintained a process agent in the State, upon whom service could be had, and upon (657) whom service actually was had in the case now being considered.

The defendant pleaded the three years' statute of limitations. This Court held that the plea is not available to a nonresident corporation.

Some of the earlier utterances of this Court upon the subject would indicate that the plea is open to a nonresident corporation upon which service of process can be had within the State and against which a personal judgment may be rendered. *Armfield v. Moore*, 97 N. C., 34; *Williams v. B. & L. Assn.*, 131 N. C., 267. In this last case *Mr. Justice Clark*, speaking for the Court and quoting with approval *Armfield v. Moore*, says: "The plain intent of the statute is to put nonresidents on the same footing as residents, and not to protect them from an action unless they have been for two years exposed to service of summons."

Since those decisions it has been held by this Court that the plea is never available to a nonresident corporation, although it may have fully complied with our statutes (Revisal, sec. 1243), and appointed and maintained an agent here upon whom process can be at all times served. *Green v. Insurance Co.*, 139 N. C., 309, and cases cited.

We are now of opinion that these last cases are not well decided and that the better doctrine, more consonant with reason and justice, is that expressed in the citation from *Williams v. B. & L. Assn.*

The overwhelming weight of judicial precedent recognizes the doctrine as expounded by the Supreme Court of Iowa in *Wall v. R. R.*, 69 Ia., 501: "The theory of the statute of limitations is that it operates to bar all actions except as against persons and corporations upon whom notice of the action cannot be served because of their nonresidence. If such notice be served and a personal judgment obtained which can be enforced in the mode provided by law against the property of such person or corporation, wherever found, then such person or corporation is not a nonresident as contemplated by the statute of limitations."

To the same effect the following cases, and particularly the strong cases of *Huss v. R. R.*, 66 Ala., 472, and *Sidway v. Land Co.*, 187 Mo., 673; *Lawrence v. Ballou*, 50 Cal., 258; *Hubbard v. Mortgage Co.*, 14 Ill. App., 40; *St. Paul v. R. R.*, 45 Minn., 387; *R. R. v. Pool*, 72 Miss., 487; *Mortgage Co. v. Thresher Co.* (1905), 14 N. D., 147; *Turcott v. R. R.*, 101 Tenn., 102; *L. Ins. Co v. Duerson*, 28 Gratt., 630; *Thompson v. Land Co.*, 24 S. W., 856; *Express Co. v. Ware*, 87 (658) U. S., 543; *Taylor v. R. R.*, 123 Fed., 155; *McCabe v. Illinois Cent. R R.*, 13 Fed., 827; *Winney v. Mfg. Co.*, 86 Iowa, 608; *Abel v. Ins. Co.*, 18 W. Va., 400; *Norris v. Steamship Co.*, 37 Fed., 426; *Dry Goods Co. v. Cornell*, 4 Okla., 412.

After adverting to the few decisions to the contrary, the 13 Am. & Eng. Ency., 904, says: "The majority of decisions maintain a rule

believed to be more consonant with justice. The rule, briefly stated, is that if under the laws of the domestic State the corporation has placed itself in such position that it may be served with process, it may avail itself of the statute of limitations when sued. Ability to obtain service of process is the test of the running of the statute of limitations."

To the same effect is 25 Cyc., 1238, which cites in support of the text, among a large number of cases, our own case of *Williams v. B. & L. Assn., supra.*

In Murfree on Foreign Corporations it is said: "As to the second question, whether a foreign company, when sued can plead the bar of the statute in defense, it may be said that the great weight of authority is in favor of the conclusion suggested above, that the true test of the running of the statute is the liability of the party invoking its bar to the service of process during the whole of the period prescribed; that if the operations of the company within the jurisdiction were such as to render it liable to suit, then it may plead the statute."

The soundness of this doctrine has nowhere been more forcibly stated than by *Mr. Justice Pleasants* in *Penn. Co. v. Sloan,* 1 Ill. App., 364, a most instructive and well-reasoned case.

The Tennessee Court in *Turcott v. R. R.,* 101 Tenn., 102, holds on a statute exactly like ours that a corporation is a *person,* within the purview of the statute, excluding absences from the State in computing the time for the running of the statute of limitations, and that a foreign corporation doing business in the State upon which service of process may be made may plead the statute of limitations.

The Constitution of Alabama contains a provision similar to our statute, requiring all foreign corporations doing business within the State to maintain an agent upon whom service of process may be made. That court held that such corporation could plead the statute of limitations. *Huss v. R. R.,* 66 Ala., 475. In rendering the opinion *Chief Justice Brickell* says: "The true test of the running of the
(659) statute of limitations is the liability of the party invoking its bar to the service of process during the whole of the period prescribed. If there is the continuous liability, the residence or domicile of the party is immaterial."

In *Express Co. v. Ware,* 87 U. S., 543, the Supreme Court of the United States held: "A statute of limitations as against a foreign corporation begins to run from the time such corporation has a person within the State upon whom process to commence a suit may be served."

The Court of Appeals of New York, it seems, at one time held to the contrary, but what is called the "New York rule" by Mr. Murfree has not been often followed. In speaking of it, the Supreme Court of the United States says, through *Mr. Justice Bradley:* "These decisions upon

the construction of the statute are binding upon us, *whatever we may think of their soundness on general principles.*" *R. R. v. R. R.*, 87 U. S., 143. In the same case *Mr. Justice Miller* says: "The liability to suit where process can at all times be served, must in the nature of things be the test of the running of the statute. A different rule applied to an individual because he is a citizen or resident of another State is a violation at once of equal justice and of the rights conferred by the second section of the fourth article of the Federal Constitution, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

The latest decision of the Supreme Court of the United States holds that a foreign corporation owning property and doing business within a State and amenable to its process is a "person," and as such is protected by the equal protection clause of the United States Constitution. *R. R. v. Greene,* 216 U. S., 400.

Statutes, like ours, requiring all foreign corporations doing business within the State to maintain an agent therein upon whom process may be served, have been enacted in a great majority of the States, and in nearly all of them, where the question has arisen, the right to plead the statutes of limitation of such State has been accorded. This is the more consonant with elementary principles of justice because a judgment obtained by such service in the courts of the State is entitled to the full faith and credit in another State as it is in the State where rendered. *St. Clair v. Cox,* 106 U. S., 350; 13 Am. & Eng. Ency., 895.

For these reasons, we think that our precedents to the contrary (660) should no longer be authoritative.

We are of opinion that the action is barred.

Error. Petition allowed.

Justices WALKER and MANNING concur fully in the above opinion, but think that the judgment should not be retroactive, upon the principle expressed in the concurring opinion of *Justice Walker* in *S. v. Fulton,* 149 N. C., 492; *S. v. Bell,* 136 N. C., 674.

Cited: Bennett v. Tel. Co., post, 671.

LANCASTER TRUST COMPANY v. J. B. MASON.

(Filed 27 May, 1910.)

Corporations—Rehearing—Dividends Reserved—Stock and Cash Dividends—Purchaser—Interest Acquired.

The interest of stockholders in a corporation remains unchanged upon the latter declaring a so-called stock dividend, as such stock dividend neither takes from nor adds to the corporate wealth; and an accepted offer to sell certain shares of stock in a corporation at a certain price, reserving dividends to be declared at a certain date, refers only to dividends payable in cash, and not to stock dividends which had already been declared, to be effective at the date specified: Hence, by buying the shares so offered, the purchaser acquired the stock dividend thereon, and the seller under the contract of sale is entitled to the regular and special cash dividends payable in January following.

Former opinion modified.

PETITION to rehear this cause, decided 11 November, 1909, and reported 151 N. C., 265.

Foushee & Foushee for petitioner.
Giles & Sykes contra.

BROWN, J. When we considered this cause at last term we concluded that under the terms of the contract of sale of the stock in the Durham Cotton Manufacturing Company the reservation of the "January dividend" by plaintiff entitled it not only to the regular 4 per cent and extra 6 per cent cash dividend declared and payable then, but also to the value of the so-called 50 per cent stock dividend which was declared at same time as the regular and extra cash dividends.

Upon a careful review of the correspondence between the parties and a further consideration of the case we are led to the conclusion that the words, "allowing the January dividend to us," used in plaintiff's
(661) letter of 23 December, 1907, was intended to refer to dividends payable in cash only, and do not embrace the so-called stock dividend of 50 per cent.

That was not strictly or in the usual sense of the word a dividend. It was simply an increase in the capital stock by dividing the capital of the corporation into a larger number of shares and allotting them to each stockholder in proportion to the number of shares he owned before the increase. This is not infrequent in these days when "watering stock" is no uncommon occurrence; not that we mean to intimate that such has been the case here. Therefore it has been held that where the word dividend is used without qualification or explanation it signifies dividends

payable in money. 14 Cyc., 554, and cases cited; Black Law Dict., 3 Words and Phrases, pp. 2143 and 2144; *Smith v. Hooper,* 95 Md., 16.

This appears to us to be more consistent with the relationship which exists between the stockholders and the corporation.

The distinction between the title of a corporation and the interest of its stockholders in the corporate property is familiar and well settled. *Van Allen v. Assessors,* 3 Wall., 573; *Pullen v. Corporation Commission, ante,* 548. The ownership of that property is in the corporation and not in the holders of shares of stock. The certificates of shares of stock denote the interest of each stockholder, which consists in the right to his proportionate part of the profits when declared as dividends, and to a like proportion upon its dissolution, after its debts are paid. Therefore the value of the shares of stock are dependent upon the value of the property retained by the corporation. A cash dividend depletes the treasury of the corporation and detracts from its assets, but a stock dividend neither takes from nor adds to the corporate wealth. The interest of each stockholder remains the same when he receives his stock dividend as it was before. He is neither richer nor poorer. By it nothing is taken from the property of the corporation and nothing added to the interests of the shareholders. Its property is not diminished and their interests are not increased.

Upon this principle it is held that *accumulated earnings* (upon which stock dividends are supposed to be based), so long as they are held by the corporation, being a part of the corporate property, the interest therein represented by each share is capital, and not the income of that share, as between tenant for life and the remainderman, legal or equitable, thereof. *Gibbons v. Mahon,* 136 U. S., 558. In this case it is said that "ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income of each share."

This view is taken by the Court of Appeals of Virginia: "A stock dividend is merely an increase in the number of shares; the (662) increased number representing the same property that was represented by the smaller number of shares. One who sells stock, reserving the dividend that may be declared by a certain date, cannot claim the stock dividend thus declared, but only the cash dividend." *Kaufman v. Woolen Mills,* 93 Va., 673.

It is held by the Illinois Court that, "A stock dividend gives the stockholder merely an evidence of the additions made by the corporation to its own capital. It adds nothing to the capital of the corporation nor to the capital of the shareholder." *DeKoven v. Alsop,* 205 Ill., 309; 63 L. R. A., 587: "A stock dividend is not in the ordinary sense a dividend; the latter being the distribution of profits to stockholders as the income from their investments. A stock dividend is merely an increase in the

number of shares; the increased number representing exactly the same property that was represented by the smaller number of shares." 7 Words and Phrases, p. 6664, and cases cited.

As it is admitted the plaintiff did not know of any stock dividend, it is manifest that it intended to sell and transfer to the defendant the entire interest in the corporate property represented by the four shares of stock it held prior to any increase in the capital stock.

As the defendant testifies that he had no knowledge of such increase, and as he paid $675 per share for each share of the par value of $500, we think it equally evident that he intended to purchase the entire interest of plaintiff in the corporate property.

Therefore we now think that, upon reason and authority, the proper construction of the contract is that the plaintiff sold its entire interest in the corporate property, retaining whatever cash dividend that should be declared as the fruit of the investment that it was parting with. The so-called stock dividend of 50 per cent represented part of the corporate property sold to defendant, in which plaintiff reserved no interest and is therefore not entitled to the whole or any part of it.

The former opinion is modified so as to hold that plaintiff is entitled to recover the extra cash dividend, but not the value of the stock dividend or any part of it.

The judgment of the Superior Court is reversed and nonsuit set aside and a new trial ordered.

The costs of the appeal are taxed against the defendant. The costs of this rehearing are taxed against plaintiff.

Petition allowed.

Cited: Whitlock v. Alexander, 160 N. C., 472; *Humphrey v. Lang,* 169 N. C., 602.

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(663)

H. N. WELLS ET AL., PETITIONERS, v. THE BOARD OF COMMISSIONERS OF CHEROKEE COUNTY.

(Filed 27 May, 1910.)

County Commissioners—Mandamus—Money Demand—Public Roads—Cherokee County—Highway Commission—Separate Entity.

Under ch. 210, Laws 1905, the Sheriff of Cherokee County shall pay over to the treasurer of the Highway Commission of Valleytown Township all moneys arising from taxes in that township levied for road purposes, to be expended upon the roads of the township; and this exempts that township from the general provisions of Revisal, sec. 2685, making damages

assessed on account of laying out a road a county charge, and a *mandamus* will not lie against the county commissioners to compel such payment, though it is for a money demand.

APPEAL from *Ferguson, J.*, at the August Term, 1909, of CHEROKEE.

Petition for *mandamus*. Upon the hearing his Honor rendered the following judgment:

In the above-entitled case the summons was made returnable to August term of the Superior Court. See summons.

An alternative *mandamus* issued, returnable on second Monday in August, being the first day of said term, commanding the board of commissioners to pay or cause to be paid the several sums of the respective petitioners, or show cause why they did not.

It appears from the statute creating the Highway Commission of Valleytown Township and the petition filed herein that the proceedings were regular and that the jury assessed the damages as claimed by the respective petitioners, and that the report of the jury was confirmed by the said Highway Commission of Valleytown Township, and that demand has been made on the board of commissioners for payment of the respective sums assessed as damages, and payment refused.

On the call of the petition for hearing the respondents did not answer, but moved the court to transfer the case to the appearance or summons docket, to be tried as other civil actions. This motion was based on the contention that the suit was for a money demand. With light before the court, the motion of the board of county commissioners was granted, and the petitioners excepted. The board of commissioners filed a demurrer to the petition. After argument it was agreed by and between counsel that the judge should take the papers and review the former ruling as well as to render judgment on the demurrer and render his decision out of term.

I am of the opinion that the statute creating the highway com- (664) mission is authorized by the Constitution; that so far as appears from the petition, the proceedings were regular and damages assessed just. I regard the report of the jury laying off the roads and assessing the damage and the confirmation of the report of the highway commission of equal and no greater force than the report of a jury appointed by the board of commissioners under section 2685 of Revisal of 1905. That in neither instance is the county or individual bound by the report, but the same is subject to review by the board of county commissioners; that said board may allow the claim for damages as reported, or may increase or decrease the damages as awarded, or disallow it altogether, and from such order the individual may appeal to the Superior Court, if so advised; or any taxpayer of the county, by making himself a party to the action, may appeal to the Superior Court.

This being my view of the law and method of procedure, I sustain the demurrer and adjudge that the petitioners pay the cost of the proceeding. The petitioners, if so advised, have leave to formally present the report to the Board of Commissioners of Cherokee County, or take such other course as to them may seem most advisable.

G. S. FERGUSON,
Judge Presiding.

WAYNESVILLE, 24 August, 1909.

From the judgment rendered, the petitioner appealed.

Dillard & Bell for plaintiffs.
Ben Posey and W. M. Axley for defendants.

BROWN, J. As we construe the act to improve the public roads in Valleytown Township in Cherokee County, ch. 210, Laws 1905, this proceeding cannot be maintained.

We agree with his Honor that the *mandamus* is sought to enforce a money demand, but in our opinion it is not a money demand payable from the general funds of Cherokee County, and a *mandamus* will not lie against its board of commissioners to compel payment.

The aforesaid act created a body corporate under the name of the Highway Commission of Valleytown Township and gave to such commission complete jurisdiction over the roads of that township, including the laying out of new roads as well as the repair and maintenance of all roads. The act provides for the election of commissioners by the justices of the peace of the township and also for the appointment of a secretary and treasurer.

It also provides that all road taxes for Valleytown Township (665) in the hands of the sheriff be paid over to such treasurer, and that all moneys arising from taxes in that township levied for road purposes be kept separate, to be expended upon the roads of the township. Section 4 of the act provides: "The treasurer of said highway commission shall make payments out of the road funds belonging to said township only upon the written order signed by the president and secretary of the commission."

It is contended that by section 2685 of the Revisal of 1905 the damages assessed on account of laying out public roads are deemed and made a county charge. That is true under the general road law, but Valleytown Township has a road law of its own, which exempts it from the general road law of the State.

Under that law the remedy of petitioners is to be had by proceedings against that corporate body and treasurer thereof.

Petition dismissed.

BROOKS MANUFACTURING COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 27 May, 1910.)

1. Carriers of Freight—Transportation—Private Tracks—Delivery—Accessible for Unloading—Interpretation of Statutes.

Revisal, sec. 2632, penalizing a railroad company for failure, etc., to transport freight (amended so as to include delivery at destination under ch. 461, Laws 1907), does not apply to a delivery on the private tracks of a consignee; but to avoid the penalty it is required of the carrier to place for delivery a carload shipment on its track at destination at a place reasonably accessible.

2. Carriers of Freight — Penalty Statutes — Transportation — Intermediate Points.

In this case there was no evidence upon which the trial judge could hold that Durham was an intermediate point at which the carrier should have further time for necessary delay, under the principles announced in *Wall's case*, 147 N. C., 408, and *Davis' case*, 145 N. C., 207.

HOKE, J., concurring in result.

APPEAL from *Long, J.*, at the February Term, 1909, of GUILFORD.

Action to recover a penalty. The facts are set out in a special verdict and in the judgment of the judge of the Superior Court.

SPECIAL VERDICT.

The jury upon being impaneled found the following special (666) verdict:

"The facts in this case are found to be as follows:

"This was a shipment of a solid carload of lumber from Pittsboro, North Carolina, to Greensboro, North Carolina, consigned to the plaintiff; shipment was over the Seaboard Air Line and the Southern Railway; the Seaboard Air Line delivered this car to the Southern Railway Company at Cary, North Carolina, 13 December, 1906, at 4 p. m.; said car arrived at Greensboro, 16 December, 1906, and upon its arrival notice was given in writing to the plaintiff by the defendant by mail on 17 December, 1906; that said car was placed by the defendant at the siding of the Brooks Manufacturing Company, the plaintiff, on 18 December, 1906, at 6 p. m.; that the distance from Cary to Greensboro is 73 miles; that a reasonable time for the going of the car from Cary to Greensboro is one day of twenty-four (24) hours; this is not inclusive of any lay-over time that the defendant may be entitled to under the statute at either the initial point, Cary, or any intermediate point, to wit, Durham, if it is an intermediate point; the siding of the plaintiff is

within one-quarter mile of the defendant's freight yard at Greensboro, and is connected by means of a switch with defendant's track in its freight yard at Greensboro; and there were physical connections by means of switches between the siding of the plaintiff and the track of the defendant leading from Sanford to Greensboro; the main line from Sanford to Greensboro runs within thirty (30) feet of plaintiff's siding, and the main line is connected by a switch, 175 feet from the usual place of unloading; the shipments of lumber consigned to the plaintiff shipped over defendant's road are usually placed upon this siding; 95 per cent of the same being so placed for unloading, and the other 5 per cent being placed at other points in cases where cars have been turned over to other parties by the consignee; the car in question was not placed for unloading elsewhere than on the plaintiff's siding. The main line from Cary to Greensboro connects with the Sanford line by a switch in the Greensboro freight yards of defendant company and about one-quarter of a mile from plaintiff's siding; the schedules of the freight trains from Cary to Greensboro at the time of the shipments referred to were as follows:

"Train No. 183, through freight, passes Cary at 6:15 p. m., does not stop; leaves Durham at 8:15 p. m.; arrives at Greensboro at 1:54 p. m.

"Train No. 163, local freight, leaves Cary at 7:30 p. m.; arrives (667) at Durham at 8:30 a. m.; this train does not go farther west than Durham, but returns to Selma from Durham.

"Train No. 107, local freight, leaves Durham at 10:24 a. m., and arrives in Greensboro at 5 p. m.

"Train No. 171, through freight, passes Cary at 10:25 p. m., but does not stop there; leaves Durham at 11:28 p. m., and arrives in Greensboro at 2:50 a. m.

"Train No. 173, through freight, passes Cary at 9:10 a. m., but does not stop there; leaves Durham at 11:20 a. m., and arrives in Greensboro at 2:10 p. m.

"That local freight trains only stopped at Cary; that the local freight ran from Cary to Durham and there that train stopped; this train stopped at Durham and returned to Selma, North Carolina; the car was left in the yards at Durham until the next freight was made up going to Greensboro, by which train it was brought to Greensboro. There is no question as to the payment of freight by the plaintiff. This car of lumber was not assigned by plaintiff consignee."

JUDGMENT.

Upon the foregoing special verdict of the jury, the question of law is left to the court to decide whether or not the plaintiff is entitled to recover.

The court is of the opinion that the defendant should be allowed two days at the initial point and one day as reasonable time to have transported the goods from Cary to Greensboro, North Carolina. The court is also of opinion that in view of what the Supreme Court has said in *Hilliard v. R. R.*, 51 N. C., 343, and in *Alexander v. R. R.*, 144 N. C., 95, and other cases, that the duty of the defendant in transporting the car, at destination, was fulfilled when it brought the car and placed it in a state ready to be delivered to the plaintiff on the siding of the plaintiff in Greensboro, having physical connection with the defendant's tracks.

It is, therefore, considered and adjudged by the court, after allowing the defendant two days at the initial point and one day as reasonable time for transportation, that the car was detained in its possession for a period of two days before finishing the transportation.

It is, therefore, further considered that the plaintiff recover of the defendant thirty dollars ($30) and the cost of this action, to be taxed by the clerk.

B. F. LONG,
Judge Presiding.

From the judgment rendered, the defendant appealed. (668)

Justice & Broadhurst for plaintiff.
Wilson & Ferguson for defendant.

BROWN, J. The first assignment of error is that his Honor erred in holding that the defendant was required not only to transport the car from Cary to Greensboro within the statutory period, but must within that time place the car upon the plaintiff's sidetrack.

1. We do not construe his Honor's judgment to hold exactly that, under the authority of *Hilliard v. R. R.*, 51 N. C., 343, and *Alexander v. R. R.*, 144 N. C., 95, cited in his judgment, it was the duty of the defendant to deliver the loaded car to the plaintiff on its private sidetrack. Neither of those cases sustain that position. On the contrary, the *Alexander case* expressly holds that the carrier is not penalized by section 2632 for delay in delivering the freight to the consignee after transportation ceases, and that such section does not include a failure to deliver, but only a failure to transport, "delivery necessarily requiring the concurrence of the consignee and having a distinctive meaning." Although this statute was amended by ch. 461, Laws 1907, so as to require a delivery at destination within the time specified, we have held that when the goods arrive and the carrier has notified the consignee that it is ready to deliver, it has discharged its duty. *Wall v. R. R.*, 147 N. C., 411. But this statute as amended does not undertake to compel a railway company to deliver loaded cars off its own right of way and tracks onto the private track of an individual or private corporation. Therefore,

a delivery of the carload of lumber to plaintiff upon its private track, belonging to it and leading to its mill, must of necessity be a matter of agreement between plaintiff and defendant, and cannot come within the purview of section 2632. A railroad company cannot be compelled to operate its engines on a private track belonging to a private corporation or individual over which the railroad company has no control or supervision.

But whatever reasons the judge gave for his judgment, the facts set out in the special verdict sustain it. It is found as a fact therein that "the car in question was not placed for unloading elsewhere than on the plaintiff's siding."

While the defendant was under no legal obligation to haul this car off its own tracks and onto the private tracks of plaintiff, yet it was its duty to place the car in a position for unloading, so that it may be accessible for that purpose.

Transportation ceases when the duty of the carrier as a ware-
(669) houseman commences, and in respect to freight transported in carload lots, when the car reaches destination and is placed for unloading. *Wall v. R. R.*, 147 N. C., 408. What particular parts of the carrier's tracks and freight yards may be used for such purposes must of necessity be left to its discretion, but the car must be reasonably accessible and placed for delivery before transportation is fully ended.

2. The second assignment of error is that his Honor did not hold that Durham was an intermediate point, and did not allow the defendant any time for necessary delay there. We are unable to find in the special verdict any fact that warrants the contention that Durham is an intermediate point between Cary and Greensboro within the meaning of the statute. What constitutes such intermediate point is discussed and decided in *Wall v. R. R., supra; Davis v. R. R.*, 145 N. C., 207.

Affirmed.

HOKE, J., concurs in result.

W. J. BROOKSHIRE v. ASHEVILLE ELECTRIC COMPANY.

(Filed 27 May, 1910.)

1. Street Railways—Fellow-servant Act—Interpretation of Statutes.

The Fellow-servant Act, Revisal, sec. 2646, applies to street railways, and *Hemphill v. Lumber Co.*, 141 N. C., 487, is cited and approved.

2. Negligence—Evidence—Accident—Nonsuit.

While plaintiff was working as a lineman for defendant, he and others were engaged in carrying a pole to a point where it was to be erected, two on the right-hand side of the pole and plaintiff and another on the left-hand side, those on the right being taller than plaintiff and his companion, which threw more weight on the latter. The pole "gave a turn," those on the right lowered their side of the pole, and those on the left were instructed to "come up with the pole," which plaintiff's companion did; but plaintiff said, "Let it down, boys; I am hurt": *Held*, the evidence tended to prove that the injury resulted from an accident, was insufficient on the question of negligence, and defendant's motion to nonsuit should have been sustained.

APPEAL from *Justice, J.*, at March Term, 1910, of BUNCOMBE.

Action to recover damages for personal injury. The usual (670) issues were submitted and found against the defendant. Appeal to this Court.

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

Craig, Martin & Thomason for plaintiff.
Martin & Wright for defendant.

BROWN, J. This action was brought to recover damages from the defendant on account of an alleged injury to plaintiff while working for defendant in the capacity of lineman, while defendant was engaged in the business of operating a street railway and "putting up and taking down telegraph and telephone poles and wires."

1. While, possibly, not necessary to a decision of this case, yet we deem it proper to say for future guidance that we approve the opinion in *Hemphill v. Lumber Co.*, 141 N. C., 487, and regard it as settled in this State that the Fellow-servant Act, Revisal, sec. 2646, applies to street railways.

2. We are, however, of opinion that there is no sufficient evidence of negligence in the record, and that the motion to nonsuit should have been sustained.

The only witnesses examined were the plaintiff and his brother Jim Brookshire, and their evidence tends to prove that the injury to plaintiff was the result of an accident that ordinary prescience could not forsee nor ordinary care guard against. They, with four others, were engaged

in unloading large poles from a car and placing them in position for use on defendant's line. One pole rolled into the edge of the lake at Riverside Park. In getting it out Williams and Wilson "were toting on left-hand side of pole"; plaintiff and King on right-hand side, and Jim Brookshire and Reagan were "toting the tip end of the pole." There is no substantial difference in the testimony of the two witnesses. Jim Brookshire testified that "The pole was lying up along the side of the lake and we started to 'tote' the pole up the lake, and we all reached down to get it up, and Mr. Wilson and Mr. Williams were so much taller than my brother and Mr. Lon King and that throwed most of the weight on them, and the pole gave a kind of turn, and let my brother and Mr. Lon King drop down a little and we started off with the pole, and Mr. Wilson said, 'Jeff, come up with the pole,' and Jeff straightened up, and my brother said 'Let it down, boys; I am hurt.'"

The court below should have sustained the motion to nonsuit, and it is so ordered.

Reversed and action dismissed.

Cited: Hipp v. Fiber Co., post, 748; *Howell v. R. R.,* 153 N. C., 184; *Warwick v. Ginning Co., ib.,* 265; *Rumbley v. R. R., ib.,* 458; *Simpson v. R. R.,* 154 N. C., 53; *Twiddy v. Lumber Co., ib ,* 241; *Briley v. R. R.,* 160 N. C., 92; *Wells v. R. R.,* 161 N. C., 371; *Lloyd v. R. R.,* 168 N. C., 648; *Bunn v. R. R.,* 169 N. C., 651; *Smith v. R. R.,* 170 N. C., 185; *Wright v. Thompson,* 171 N. C., 91.

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(671)

J. B. BENNETT v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 27 May, 1910.)

Foreign Corporations—Process—Limitation of Actions—Plea.

Public service corporations chartered in other States, but doing business in this State, upon whose agents service of process may be made have the legal right to plead the statutes of limitation to the same extent and under the same conditions as citizens and corporations of this State. *Volivar v. Cedar Works, ante,* 656, is decisive of this case.

APPEAL from *W. J. Adams, J.,* at Fall Term, 1909, of ANSON.

Action for damages for personal injury, alleged in the complaint to have been received in Savannah, Georgia, in May, 1901. These issues were submitted:

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

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

3. Did the plaintiff voluntarily assume the risk of the work he was doing at the time he was injured, as alleged in the answer? Answer: No.

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

5. What damages, if any, is the plaintiff entitled to recover? Answer: $300.

From the judgment rendered, the defendant appealed.

Robinson & Caudle for plaintiff.
Tillett & Guthrie for defendant.

BROWN, J. The defendant requested the court to instruct the jury that upon the allegations of the complaint and the plaintiff's testimony, as well as all the evidence, the action is barred by the statute of limitations.

This question has been fully considered at this term upon petition to rehear *Voliver v. Cedar Works, ante,* 656. The disposition of that case upon rehearing controls this.

The prayer for instruction should have been given and the jury directed to answer the fourth issue Yes.

Error. Reversed.

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(672)

H. L. GODWIN v. T. A. PARKER, GUARDIAN.

(Filed 27 May, 1910.)

1. Deeds and Conveyances—Insane Persons—Knowledge—Valid Contracts—Loss.

A contract made with an insane person by one with knowledge of the fact of insanity, is void, and the one so contracting must bear the loss attendant upon the void transaction: *Hence,* when the one thus dealing has erected a building on the land contracted for, he is not entitled to betterments.

2. Same—Judgments—Equity.

In this case the plaintiff sued for the specific performance of a contract made with an insane person, and the verdict of the jury established the fact of insanity and plaintiff's knowledge thereof at the time. It likewise appeared that plaintiff had erected a building on the land at a cost, by his own evidence, of $475, found by the verdict to be now worth $1,000, but had been in possession for eight years, collecting an annual rent of

$100: *Held*, a judgment should be entered decreeing that defendant recover possession; that the alleged contract be canceled of record; that defendant be not charged with taxes paid by plaintiff on the property, and that the latter be not required to account for the rents and profits by him received.

APPEAL from *W. R. Allen, J.*, at November Term, 1909, of HARNETT.

The plaintiff brought this action to compel specific performance of the following contract:

NORTH CAROLINA—Harnett County.

I, Bud Tart, of said county and State, have this day given to H. L. Godwin the privilege of erecting a store building on my lot in Dunn, N. C., the same being lot No. 11 in the subdivision of the original lot No. 3 in block R in the blue-print, plan of town of Dunn, N. C. The said H. L. Godwin has the privilege of remaining in possession of said lot for three years from the date of this contract, and he is required to keep the taxes paid on said lot. And it is agreed and understood, and I do hereby bind myself, my heirs, executors and administrators to make a good and lawful deed to H. L. Godwin, his heirs or assigns, upon the receipt of the sum of $360, which must be paid indefinitely (immediately) upon the expiration of this contract, or at any time before it expires.

BUD $\overset{\text{his}}{\underset{\text{mark}}{\times}}$ TART. (SEAL.)

H. L. GODWIN. (SEAL.)

(673) His Honor submitted the following issues to the jury, which were responded to as set out:

1. Did the plaintiff and the defendant Bud Tart execute the contract set out in the complaint? Answer: Yes.

2. Did Bud Tart, at the time of executing the said contract, have sufficient mental capacity to make same? Answer: No.

3. If not, did the plaintiff have notice of said mental incapacity? Answer: Yes.

4. What was the value of said lot on 17 June, 1902? Answer: $360.

5. What was the value of the improvements put on said land by H. L. Godwin? Answer: $1,000.

6. What was the annual rental value of the lands before the improvements were put upon it by the plaintiff? Answer: Nothing.

7. What was the annual rental value after the improvements were put upon it by the plaintiff? Answer: $100.

Upon the verdict, his Honor rendered the following judgment:

"This cause came on for trial at the November Term, 1909, of the Superior Court of Harnett County, before *W. R. Allen, Judge,* and a

jury, and the jury having returned their verdict, as appears in the record, it is, upon said verdict and the admissions in the pleadings, considered and adjudged that the defendant Bud Tart is the owner in fee of the lot described in the complaint, and that he is entitled to recover possession thereof of the plaintiff, H. L. Godwin, upon the payment to him of the sum of $1,000, the value of the improvements placed on said land by the plaintiff.

"And it further appearing to the court that the defendants still refuse to perform the contract referred to in the issue, and that they demand possession of said lot, it is further considered and adjudged that said sum of $1,000 is due to the plaintiff, H. L. Godwin, and the same is a lien on said lot, and, upon failure to pay the same within ninety days it is ordered that the said lot be sold for the satisfaction thereof by N. A. Townsend and E. F. Young, now appointed commissioners for that purpose, who shall report their proceedings to this court.

"It is further ordered that each party pay his costs. Let the pleadings be amended, if so advised."

The plaintiff testified, over the objection of the defendant, that he had been in possession of the lot since June, 1902; that he knew Bud Tart had been in the asylum; that he returned to the asylum at Raleigh; that the building put by him on the lot cost him $475, not exceeding $500; that its rental value was $100 per year; that he had received the rents; that he had tendered the amount he was to (674) pay to defendant Parker, as guardian of Bud Tart, and demanded a deed from him; that Parker declined to make the deed. Another witness for plaintiff testified that Bud Tart, at times, looked dangerous. The summons showed service on Dr. James McKee, superintendent of the State's Hospital at Raleigh, N. C., where Bud Tart was confined; the service was made 17 June, 1905. There was evidence that the unimproved lot was worth, in June, 1902, from $300 to $400, and that it had since then increased in value. The defendant tendered the following judgment:

"This cause coming on to be heard, and being heard before his Honor, *W. R. Allen,* and a jury, and the issues answered as follows (here follow the issues as set out above):

"It is now considered, ordered and adjudged that the defendants, Bud Tart and his guardian, T. A. Parker, recover of the plaintiff, H. L. Godwin, the possession of the said land described in the complaint; and it is further ordered and decreed that the paper-writing or contract referred to and set out in the complaint be canceled of record; and it is further adjudged that the plaintiff pay the costs of this action, to be taxed by the clerk."

To the judgment of the court, defendant excepted and appealed to this Court.

Godwin & Townsend and J. C. Clifford for plaintiff.
E. F. Young and H. E. Norris for defendant.

MANNING, J. In our opinion, the judgment of his Honor is not supported by the adjudications of this Court. The jury found that Bud Tart was insane at the time he attempted to contract with the plaintiff, and his insanity was known to the plaintiff. Upon a verdict establishing the same facts, this Court, in *Creekmore v. Baxter,* 121 N. C., 31, said: "The first two issues found facts which constitute fraud in law. No other kind of fraud was charged in the pleadings; and the third issue, referring to actual fraud in fact, is neither necessary nor contradictory. It cannot be doubted that any one dealing with an insane person, knowing his insanity, deals with him at his own peril." "The ground upon which courts of equity interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics or 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, (675) is deemed to perpetrate a meditated fraud upon them and their rights." Story Eq. Jur., sec. 227; Adams Eq., 183; *Odom v. Riddick,* 104 N. C., 515. In *Sprinkle v. Wellborn,* 140 N. C., 163, *Mr. Justice Walker,* speaking for this Court, said: "If, therefore, one person induces another, who lacks this capacity or this freedom, to enter into an apparent contract, equity will not recognize the transaction, however, as one author says, it may be fenced by formal observances, but, deeming it fraudulent, will in proper cases afford relief against it at the suit of the party imposed upon. Fetter on Equity, 143. On this ground, the contracts of idiots, lunatics and other persons *non compos mentis* are generally regarded in a certain sense as invalid. It has been said by many courts that the contracts of a lunatic, made after the fact of insanity has been judicially ascertained, are absolutely void, and that he can have no power to contract at all until there is reversal of the finding and he is permitted to resume control of his property. Fetter Eq., 143; *Odom v. Riddick,* 104 N. C., 515." *Beeson v. Smith,* 149 N. C., 142.

The plaintiff's evidence established the fact that the insanity of Bud Tart had been judicially ascertained, for it appeared that he had previously been committed to the State's Hospital for the care of the insane, and the verdict establishes the fact of his insanity at the time of the alleged contract, to the knowledge of the plaintiff. In *Creekmore v. Baxter, supra,* this Court said: "Courts of equity always protect innocent purchasers as far as possible, and ordinarily place the parties back

in *statu quo,* when it can be done without injury to either; but if any one contracts with a lunatic, knowing his insanity, he must bear alone whatever loss arises from the transaction."

The evidence of the plaintiff himself shows, however, that a reversal of the judgment can work no loss or inequity to him; he has now had possession of the property for nearly eight years, at a rental of $100 per year, and the improvements put by him on the lot cost him, by his own evidence, $475. From this statement it clearly appears that the plaintiff will sustain no loss by the improvements placed by him upon the property. In no event is he entitled to betterments.

It is our opinion that his Honor should have signed the judgment tendered by the defendant, and that he was in error in signing the judgment tendered by plaintiff. We, therefore, reverse the judgment of his Honor and direct judgment to be entered in accordance with this opinion, without liability to the plaintiff to further account for the rents and profits by him received to 17 June, 1910, and without charge to the defendant for the taxes which may have been assessed against said property, and which are to be a charge against the plaintiff. (676)

The plaintiff will pay the costs of this action.

Reversed.

Cited: Ipock v. R. R., 158 N. C., 448.

W. H. WOODBURY v. A. W. KING.

(Filed 27 May, 1910.)

1. Deeds and Conveyances—Attorney in Fact—Insufficient Execution.

A paper-writing purporting to be a deed to land by an attorney in fact does not bind the principal, if not signed and sealed by the attorney in fact *eo nomine.*

2. Same—Standing Timber—Contract to Convey—Title.

Deeds and conveyances of standing timber are governed in their effect by the law regarding a conveyance of real property; and, in this case, the paper-writing, invalid as a deed because not properly sealed and signed by an attorney in fact, is admitted to be sufficient as a contract to convey the standing timber and sawmill plant.

3. Deeds and Conveyances—Standing Timber—Contract to Convey—Vendor and Vendee—Outstanding Title—Purchase Price—Notes—Abatement.

In defense to an action upon a note, between the original parties, given for the purchase price of standing timber upon lands under a contract to convey the same, the defendant, the vendee, may show in abatement of the

agreed purchase price that, under an outstanding title superior to that of his vendor, he had been prevented from receiving the number of trees embraced by the description in his conveyance, thus proving a partial failure of title and a shortage or deficiency in the number of trees conveyed.

APPEAL from *Ferguson, J.*, at August Term, 1910, of CHEROKEE.

The plaintiff sued the defendant upon the following note:

$1,500. MURPHY, N. C., 16 January, 1906.

Sixty days after date I promise to pay to the order of W. H. Woodbury $1,500, at the Bank of Murphy, Murphy, N. C., for value received. Received and subject to contract of 16 May, 1904. We, the makers and indorsers, waive demand, protest and notice. All demands and offsets against payee herein named are waived in favor of any *bona fide* holder.

A. W. KING.

(677) The defendant, admitting the execution of the note, rested his defense upon the grounds that the note sued upon was part consideration of the purchase by him of a sawmill and outfit and timber trees standing on various tracts of lands in Clay County; that there were titles outstanding to the lands on which the trees stood better and superior to the title sold by plaintiff to defendant; that there was an actual large deficiency in the number of trees sold; that while he had paid all the purchase price of $5,500 except $1,500, he had not, at the times of such payment, nor at the time of giving the note sued upon, which was a renewal note, discovered either the defect of title or shortage in the number of trees. No complaint was made by him until shortly before this suit was begun, April, 1906. The negotiations between plaintiff and defendant were reduced to writing, first in a memorandum agreement, dated 13 May, 1904, in which plaintiff agreed to sell to the defendant "the balance of the marked timber that is uncut in Clay County, and a sawmill complete that is in the same section. Such titles to be made as said Woodbury has authority to make."

Second. A deed dated 16 May, 1904, in which plaintiff, as attorney in fact of U. A. Woodbury, "hereby grants, bargains, sells and conveys to the party of the second part, his heirs, executors, administrators and assigns, all those certain timber trees standing, lying being and situate in Clay County, North Carolina, which were purchased from the then owners thereof, in January, 1890, and the deeds thereof recorded in said county, at or about that date, and all other timber deeds bought by the said U. A. Woodbury, in said county, whether of record in said county or not, reference being made to said records and deeds and to the memoranda on the backs thereof for the number and kind of trees therein and thereby conveyed for greater certainty, which memoranda

shall be taken as a part thereof, a schedule of which trees shall be made by party of the first part and attached hereto; excepting and reserving from said sale the trees cut and manufactured into timber by him, said trees being then marked with a cross (×)." Then follows a description of the sawmill plant and its fixtures and parts; then the terms of payment of the property purchased as agreed upon, and it is further stipulated: "At the date of payment of the first installment of the purchase money ($1,833.33) party of the first part shall execute and deliver to the party of the second part a fee simple deed or deeds for all the timber trees on Shooting Creek, and shall at the same time execute and put in escrow in the Bank of Murphy, N. C., a bill of sale of the mill, boiler, engine and fixtures; but the use and possession of said mill shall be delivered to the party of the second part, and party of the second part shall every three months thereafter, until last payment is (678) made, account and pay for all trees cut and sold by him from said lands, which amount shall be credited on the amount due on the contract, unless otherwise previously paid. When second payment is made, a deed or deeds shall be executed and delivered for the proportionate part of the trees paid for by said payment when said trees may be cut; and when the third payment is made a deed shall be delivered to the party of the second part for the remaining trees, and the bill of sale of the mill and fixtures shall be delivered to the same, the said bill of sale having been retained in the meantime as security for the faithful performance of the contract by the party of the second part."

The consideration was $5,500, divided into three payments of $1,833.33 each, one of these being made in cash and the others represented by two notes. The sawmill and fixtures were delivered to the defendant, and he began to cut the timber. The statement of the trees cut was never made as stipulated, and there was no evidence at the trial of the number cut. It appeared that he owned timber lands in the same section.

The defendant offered in evidence the timber deeds to U. A. Woodbury, recorded in Clay County, all dated in January, 1890, and embraced in a memorandum attached to the deed to defendant, of 16 May, 1904. In these deeds the property granted is thus described: "has bargained and sold and by these presents do hereby bargain and sell, grant and convey unto the parties of the second part (U. A. Woodbury), their heirs and assigns, all the poplar, ash, cherry and walnut timber trees having an average diameter of twenty (20) inches and upward, marked thus (×), now growing upon the lands of the party of the first part, described as follows (description), together with right of way," etc.

The defendant offered then to show outstanding titles to the Groves land, Groves himself being one of the grantors to U. A. Woodbury, better

and superior to said Groves' title, and offered "to show by the record of the titles themselves, and by the witness Meese, a surveyor, that a number of the tracts covering a large percentage of the timber claimed by U. A. Woodbury, and referred to in the contract of 16 May, 1904, was owned under older and superior titles by other persons than those from whom U. A. Woodbury purchased, and under whom he claims to own such timber," and there was a large shortage in the number of timber trees from the memorandum furnished defendant. Upon plaintiff's objection, his Honor excluded this testimony, and defendant excepted.

(679) It was not denied by defendant, as testified to by plaintiff, that the defendant was furnished the deeds and all memoranda, as to the number and kind of timber trees, by plaintiff, several months prior to the date of the written agreements between plaintiff and defendant; that defendant was notified by plaintiff that he must count the trees; that plaintiff declined to make an actual count; that plaintiff had been sawing in the timber and was so engaged at the time the negotiations were concluded, to the knowledge of defendant. His Honor, without objection, submitted the following issues:

1. Is the plaintiff the owner of the note sued upon?
2. Has the note or any part thereof been paid?
3. What number of trees, if any, were cut off the Groves land prior to the contract of 16 May, 1904, by W. H. Woodbury, or with his knowledge and consent?
4. What is the value of said trees?

His Honor instructed the jury to answer the first issue "Yes," if they believed the evidence; the second issue "No," and the jury responded to the third issue, 47 trees, and fixed their value, in answer to the fourth issue, at $94. It was not seriously contended that the plaintiff was not the owner of the note; and it was admitted that no payment had been actually made upon the note, unless, as the defendant contended, he was entitled under his counterclaim and by way of set-off to have the value of the trees embraced in the shortage credited on the note, which he contended would extinguish it. Upon the verdict, judgment was rendered for the plaintiff, and defendant appealed.

Dillard & Bell for plaintiff.

Zebulon Weaver, E. B. Norvell, George A. Shuford, Axley & Axley and Ben Posey for defendant.

MANNING, J., after stating the case: The paper-writing of 16 May, 1904, purporting to be a deed executed by W. H. Woodbury, the plaintiff, as attorney in fact of U. A. Woodbury, and the defendant, was not properly executed to bind U. A. Woodbury, because it was not signed

and sealed by his attorney in fact *eo nomine,* but only by W. H. Woodbury individually. It was conceded by the defendant to be good as a contract to convey, and it was by its express language not considered effective as a deed, for it stipulates for deeds to be executed proportionately to the property described as the payments are made. It was undoubtedly sufficient to pass the title to the sawmill plant and machinery, and as an executory contract to convey the standing timber. In *Hawkins v. Lumber Co.,* 139 N. C., 160, this Court said: "It is (680) an established principle in this State that growing timber is a part of the realty, and deeds and contracts concerning it are governed by the laws applicable to that kind of property. *Mizzell v. Burnett,* 49 N. C., 249; *Moring v. Ward,* 50 N. C., 272; *Mizzell v. Ruffin,* 118 N. C., 69." *Timber Co. v. Wilson,* 151 N. C., 154.

The two rulings of his Honor chiefly urged upon us by the defendant as erroneous were: 1. His refusal to permit the defendant to show by the record of titles an outstanding title superior to the title of U. A. Woodbury for some of the standing timber contracted to be sold. 2. His refusal to permit defendant to prove that, by actual count of the trees standing and contracted to be conveyed, there was a shortage of 1,196 in a total of 2,030 trees. In *Leach v. Johnson,* 114 N. C., 87, it was held that where one contracts for the purchase of land without any agreement for a warranty of title, and thereafter and before the execution of a deed, encumbrances are discovered, he cannot be compelled to take the defective title or pay the bonds given for the price of the land, for an agreement to take a clear deed without warranty is not a waiver of the right to demand a clear title, citing *Batchelor v. Macon,* 67 N. C., 181; *Castlebury v. Maynard,* 95 N. C., 281, and other cases.

In *Castlebury v. Maynard, supra, Mr. Justice Ashe,* speaking for the Court, said: "The contention of the parties presents for our consideration the question whether the plaintiff can make a good title to the land described in the complaint. If he cannot, it would be against equity and good conscience that he should recover the amount of the note in suit, for a purchaser of land is never required to accept a doubtful title. *Batchelor v. Macon,* 67 N. C., 181; *Motts v. Caldwell,* 45 N. C., 289." In *Timber Co. v. Wilson,* 151 N. C., 154, *Mr. Justice Brown,* speaking for the Court, said: "It it 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 Am. & Eng. Enc., 621." *Wilcoxon v. Calloway,* 67 N. C., 463; 1 Warvelle on Vendors, 349; *Hayes v. White,* 55 Cal., 38; *McCroskey v. Ladd,* 96 Cal., 455.

(681) Different principles and different requirements apply where a deed has been made and delivered and the purchaser then seeks, as a defense to an action brought to recover the purchase money, to set up damages for a partial failure of title. This difference is illustrated by *Etheridge v. Vernoy,* 70 N. C., 713; *Foy v. Houghton,* 85 N. C., 168; *Anderson v. Rainey,* 100 N. C., 321; *Woodbury v. Evans,* 122 N. C., 779.

In *Etheridge v. Vernoy, supra,* an action brought to recover the balance on a note for the purchase price of land, where the deed had been executed and a note and mortgage given to secure it, this Court said: "In contracts for the sale of land, it is the duty of purchasers to guard themselves against defects of title, quantity, encumbrances and the like; if they fail to do so, it is their own folly, for the law will not afford them a remedy for the consequences of their own negligence. But if representations are made by the bargainor, which may reasonably be relied on by the purchaser, and they constitute a material inducement to the contract, and are false within the knowledge of the party making them, and they cause damage and loss to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief. *Walsh v. Hall,* 66 N. C., 233."

And this doctrine applies with equal force where the ground of relief, instead of fraudulent representations, is mutual mistake. *Wilcoxon v. Calloway,* 67 N. C., 463. In that case this Court said: "But upon a contract for 100 acres, even though there is no suggestion that the vendee, for any reason, desired exactly that quantity, or that quantity was of any value except as *quantity,* yet a deficiency of one-third must be held material, and would probably entitle the vendee to rescind the contract if he chose to do so, *or at all events* to an abatement of the price."

As to the rule for determining the amount of abatement of the price for deficiency, the Court said: "In this case, however, it does not appear that any part of the land has been improved, or that there is anything to give any one part of it extraordinary value over any other part, and we do not see why it will not be fair and reasonable to estimate the value of the deficiency at the average price per acre." This seems to have been adopted by the jury in fixing the value of the 47 trees cut from the Groves land allowed as an abatement.

In view of the authorities above cited, and accepting their reasoning as conclusive upon us, we are of the opinion that his Honor erred in not permitting the defendant to prove a partial failure of title and the shortage or deficiency in the number of trees conveyed—which would be in reality a failure of title—and in not permitting the jury to (682) determine the abatement of price to the defendant, if his contentions in these particulars shall be accepted by the jury as true. For these errors,

New trial.

J. W. HUNTER v. SOUTHERN RAILWAY COMPANY.

(Filed 27 May, 1910.)

1. Negligence—Explosives—Noises—Injurious Effects—Notice.

In an action for damages alleged to have been caused to plaintiff's intestate, there was evidence tending to show that the intestate was the wife of plaintiff, in delicate health, and that the blasting necessary in constructing defendant's railroad on the other side of the river from plaintiff's residence was done in such unusual manner as to cause stones to be thrown across the river on plaintiff's premises, and the noise and the falling stones kept the intestate in such fear and anxiety that, being in delicate health, it eventually caused her death, notice of which was repeatedly given defendant and utterly disregarded: *Held*, in this connection, the noise, alone, caused by the necessary blasting would not be negligence.

2. Principal and Agent—Independent Contractor—Negligence—Explosives—Necessary Methods—Owner's Liability.

The defendant railroad company cannot avoid the payment of damages caused to the deceased, the wife of plaintiff, a woman then in delicate health, by explosions in blasting a way for defendant's railroad near her dwelling, after notice, by setting up the defense that the work was done by an independent contractor, it appearing that defendant had commenced the work and carried it on in like manner, and that was the only way in which it could be accomplished.

3. Husband and Wife—Negligence—Death of Wife—Executors and Administrators.

A husband as administrator may sue for damages for the wrongful death of his wife caused by tortious acts of another.

4. Negligence—Notice—Particular Consequences—Damages.

The defendant cannot escape liability for the death of another proximately caused by its own tortious acts, after being notified to desist, because the result in the particular form of injury was not foreseen.

APPEAL from *Justice, J.*, at March Term, 1910, of BUNCOMBE.

The plaintiff, as administrator of his wife, brought this action (683) to recover damages for the death of his wife, and alleged that:

"4. During the spring and summer of 1906 the defendant railroad company did willfully, wantonly and in a grossly negligent manner, and in utter disregard of the rights of the plaintiff's intestate, carry on and conduct its blasting operations across the French Broad River from where the plaintiff's intestate lived, and did use excessively large charges of explosives, and did wantonly, willfully, negligently and carelessly fail to take proper precautions to prevent throwing of rocks by the explosions of the blasts around and about the home of the plaintiff's intestate.

"5. The plaintiff in this case, James W. Hunter, who was at the time of the acts and negligence complained of the husband of the plaintiff's intestate, notified the defendant, its agents and servants, of the dangerous and negligent manner in which they and the defendant were conducting the said blasting operations, and the said defendant, its agents and servants, were requested by the said James W. Hunter to use proper care in such operations, that his intestate was in a delicate state of health, and that such reckless and dangerous blasting so near her home would probably inflict upon her serious injury, and might cause her death; that the defendant railway company, through its agents and servants, replied to the said James W. Hunter, on being notified, that they, the said agents and servants of the defendant, had been instructed to 'tear hell out of the side of that mountain,' and that they intended to do it, regardless of consequences; and thereafter the said blasting was continued in the same negligent manner as before.

"6. On account of the negligence of the defendant, its agents and servants, as hereinbefore set forth, the health of the plaintiff's intestate was destroyed and her nervous system was so shocked and wounded that she became seriously ill therefrom and died—all of which was caused by the acts and negligence of the defendant, its agents and servants, as hereinbefore set forth."

The defendant, after denying the imputed acts of negligence, for a further defense pleaded that this defendant, Southern Railway Company, on the....day of June, 1906, made and entered into a written contract with Timothy Shea to construct a roadbed for extension of certain tracks at Alexander, N. C., and that said contract was in all respects a lawful one, which the parties thereto might lawfully make and perform; that the work of constructing a roadbed of the character and nature the said Timothy Shea was employed by this de- (684) fendant to make was an independent avocation, calling or busi-

ness in which the said Timothy Shea was and had for many years previously been engaged, and for the exercise of which he had and owned all of the necessary means and appliances; that this defendant, under said contract, was neither principal nor master, nor did it reserve any general or special control over said Timothy Shea either in respect of the manner of performance of said contract by him or in respect of the agents to be employed by the said Shea in doing said work, nor did this defendant, before the commencement of said contract by the said Shea heretofore mentioned, or at the commencement of the same, or at any time during the progress of its performance assume or in any manner attempt to assume of the said Shea or the said work or any of the workmen engaged upon the said work or in any other respect whatever; that the said Shea was neither the agent nor the servant of this defendant, but was an independent contractor, taking said work as a job and as a whole, for a definite, fixed, agreed sum, and this defendant was only interested in the result of the work and not in any way in the means employed by the said Shea in its performance; that in making said contract with said Shea, by which he agreed and contracted to do the work of constructing a roadbed for the extension of certain tracks at Alexander, N. C., this defendant ascertained that the said Shea was a man of experience in the kind and character of work which by said contract he bound himself to perform, and he was in every way thoroughly competent and skilled, and this defendant knew when it employed the said Shea that he, for a long time, had been engaged in the performance of such work, and this defendant, before making and signing said contract, made due inquiries as to the capacity and reliability of the said Shea in respect of such work, and ascertained that he was both capable and trustworthy, and this defendant is advised, informed and believes that the said blasting mentioned in the plaintiff's complaint was the blasting done by the said Shea and his employees and subcontractors, while engaged in doing the work set out in the contract made between this defendant and the said Timothy Shea. This defendant never authorized the said Timothy Shea or any one else to resort to blasting in constructing the roadbed for the extension of the tracks at Alexander, or to use powder, dynamite, or any other unlawful agency in the performance of said work.

The following issues were submitted to the jury, who answered them as set out:

1. Was the death of plaintiff's intestate caused by the negli- (685) gence of the defendant Southern Railway Company, as alleged in the complaint? Answer: Yes.

2. What damages, if any, is plaintiff entitled to recover of defendant Southern Railway Company? Answer: $2,000.

Judgment was rendered for the plaintiff, and defendant appealed to this Court.

Craig, Martin & Thomason, Frank Carter and H. C. Chedester for plaintiff.

Moore & Rollins for defendant.

MANNING, J., after stating the case: In view of the verdict of the jury rendered under the charge of his Honor, the following facts are established by the evidence: That in the month of April or May, 1906, the defendant, desiring to widen its roadbed at or near Alexander, in Buncombe County, and lay additional tracks or straighten its existing tracks then used and having been used for many years, found it necessary to blast out a perpendicular cliff of rock about 400 feet long and 42 feet high, at its greatest height, situate on its right of way, and began the work of blasting down the cliff by its own employees. This continued two or three weeks. The plaintiff lived across the French Broad River with his wife and two small children, in the corporate limits of Alexander and a quarter of a mile from the blasting. The results of defendant's operations were to throw rocks of large and small size across the river in plaintiff's yard, on his house and buildings, in his garden and field, and the blasting was of such violence that the window-glass in plaintiff's house was shaken out and his wife much frightened and rendered very nervous. The plaintiff made frequent complaints, but to no avail.

The defendant suspended operations by its own employees, and in June, 1906, made a contract with one Timothy Shea to continue the work and complete it according to certain plans and specifications. He soon thereafter began work, and conducted it in the same manner as the defendant had done, and he and his foreman and other witnesses, offered by the defendant, testified that the work could be done in no other way. The results, in so far as it affected the plaintiff's wife and his premises, were the same; rocks were constantly thrown with great force in and around his house. In the latter part of August plaintiff's wife was taken with typhoid fever; the violent blasting continued with its results. The effect upon plaintiff's wife was that she was kept in a highly nervous condition; that her condition was made known to the foreman in charge, and the effect of the blasting and falling rock
(686) upon her. That the blasting continued up to three or four days before her death.

The physician testified that, in his opinion, but for the blasting and the nervous condition and alarm produced by it upon Mrs. Hunter, she would have recovered.

After making several efforts to have the blasting stopped, the plaintiff succeeded, with a threat of suit, on Thursday or Friday before his wife's death on the following Monday night, 11 September, 1906. This action was begun 4 October, 1906.

The liability of the defendant was presented to the jury in this language, given substantially in accordance with one of the prayers of the defendant: "The court charges you that the act of blasting, as a means of excavation of a railroad in North Carolina, is not in itself negligence; that it is the recognized method of clearing the way of the railroad track, and the simple fact of the blasting making noise is not negligence, for that is the natural result of blasting. So that this, aside from the fact that rocks were thrown, if you find from the greater weight of the evidence that they were thrown in the yard of the plaintiff the court charges you that the noise of the blasting would not be negligence unless you find that after the contractor was notified of the sickness of Mrs. Hunter, that he willfully and wantonly and negligently continued the blasting, that the simple act of blasting would not be negligence, and if the result of it was to produce death, even, the simple noise, disassociated from the fact that if they had thrown any rocks in the yard, had produced her death, that would not be negligence for which the defendant would be liable, unless, as I say, it was done negligently, willfully and wantonly, after notice on the part of the contractor."

The defendant, however, contended that the vital error committed by his Honor was his failure to give the following instruction: "The court charges the jury that under the terms of the contract introduced in evidence, between the defendant Southern Railway Company and one Timothy Shea, the relation of master and servant did not arise between them, but that the said Timothy Shea, under said contract, was an independent contractor, and anything done by said Timothy Shea under said contract, he was responsible for, and not the Southern Railway Company."

His Honor held, and so charged the jury, that the contract created Timothy Shea an independent contractor, but declined to hold that that fact alone exonerated the defendant from liability to the plaintiff.

In *Young v. Lumber Co.*, 147 N. C., 26, *Mr. Justice Connor,* speaking for the Court, said; "When the contract is for some- (687) thing that may be lawfully done, and it is proper in its terms, and there has been no negligence in selecting a suitable person in respect to it, and no general control is reserved, either in respect to the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses. the latter is not liable to third persons for the negligence of the contrac-

tor as his master." This is quoted with approval in *Gay v. Lumber Co.,* 148 N. C., 336, from the opinion of *Mr. Justice Walker* in *Craft v. Lumber Co.,* 132 N. C., 157, and expresses with clearness the general doctrine. In both these cases, however, the exceptions are recognized as well settled which impose liability upon the proprietor or owner for the acts of the independent contractor. In *Young v. Lumber Co., supra,* it is said: "It is conceded that, upon grounds of public policy, certain exceptions are made by the law to the general rule. The one upon which plaintiff relies is well stated by *Andrews, C. J.,* in *Engel v. Eureka Club,* 137 N. Y., 100: 'Where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, or is intrinsically dangerous, it is held that the party who lets the contract to do the act cannot thereby escape responsibility from any injury resulting from its execution, although the act to be performed may be lawful. But if the act to be done may be safely done in the exercise of due care, although, in the absence of such care, injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise due care.' "

In *Davis v. Summerfield,* 133 N. C., 325, the Court, speaking through *Mr. Justice Montgomery,* says: "There is yet another class of cases where there is an exception to the exemption, and that is where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, said by *Judge Dillon* to be 'intrinsically dangerous.' There the employer cannot escape liability for an injury resulting from the doing of the work, although the act performed might be lawful."

These rules of the liability of the owner or proprietor for the acts of the independent contractor are stated in 2 Cooley on Torts (3 Ed.), 1090: "1. If a contractor faithfully performs his contract, and the third person is injured by the contractor in the course of its due performance, or by its result, the employer is liable, for he causes
(688) the precise act to be done which occasions the injury; but for the negligence of the contractor not done *under* the contract, but in violation of it, the employer is, in general, not liable. 2. If I employ a contractor to do a job of work for me which, in the progress of its execution, obviously exposes others to unusual perils, I ought, I think, to be responsible on the same principle as in the last case, for I cause acts to be done which naturally expose others to injury. 3. If I employ as contractor a person incompetent or untrustworthy, I may be liable for injuries done to third persons by his carelessness in the execution of his contract. 4. The employer may be guilty of personal neglect, connecting itself with the negligence of the contractor in such

manner as to render both liable." *Lawrence v. Shipman,* 39 Conn., 586; 1 Thompson on Negligence, secs. 652, 771; *Wetherbee v. Partridge,* 175 Mass., 185; *Tiffin v. McCormack,* 34 Ohio St., 638; *R. R. v. Morey,* 47 Ohio St., 207; *Hawver v. Whalen,* (Ohio), 14 L. R. A., 828, and editor's note; *Thomas v. Harrington,* 72 N. H., 45; 65 L. R. A., 742, and editor's note; *R. R. v. Tow* (Ky.), 66 L. R. A., 941, and note. In *Wetherbee v. Partridge,* 175 Mass., 185, the conclusion of the Court is thus stated in the headnote: "At the trial of an action for injuries to the plaintiff's property by the blasting of rocks upon adjoining land of the defendant, what the defense relied on was that the work was done by an independent contractor. The contract contemplated that blasting would be done, and the place where it was done was within three or four feet of the line between the plaintiff's and the defendant's land, and about eight or nine feet from the plaintiff's house: *Held,* that it is plain that performance of the contract would do the damage complained of unless it was guarded against, and that the defendant was bound to see that due care was used to prevent harm."

In the present case, from the evidence of the defendant, it was plain that performance of the contract would injure the plaintiff. The defendant, by its own servants, had first attempted to perform the work subsequently included in its contract with Shea, the independent contractor, and the injury to plaintiff was made plain; the independent contractor prosecuted the work in the same manner as the defendant had done and testified it could be done in no other way, and he produced like results to the plaintiff. It, therefore, in our opinion, results from the facts of this case that whether we follow the New York rule (which this Court in *Davis v. Summerfield, supra,* declined to follow, and the Massachusetts Court in *Wetherbee v. Partridge, supra,* also declined to follow), or accept the doctrine of the cases cited, we must reach the conclusion that the defendant is liable under the evidence in (689) this case.

The sole remaining question to be determined is whether plaintiff, as administrator of his wife, can recover damages for her wrongful death, or is he prevented because, as husband, he is entitled to her earnings and she can accumulate nothing and is valueless to her estate. We cannot yield our assent to this argument of the defendant; we are not prepared to so interpret our law that, under Lord Campbell's act, all the wives in the State could meet with a tortious and wrongful death, and yet, because the husbands are entitled to their earnings, the issue of damages must be answered, "Nothing." Nor can the defendant escape liability because the particular form of injury was not foreseen. "While the defendant could not foresee the exact consequence of his act, he ought, in the exercise of ordinary care, to have known that he

was subjecting plaintiff and his family to danger, and to have taken proper precautions to guard against it." *Kimberly v. Howland,* 143 N. C., 398; *Hudson v. R. R.,* 142 N. C., 198; *Drum v. Miller,* 135 N. C., 208; *Sawyer v. R. R.,* 145 N. C., 24; *Rolin v. Tobacco Co.,* 141 N. C., 300.

A careful examination of the record and the brief of the learned counsel of the defendant has failed to discover to us any reversible error.

No error.

Cited: *Thomas v. Lumber Co.,* 153 N. C., 355; *Marlow v. Bland,* 154 N. C., 146; *Beal v. Fiber Co., ib.,* 151; *Denny v. Burlington,* 155 N. C., 37; *Johnson v. R. R.,* 157 N. C., 383; *Arthur v. Henry, ib.,* 402.

J. O. RICH v. ASHEVILLE ELECTRIC COMPANY.

(Filed 27 May, 1910.)

1. Street Railways—Personal Injury—Conductors—Negligence—Improbable Results—Nonsuit.

The plaintiff was injured while engaged in the service of the defendant company in collecting fares on a summer car run in cold weather. His evidence tended to show that the weather was too cold for a car of this character, and that he had unsuccessfully requested closed cars of his superior for the purposes required; that the curtains of the car ran tight in their grooves, and that the injury occurred while he was necessarily attempting to raise a curtain to collect fares, which had been caught in the grooves, by his hand slipping from the curtain and striking the other one with which he was holding to a stanchion provided for the purpose, which, from the blow, or from being numb by the exposure to the cold, relaxed its hold, causing plaintiff to fall from the moving car to his injury: *Held,* the injury complained of would not ordinarily arise or be likely to ensue from the tightening of the curtain plaintiff was attempting to roll up, and a motion for judgment as of nonsuit upon the evidence should be allowed.

2. Street Railways—Personal Injury—Conductors—Negligence—Vestibules—Statutory Requirements—Causal Connection.

The plaintiff's evidence tended to show that the injury complained of was received by his falling from the running-board of a summer street car while collecting fares from passengers, under circumstances insufficient to establish the defendant's negligence. In order to avoid a nonsuit under the provisions of Revisal, secs. 2615 and 3800, requiring street passenger railways to use vestibule fronts at certain prescribed times, the plaintiff must show a causal connection between the violation by defendant of the statute and the injury sustained, or a judgment as of nonsuit upon the evidence will be sustained.

CLARK, C. J., dissenting.

APPEAL from *Joseph S. Adams, J.*, at December Term, 1910, (690) of BUNCOMBE.

The plaintiff sued to recover damages for injuries received by him on Sunday morning, 3 December, 1905, between 10 and 11 o'clock a. m., while acting as conductor on one of the defendant's cars in Asheville. The plaintiff testified that he had been, prior to the injury, a conductor for three years; that he asked to be relieved of his regular run that morning and to fill an extra man's run, which was to take cars empty to Riverside Park—a distance of about three miles—to bring the cadets of Bingham School in to church; that when he reported to the car barn he found "signed up" on the bulletin-board two open summer cars for this special run; that the weather was cold, something near freezing, a strong wind blowing from the north, cloudy and "spitting snow"; the thermometer had dropped from 49° Far. at midnight to 33° Far. between 10 and 11 a. m.; that the summer cars are not equipped with a vestibule, but they have a glass front in the rear of the front platform, and in front of the rear platform; that the seats run across the car and at each end there is a roller curtain which can be pulled down or rolled up, as the weather conditions require; that these curtains work in grooves cut in posts at the ends of each seat; that fastened on the outside of each post is a substantial stanchion for holding to as one walks or stands on the running-board or step, which board or step runs lengthwise the car on either side and is used by passengers alighting from or getting on the car, and likewise used by the conductor in going from one end of the car to the other, in collecting fares of passengers; that after reporting at the car barn on the morning of 3 December, to Mr. White, the man in charge, he observed that the open cars were "signed up" for the run he was to make; that he complained and requested closed cars on account of the weather; that White told (691) him he would see about it; that he, the plaintiff, looked around and saw three closed cars apparently in good order and went to report to White, but he had gone, and the other car crews had left, so he took out the open car at 10:05 a. m. and proceeded on his run to Riverside Park; that he had no passengers and took on none; that he had his overcoat, but did not put it on, and stood on the rear platform; that his car made the trip to the park in about 20 minutes; the cadets got aboard, pulled down the curtains, certainly on one side of the car, and the plaintiff started his car back to Asheville; that the car had gone about 200 or 300 yards when he started to collect fares; that he had to roll up the curtain, which was done by a pull, when it rolled up by a spring; that the curtain caught and he jerked it with his right hand, his hand slipped off and either struck his left hand with which he was holding to a stanchion, or it being numbed with cold, slipped aloose and he fell from

the running-board and received the injuries for which he sues to recover damages. At the conclusion of the evidence his Honor allowed the motion, made under the statute, for judgment as of nonsuit, and the plaintiff excepted and appealed to this Court.

Frank Carter and H. C. Chedester for plaintiff.
Martin & Wright for defendant.

MANNING, J., after stating the case: Construing the evidence in the view most favorable for the plaintiff, as we must do under the uniform rulings of this Court, where the motion for judgment as of nonsuit is allowed, we are not convinced that his Honor committed error in allowing the motion. In speaking of an injury occurring to the plaintiff in *House v. R. R., ante,* 397, where the plaintiff, a servant of the defendant, employed to clean its cars and wash its windows, was injured by attempting, with unusual force, to raise a window which had become tight in the sash, when her hand slipped, broke through the glass and was severely cut, *Mr. Justice Hoke* said: "We have repeatedly decided that an employer of labor is required to provide for his employees a reasonably safe place to work, and to supply them with implements and appliances reasonably safe and suitable for the work in which they were engaged. As stated in *Hicks v. Manufacturing Co.,* 138 N. C., 319-325, and other cases of like import, the principle more usually obtains in the case of 'machinery more or less complicated, and more especially when driven by mechanical power'; and does not, as a rule,
(692) apply to the use of ordinary every-day tools, nor to ordinary every-day conditions, requiring no special care, preparation or prevision, where the defects are readily observable, and where there was no good reason to suppose that the injury complained of would result. The reason for the distinction will ordinarily be found to rest on the fact that the element of proximate cause is lacking—defined in some of the decisions as 'the doing or omitting to do an act which a person of ordinary prudence could forsee would naturally or probably produce the injury.' *Brewster v. Elizabeth City,* 137 N. C., 392. These windows not infrequently become tightened from different causes, and while it may be a great inconvenience and should perhaps be given more attention it receives, no one would say that an injury of this character would ordinarily arise or be likely to ensue, and, therefore, no actionable wrong has been established." This case, we think, is decisive of the point presented in the present case, as to the tightening of the curtain which plaintiff was attempting to roll up. No one would say that the injury which plaintiff received—falling from the running-board or step—would ordinarily arise or be likely to ensue from this

cause. No reason is given, nor does any appear, why the plaintiff, as he had charge of the car, did not examine these curtains before leaving the barn, if he had apprehended any injury as likely to ensue to him from their becoming tightened in the grooves, as such a condition was readily observable.

The liability of the defendant, however, was urged before us chiefly upon the ground that it was operating a car for passengers on its line in violation of sections 2615, 3800, Rev., which provides that "all street passenger railway companies shall use vestibule fronts . . . on all passenger cars run by them on their lines during the latter half of the month of November and during the months of December, January, February and March of each year. . . . *Provided further,* such companies may use cars without vestibule fronts in cases of temporary emergency in suitable weather, etc." While the evidence does not disclose any causal connection between the failure to use the vestibule front on the car the plaintiff was using and the injury received by him, or that defendant's failure to provide a vestibule front was an act which a person of ordinary prudence could foresee would naturally or probably produce the injury complained of, yet it is insisted by the plaintiff that the running of a passenger car without the vestibule front was forbidden by statute and constituted negligence for which the defendant is liable to plaintiff. In *Henderson v. Traction Co.,* 132 N. C., 779, this Court said: "After a careful examination of a number of authorities, we are of the opinion that the sound doctrine is that a violation of the public statute or a city ordinance is evidence, (693) to be submitted to the jury. It is generally held, and this we regard as the true doctrine, that the element of proximate cause must be established, and it will not necessarily be presumed from the fact that a city ordinance or statute has been violated. Negligence, no matter in what it may consist, cannot result in a right of action unless it is the proximate cause of the injury complained of by the plaintiff. Elliott on Railroads, sec. 711." This case has been approved in *Cheek v. Lumber Co.,* 134 N. C., 225.

In *Leathers v. Tobacco Co.,* 144 N. C., 330, *Mr. Justice Connor,* speaking again for this Court, reviewed in an elaborate opinion the whole doctrine, and quoted with approval, as expressing the conclusion reached by the best-considered authorities, the following language from Thompson on Neg., vol. 1, sec. 10: "When the Legislature of a State or the council of a municipal corporation, having in view the promotion of the safety of the public or of individual members of the public, commands or forbids the doing of a particular act, the general conception of the courts, and the only one that is reconcible with reason, is that a failure to do the act commanded, or doing the act prohibited,

is negligence as mere matter of law, otherwise called negligence *per se;* and this irrespective of all questions of the exercise of prudence, diligence, care or skill; *so that if it is the proximate cause of hurt or damage to another, and if that other is without contributory fault,* the case is decided in his favor, and all that remains is to assess his damages." The conclusion of this Court is thus stated in that opinion: "Upon careful consideration, we conclude that the law is correctly laid down by Judge Thompson, and the other authors quoted, and sustained by the best-considered decided cases. . . . While it is true that if there be any dispute regarding the manner in which the injury was sustained, or if, upon the conceded facts, more than one inference may be fairly drawn, the question should be left to the jury; yet it is equally well settled that when there is no dispute as to the facts, and such facts are not capable of more than one inference, it is the duty of the judge to instruct the jury, as a matter of law, whether the negligence of the defendant was the proximate cause of the injury. *Rolin v. Tobacco Co.,* 141 N. C., 300." Again, this Court was called upon to consider the question in *Starnes v. Mfg. Co.,* 147 N. C., 556, and, speaking through *Mr. Justice Brown,* said: "As to the second contention, it is decided squarely against the defendant in the recent case of *Leathers v. Tobacco Co., supra,* where it is held not only that a cause of action ac-
(694) crues to the child, if injured, but that it is negligence *per se,* and not merely evidence of negligence, to violate the statute (Rev., sec. 3362). . . . This brings us to consider defendant's third contention, a matter not fully determined in the *Leathers case,* and which may be thus stated: That the plaintiff cannot recover, because the employment of him, although willfully and knowingly done in violation of the statute, was not the proximate cause of his injury, inasmuch as he did not receive the injury while in the discharge of the duties to which he was assigned." After reviewing the evidence in that case tending to show that the violation of the statute was the proximate cause of the injury received, the Court proceeded: "We do not mean to hold that the employer violating the act would be liable in damages for every fatality that might befall the child while in its factory. For instance, had the plaintiff died of heart disease, or from a stroke of paralysis, or been seriously injured by the willful and malicious act of a workman in knocking him against a machine, or injured from some cause wholly disconnected from the unlawful employment, the defendant could not be held liable in damages simply on account of the employment, in violation of the statute. But we do hold that the employment, when willfully and knowingly done, is a violation of the statute, and that every injury that reasonably and naturally results is actionable. In this case

the connection between the employment and the injury is that of cause and effect, and brings the defendant within the operation of the statute." *Fowle v. R. R.*, 147 N. C., 491.

It seems to us that the principle is clearly settled by this Court in the cases cited, that, while the violation of a statute is negligence, yet to entitle the plaintiff seeking to recover damages for an injury sustained, he must show a causal connection between the injury received and the disregard of the statutory prohibition or mandate—that the injury was the proximate cause; and this requirement is fundamental in the law of negligence. In the present case there is an entire absence of evidence tending to show such causal relation, but on the contrary, the plaintiff's evidence negatives it. If we suppose the car equipped with a vestibule front, as required by statute—and the open cars are so equipped in many parts of the country—what causal connection existed between the injury and the negligence, or how could the failure to have a vestibule front be reasonably inferred as the proximate cause of plaintiff's injury? Besides, the manifest purpose of the statute, considered in the *Leathers case* and the *Starnes case,* being the statute forbidding the employment of children under twelve years of age in manu- (695) facturing establishments (Rev., sec. 3362), was not only to protect children of such tender years and immature judgment from injuries likely to ensue from their coming in contact with machinery, but their health from injury by such close confinement, as pointed out in *Rolin v. Tobacco Co., supra;* while the manifest purpose of the statute in the present case was to protect *the motorman* (not the conductor) from unnecessary exposure to the weather while performing his duty. It will be observed that the statute does not require any particular kind or make of car to be used, but refers only to its equipment. The same necessity for showing the causal or proximate relation between the injury and the alleged negligence is recognized as essential in *Troxler v. R. R.*, 122 N. C., 902, and in the numerous cases citing and approving that decision, for, as is said in that case: "Where the negligence of the defendant is continuing negligence (as the failure to furnish safe appliances, in general use, *when the use of such appliances would have prevented* the possibility of the injury), there can be no contributory negligence which will discharge the master." And the second headnote in *Biles v. R. R.*, 139 N. C., 528, thus states the principle: "In an action against the defendant railroad, if the jury should find that the plaintiff, while in the performance of his duty, was injured as the *proximate consequence of a defective engine or defective appliance,* then the defense of assumption of risk is not open to the defendant, by reason of the Fellow-servant Act."

We have found no case in which the plaintiff was not required to show that his injury was the proximate consequence of the defendant's negligence, even in those cases where the doctrine of *"res ipsa loquitur"* applies; this causal or proximate relation is sufficiently shown by the act itself, and is inferred from the act from which the injury results. The evidence of the plaintiff, construed in the view most favorable to him, failing to show this causal or proximate relation between the injury received and the negligence of the defendant, we must hold that the judgment of nonsuit was properly rendered, and it is

Affirmed.

CLARK, C. J., *dissenting:* Two sections of The Code, 2615 and 3800, forbade the defendant to use the summer car (which has no wind shields) at the time it did—in December—and the latter section made it a misdemeanor.

In *Leathers v. Tobacco Co.,* 144 N. C., 330, this Court expressly repudiated the doctrine that the violation of a statute was merely
(696) "evidence of negligence," and held that such conduct was "negligence *per se*," *Connor, J.,* pp. 345-348, citing a wealth of authorities to that effect. He thus summed up: "Upon careful consideration, we conclude that the law is correctly laid down by Judge Thompson, and the other authors quoted, and is sustained by the best-considered cases." That case was well considered and is based upon numerous authorities of great weight. A due consideration for the dignity and consistency of our own decisions requires that we adhere to what was there said, after so great deliberation. Even if an unlawful act is only evidence of negligence, that would entitle the plaintiff to have the injury committed in the perpetration of the unlawful act submitted to the jury.

If one is engaged in an unlawful act and unintentionally or accidentally slays another, he is not absolved from responsibility, but it is manslaughter. *S. v. Vines,* 93 N. C., 493; *S. v. Hall,* 132 N. C., 1107. If one while engaged in doing an unlawful act injures another, he is certainly liable for damages. The defendant was violating the law and in the commission of a misdemeanor in running the car. The injury to the plaintiff could not possibly have occurred if the defendant had not disobeyed the statute. There was no evidence of contributory negligence (though the burden to prove that was upon the defendant), and it was necessarily error to withdraw the case from the jury.

Aside from the statute, it was negligence for the defendant in midwinter, with the temperature down to freezing and a strong wind blowing from the north, cloudy and "spitting snow," to refuse the plaintiff's request for a closed or winter car, of which there were three, at least, idle under the shed ready for use. It was in violation of the ordinary

dictates of humanity, as well as of the statute, to require the plaintiff to take instead an open summer car in such weather on a run of three miles out beyond the city limits and back. The plaintiff, in the regular winter car which could and should have been given him as he requested, would have been protected in the aisle from the weather, while collecting the fares, and could not have slipped and been hurt. As it was, the curtains being let down to protect the passengers, the plaintiff was obliged to dodge along, under one curtain after another, which he had to lift so that he could collect the fares. While doing this he had to walk along the running-board, which was slippery, for it was "spitting snow," and his hands being numb with cold and the strong north wind blowing the curtains, his hands slipped when trying to raise a curtain which was "caught." The plaintiff in consequence fell off the running-board and was hurt.

The facts not being denied, and the law fixing the defendant (697) with negligence, the judge might well have held as a matter of law that such negligence was the proximate cause of the injury. Certainly, he should not have denied the plaintiff the right to have a jury pass on the question. The exposure by the defendant to such weather, unnecessarily and over his protest, was more than negligence. It was inhumane. The statute made the conduct of the company a misdemeanor, even if no harm had accrued to the plaintiff.

The plaintiff, in my judgment, has a right to have a jury, instead of the judge, to pass upon his issues. Employees are entitled to protection from such heedless disregard of their comfort and safety as was shown on this occasion, and are surely entitled to recover for injuries which a jury shall find were sustained from such cause.

Cited: Ledbetter v. English, 166 N. C., 129.

SANFORD, CHAMBERLAIN & ALBERS COMPANY ET AL.
v. L. M. EUBANKS ET AL.

(Filed 27 May, 1910.)

1. Deeds and Conveyances—Mortgages—Husband and Wife—Fraud—Bona Fide Debt—Fraudulent Intent—Knowledge.

In an action brought by the creditors of the husband to set aside his mortgage to his wife, given to secure a loan of money made by the latter to the former, on the ground of fraudulent intent to delay or defeat his other creditors in the collection of their debt, the questions involved are

whether the husband had the fraudulent intent and whether the wife had notice of it; and evidence of the latter that she had no knowledge or notice of her husband's unlawful purpose, is competent.

2. Same—Presumption—Burden of Proof.

When the husband makes a mortgage to his wife to secure a debt admittedly *bona fide* and due at the time of the execution of the mortgage, in a suit by other creditors of the husband to set aside the deed as fraudulent for the purpose of delaying or defeating the collection of their debt, there is nothing in the transaction to raise a presumption of fraud, and the burden of proof is on the plaintiff to establish it.

3. Deeds and Conveyances—Mortgages—Husband and Wife—Debt, Bona Fide—Fraud—Evidence—Instructions—Questions for Jury.

In an action by the creditors to set aside a mortgage given by the husband to his wife to secure a debt admittedly due at the time of its execution, it is for the jury to find, upon the evidence, the actual intent of the husband to defraud his other creditors and whether the wife knew or had notice thereof, or acted in good faith in the transaction; and it is no error for the trial court to instruct the jury to answer the issue of fraud in the negative if they found that the wife acted in good faith, without knowledge of the husband's wrongful intent.

(698) APPEAL by plaintiff from *Ferguson, J.*, at August Term, 1909, of CHEROKEE.

The facts are stated in the opinion of the Court.

Dillard & Bell for plaintiff.
Ben Posey for defendant.

WALKER, J. This action was brought by the plaintiffs to set aside a mortgage executed on 16 February, 1907, by the defendant L. M. Eubanks, to his wife, Fannie D. Eubanks, and to Hattie Swaggerty, his sister-in-law, and J. L. Robinson, to secure the payment of certain debts alleged therein to be due by L. M. Eubanks to the mortgagees. The court submitted issues to the jury which, with the answers thereto, are as follows:

1. Is the defendant L. M. Eubanks indebted to Sanford, Chamberlain & Albers Company; if so, in what sum? Answer: $535.35, with interest from 1 April, 1907, and $4.65.

2. Is said defendant indebted to Briggs & Cooper Company, Ltd.; if so, in what sum? Answer: $217.52.

3. Was the mortgage of 17 February, 1909, from L. M. Eubanks to Fannie D. Eubanks and others executed with intent to hinder, delay and defeat the creditors of said L. M. Eubanks? Answer: Yes.

4. Did the defendant Fannie D. Eubanks know of any fraudulent intent on the part of said L. M. Eubanks at the time of the execution and delivery of said mortgage to her? Answer: No.

5. Did the defendant Hattie Swaggerty know of such intent at said time? Answer: No.

The allegation of the plaintiff is that the mortgage was executed to defraud the creditors of the mortgagor. There was no dispute at the trial as to the indebtedness of L. M. Eubanks to the plaintiffs. The mortgagor was largely indebted to his wife for money which she loaned him in the amount of $1,000, and further in the sum of $2,500, for money which he had obtained by mortgage on her separate estate. It was admitted that L. M. Eubanks was insolvent at the time he executed the mortgage. There was some evidence tending to show that the mortgage was made with a fraudulent intent, and the question really involved in the case was whether Fannie D. Eubanks, the wife of the mortgagor, had notice at the time he executed the mortgage (699) to her and the others named therein, of such fraudulent intent. She was asked by her counsel the following question: "Did you, at the time you took this mortgage from your husband, have any intention to defraud any of your husband's other creditors?" The plaintiffs objected to this question; the objection was overruled and the plaintiffs excepted. The witness answered that she did not intend to defraud any of her husband's creditors. Her own testimony tended to show that the mortgage was taken by her in good faith and without notice of the fraudulent intent of her husband.

The plaintiffs requested the court to charge the jury as follows: "The defendant Fannie D. Eubanks need not have known, as a matter of law, that the mortgage executed to her was fraudulent, but it was sufficient if she knew of the circumstances which the law says made the deed fraudulent on the part of her husband, if it was so, and if the jury should find that she knew the circumstances and the deed was fraudulent, they should answer the fourth issue 'Yes,' that is, in favor of the plaintiffs." The court declined to give this instruction, and the defendant's again excepted.

The court charged the jury that if the mortgage was made with a fraudulent intent, that is, with an intent on the part of L. M. Eubanks to hinder, delay or defeat his creditors, or any of them, in the collection of their claims, and the wife of the mortgagor, Fannie D. Eubanks, knew of this intent, they would answer the fourth issue "Yes"; but if the jury found as a fact that she did not know of such intent, if it existed, but merely knew that he was indebted to other persons than those secured by the mortgage, and that his purpose in executing the same was merely to secure the payment of the indebtedness to her, and that was

his only purpose when he executed the mortgage, and she did not know that he intended to hinder, delay or defeat any of his creditors in the collection of their claims against him, they would answer the fourth issue "No." In other words, the court substantially charged the jury that if Fannie D. Eubanks, the wife of the mortgagor, believed the transaction to be an honest one and did not know that there was any actual intent on the part of her husband to defraud any of his other creditors, as defined by the court, and she acted in good faith in taking the mortgage to secure the indebtedness to her, they would answer the fourth issue "No." The plaintiffs assigned the following errors:

(700) 1. That the court permitted the defendant Fannie D. Eubanks to testify, over the objection of the plaintiffs, that she had no intention to defraud any of the other creditors of her husband at the time the mortgage was executed to her.

2. That the court refused to give the instruction as requested by the plaintiffs.

3. That the court charged the jury that the defendant Fannie D. Eubanks must have had knowledge of the fraudulent intent of the mortgagor, and not merely notice of the fraud.

As to the first assignment of error, we are unable to see why it was not competent and relevant for the witness, Fannie D. Eubanks, to testify as to what her intention was at the time the mortgage was executed to her. It cannot be denied that the mortgage would be valid in her hands as against the creditors of her husband, even if he had a fraudulent intent, provided she did not have notice of it or did not participate in the fraudulent execution of the mortgage, and this being one of the questions involved in the case, how can the fact better be proved than by her own testimony as to what her intention was at the time?

But the questions involved in the case were, whether her husband had the fraudulent intent, and whether she had notice of it. In this aspect of the case her intention was either irrelevant and the testimony was, therefore, harmless, or, if relevant, as tending to show that she did not have any knowledge or notice of her husband's unlawful purpose, it surely would be competent to prove by her what her intention was, for it might be said, if her husband executed the mortgage with a fraudulent intent, and she executed it knowing, or having notice, of such intent, she in a legal sense intended to defraud her husband's other creditors, as she would then be participating in the fraud. If it is competent to inquire whether or not she had a fraudulent intent at the time she executed the mortgage, the fact that she did not have such an intent could be proved by her own testimony, as we held in *Phifer v. Erwin*, 100 N. C., 59. In that case *Chief Justice Smith*, speaking for the Court, said: "The test of the admissibility of the evidence of motive

or intent is the materiality of the motive or intent in giving character to the act, and when they must, as separate elements, coexist to constitute guilt or produce a legal result. When as distinct facts, each must be alleged and proved, the inference to be deduced may be met and repelled by the direct testimony of the party as to their being entertained by him," citing *S. v. King,* 86 N. C., 603, and 1 Wharton Ev., sec. 482. In that case the question involved was whether or not the (701) mortgage was fraudulent, and the decision seems to be a direct authority for the ruling of the court upon the objection we are now discussing.

As to the second assignment of error, we are of the opinion, after a careful persual of the charge of the court, that the instruction was substantially given to the jury. If it was not given, there were no circumstances from which the jury could infer fraud in law. The plaintiff submitted to a nonsuit as to Hattie Swaggerty and J. L. Robinson, the other defendants, and the issue was confined, therefore, to the validity of the mortgage as to Fannie D. Eubanks. The court properly submitted the case to the jury as involving the above questions of fact, as to whether the mortgagor had an actual intent to defraud his creditors and whether his wife had notice or knowledge of such intent. The plaintiff having admitted that the debt secured by the mortgage was justly due to Fannie D. Eubanks by her husband, the burden was upon the plaintiff to show that the mortgage was executed with a fraudulent intent on the part of the debtor. *Peeler v. Peeler,* 109 N. C., 628; *Redmond v. Chandley,* 119 N. C., 575. It is true that where the husband executes a mortgage to secure an alleged indebtedness to his wife, the law casts suspicion upon the transaction and raises what has been called a presumption of fraud; but when she has shown that the debt was honestly contracted and was justly due to her at the time the mortgage was executed, it then becomes a question for the jury, to determine the intent of the parties and to find the contract fraudulent or otherwise, as they may find the fact to be upon a consideration of the testimony, the burden being upon the attacking creditor to show the fraudulent intent of the debtor, if the debt which is secured by the mortgage was actually due to his wife. *Reiger v. Davis,* 67 N. C., 185. If the husband is indebted to his wife and executes the mortgage to secure such indebtedness, and the wife acts in good faith and without knowledge of any fraudulent intent on his part, if he had any, we do not see why the husband may not prefer his wife as one of his creditors, as well as any of his other creditors. The case in this respect seems to have been correctly and fairly tried in accordance with the decisions which we have just cited.

The third objection to the judge's charge is clearly untenable. If the husband had a fraudulent intent, the wife must have knowledge of it to invalidate the deed or mortgage as to her. This is decided in *Peeler v. Peeler, supra,* and the other cases above cited, but the court, (702) in its charge to the jury, evidently used the word "knowledge" in the sense of "notice."

We have examined the case carefully, and find no error in the rulings of the court.

No error.

Cited: *Smathers v. Hotel Co.,* 167 N. C., 474.

THOMAS J. COORE v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 27 May, 1910.)

1. Pleadings—Proof—Variation.

There is no material variance between the allegations and the proof in an action for damages for personal injuries, the averments of the complaint substantially being that the alleged injury was caused by the negligent, etc., starting the train of defendant railroad company by the engineer, without signal or warning, which violently jerked the slack out of the train, pulled the cars farther apart, causing plaintiff to miss his footing and fall to his injury between the cars; and the evidence objected to being that "the engineer started off at high speed—quick start," etc.

2. Evidence Withdrawn—Harmless Error.

When improper evidence, objected to, is withdrawn, by the court from the consideration of the jury, the error in admitting it is cured.

3. Railroads—Orders—Negligence—Evidence—Instructions.

Upon conflicting evidence an instruction is correct in substance as follows: that if the engineer should not have started his train without a signal from plaintiff, an employee, if they find the conductor had ordered him to thus signal from the top of the train, and if the engineer did start the train with a jerk without plaintiff's signal, or did so at a signal from the conductor, jerking the cars apart so as to throw plaintiff between them to his injury, and this was the proximate cause thereof, the issue as to negligence should be answered for plaintiff.

APPEAL by defendant from *Lyon, J.,* at the January Term, 1910, of MOORE.

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

Douglass & Lyon and H. F. Seawell for plaintiff.

Walter H. Neal and U. L. Spence for defendant.

WALKER, J. This action was brought by the plaintiff to recover damages for injuries alleged to have been sustained by him while engaged in the performance of his duties as a brakeman in the service of the defendant. The plaintiff alleged that he was ordered (703) by the conductor to go up on the freight cars, which were coupled to an engine, for the purpose of giving a signal to the engineer to start the train, and of attending to his other duties. That when he was on the top of one of the cars and about to step to another car, the engineer, without any signal or warning from him, but after receiving a signal from the conductor to go ahead, suddenly and negligently started the train and violently jerked out the slack, which caused him to fall as he was passing from one car to the other.

There was evidence tending to show negligence on the part of the defendant. The plaintiff, when testifying in his own behalf, was permitted by the court to state that "The engineer started off at a high rate of speed—quick start." The defendant objected to this testimony upon the ground that it is not alleged in the complaint that the engineer started the train at a high rate of speed. The allegation of the complaint is that the engineer suddenly, negligently, carelessly and without any signal or warning to the plaintiff, applied the steam to the engine and violently jerked the slack out of the said train, pulling the cars farther apart and causing the plaintiff to miss his footing, and thereby he was thrown between the said cars and seriously injured. It is further alleged that, at the time the train was started by the engineer, the plaintiff was walking along the running-board on the top of the car and was in the act of stepping on the running-board of the car immediately in the rear, which was coupled to the one upon which he was walking, and that as the train was started and the cars were jerked apart, he fell between them and was injured.

It is provided by the Revisal, secs. 515 and 516, as follows: "No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the judge may order the pleading to be amended upon such terms as shall be just. Where the variance is not material as provided in the preceding section, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."

We do not think there was any substantial variance between the allegation of the complaint and the proof. If there was any variance at all, it was immaterial, and, if material, the defendant did not comply

with the requirements of the sections in the Revisal to which we
(704) have referred. There was, though, no variance, as it clearly appears by the allegation in the complaint and the proof that the plaintiff was injured before the train had acquired any speed and that his fall between the cars was caused by the sudden and unexpected movement of the train, which jerked the cars apart. This exception it without any merit.

The court permitted the plaintiff, as a witness in his own behalf, to testify that he was acting carefully when he stepped from the one car to the other, but afterwards withdrew this testimony from the consideration of the jury. The defendant duly excepted to the testimony, but the withdrawal of the same cured the error of the court, if any was committed. *Bridgers v. Dill,* 97 N. C., 225; *Cowles v. Lovin,* 135 N. C., 488.

The defendant requested the court to charge the jury that the defendant, upon the allegations of the complaint and proof, is not liable for a sudden, violent or careless jerk of the train, nor for a jerk without a signal, unless the same was necessary in the handling of the train, there being no evidence that it was unnecessary. We think the instruction was substantially given by the court, except in the following respect: The court charged the jury that if the engineer should not have started the train without a signal from the plaintiff, and he did start it and jerk the cars apart, so that the plaintiff was thrown between the cars and and engine, and if the jury should further find that the act of the engineer was the proximate cause of the injury, they should answer the first issue "Yes"; and if they did not find the facts to be as above stated, they should answer the issue "No." If the conductor ordered the plaintiff to go up on the cars, release the brakes and signal to the engineer when to start the train, and while the plaintiff was in the performance of his duty the engineer moved the train in obedience to a signal from the conductor, who had given the order to the plaintiff, and the plaintiff was thereby thrown from the car and injured, as the proximate result of the negligent act of the conductor or the engineer, we are unable to see why the plaintiff is not entitled to recover. *Redman v. R. R.,* 150 N. C., 400; *R. R. v. Murray,* 55 Kansas, 336.

It is unnecessary to consider the other exceptions, as some of them were withdrawn and those remaining have been sufficiently considered and disposed of by what we have already said.

No error.

Cited: Dellinger v. Electric Co., 160 N. C., 540.

(705)

JOHN H. RICHARDSON v. SARAH A. RICHARDSON ET AL.

(Filed 27 May, 1910.)

Estates—Contingent Remainders—Waste—Injunction.

An estate devised to the wife of the testator for life and at her death to S., the grandson, for life with limitation over, etc. An action for waste and for forfeiture brought by the grandson against the wife of the testator, the first tenant for life, cannot be maintained, as his interest is contingent upon his surviving the death of the first taker; for if the life estate is destroyed by forfeiture resulting from waste under the statute, Revisal, sec. 858, the event upon which the plaintiff is to take his estate in remainder, the death of the first taker, has not happened; and the remedy is by injunction.

APPEAL by plaintiff from *W. J. Adams, J.*, at August Term, 1909, of UNION.

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

A. M. Stack and J. J. Parker for plaintiff.
Adams, Jerome & Armfield for defendant.

WALKER, J. This is an action for waste alleged to have been committed by the defendant, who is the owner of a life estate in the land, by virtue of a devise contained in the will of her husband, John Richardson, which is as follows: "I give and devise to my beloved wife 396 acres of land, more or less, it being the home place whereon I now live, to have and to hold during her lifetime, and at her death I will and direct that lot No. 1 (as I have already divided it), containing 208½ acres, more or less, shall descend to and belong to John Richardson, son of S. J. Richardson, during his lifetime, and at his death the said land shall belong to his children, if he shall leave any living; and in case he shall have no living children at his death, in that event said land shall belong to his brothers, viz., James Richardson, Lathan Richardson, Eli Richardson and Frank Richardson."

The action is brought by John Richardson, son of S. J. Richardson, to whom a life estate in remainder was devised in the said will, to take effect at the death of Sarah A. Richardson, the widow. There was a limitation over at the death of the said John Richardson to his children. It is contended by the defendant that the plaintiff cannot maintain this action, as by the will of John Richardson he acquired only a contingent remainder, and it is conceded that an action for waste cannot be brought by a contingent remainderman, but, for the protection of his right or interest, he must resort to the remedy by injunction. *Latham v. Lumber Co.*, 139 N. C., 9.

(706) The only question which we deem it necessary to discuss and decide is whether the plaintiff, John Richardson, by the terms of the will acquired a vested or a contingent remainder. There are, according to Mr. Fearne, four kinds of contingent remainders:

1. Where the remainder depends entirely on a contingent determination of the preceding estate itself, as if A makes a feoffment to the use of B till C returns from Rome, and after such return of C then to remain over in fee. Here the particular estate is limited to determine on the return of C, and only on that determination of it is the remainder to take effect; but that is an event which possibly may never happen, therefore the remainder which depends entirely upon the determination of the preceding estate by it is contingent.

2. The *second* kind of contingent remainder is where some uncertain event, unconnected with and collateral to the determination of the preceding estate, is by the nature of the limitation to precede the remainder. Thus, as Lord Coke says, if a lease for life be made to A, B and C, and if B survives C, then the remainder to B and his heirs. Here the event of B's surviving C does not affect the determination of the particular estate; nevertheless, it must precede and give effect to B's remainder; but as such an event is dubious, the remainder is contingent. In the contingent remainders which fall under this head, the event which makes them contingent does not in any way depend on the manner in which the particular estate determines, as whether it determines in one manner or another, the remainder takes place equally. This distinguishes them from the first sort.

3. The *third* kind of contingent remainder is where it is limited to take effect upon an event which, though it certainly must happen some time or other, yet may not happen until after the determination of the particular estate. For it is a rule of law that a remainder must vest, either during the continuance of the particular estate or at the very instant of its determination. So that, if the event does not happen during the continuance of the particular estate, the remainder becomes void. Thus, if a lease be made to A for his life, and after the death of B remainder to another in fee, this remainder is contingent, for though B must die some time or other, yet he may survive A, by whose death the particular estate will determine and the remainder become void.

4. The *fourth* kind of contingent remainder is where it is limited to a person not ascertained, or not in being at the time when such limitation is made. Thus, if a lease be made to one for life, the remainder to the right heirs of A; now there can be no such person as the right (707) heir of A until his death, for *nemo est hæres viventis;* and A may not die until after the determination of the particular estate; therefore, such remainder is contingent. Again, where an estate is

limited to two persons during their joint lives, the remainder to the survivor of them in fee, such remainder is contingent, because it is uncertain which of them will survive.

Vested remainders, or remainders executed, are those by which the present interest passes to the party, though to be enjoyed in the future, and by which the estate is invariably fixed to remain to a determinate person, after the particular estate is spent. The person entitled to a vested remainder has an immediate fixed right of future enjoyment, that is, an estate *in præsenti,* though it is only to take effect in possession and pernancy of the profits at a future period, and such an estate may be transferred, aliened and charged, much in the same manner as an estate in possession, as distinguished from one which is vested in interest. The remainder is said to be contingent when it is limited to take effect on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate, in which case, as we have shown, such remainder never can take effect. 1 Greenleaf's Cruise on Real Property, (2 Ed.), 703 *et seq.*

In 1 Fearne on Remainders (Ed. of 1845), p. 216, he thus states and illustrates the difference between a vested and a contingent remainder: "It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that, every remainder for life or in tail is and must be liable; as the remainderman may die, or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. For instance, if there be a lease for life to A, remainder to B for life, here the remainder to B is vested, although it may possibly never take effect in possession, because B may die before A; yet, from the very instant of its limitation, it is capable of taking effect in possession, if the possession were to fall by the death of A; it is therefore vested in interest, though perhaps the interest so vested may determine, by B's death, before the possession he waits for may become vacant." In commenting upon this passage from Mr. Fearne, this Court, in a very able and learned opinion by *Chief Justice Shepherd* in *Starnes v. Hill,* 112 N. C., 1, thus qualified or explained the language of Mr. Fearne: "In support of the plaintiff's contention, we are referred to the principle laid down by (708) Mr. Fearne (*supra,* 217) in a passage which has often been quoted in text-books and judicial opinions, but seldom accompanied with the explanation of the learned author in its immediate connection. *Ib.,* 216, 217. The language is as follows: 'The present capacity of tak-

ing effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.' It is urged that, inasmuch as the death of Madara J. (his wife) is an event which must happen, and as R. O. Patterson is a person *in esse,* the latter would have the capacity of taking the possession should the preceding estate of the said Madara J. be presently determined by her death, and, therefore, under the foregoing rule, his estate would be a vested remainder. The fallacy of the argument may be found in the failure to observe that at common law the particular estate may be determined during the lifetime of its tenant (as by forfeiture or surrender: Fearne, *supra,* 217; Tiedeman Real Prop., 401; 4 Kent Com., 254), in which case it is entirely clear that the remainder to R. O. Patterson would be defeated, because the *event* upon the happening of which his interest was to vest, to wit, the survival of his wife, would not have transpired during the continuance of the particular estate (Fearne, 217; 2 Minor Inst., 170, 171), and it is common learning that the contingency must happen during the continuance of the particular estate or *eo instanti* it determines. 2 Blk. Com., 168."

In the case we are now considering, the plaintiffs seek, by their action, not only to recover damages for the waste alleged to have been committed, but to have the life estate of Mrs. Sarah A. Richardson, the widow of John Richardson, declared to have been forfeited by reason of the waste so committed by her. In other words, we have presented practically and in concrete form the very example which is given by *Chief Justice Shepherd* in the case to which we have just referred. It is true that there the remainder could not vest in interest, or even in possession, unless R. O. Patterson survived his wife, and this, by its very nature, was a contingent event, but we do not perceive how any reasonable or practical distinction can be made between a case where the survivorship of one party by another is required to vest the remainder in interest and possession, and one where the remainder is limited to take effect, not generally after a life estate, but at the death of another.

In this case the court entered a judgment of nonsuit at the close of the evidence and on motion of the defendant; but suppose this ruling had been just the reverse of what it was at the trial, and the court had entered judgment, not only for the damages assessed by the jury, but for a forfeiture of the life estate of the widow. Under the statute of Gloucester (6 Edw. I.), which we have adopted (Revisal, sec. 858), it would follow that the life estate would have determined before the happening of the event, namely, the death of the widow, upon which the remainder was to vest in the plaintiff. The widow would have lost

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her life estate, as the plaintiff would have recovered the place wasted, by virtue of the statute, but the interest in and the possession of the land would have vested in him under the judgment of the court declaring a forfeiture of the life estate, and not by virtue of the terms of the will, as it is evident the testator intended that the plaintiff should have no vested interest in the land until the death of the widow, and that intention of the testator must prevail. We have a case, therefore, where the life estate may be determined or destroyed before the happening of the event upon which the estate is limited to the plaintiff in remainder, and if we follow the rule as laid down in *Starnes v. Hill,* we must hold that the remainder to the plaintiff was contingent, and, therefore, that he cannot maintain this action.

Where an estate is limited to A for life, with remainder to B for life, and there is a forfeiture or surrender of the first life estate, it determines and the estate in remainder becomes immediately vested, as there is nothing in the limitation to prevent its vesting at once. But in our case, if the first life estate is determined by forfeiture, surrender or otherwise, and the life tenant survives its determination, the remainder cannot take effect, by the express words of the will, until the death of the widow, whereas the imperative rule of the law requires that the remainder must vest, that is, the contingency must happen, during the continuance of the particular estate or *eo instanti* it determines. The life estate is destroyed by the forfeiture resulting from the waste under the statute, and yet the event upon which the plaintiff is to take his estate in remainder has not happened.

The court below ruled in accordance with the views we have expressed, and finding no error in the judgment, we must affirm it.

Affirmed.

Cited: *Vinson v. Wise,* 159 N. C., 655.

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THE HIGHWAY COMMISSION OF VALLEYTOWN TOWNSHIP
v. C. A. WEBB & CO.

(Filed 27 May, 1910.)

1. Municipal Corporations—Bond Issues—Necessary Improvements—Legislative Restrictions—Constitutional Law.

The Legislature has the constitutional power and authority to prescribe the terms and conditions upon which municipal corporations may enter into a contract by which a debt is incurred and limit the amount to such sum as it deems necessary; and having done so, the municipality is without power to exceed the amount of the indebtedness prescribed by the act.

2. Same—Highway Commissioners.

A highway commission having been authorized by a legislatve act to improve the roads of its township, and, for that purpose, to issue coupon bonds of the township "for an amount sufficient, not exceeding $25,000," cannot issue an additional amount of bonds for the necessary purpose of completing the work undertaken, without authority from the Legislature to do so.

APPEAL by plaintiff from *Joseph S. Adams, J.*, at Spring Term, 1910, of CHEROKEE.

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

Dillard & Bell and T. H. Calvert for plaintiff.
No counsel for defendant.

WALKER, J. This case was submitted to the court below as a controversy without action, under the statute, to determine the validity of certain bonds proposed to be issued by the plaintiff, and which the defendants had contracted to purchase. They refused to pay for the bonds, upon the ground that the plaintiff had no power to issue them, and that, therefore, when issued they would be invalid. It appears from the case agreed that the plaintiff was incorporated by Laws 1905, ch. 210, and was vested with all the powers, rights, duties and authority of the board of county commissioners with respect to the public roads of Valleytown Township. By Laws 1909, ch. 237, the plaintiff was authorized to improve and macadamize the public roads of the said township, and for that purpose it was authorized to issue coupon bonds of the township "for an amount sufficient, not exceeding $25,000, to pay the necessary expenses of constructing and improving and macadamizing the public roads in the township, and to sell the same publicly or privately, at not less than their par value." Bonds to the amount of $25,000 were issued in accordance with the terms and provisions of the act of 1909, and were sold by the commission and the proceeds applied in constructing, improving and macadamizing the pub-
(711) lic roads in the township; but it was found that the amount realized from the sale of the bonds, namely, $25,000, was not sufficient to carry out the scheme of improvement contemplated by the commission. It was thereupon decided that additional bonds be issued to an amount not exceeding $75,000, and the defendants contracted to buy the same.

The question, therefore, is whether the commission has the power, under the law, to issue any additional bonds without the special approval of the Legislature. This question has been so recently decided, after a thorough investigation and full discussion by this Court, that it would seem to be now well settled that no such power resides in the commission.

While the expense of improving and macadamizing the public roads may be conceded, for the sake of argument, to be a necessary expense, we held in *Wadsworth v. Concord,* 133 N. C., 587, that wherever the debt of a municipality is to be incurred, even for necessary expense, it is within the province of the Legislature to prescribe the terms and conditions upon which municipal corporations may enter into a contract by which such a debt is incurred. This principle was approved in *Davis v. Fremont,* 135 N. C., 538. We recognized the correctness of the principle in the case of *Wharton v. Greensboro,* 149 N. C., 62. In the recent case of *Burgin v. Smith,* 151 N. C., 561, the subject was fully discussed by *Mr. Justice Manning,* and it was held by the Court that where the right to incur a debt, even for a necessary expense, was limited to a certain amount by an act of the Legislature, that amount could not be exceeded where the contract was an entire one; and we further held that the Legislature had the constitutional power to restrict or limit the amount of indebtedness to be incurred by a county or municipality, even for a necessary expense. The Court cited and approved *Hightower v. Raleigh,* 150 N. C., 569, in which we held that, "while it is within the province of the Court to determine what are necessary public buildings, and what classes of expenditure fall within the definition of necessary expenses of a municipal corporation, the authority for determining the kind of building which is needed, or what would be a reasonable cost for it, is not within the purview of the judicial authority, but is vested in the Legislature and the municipal authorities, and not in the courts."

We have held at this term, in *Ellison v. Williamston, ante,* 147, that the Legislature has the power to restrict the authority of a municipality to issue bonds. The case of *Burgin v. Smith* was approved, and it was said by *Mr. Justice Hoke,* when referring to the previous decisions of this Court upon the question now presented, that where the limit as to the amount of bonds is fixed by the Legislature in the act (712) authorizing them to be issued by the municipality, the latter cannot exceed that limit without further legislative sanction. It may be said generally that in all such cases the Legislature has plenary power to control the action of the municipalities in this State in the creation of any indebtedness, even for necessary expenses, and there is nothing in the Constitution which is in conflict with this statement of the law. When that instrument is read as a whole, it appears to have been the intention that the Legislature should have complete control and authority in such matters. We do not mean to say that the special approval of the General Assembly is required in order that a municipality may contract a debt for necessary expenses, but only to decide that where the Legislature does take action and restrict the right of

a municipality to contract a debt, even for necessary expenses, by limiting the indebtedness to a certain amount, it is only exercising power which is clearly recognized by the Constitution. There was no error in the ruling of the court, by which its decision was given against the plaintiff upon the case agreed.

Affirmed.

Cited: Trustees v. Webb, 155 N. C., 386, 388; *Comrs. v. Comrs.,* 165 N. C., 634.

T. C. McBRAYER v. R. M. HARRILL.

(Filed 27 May, 1910.)

Deeds and Conveyances—Mortgagor and Mortgagee—Registration—Original Parties—Executors and Administrators.

As between the original parties, the lien of an unregistered mortgage holds, and the personal representative of a deceased mortgagor stands in the shoes of the latter: *Hence,* the plaintiff holding an unregistered second mortgage on the lands of the defendant's intestate is entitled to his lien upon the funds derived from the sale in excess of the first mortgage, in preference to other creditors of deceased.

APPEAL by defendant from *Justice, J.,* at the August Term, 1909, of RUTHERFORD.

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

R. S. Eaves and B. A. Justice for plaintiff.
McBrayer, McBrayer & McRorie for defendant.

CLARK, C. J. This is an action by the plaintiff (appellant) to recover out of the defendant, administrator, and the surety on his administration bond a sum due by the defendant's intestate which (713) was secured by a second mortgage on realty, which mortgage was unregistered at the date of the debtor's death and remained so for some time after the order to sell the realty to make assets.

The appellant states in his brief: "The sole question before the Court is, Will a mortgage not recorded till after the death of the mortgagor create a lien from the date of its registration as against other simple debts?" But, in fact, no subsequent registration is necessary.

Revisal, 982, provides that a mortgage shall be a lien only from its registration. But as between the parties a mortgage or deed is valid without registration. *Wallace v. Cohen,* 111 N. C., 103; *Deal v. Palmer,* 72 N. C., 582; *Leggett v. Bullock,* 44 N. C., 283. The personal

representatives stands in the shoes of his testator or intestate, and the unregistered mortgage has the same lien as it had between the parties. The mortgaged property brought enough to pay both mortgages, over and above the costs of the sale. After paying off the costs of sale, including defendant's commissions on the sale and the taxes on the mortgaged property and the first mortgage, the surplus left should have been applied to the lien of plaintiff's unregistered second mortgage. It was a specific lien with priority over all other classes of debt (Rev., 87 (1), to the extent of the net proceeds of the realty covered by the mortgage. Jones on Mortgages (6 Ed.), sec. 509; Jones Chattel Mortgages, sec. 239, which are cited with approval, *Williams v. Jones,* 95 N. C., 504; *Hinkle v. Greene,* 125 N. C., 489. It seems that the personal representative of the debtor applied the proceeds of the sale of the realty, after paying off the amount of the first mortgage, to other claims, after notice of the plaitniff's unregistered mortgage. He was evidently under the erroneous impression that the plaintiff's mortgage being unregistered at the death of the mortgagor, the plaintiff had no specific lien. This was error. The judgment below is

Reversed.

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M. F. HASKETT v. TYRRELL COUNTY ET AL.

(Filed 27 May, 1910.)

1. Counties—Jail—Necessary Expense—Bond Issue.

A jail is a necessary county expense, and in the absence of statutory restrictions, the county commissioners may pledge the credit of the county in order to obtain one.

2. Same—Legislative Powers—Restriction—Retroactive—Previous Contract—Validity.

The county commissioners entered into a contract for the building of a jail as a necessary county expense; issued bonds for payment and sold them, receiving part payment and a check on a bank, until the payment of which they kept the bonds for security. The check was paid and the bonds delivered, but after the sale and before the physical delivery of the bonds the Legislature passed an act requiring the commissioners to advertise for bids on the jail, and annulled the commissioners' resolution to issue the bonds: *Held,* the contract for the sale of bonds was valid; the delivery in effect was made when payment, under the circumstances, was received, and the legislative act came too late to affect the transaction.

APPEAL from TYRRELL from the refusal of *Ferguson, J.,* to grant a restraining order, heard at chambers; plaintiff appeals.

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

Ward & Grimes for plaintiff.
I. M. Meekins for defendant.

CLARK, C. J. On 1 January, 1909, the county commissioners of Tyrrell passed a resolution that it was necessary to build a jail for said county, and contracted with the Stewart Jail Works to build the same for the sum of $6,895. On the succeeding day, said board contracted with the Stewart Jail Works, in order to raise funds to pay for said work, to issue $6,500 in 6 per cent bonds, *i. e.*, 13 bonds of $500 each, bond No. 1 to fall due 1 February, 1918, and one bond to fall due 1 February of each succeeding year till all of said bonds should be paid, for which bonds the said Jail Works should pay cash at par. On 1 March, 1909, I. M. Meekins presented to the commissioners a written request from the Stewart Jail Works to turn over to him said $6,500 of bonds for them, stating that he would pay cash for the same. Meekins on that day paid the commissioners $500 in cash and gave his check for $6,000 on a bank in Norfolk, Va., which was paid on presentation. The bonds were left with the county treasurer till the check was paid, whereupon the bonds were duly delivered, and are now held by an innocent purchaser for value. The $6,500 received for
(715) the bonds has been paid out from time to time to the contractors for building said jail.

On 2 March, 1909, the General Assembly ratified an act (Laws 1909, ch. 413) which prohibited the county of Tyrrell to contract for work on any public building without first advertising for bids, in the manner therein prescribed, and annulling the resolution of 2 February, to issue the bonds, and prescribing that bonds for such purposes should be issued only with the approval of a commission named in the act.

It was within the power of the General Assembly to restrict the county commissioners in incurring debt, even for necessary purposes (*Burgin v. Smith,* 151 N. C., 561), but the act ratified 2 March, 1909, came too late so far as this transaction is concerned. A jail is a public necessity and the county commissioners, in the absence of statutory restriction, had the power to make the contract of 1 February to build the same (*Burgin v. Smith, supra; Vaughan v. Commissioners,* 117 N. C., 432), and to issue bonds to raise money to pay for the work (*Commissioners v. Webb,* 148 N. C., 123). The contract for sale of bonds 2 February, 1909, was valid, as the statute then stood. The bonds were in effect delivered 1 March, when the commissioners received part cash and part in a check. The bonds were held as the property of the purchaser, as security for the payment of the check, which was paid on presentation.

Fraud vitiates everything, but none is alleged and proven in this case. The judge properly denied the motion for a restraining order and injunction.

Affirmed.

Cited: Jackson v. Comrs., 171 N. C., 382.

MRS. M. E. FORTUNE v. HAL HUNT.

(Filed 27 May, 1910.)

1. Deeds and Conveyances—Estates in Remainder—Remainderman—Direction to Pay Moneys—Interpretation of Deeds.

A deed conveying for the consideration of $800 lands to E., the widow of A., "during her widowhoow, then to her children, the heirs of A.," and in the warranty clause, "to said E. during her lifetime or widowhood, then to the said heirs of her husband, A., forever," directing payments to be made by W., one of the sons, a remainderman, in various amounts to certain of his brothers and sisters, and this being done, "the lands above described to belong to W. and his heirs forever," at the death of E., the life tenant: *Held,* (1) the children took as heirs in fee simple; (2) the warranty clause will be construed so as to vest in W. his part of the remainder interest in the lands upon the payment of the sums directed, and not to contradict the express terms of the deed by giving the interest of all the remaindermen to him upon his so doing; (3) should the payment by W. of the various sums directed be construed to cancel the previous parts of the deed, his failure to pay said charges for forty years would bar his recovery in this case.

2. Deeds and Conveyances—Repugnant Clauses—First Controls—Interpretation of Deeds.

When there are repugnant clauses in a deed, the first clause will control.

3. Appeal and Error—Partition—Costs—Discretion.

The taxing of costs among the parties to proceedings to partition land is left in the discretion of the court, and will not be reviewed on appeal. Revisal, sec. 1267 (7).

WALKER, J., and HOKE, J., concur in result.

APPEAL by defendants from *J. S. Adams, J.,* at February (716) Term, 1909, of RUTHERFORD.

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

McBrayer & McBrayer for plaintiff.
J. M. Carson for defendant.

CLARK, C. J. This is a petition for partition, transferred upon "issue of title" joined to the Superior Court. The deed executed in 1870 recites that in consideration of $800 the grantor conveys the property to "Elizabeth Hunt" (who was the widow of grantor's son, Alferia Hunt) "during her widowhood, then to her children, the heirs of said Alferia Hunt." Said children took "as heirs" in fee simple, for in the warranty clause the grantor warrants the premises to "said Elizabeth Hunt, during her lifetime or widowhood, then to the said *heirs of her husband,* Alferia Hunt, *forever,* in the following manner, to wit, William Hunt is to pay $50 to E. S. Hunt, $50 to John Hunt, $5 to Collace Hunt and to the heirs of my daughter Elizabeth Hunt, namely, Alsaline and Sarah Hunt, $50. The above obligation being filled, the lands above described to belong to William Hunt and his heirs forever."

It will be noted that the life tenant paid $800. It is to be presumed that the remainder, given by the grantor to his grandchildren, was worth much more. It is unreasonable to suppose that the grant to them in the conveying clause is revoked by the warranty clause, or that immediately after the warranty clause warrants the premises to "the heirs of Alferia Hunt *forever,*" it should immediately deprive them of it in favor of William Hunt upon payment by him to Collace Hunt of $5, on payment to A. W. Hunt of nothing, on payment to Elizabeth Hunt of $50, and $50 to her daughters. It is true that the warranty clause says that on payment of above sums "the *lands above de-*
(717) *scribed* to belong to William Hunt and his heirs forever." But if this is strictly construed, *au pied du lettre,* it gave to William Hunt the life estate of the widow as well as all the five shares of the remaindermen. This would contradict the entire conveying clause and all the first part of the warranty clause, both of which gave the land to the mother for life, with remainder to the five "heirs." The true meaning is, of course, that upon payment by William of the $155, William Hunt's interest in the lands, as already "described," is to go to him. The grantor was evidently charging his share with said $155, which $155 it is not even claimed that he has ever paid, though the deed was made forty years ago, and the other heirs have not sought to make him pay it, even now. Had the clause meant to cancel all the previous parts of the deed, William and his heirs are barred by the delay for forty years to pay the $155 and take the property.

We think his Honor correctly held that this conveyance was to the widow for life, with remainder to the five children named, "heirs of Alferia" (the deceased son of grantor), in fee simple; and one of them (John) being dead without issue, and the life tenant being lately deceased, the proceeds of the sale were properly decreed to be divided

into four shares, the heirs or assignees of each of the four taking one-fourth, as recited in the judgment. The recital in the warranty does not vitiate the conveying clause. It was a crude attempt to charge William Hunt's share with payment of the sundry amounts set out, but there is no judgment charging said sums, and neither side excepts. If there are repugnant clauses in a deed, the first will control. *Wilkins v. Norman,* 139 N. C., 40.

Rev., 1268 (7), provides that "all costs and expenses" in partition proceedings, whether by sale or actual division, shall be "taxed against either party or apportioned among the parties, in the discretion of the court." The taxation of costs is therefore irreviewable. The judgment is, in all respects,

Affirmed.

WALKER, J., and HOKE, J., concur in result.

Cited: *Midgett v. Meekins,* 160 N. C., 45.

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(718)

CAROLYN S. POWERS v. J. Q. BAKER ET AL.

(Filed 27 May, 1910.)

1. Deeds and Conveyances—Foreign Countries—Probate—Title of Officer—Clerical Error.

A deed made in England to the *locus in quo,* the evidence showing it was in fact probated before a United States Vice and Deputy Consul General there, but giving the title to the probate officer as "Née" and Deputy Consul, etc., will be adjudged "duly acknowledged," it appearing that the word "née" was a clerical error and intended for the word "vice," as indicated. U. S. Rev. Statutes, sec. 1674; Code, sec. 1245 (4).

2. Deeds and Conveyances—Foreign Countries—Probate—Validating Acts—Interpretation of Statutes.

Revisal, sec. 1024, validating acknowledgment of deeds in foreign countries before "vice consuls and vice consuls general," though not valid against a deed from the same grantor duly registered or a lien against the grantor acquired before the validating act (Laws 1905, ch. 451), is good as against the plaintiff in this action not claiming under the grantor therein.

3. Deeds and Conveyances—Probate—Defective—Married Women—Title.

The exception that there is a defect in the privy examination of a married woman to a conveyance made to the husband's land, is irrelevant in the lifetime of the grantor in an action involving the question of title thereunder.

4. State's Lands—Entry—New County—Grant—Location—Description Sufficient—Interpretation of Deeds.

It appearing that an entry of State's lands was made and definitely located and described as being in a certain county, wherein it was situated at the time, the validity of the grant is not affected by reason of the subsequent creation of a new county by the Legislature, including the *locus in quo*, and the description of the grant following the entry which called for the land in the original county; or by a clerical error in giving the number of the district as No. 6, when from a sufficient description it appears that District No. 9 was clearly intended.

APPEAL by defendants from *Ferguson, J.*, at Fall Term, 1909, of GRAHAM.

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

A. D. Raby, T. A. Morphew and Avery & Avery for plaintiff.
Dillard & Bell for defendant.

CLARK, C. J. The plaintiff claims title under a grant No. 3993, issued in 1877 to Joseph L. Stickney, upon an entry No. 6317, made by him 26 February, 1857. Stickney conveyed to the plaintiff by deed executed 1 January, 1880, in London, Eng. The first exception (719) is that the execution of this deed purports to have been acknowledged before "Joshua Nunn, *Née* and Deputy Consul General U. S. A." "Née" is clearly a clerical error in copying, for "Vice," for the evidence shows that Nunn at that time was "Vice and Deputy Consul General of U. S." in London. He signs himself in above capacity and *"ex officio* notary public." The judge of probate of Graham County adjudged that "the foregoing deed has been duly acknowledged," and ordered it to registration. The U. S. Rev. Statutes, sec. 1674, in force at that date, provides for "vice" and "deputy" consuls, and section 1750 confers upon every "consular officer" the "authority and powers of a notary public."

The Code of North Carolina, sec. 1245 (4), authorized such acknowledgments to be taken before "any ambassador, minister, consul or commercial agent of the United States." This would seem to include any consul, whether consul, consul general or vice or deputy, in view of U. S. statute, *supra*, giving to every "consular officer" the authority and power of a notary public. It was so held, *Mott v. Smith*, 16 Cal., 533; 1 A. & E. Enc., 506, n. 1. But to make the matter sure, the curative statute, Laws 1905, ch. 451, sec. 2, now Rev., 1024, validates acknowledgments before "vice consuls and vice consuls general." Validating statutes of this nature have always been within the power of the General Assembly, *Tatum v. White*, 95 N. C., 453, though such statute would not be valid against a deed from the same grantor duly regis-

tered, or a lien acquired against the grantor, before the validating act. *Barrett v. Barrett,* 120 N. C., 127. But the validation of the probate of a deed from Stickney to the plaintiff would be good against the defendant, who does not claim under Stickney.

The second exception is that there is a defect in the privy examination of the wife of Stickney. If so, she might claim her dower against the plaintiffs if she outlived her husband; but that is a matter that does not concern the defendant.

The land when entered was in Cherokee County. When granted it lay, as the jury finds, in Graham, because that county had been then cut off in 1872 from Cherokee. There is nothing irregular in this. *Harris v. Norman,* 96 N. C., 59, has no application. There the entry and surveys were of land in Watauga, when at the time of the entry and survey the land claimed lay in Mitchell, and had never been in Watauga.

The grant to Stickney is of "640 acres lying and being in the county of Cherokee, section No. ....., in District No. 6, Warrant No. 6317, it being part of the land lately acquired by treaty from the Cherokee Indians, and sold in obedience to an act of the General Assembly of this State, bounded as follows, viz.: Beginning on a Spanish (720) oak and hickory and runs west with Mauney's line 320 poles to a stake at the corner of E. L. Morron's survey, thence north 320 poles to a rock in Big Snow Bird Creek, thence east 320 poles to a cucumber, thence south to the beginning, as by the plat on file in the office of the Secretary of State." The court properly held that if in fact the land lay in Cherokee when entered and, by reason of the creation of Graham County, it lay in the latter county when granted, the fact that the grant, following the words of the entry, described the land as being in Cherokee would not invalidate the grant.

There was uncontradicted evidence that Big Snow Bird Creek is entirely in Graham County, and evidence identifying the beginning corner and the location of the land, as claimed by the plaintiffs; but it was in evidence that District No. 6 is still in Cherokee. The plaintiffs contended that this was a mere clerical error for No. 9, in which district their evidence showed that the beginning corner and boundaries actually lay, which district is now in Graham. The court charged the jury: "Now, if you should find from the evidence from the time the survey was actually made that the corner of 6317 was established at the point marked hickory, and the other corners made as called for in the deed at that location, then it would be your duty to answer the third issue yes." The defendant's exception to this charge cannot be sustained. *Higdon v. Rice,* 119 N. C., 623, and cases there cited. In *Houser v. Belton,* 32 N. C., 358, the jury were allowed to find that a

corner which in the deed read "east" of a certain creek should have been written "west." Here the real contention was over the location of the land, and the jury upon evidence and on a proper charge have found the issue for the plaintiffs.

No error.

Cited: *Byrd v. Spruce Co.*, 170 N. C., 433.

J. M. HARRISON v. W. H. ALLEN ET AL.

(Filed 27 May, 1910.)

Removal of Causes—Jurisdictional Amount—Damages—Injunction—Further Procedure.

Upon defendant's sufficient petition and bond, filed in apt time, to remove a cause from the State to the Federal court on the ground of diversity of citizenship, the court having found as a fact that the cause was wholly between citizens of different States and therein wholly determinable, the amount is sufficient when damages are claimed in the sum of $2,000, and an injunction prayed which undoubtedly extends the amount beyond that sum, and alleged by defendant in his petition to be in excess of that specifically demanded; and the case being ordered removed, as prayed, all further proceedings must be had in the Federal court—exceptions to orders made in the lower court, and the like.

(721) APPEAL by defendant from *Justice, J.*, at December Term, 1909, of BURKE.

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

J. F. Spainhour for plaintiff.
Avery & Ervin for defendant.

CLARK, C. J. It was error to refuse the motion of the defendants to remove the cause to the United States Circuit Court. The petition and bond were filed in apt time. The court finds as a fact that the controversy is wholly between citizens of different States and wholly determinable between them. The court further finds that plaintiff, in his complaint, asks damages in the amount of $2,000 and a permanent injunction against defendants, and that defendants claim in their petition for removal that the granting of this injunction will deprive them of property to the amount of $3,000 over and above the $2,000 claimed by plaintiff for damages accrued. Upon these findings defendants were entitled to a removal of the cause.

In *Corp. Com. v. R. R.,* 135 N. C., 81, the Court cites with approval *R. R. v. McConnell* (C. C.), 82 Fed., 85, which lays down the rule in equity cases as to removals: "It is the value of the whole object of the suit to complainant which determines the amount in controversy." In *Ayers v. Watson,* 113 U. S., 594 (a case decided when the jurisdictional amount was $500 instead of $2,000, as now), *Justice Bradley,* for the Court, says: "The plaintiff's petition demanded the recovery of the land and $500 damages. This was certainly a demand for more than $500, unless it can be supposed that the land itself was worth nothing at all, which will hardly be presumed. *Sheriff v. Turner,* 119 Fed., 231; *R. R. v. Conningham,* 103 Fed., 708; *Smith v. Bivins,* 56 Fed., 352."

In the case at bar the plaintiff seeks $2,000 damages and a permanent injunction. Plaintiff states in his complaint that, unless defendant is restrained, plaintiff's two tracts of land "will be rendered wholly worthless." He claims $2,000 for damages already done. That is as far as he could go without making his cause removable. But he goes further, and asks the benefit of a permanent injunction to prevent his lands from becoming "wholly worthless." If that relief is worth one penny, he has exceeded the jurisdictional amount, upon his own show- (722) ing.

"Where a bill in equity is filed to abate a nuisance or to set aside a deed, or for a decree giving other mandatory or preventive relief, it is the value of the property of which the defendant may be deprived by the decree sought which is the test of jurisdiction, and not the claim of plaintiff alone." *Baltimore v. Postal Co.,* 62 Fed., 502; 18 Enc. Pl. & Pr., 270.

"Where the object of a suit is to restrain the use of property by a party other than the owner, the right to use the property is the matter in dispute, and the value of such right determines the question of jurisdiction." *Oleson v. R. R.,* 30 Fed., 81.

"The sum or value of the matter in dispute which conditions the jurisdiction of a Federal court is the amount or value of that which the complainant seeks to recover, or the amount or value of that which the defendant will lose if the complainant obtains the recovery he seeks." *Cowell v. Water Co.* (C. C. A.), 121 Fed., 53.

"It is conceded that the pecuniary value of the matter in dispute may be determined not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief, or by the pecuniary results to one of the parties immediately from the judgment." *Smith v. Adams,* 130 U. S., 174.

"Where property itself, or its title, is in litigation, or some question *per se* affecting its enjoyment and possession, its value is the real matter in controversy, as distinguished from the claim of the contending parties." 1 Enc. Pl. & Pr., 726.

"In a suit in equity for an injunction, the value of the matter in dispute is that of the object of the bill, namely, the value to the complainant of the right for which he prays protection, or the value to defendant of the acts of which plaintiff prays prevention, together with the amount of damages which plaintiff claims he has already sustained, and prays to have awarded to him." 34 Cyc., 1235; *Scott v. Donald,* 165 U. S., 107.

The appellants ask that we also pass upon the exception for granting the injunction. But upon filing in apt time a valid petition to remove, the jurisdiction of the State court terminates. The remedy of the appellant is by motion in the Federal court to dissolve the injunction.

Reversed.

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(723)

GEORGE F. HARPER v. TOWN OF LENOIR.

(Filed 27 May, 1910.)

1. Cities and Towns—Streets—Grading—Lateral Support—Negligence.

When changing the grade of an existing street under the proper authorities of a town involves an excavation of 12 or 14 feet, and leaves the plaintiff's property abutting on an embankment of the height nearly perpendicular, with a soil showing a tendency to crumble away, a rotten, ashy kind of soil with a "good deal of isinglass," having no body, which will not stand as left after the excavation, a failure to provide a support for it is evidence of actionable negligence on the part of the town in doing the work, for which, if established, the plaintiff may recover damages.

2. Cities and Towns—Pleadings — Allegations — Injunctions — Negligence—Amendments—Procedure—Equity—Damages.

When a complaint alleging negligence in the town authorities for leaving plaintiff's abutting property unsupported after grading down the street, is used for the purpose of an affidavit in applying to the courts for a restraining order, it is not error in the trial judge to permit plaintiff to amend so as to allege damages arising from the negligent act complained of. Under the old system an award of damages was not infrequently allowed as an incident to some recognized ground of equitable relief, and this is undoubtedly true under our present procedure, which combines legal and equitable actions in one and the same jurisdiction and permits the joinder of "all causes of action arising out of the same transaction," etc. (Revisal, sec. 469.)

3. Cities and Towns — Streets — Grading — Lateral Support — Negligence — Damages.

The doctrine that the withdrawal of lateral support to adjoining lands is not actionable until damage accrues, and to the extent it has accrued, does not apply to further grading of an established street done under statutory authority. In such case an action lies only in case the work is negligently done and damages are awarded which are properly attributable to such negligence.

4. Cities and Towns—Streets—Grading—Negligence—Measure of Damages.

The work being done under statutory authority, and the injury regarded as permanent in its nature, the proper rule for the admeasurement of damages is the impaired market value of the property arising and likely to arise by reason of the negligence established, determined on consideration of the entire damages from the wrong—past, present, and prospective.

5. Same—Supporting Walls—Cost—Evidence.

In an action for damages against a town for negligently leaving plaintiff's abutting land, elevated by reason of grading down a street, insecure and unsupported, evidence of the cost of a retaining wall is competent as a fact relevant to the inquiry as to the amount of permanent damages recoverable, and under some circumstances might be adopted as determinative, particularly when such cost is reasonable and operates in restriction of the amount demanded.

6. Cities and Towns—Streets—Grading—Damages—Experts Upon the Facts—Evidence—Tax Value—Relevant Circumstances.

In an action for damages to plaintiff's abutting land caused by the negligence of defendant town in lowering a street in grading it, opinions of witnesses who have had a personal observation of relevant facts and conditions, and whose opinions are calculated to aid the jury in coming to a correct conclusion, are competent.

APPEAL from *Council, J.*, at November Term, 1909, of CALD- (724) WELL.

There was evidence tending to show that the plaintiff was the owner of a house and lot in the town of Lenoir, abutting on Main Street, and also on north Boundary Street; that the authorities of the town in charge of the matter, having determined on a change of grade of these streets, proceeded to dig down and lower Main Street, leaving plaintiff's property twelve or fifteen feet above the level of the sidewalk, and were about to commence like action on north Boundary Street, when plaintiff instituted the present suit.

While the record does not make the matter very clear as to what was the original purpose of the action, nor what part of the digging took place or damage was caused before the same was commenced, it seems to have been admitted on the argument that the suit was instituted to

restrain the authorities from going on with the work complained of, and that this having being stopped, no restraining order was issued and the suit was proceeded with without process of that character, and was tried on an issue as to negligence. It appears to have been further conceded that the change of grade along Main Street had been completed before suit commenced, but that some of the consequential damages had occurred from it since action brought, and evidence as to all such damage was admitted over defendant's objection. The original complaint, evidently drawn with a view of using same also as an affidavit on the hearing of an application for a restraining order, contained allegations of carelessness in the work on the part of the defendant, and was filed at the return term in 1908, and answer was then filed by defendant denying all material averments. At the trial term, in November, 1909, plaintiff was allowed, over defendant's objection, to amend his complaint, making a more extended and specific allegation of negligence on the part of defendant in doing the work complained of, and amended answer was then filed by defendant.

(725) There was evidence on part of plaintiff tending to show injury to the plaintiff's property by reason of alleged negligence, causing substantial damage to same, part of this damage occurring before commencement of the suit; and to all evidence tending to show damages subsequently occurring, defendant objected and properly filed exceptions.

On issues submitted, the jury rendered the following verdict:

1. Did the defendant have authority under the law to lower the grade of north Main Street in the town of Lenoir, and to remove earth therefrom up to the line of the plaintiff's property? Answer: Yes.

2. Was the plaintiff's property injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

3. What damage, if any, is plaintiff entitled to recover? Answer: $800.

Judgment on verdict for plaintiff, and defendant appealed.

George W. Wilson, W. C. Newland and Lawrence Wakefield for plaintiff.

W. A. Self and Mark Squires for defendant.

HOKE, J., after stating the case: On the issue as to defendant's responsibility, the court below, among other things, charged the jury as follows:

"Cities and towns have the right to improve streets and pavements for the public good, and in the exercise of this right may grade down streets and pavements to a lower or make them of greater elevation than the

property of adjacent or abutting property owners, and if in doing such work the town or city exercises (*a*) care and skill, that is, does the work properly, (*b*) then if injury results to the adjacent or abutting owners either by leaving their property below or above the grade so made, the property owners are not entitled to recover damages, even though their property is rendered of less value by reason of the work so done. Nor can property owners recover damages under such conditions because of the ingress or egress to their property being interrupted or hindered, nor can they recover because of the effect of such work upon the appearance of their property."

And again:

"Every one who owns real estate in a city or town that adjoins a public street or pavement holds it subject to the right of the city or town to grade such street or pavement down or to elevate it when in the exercise of the judgment of the authorities of the city or town it becomes necessary or advisable to do so. And where grading is done under such conditions, (*c*) and is done properly, that is, (726) with care and skill, and with due regard to the rights of the property owners, (*d*) then the law affords no protection to the property owners on account of injury to their property resulting from being left at a higher or lower level than the street or pavement, or on account of ingress or egress to such property being affected, or for any injury to the appearance of the property."

This is a very correct statement of the law as it obtains with us, where streets have been already established, and is in accord with numerous decisions of our Court on the subject. *Dorsey v. Henderson,* 148 N. C., 423; *Jones v. Henderson,* 147 N. C., 120; *Wolf v. Pearson,* 114 N. C., 621; *Meares v. Wilmington,* 31 N. C., 73.

Under the charge, and applying this principle, the jury have awarded plaintiff damages for the negligent manner in which this work was done by the town authorities, and unless there is reversible error appearing in the record, the judgment in his favor must be affirmed.

It was objected to the validity of the recovery, that the judge on the issue as to negligence imposed upon the defendant the duty of constructing a retaining wall for the protection of plaintiff's property; but on the facts presented we do not think the position can be sustained. The defendant certainly is not required to build a retaining wall in every case where an excavation of this character is made, nor is the cost of such a wall usually the correct measure of damages; but where, as in this case, the change of grade involves an excavation of 12 or 14 feet, leaving plaintiff's property abutting on an embankment of that height, nearly perpendicular and with a soil showing a tendency to crumble away, "a rotten, ashy kind of soil that has no body, has a

good deal of isinglass or mica in it, not a kind of soil that will stand in any such shape as that," we think the court correctly held that proper care required that some kind of proper support should have been provided; and a failure to provide such support was correctly imputed for negligence on the part of the town. This was substantially held in *Meares' case, supra,* and the decision was so interpreted in *Jones' case, supra;* both cases certainly giving decided intimation that the failure to build a retaining wall under the conditions indicated was properly held to be actionable negligence.

It was objected further, on the part of the defendant, that the action having been instituted primarily to obtain an injunction, and before any substantial damages had accrued from the alleged wrong, that the court had no power to allow an amendment demanding damages for a negligent breach of duty on the part of defendant, the position being
(727) that such an amendment amounted to an entire change in the scope and purpose of the action, and constituted reversible error under the authority of *Clendenin v. Turner,* 96 N. C., 421, and that class of cases.

As heretofore stated, it does not necessarily appear that it was the sole purpose of the action to obtain an injunction, and the original complaint contains averments which by correct interpretation amount to a charge of negligence, so that the facts here are against the defendant; but if it were otherwise, the position cannot be sustained. Courts of equity not infrequently award damages when such a demand is incident to some recognized source of equitable relief; and, under our system combining legal and equitable actions in one and the same jurisdiction, and permitting the joinder of "all causes of action arising out of the same transaction or transactions growing out of the same subject of action" (Revisal, sec. 469), it was not only permissible, but eminently proper that the plaintiff should be allowed to amend and claim the damages accrued and which were incident to the principal relief. Beach on Injunctions, sec. 10; Pomeroy's Equity Jurisprudence, secs. 112-237.

Making a short extract from the last citation: "Equity, therefore, assumes a jurisdiction to grant an injunction restraining the commission of actual or threatened waste; and having obtained jurisdiction for the purpose of awarding this special relief, which in many instances is not complete, the court will retain the cause and decree full and final relief, including damages, and, when necessary, an abatement of whatever creates the waste or causes the nuisance.

Again, it was contended that this is an action for withdrawal of lateral support; that such an injury is never considered as an actionable wrong until appreciable damage has actually occurred, and as

there was no evidence tending to show any substantial injury to plaintiff's property prior to the commencement of the suit, the recovery cannot be sustained. There seems to have been no more fruitful source of litigation than actions for wrongful withdrawal of lateral support by excavations on the part of an adjoining property owner, and there are many learned discussions in the reported cases on the subject. Considering these cases, it is undoubtedly established by the weight of authority that in actions of this character a claim for damages does not arise until there has been some appreciable injury to plaintiff's property as by an actual subsidence of the soil, and then only to the extent of the injury suffered. *R. R. v. Schwake,* 70 Kansas, 141, reported in 68 L. R. A., 673; *Larson v. Street Ry.,* 110 Mo., also reported in 33 Amer. St. Reports, 330; *Charless v. Rankin,* 22 Mo., 566, in 66 Amer. Decisions, 642, with full and learned notes by the editors of these (728) respective publications.

These decisions, however, cannot avail defendant, for the reason that in the respect suggested the principle upon which they rest does not apply with us to an action against a municipal corporation for damages caused by changing the grade of a street already established. In such case, as heretofore stated, damages can only be recovered if the work is negligently done and to the extent caused by such negligence. And this, too, is the answer to another and kindred exception noted by defendant to the admission of all testimony as to any damages accruing since action commenced. Recovery, then, being sustainable only for negligence in the case of a pure tort, the damages, as said in *Bowen v. King,* 146 N. C., at page 390, "will include all that are directly caused by the wrong and all consequential damages which are the natural and probable effect of such wrong, under the facts as they existed at the time the same is committed and which could be ascertained with a reasonable degree of certainty." Citing *Johnston v. R. R.,* 140 N. C., 574; *Charpe v. Powell,* 7 L. R., 1892, p. 253; 8 A. & E. Ency., p. 598; Hale on Damages, 34, 35 *et seq.;* and having been caused by a change of grade done, as a rule, under statutory authority and considered of a permanent nature, under our decisions there may and, ordinarily, must be but one recovery for the entire wrong.

This general principle is well stated by *Justice Avery* in *Ridley v. R. R.,* 118 N. C., 998, as follows:

"But even where the injury complained of, either by the servient owner or an adjacent proprietor, is due to the negligent construction of such public works as railways which it is the policy of the law to encourage, if the injury is permanent and affects the value of the estate, a recovery may be had at law of the entire damages in one action." Citing *Smith v. R. R.,* 23 W. Va., 453; *Troy v. R. R.,* 3 Foster (N. H.),

83; *R. R. v. Maher,* 91 Ill., 312; *Biger v. R. R.,* 70 Iowa, 146; *Fowle v. R. R.,* 112 Mass., 334, 338; *S. c.,* 107 Mass., 352; *R. R. v. Estorle,* 13 Bush (Ky.), 667; *R. R. v. Combs,* 10 Bush (Ky.), 382, 393; *Stodghill v. R. R.,* 53 Iowa, 341; *Cadle v. R. R.,* 44 Iowa, 1.

This is said by Mr. Elliott, in his work on Roads and Streets, to obtain very generally in determining the damages recoverable on a change of grade by the authorities. Speaking to this question, the author said: "SEC. 488. *All Damages Are Recoverable in One Action.* The change of grade is a permanent matter and all resulting injury must be (729) recovered for in one action, for the property owner cannot maintain successive actions as each fresh annoyance or injury occurs. The reason for this rule is not far to seek. What is done under color of legislative authority and is of a permanent nature, works an injury as soon as it is done, if not done as the statute requires, and the injury which then accrues is, in legal contemplation, all that can accrue, for the complainant is not confined to a recovery for past or present damages, but may also recover prospective damages resulting from the wrong. It is evident that a different rule would lead to a multiplicity of actions and produce injustice and confusion. It is in strict harmony with the rule which prevails, and has long prevailed, in cases where property is seized under the right of eminent domain.

"The presumption of the permanency of the grade once established is the only reasonable and defensible one, and it is, therefore, just to apply to such cases the rule which governs in cases where the improvement is permanent. It is not reasonable to apply the rule which prevails in cases where a nuisance is created which is capable of abatement or removal and is not a thing of a permanent nature. The general rule is that where the act complained of is of a permanent nature, all the damages must be recovered in one action, and this rule should govern in actions for injuries resulting from a change of grade."

Applying the principle, the entire damage for plaintiff's injury is recoverable in the present action, and from this it follows that the proper and only feasible rule for admeasuring the damage will be the impaired market value of the property arising, and which is likely to arise by reason of the negligence established.

We were referred to several decisions to the effect that the impairment of market value was not the correct rule, but rather the diminished value of the lot caused by subsidence of soil or other injury which has occurred: *Gilmore v. Dincoll,* 122 Mass., 199; *Magguire v. Grant,* 25 N. J. L., 356; but these cases were actions for wrongful withdrawal of lateral support by an adjoining proprietor, which did not necessarily involve the question of negligence, nor permit the award of prospective

damages. Even in actions of that character, there are authorities to the effect that the correct rule is the impaired market value of the lot, the estimate to include prospective damages. See note to *R. R. v. Schwake, supra,* in 68 L. R. A., 702, 703. But when, as in this case, the recovery is for negligence arising from an injury permanent in its character and under color of statutory authority, the true rule should undoubtedly be the impaired market value, to be deter- (730) mined on consideration of the entire damages arising from the wrong—past, present and prospective. Taking the charge as a whole, and in connection with the special instructions given at the request of the defendant, this was the principle laid down for the guidance of the jury in the present case, and these exceptions of the defendant are also overruled.

There were several other objections made to rulings of the court on questions of evidence. One of them was pointed to the admission of evidence as to the cost of a retaining wall. Both plaintiff and defendant seem to have offered testimony on that question, and we think the evidence was properly admitted. As we have endeavored to show, the general and better rule for the admeasurement of damages in these cases is the impaired value of claimant's lot by reason of defendant's negligence; but the cost of a retaining wall should, we think, be received as a fact relevant to the inquiry, and under some circumstances might be adopted as determinative, particularly when such cost is reasonable and operates in restriction of the amount recovered.

As we have said in *Bowen v. King, supra,* "A well-recognized restriction applying in case of tort or contract, and as to both elements of damages (direct and consequential), is to the effect that the injured party must do what he can in the exercise of reasonable care and diligence to avoid or lessen the consequences of the wrong, and for any part of a loss incident to such failure no relief can be had"; and a proper application of this principle in such cases might require that this cost of retaining wall should be accepted as controlling. See note to 68 L. R. A., 706, citing *Kopp v. R. R.,* 41 Minn., 310; *Richardson v. Webster City,* 111 Iowa, and other authorities. And the case in our own Reports of *Meares v. Wilmington, supra,* gives clear indication that the costs of such a wall, if reasonable, might under given conditions be accepted and acted on as the correct estimate in determining the damage.

Defendant excepted further that several witnesses were allowed to give their opinion as to the amount the lot was damaged. Evidence of this character from witnesses who have had personal observation of relevant facts and conditions, and whose opinion is calculated to aid the jury to a correct conclusion, is coming to be more and more re-

garded as competent, and its reception has been sanctioned and approved in several recent decisions of the Court. *Lumber Co. v. R. R.*, 151 N. C., 220; *Wilkinson v. Dunbar*, 149 N. C., 20; *Davenport v. R. R.*, 148 N. C., 287; *Tire Setter Co. v. Whitehurst*, 148 N. C., (731) 446; *Taylor v. Security Co.*, 145 N. C., 385.

Again, defendant excepted that a witness for plaintiff, testifying to the value of the lot in question, was allowed to say that the tax assessors were accustomed to assess such property at about one-third of its true value. This as an independent proposition would not be regarded as competent testimony, but on cross-examination of this same witness defendant's counsel had brought out the statement that the property in question had been assessed for taxation at a much lower value than plaintiff claimed, and this statement of the witness on redirect examination became in this way, we think, a relevant circumstance; certainly it will not be held for reversible error.

Considering the entire matter, we are of opinion that the cause has been carefully and correctly tried, and that no reversible error appears in the record.

No error.

Cited: Earnhardt v. Comrs., 157 N. C., 236, 237; *Ludwick v. Penny*, 158 N. C., 109; *Moser v. Burlington*, 162 N. C., 144; *Hoyle v. Hickory*, 164 N. C., 82; *Wood v. Land Co.*, 165 N. C., 369; *Brown v. Chemical Co., ib.*, 423; *Rhodes v. Durham, ib.*, 680; *Hoyle v. Hickory*, 167 N. C., 621; *Bennett v. R. R.*, 170 N. C., 391; *Webb v. Chemical Co., ib.*, 665.

GRACE ROBERTS v. WILLIAM M. PRATT.

(Filed 27 May, 1910.)

1. Judgments—Other States—Fraud—Pleadings.

Under our system of procedure it is permissible for a defendant to plead fraud in the procurement of a judgment rendered against him in the courts of a sister State.

2. Judgments—Other States—Common Law—Presumptions.

When relevant, the courts here will presume the existence of the common law in a sister State, in the absence of evidence, statutory or otherwise, bearing on the subject. The principle is not modified or affected by the fact that the sister State was formed from territory acquired from a country where the civil law prevailed (in this case, South Dakota, a part of Louisiana Purchase) if, at the time of the acquisition, it was an unoccupied portion of such territory, where no government or civilized

community prevailed, and where it was later settled chiefly by emigration from States where the common law prevailed as the basic principle of their jurisprudence.

3. Same—Fraud—Motion.

While it is very generally recognized that a final judgment can only be impeached for fraud by means of an independent action, this position does not necessarily prevail when a judgment has been procured by fraudulent imposition on the court as to the rendition, or where it has been entered contrary to the course and practice of the court. In such case, relief may ordinarily be obtained by motion in the cause, and this procedure, as a rule, is proper and allowable in all cases where courts of the common law would correct their judgments by writs of error *coram nobis* or *coram vobis;* and this is especially true under our present system combining legal and equitable procedure in one and the same jurisdiction.

4. Same.

In this case, where it appears that the plaintiff had recovered a judgment against defendant in the courts of South Dakota, said courts having jurisdiction of the cause and of the parties by personal service of process and the defendant appeared in said court and moved to set the judgment aside because the same was procured in fraudulent disregard of an agreement between plaintiff and defendant as to the course and conduct of the cause, and the Dakota court on the hearing entered judgment, "Motion of defendant to set aside judgment, denied": *Held*, that in the absence of evidence on the subject, the Court here should presume that the courts of South Dakota had jurisdiction to entertain the motion on the ground of fraud, and that its judgment worked an estoppel on defendant here.

5. Same—Counterclaim.

A defendant is not estopped by a final judgment against him of a sister State, for setting up a counterclaim to the judgment sued on there, but not included in the adjudication, though it might have been alleged and included; and it is not sufficient to show that the matters of counterclaim are being litigated in the court of the other State, having jurisdiction of the cause and the parties, as the pendency of another action for the same cause in another State is not, as a matter of law, a bar to judicial proceedings here.

APPEAL from *Webb, J.,* at February Term, 1910, of Mc- (732) DOWELL.

The plaintiff instituted suit in said county to recover on a judgment rendered in her favor against defendant in the State Circuit Court of South Dakota for the sum of $1,646, said court having jurisdiction of the cause and parties at the time the same was rendered.

Defendant answered, alleging fraud in procurement of said judgment, in that while said suit was pending in the Dakota court, there being some matters of account and adjustment between plaintiff and defendant, the defendant paid several hundred dollars on the claim, and plaintiff and defendant then and there had a written agreement that

no further steps should be taken in said suit without notice first served on defendant or his attorneys; that plaintiff, in violation of said agreement, had induced the Dakota court to proceed further and render the judgment sued on, without allowing credit for payments made, and without any accounting had, and by serving pretended notice on
(733) an attorney known by plaintiff not to represent defendant at the time, and this with a fraudulent design and purpose, etc.

Defendant further answered, and set up a counterclaim alleging, in substance, that plaintiff, through her attorney and agent for the purpose, one Edwin Van Cise, had collected from certain real estate belonging to defendant, situate in Deadwood, South Dakota, rents at the rate of $180 per year for about seven years next before action brought, for which said sum plaintiff was accountable to defendant.

Plaintiff replied, and averred that defendant should not be allowed to further plead fraud in the procurement of the South Dakota judgment, for the reason that defendant had appeared in said court and formally applied by motion to set aside said judgment on the ground of fraud and on the same facts as now contained in the answer, and on the hearing the South Dakota court denied the application.

Plaintiff replied further, that this counterclaim for $1,260 set up by defendant was involved and embraced in a suit now pending in South Dakota, said court having jurisdiction of the cause and parties, and in which Edwin Van Cise, as trustee, was seeking for a final account and settlement as trustee.

The present cause coming on for trial, and the plaintiff having offered in evidence the record of the South Dakota suit showing that plaintiff had regularly obtained the judgment sued on, and that defendant had moved to set aside the judgment for fraud, and the motion had been denied, the court, being of opinion that defendant was thereby precluded from further averment of fraud in impeachment of the South Dakota judgment, entered judgment as follows:

This cause coming on for hearing at this time before the undersigned judge, and a jury, and a jury having been impaneled, and the pleadings read, and the plaintiff having introduced in evidence the record of the proceedings, certified from the Eighth Judicial Circuit of the Circuit Court in and for Lawrence County, South Dakota, including the order to vacate the judgment theretofore rendered in that court, the same being the judgment sued upon in this action, with the affidavit of defendant, and the affidavits thereto attached (copies of the affidavits, etc., filed in the South Dakota court in the application to vacate said judgment), and the court being of the opinion that said order of said South Dakota court refusing to vacate said judgment is a bar to defendant in this action in this court:

It is now considered and adjudged by the court that the plain- (734)
tiff have and recover of the defendant judgment for the sum of said judgment, to wit, the sum of $1,666.45, with interest from the date of rendition, or from 2 June, 1908, until paid, together with the costs of this action, to be taxed by the clerk.

JAMES L. WEBB,
Judge Presiding.

Whereupon defendant excepted and appealed.

W. T. Morgan for plaintiff.
Pless & Winborne for defendant.

HOKE, J., after stating the case: Under our system of procedure it is permissible for a defendant to plead fraud in the procurement of a judgment rendered against him in the courts of a sister State. The question has been so recently and fully discussed in the case of *Mottu v. Davis,* 151 N. C., 237, that we do not think further comment is at this time either necessary or desirable.

We agree with his Honor below, however, that the defendant is precluded from availing himself of any such plea in the present case by the judgment of the South Dakota court denying his application to set aside the judgment on that ground, a position undoubtedly correct, if, on the facts as they now appear, the South Dakota court had jurisdiction to entertain and determine the question of fraud as presented in defendant's application. The proceedings were introduced showing that defendant had personally appeared in the Dakota court and moved to set aside the judgment for fraud, and an averment of substantially the same facts which he now sets up in his answer by way of defense, and that court had entered judgment denying the motion. No reasons for this denial are set forth in the judgment or elsewhere, and no evidence was introduced as to the law of South Dakota, statutory or otherwise, bearing on the subject. The question presented must, therefore, be decided on the principles of the common law, this being in accordance with the presumption ordinarily obtaining in such cases. *Moody v. Johnston,* 112 N. C., 798-801; *Brown v. Pratt,* 56 N. C., 202. South Dakota having been a part of the Louisana Purchase, it might be suggested that a different presumption would obtain; but considering the facts and conditions which prevailed when that State was settled, the principle is established as stated.

Thus in *Moody v. Johnston, supra,* it was said:

"In the absence of any judicial knowledge of the statutory law of another State, the courts of this State must act upon the presumption that the common law of England, as modified by statutes passed

(735) previous to our separation and so far as they are consistent with the genius of our republican institutions, prevailed in the original colonial States and all other States formed primarily by emigration from them."

It will be noted that the fact of emigration from a country having its jurisprudence based upon the common law and its doctrines is given weight rather than the territorial placing of the new country—that is, where the movement was principally into an unsettled portion of the new territory, and at a time when the same was without government of a civilized community. The distinction being very well stated in the case of *Norris v. Harris,* 15 Cal., 226, in which, among other things, it was held:

"2. In the absence of proof to the contrary, the common law is presumed to exist in those States of the Union which were originally colonies of England, or were carved out of such colonies.

"3. The same presumption prevails as to the existence of the common law in those States which have been established in territory acquired since the Revolution, where such territory was not, at the time of its acquisition, occupied by an organized and civilized community, but where the population, upon the establishment of government, was formed by emigration from the original States."

And on this subject, *Chief Justice Field,* delivering the opinion, said:

"A similar presumption must prevail as to the existence of the common law in those States which have been established in territory acquired since the Revolution, where such territory was not at the time of its acquisition occupied by an organized and civilized community; where, in fact, the population of the new State upon the establishment of government was formed by emigration from the original States. As in British colonies, established in uncultivated regions by emigration from the parent country, the subjects are considered as carrying with them the common law, so far as it is applicable to their new situation, so when American citizens emigrate into territory which is unoccupied by civilized man, and commence the formation of a new government, they are equally considered as carrying with them so much of the same common law, in its modified and improved condition under the influence of modern civilization and republican principles, as is suited to their new condition and wants."

Applying, then, the doctrine as indicated, courts administering justice according to course and practice of the common law, would not, as a rule, entertain a proceeding to disturb a final judgment by mo-
(736) tion made after the term in which it was rendered; to effect such a purpose a bill in equity was generally required. *Brinson v. Schultan,* 104 U. S., 410; *Mock v. Coggins,* 101 N. C., 366.

The rule stated, however, does not apply when on the face of the record, or otherwise, it was made to appear that a judgment had been entered contrary to the course and practice of the court, including also all cases where errors would be corrected by writs of error *coram nobis* or *vobis*. The scope and purpose of these writs, it seems, being the same, the former being the proper designation when the proceedings were heard in the Court of King's Bench, where the monarch was presumed to be present, and the second when the matter was carried on in courts of lesser dignity, but having full jurisdiction. The power to correct errors by means of these writs was very generally regarded as inherent in common-law courts of general jurisdiction; and, wherever it formerly prevailed, the same results may be obtained in modern practice by means of a motion. In systems like ours, where law and equity are combined, and relief administered in one and the same jurisdiction, the power is universally exercised, and, when not regulated by statute, there is a disposition and tendency to extend its scope and application. *Brinson v. Schultan, supra; Craig v. Wroth,* 47 Md., 281; 5 Enc. Pl. & Pr., pp. 27, 28, 30; 7 Enc. U. S. Supreme Court Rep., 592.

In 7 Enc., S. C. R., it is said: "It is believed to be the settled modern practice that in all instances in which irregularities could formerly be corrected upon a writ of error *coram vobis* or *audita querela*, the same objects may be effected by motion to the courts as a mode more simple, more expeditious, and less fruitful of difficulty and expense."

In Enc. Pl. & Pr., *supra,* the author says: "The office of the writ of *coram nobis* is to bring the attention of the court to and obtain relief from errors of fact, such as death of either party pending the suit and before judgment therein; or infancy, where the party was not properly represented by guardian, or coverture, where the common-law disability still exists, or insanity, it seems, at the time of the trial; or a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned."

And further: "Notwithstanding occasional statements that (737) the writ of *coram nobis* has 'fallen into desuetude,' and that 'redress obtained through its aid is now sought by motion,' it was a part of the common law received from the mother country, and, when not specially abrogated by statute, still remains a factor in modern practice.

"Proceedings of like nature, under whatever name, partake of the same underlying principles in practice."

In *Craig v. Wroth, supra,* it was held: "That the power to set aside judgments upon motion for fraud, deceit, surprise or irregularity in obtaining them, is a common-law power, incident to courts of record."

And these principles have been upheld and applied in numerous and well-considered decisions: *Tucker v. Jarress,* 59 Tenn., 333; *Crawford v. Williams,* 31 Tenn., 341; *S. v. Calhoun,* 50 Kansas, 523; *Marble v. Vanhorn,* 53 Mo. App., 361. See, also, *McIntosh v. Commissioners,* 13 Kan., 171; *Thompson v. Council,* 31 Or., 231; *Browning v. Roane,* 9 Ark., 354; *Bounse v. Barker,* 1 Greene, 263.

Our own statute on the subject, Revisal, sec. 513, limiting such application to a period of one year from rendition of the judgment, is, therefore, restrictive on the powers inherent in common-law courts of general jurisdiction.

The case of *Whitney v. Haggard,* 18 S. D., 490, while not introduced as evidence of the law of that State, in nowise militates against the position stated. In that case the allegations in impeachment of the judgment extended both to the judgment itself and the motion to set the same aside, and so is distinguished from the case before us, and this decision in *Whitney v. Haggard* gives clear intimation that the court had jurisdiction to dispose of the question presented by motion.

This being the doctrine applicable, on the facts as they now appear, the judgment of the Dakota court, as heretofore stated, denying defendant's application to set aside the original judgment on the ground of fraud, will preclude all further inquiry on that question, and render the latter judgment an estoppel of record as to all matters embraced in the pleadings which may be considered as material to its rendition. *Turnage v. Joyner,* 145 N. C., 81; *Mfg. Co. v. Moore,* 144 N. C., 527; *Tuttle v. Harrill,* 85 N. C., 456.

While we thus uphold his Honor's ruling in disallowing further inquiry on this issue of fraud, we think there was error in the judgment rendered, for the reason that the answer contains a demand against plaintiff by reason of rents received from property belonging to defendant, and for which plaintiff is alleged to be personally accountable. True, plaintiff replies that this is a matter now being litigated between
(738) these parties in the courts of South Dakota, having jurisdiction both of the cause and parties; but no proof was offered on this issue, and if there had been, the weight of authority is to the effect that the pendency of another action for the same cause in the courts of another State is not a bar to judicial proceedings here. 1 Enc. Pl. & Pr., 764; and our own Court has so held. *Sloan v. McDowell,* 75 N. C., 29.

It may be that on fuller investigation and inquiry the receipt of the rents can be shown to have been under such circumstances that they amount to a payment on plaintiff's note, and may be included in the

estoppel of record arising from the judgment; but the facts, as they thus far appear, are not such as to justify the Court in holding, as a matter of law, that these rents are necessarily disposed of by the judgment. The demand is set up in a counterclaim, and may be available as such under the decision of *Tyler v. Capehart,* 125 N. C., 64, in which it was held as follows:

"1. A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them; but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings.

"2. Although the present cause of action might have been set up as a second cause of action in a former suit, but was not, it was not actually litigated, and was not 'such matter as was necessarily implied therein,' the plea of *res judicata* will not avail."

The cause, therefore, must be remanded for further inquiry on defendant's counterclaim, and to that end the judgment is set aside and a new trial ordered.

New trial.

Cited: Harden v. R. R., 157 N. C., 247; *Roberts v. Pratt,* 158 N. C., 52; *Massie v. Hainey,* 165 N. C., 177; *Cox v. Boyden,* 167 N. C., 321; *Moody v. Wike,* 170 N. C., 544.

E. W. SANDERLIN v. A. B. LUKEN ET AL., BOARD OF DRAINAGE COMMISSIONERS.

(Filed 30 May, 1910.)

1. Water and Watercourses—Drainage Commissioners—General Scheme—Public Interest—Legislature—Delegation of Power—Constitutional Law.

Chapter 442, Laws 1909, authorizing the establishment of certain levee or drainage districts, is to present a scheme for the drainage of lowlands in which the public of the locality are generally interested, at once comprehensive, adequate and efficient, in which the rights of all persons to be affected have been fully considered and protected, and is not objectionable on the ground that it is for the benefit of private landowners and not for public purposes, and an unconstitutional delegation of legislative powers.

2. Same—Assessment—Reciprocal Advantages—Taxation—Vote of People.

While drainage districts created by legislative act are regarded as public *quasi*-corporations, partaking to some extent of the character of a governmental agency, the restrictive provisions established by the Con-

stitution upon municipal corporations in reference to the imposition of taxes both as to the amount and method, do not apply to the case of local assessments made and collected by a recognized method of apportioning the burdens according to the benefits received by the property affected, as, in this case, from the drainage of the lands in accordance with the provisions of chapter 442, Laws 1909, and no vote of the people on the proposition is required. Constitution, Art. VII, sec. 7.

3. Legislature—Delegation of Authority—Judicial Powers—Clerk of Court—Constitutional Law.

The authority and powers conferred by chapter 442, Laws 1909, upon the clerk of the court is not a delegation of legislative power and duty to the judicial department of the State prohibited by the Constitution, the powers and duties conferred being of a judicial nature in relation to the prescribed proceedings to be instituted.

4. Drainage Commissioners—"Lowest Responsible Bidder"—Discretionary Powers—Power of Courts.

Chapter 442, Laws of 1909, directs that the levee or drainage commissioners shall convene with the Superintendent of Construction and let the work contemplated to the "lowest responsible bidder," thereby conferring a discretionary power in adjudging the responsibility of the bidder, in all respects, with which the courts will not interfere in the absence of undue influence or a procurement by fraud.

(739) ACTION from CURRITUCK, heard by consent of parties before *G. W. Ward, J.*, at chambers, in Elizabeth City on 12 May, 1910.

The facts relevant to the controversy and the questions presented for decision are very well stated in the brief of counsel for appellant as follows:

"This is a case involving the constitutionality of the act of the General Assembly of North Carolina of 1909, ch. 442, authorizing the establishment of levee or drainage districts; of the validity of bonds which the commissioners of a drainage district, purporting to have been established under the act, have contracted to issue; and also of the action of the commissioners in letting the contract for the construction
(740) of the work to one who was not the lowest bidder, in view of the provision of the statute requiring the contract to be let to the 'lowest responsible bidder.'

"Under the statute a petition for the establishment of a drainage district in Currituck County was presented to the clerk of the Superior Court, and after proceedings duly taken was declared to be established as the Moyock District, No. 1. The plaintiff herein is a citizen, taxpayer and landowner within the boundaries of the district, and his lands have been assessed for the costs of the improvements to be made, under the classification of the lands embraced in the district according to the provisions of the statutes. The plaintiff has brought this suit

to restrain the commissioners of the drainage district from issuing bonds contracted for to defray the costs and expenses of the proposed improvements.

"Upon the case being brought to a hearing it was adjudged by the court below that the act of 1909, ch. 442, is valid and that the proceedings of the commissioners were regular, and that the plaintiff was not entitled to the injunction prayed for. An appeal was taken and has been duly perfected.

"The following propositions, involving the constitutionality of the statute and the validity of the bonds, and also the action of the commissioners in letting the contract, are submitted to the Court:

"1. Conferring upon the clerk of the Superior Court the power to establish a levee or drainage district is invalid as constituting a delegation of legislative power and duty to the judiciary.

"2. The statute shows upon its face that it is for the benefit of private landowners and not for a public purpose.

"3. As a levee or drainage district is a *quasi*-municipal corporation, and the work is not a 'necessary expense,' within the meaning of Art. VII, sec. 7, of the Constitution of North Carolina, a debt cannot be contracted 'unless by a vote of the majority of the qualified voters therein.'

"4. The contract should have been let to the lowest bidder in this case or the work should have been advertised for new bids.

"The foregoing propositions, so far as they involve the validity of the statute, are pointed to the provisions of the State and the United States Constitutions, declaring that the legislative, executive and supreme judicial powers of the Government ought to be forever separate and distinct from each other; that no person ought to be deprived of his property but by the law of the land or by due process of law; and that no municipal corporation shall contract any debt except for the necessary expenses thereof, unless by a vote of the majority of (741) the qualified voters therein."

J. H. McMullan and T. H. Calvert for plaintiff.
Pruden & Pruden and Brown Shepherd for defendant.

HOKE, J., after stating the case: The power of the Legislature to create special taxing districts for public purposes, separate and distinct from the ordinary political subdivisions of the State, such as counties, townships, etc., was declared and approved in *Smith v. School Trustees,* 141 N. C., 143, and like power to create special assessment districts has been upheld by the Court in several well-considered decisions. *Asheville v. Trust Co.,* 143 N. C., 360; *Busbee v. Commissioners,* 93

N. C., 143; *Commissioners v. Commissioners,* 92 N. C., 180; *Shuford v. Commissioners,* 86 N. C., 552; *Newsome v. Earnheart,* 86 N. C., 391; *Cain v. Commissioners,* 86 N. C., 8.

The principle has been frequently extended and applied to the creation of these drainage districts, and while certain statutes may have been declared void, this as a rule was because the rights of persons affected had not been in some way sufficiently safeguarded; and, so far as we have examined, the power of the General Assembly to enact legislation of this character has not been successfully questioned. *Adams v. Joyner,* 147 N. C., 77; *Porter v. Armstrong,* 139 N. C., 179; *Pool v. Trexler,* 76 N. C., 297; *Norfleet v. Cromwell,* 70 N. C., 634; *Fall Brook v. Bradley,* 164 U. S., 112; *Warts v. Hoagland,* 114 U. S., 606; *Land Co. v. Miller,* 170 Mo., 240; *Morrison v. Morey,* 146 Mo., 543; *Drainage District v. Mastin Co.,* 144 Cal., 209; *Cribbs v. Benedict,* 64 Kans., 555; *Bryant v. Robbins,* 70 Wis., 258.

Speaking to such legislation, and the reasons upon which it may be made to rest, *Rodman, J.,* delivering the opinion in *Norfleet v. Cromwell, supra,* said:

"The defendant takes higher ground, and contends that the act of 1795 was unconstitutional, because it took his property *for a mere private purpose.* It is admitted that that cannot be lawfully done, and the only question on this point is as to the character of the purpose: whether it was to the benefit of one or of a limited number of individuals only, or of such general and public utility as justifies a State in the exercise of its power of eminent domain.

"It is well known that in the Atlantic section of this State there are hundreds of thousands of acres of what are called swamp lands, which from the flatness of their surface and the filling up of the natural
(742) courses of drainage, if any ever existed, cannot be relieved of the water which ordinarily covers them, and made fit for human habitation and cultivation, except by cutting artificial canals from them into some convenient creek or river, which must necessarily pass through the intervening lands of the riparian proprietors. If these canals can be cut only by permission of the owners of the banks of the necessary outlets, this vast area of fertile land must remain for ages an uncultivated and unpopulated wilderness, and it will be entirely valueless to those who bought it from the State on the faith of its laws. An act which aims to remedy so great an evil, affecting so many persons now living, and so many more in the future, must be deemed one of general and public utility. In an agricultural view, it now benefits the whole population of that part of the State in which these swamps are found.

"The right of the State to condemn lands for drains rests on the same foundation as its right in cases of public roads, mills, railroads, cart-

ways, schoolhouses, forts, lighthouses, etc. In the case of public roads, it has never been doubted, and the weight of authority is decidedly in favor of its existence for the other purposes mentioned. Roads and aqueducts are classed together in the Institutes as servitudes of the same public character. In the swamps which the act in question chiefly affects, the canals are more important than the roads, as they must always precede them. The right to drain through the banks of a natural watercourse is exactly similar in character to the right to construct dykes or levees to keep their excessive waters from overflowing the adjacent lands, a right which has been recognized in the legislation of all countries from the most ancient times. Witness the dykes which protect the coast of Holland, the fens of Lincolnshire, the lands on the Mississippi and on the Potomac. Both purposes are classed together in our act of 1789.

"The act in question, and others of a like character respecting mills, etc., are of ancient date. They have been incidentally sanctioned by this Court in many decisions, and if their constitutionality has never been directly affirmed, it may be because it was never questioned. These acts are not peculiar to North Carolina. Acts concerning mills, similar to ours, exist in many of the States (Washburn Easements, 394 [329]), and respecting drainage, at least, in Massachusetts (Gen. Stat., ch. 148) and New York (2 Rev. St., 548; *People v. Nearing,* 27 N. Y. [13 Smith], 306)."

The legislation in question here comes well within the principle established by these cases. It has evidently been prepared with great care, and seems to present a scheme for the drainage of these (743) lowlands at once comprehensive, adequate and efficient, and in which the rights of all persons to be affected have been fully considered and protected.

When these drainage districts are created under statutes like this we are now considering, they are regarded as public *quasi*-corporations, partaking to some extent of the character of a governmental agency, and for general purposes of taxation in the ordinary acceptation of the term they come, as a rule, within the restrictions established by the Constitution upon municipal corporations in reference to the imposition of taxes both as to the amount and method. *Smith v. Trustees, supra;* but under our decisions these restrictive provisions as to taxation have been held not to apply to the case of local assessments, where, as in this case, such assessments are made and collected by some recognized method apportioning the burdens according to the benefits received by the property affected. *Busbee v. Commissioners, supra, Commissioners v. Commissioners, supra; Shuford v. Commissioners, supra; Newsome v. Earnheart, supra; Cain v. Commissioners, supra.*

In *Shuford's case* it was held:

"1. A tax levied only upon land under the provisions of the 'stock law' (Laws 1879, ch. 135) is not within the constitutional prohibition as to uniformity of taxation, and hence the assent of the qualified voters of the district affected is not necessary; and this, even though the act of the Legislature styles it a *tax.*

"2. It is regarded as a local assessment, and made, with reference to special benefits derived from the property assessed, from the expenditure; while taxes are public burdens, imposed as burdens, for the purpose or general revenue."

And in *Commissioners v. Commissioners,* 92 N. C., *supra, Chief Justice Smith,* on this subject, quotes with approval from the opinion in *Cain v. Commissioners,* as follows:

"As the greater burden is thus removed from the landowner he, as such, ought to bear the expense by which this result is brought about. The special interest benefited by the law is charged with the payment of the sum necessary in securing the benefit. This and no more is what the statute proposes to do, and in this respect is obnoxious to no just objection from the taxed land proprietor, as it is *free from any constitutional impediments.*"

The objection urged, therefore, that no vote of the people on the proposition was required or provided for by the statute, must be overruled.

Nor can the further objection be sustained that the act in question improperly undertakes to confer legislative power and duties on
(744) the clerk of the court, a judicial officer; for, on authority, the duties and powers conferred on the clerk by this statute are of a judicial nature.

Speaking to this question, in 10 A. & E., at page 239, it is said: "The better doctrine, however, seems to be that the duties of the municipal authorities in determining the necessity for sewers (dependent on a like principle), their location and their general plan, are of a judicial or *quasi*-judicial nature, while the work of construction and maintenance is ministerial." And authoritative decisions fully support the position as stated. *Johnston v. District of Columbia,* 118 U. S., 19; *Callen v. City,* 43 Kans., 627; *Bellingham Imp. Co. v. City,* 20 Wash., 53; *Wahoo v. Dickenson,* 23 Neb., 426. This disposes, we believe, of the objections urged against the validity of the statute.

It was further contended for plaintiff that, under the provisions of the law, the commissioners had no right to accept and award the contract to a higher bidder, but that "the contract should have been let to the lowest bidder, or the work should have been advertised for new bids"; but the language of the statute is that "They, together with the

superintendent of construction, shall convene and let to the lowest *responsible* bidder"; and the decisions are to the effect that when, by the clear import of this or similar language, a discretion is conferred, the action of the authorities will not be interfered with, unless the same was influenced or procured by fraud. *People v. Kent,* 160 Ill., 655; *Brick and Pav. Co. v. Philadelphia,* 164 Pa. St., 477; *Commonwealth v. Mitchell,* 82 Pa. St., 343; *Clapton v. Taylor,* 49 Mo. App., 117.

In *People v. Kent* it was held:

"1. The word 'responsible,' applied to an undertaking to pay money only, means *financial ability*; but in the statute for letting contracts for public improvements, which requires a 'responsible bidder,' it has the wider meaning of ability to respond to the requirements of the contract, having full regard to the subject-matter thereof.

"2. The requirement of a statute, that contracts for a public improvement shall be let to the lowest *responsible* bidder, does not require the letting of a contract to the lowest bidder upon the ascertainment of his *financial* responsibility only, but the term 'responsible' includes the ability to respond by the discharge of the contractor's obligations in accordance with what may be expected or demanded under the terms of the contract.

"3. The courts cannot interfere, in the absence of fraud, with the exercise of the official discretion of a public officer entrusted with the duty of awarding a contract, in determining whether a certain person was the lowest responsible bidder, after investigation of such per- (745) son's record in doing similar business before."

And in *Clapton v. Taylor, supra:*

"2. In letting contracts for street improvements the duty of city authorities is not wholly ministerial, but partakes sufficiently of a judicial character, in the absence of fraud or misconduct, to render their conclusion binding; and the law in regard to the letting of such contracts does not mean absolutely that the contract shall be given to the lowest bidder without regard to fitness, and the city authorities are presumed to have done, and not to have exceeded, their duty."

The case was submitted for our decision near the close of the term, with a request that an early decision be rendered, and we may have written somewhat hurriedly. Our investigations, however, have been very much facilitated by the excellent briefs submitted by counsel for both parties, and we desire to express appreciation of the commendable diligence they have shown in their preparation, and the great aid these briefs have been to the Court in reaching a satisfactory conclusion on the questions presented.

For the reasons stated, we are of opinion that the judgment of his Honor below must be

Affirmed.

Cited: *White v. Lane,* 153 N. C., 17; *Forehand v. Taylor,* 155 N. C., 355; *Trustees v. Webb, ib.,* 386; *Carter v. Comrs.,* 156 N. C., 187; *Comrs. v. Webb,* 160 N. C., 595; *In re Drainage District,* 162 N. C., 128; *Newly v. Drainage District,* 163 N. C., 26; *Shelton v. White, ib.,* 92; *Drainage Comrs. v. Farm Asso.,* 165 N. C., 700; *Lang v. Development Co.,* 169 N. C., 664; *Drainage Comrs. v. Mitchell,* 170 N. C., 325; *Leary v. Comrs.,* 172 N. C., 25; *Canal Co. v. Whitley, ib.,* 161.

W. A. HIPP v. CHAMPION FIBER COMPANY.

(Filed 30 May, 1910.)

1. Principal and Agent—Vice Principal—Evidence Sufficient—"Fellow-servant Act."

One who has the authority from the master to command, direct and discharge, or, by reason of his position, procure the discharge of servants of the master engaged in pursuance of the work they were employed to do, this known both to him and the other servants, stands as the *alter ego* of the master to them in respect of the employment, and renders the fellow-servant doctrine inapplicable; and "the test of the question whether one in charge of other servants is to be regarded as a fellow-servant or vice principal, is whether those who act under his orders have just reason for believing that neglect or disobedience of orders will be followed by dismissal." *Turner v. Lumber Co.,* 119 N. C., 387, cited and approved.

2. Same—Negligence—Evidence.

The plaintiff was engaged by defendant to work in a gang engaged in moving "economizers," weighing not less than 2,000 pounds, from a higher to a lower level, by pushing them upon skids from a higher platform until the implements were toppled over and allowed to slide to the lower level. This work was done under the order of defendant's vice principal, who alone was in position to have full view of the work as it progressed: *Held,* the defendant is liable in damages for a negligent order of its vice principal, proximately causing an injury to plaintiff's hand, in directing the plaintiff and another to place a skid and ordering those on the upper platform to shove the "economizer" on the skids before plaintiff could step back to a place of safety. *House's case, ante,* 397, and *Brookshire's case, ante,* 669, cited and distinguished.

(746) APPEAL from *Justice, J.,* at March Term, 1910, of BUNCOMBE.

Action to recover damages for alleged negligence of defendant company causing physical injury to plaintiff.

There was evidence tending to show that plaintiff, one of a squad of hands engaged in moving a lot of economizers, in shape something like a steam radiator, each weighing not less than 2,000 pounds, had his hand seriously hurt by reason of a negligent order given by Ben Wright, who was foreman in charge of the work.

The testimony on part of plaintiff tended to show that Ben Wright, at the time, was in the position of vice principal of defendant company.

This was denied by defendant, and the alleged negligence was also denied, and evidence offered in support of both positions.

The jury rendered the following verdict:

"1. Was the defendant, Champion Fiber Company, a corporation at the date of plaintiff's injury? Answer: Yes, by consent.

"2. Was the plaintiff, W. A. Hipp, injured by the negligence of the defendant, Champion Fiber Company, as alleged in the complaint? Answer: Yes.

"3. What damage, if any, is the plaintiff entitled to recover? Answer: $750."

Judgment on the verdict for plaintiff, and defendant appealed.

Craig, Martin & Thomason for plaintiff.
Martin & Wright for defendant.

HOKE, J., after stating the case: We find no reversible error in the record. Defendant is correct in the position taken, that our statute abolishing what is known as the Fellow-servant Doctrine applies only to railroads, and, therefore, does not affect the questions presented on this appeal. Under a proper charge, however, the jury have necessarily found that, by reason of authority expressly con- (747) ferred, the foreman, Ben Wright, was acting on this occasion as vice principal of defendant company, and the position referred to therefore becomes of moment.

On this question of vice principal, the court, among other things, charged the jury as follows: "Now, it is contended by the defendant that Ben Wright was a mere foreman, having charge and direction of the work simply and laying out the work and controlling the hands simply, in doing the work; that then he would be a fellow-servant and the corporation would not be liable for his negligence. In order to establish the relation between the corporation and Ben Wright of middleman or *alter ego,* it is necessary for the plaintiff to show, by the greater weight of the evidence, that the foreman, Ben Wright, occupied the position of the company in this respect, and that he had the right to give the order and to force obedience to it. Not necessarily that he had the right to hire hands and to discharge them, but that he had the power to command them, and that they understood that it was their duty to obey him; and if he had the right to report and procure their discharge, or "firing" of the hands, why that would be the same as if he could discharge them himself, and if they understood and he understood that that relation did exist, and the relation really did exist between them,

that he occupied the position of the company in the direction of the work, and that he had the power to report and bring about their discharge, why then he would be the *alter ego.*"

There was evidence on the part of plaintiff requiring an expression on this view of the case, and the charge is in substantial accord with the position of this Court on the subject, as expressed in *Turner v. Lumber Co.,* 119 N. C., 387, and in which it was held as follows:

"The test of the question whether one in charge of other servants is to be regarded as a fellow-servant or vice principal is whether those who act under his orders have just reason for believing that neglect or disobedience of orders will be followed by dismissal."

Considering the case in this aspect, that the foreman was vice principal of defendant company, we think there was ample evidence requiring that the question of actionable negligence should be submitted to the jury. The testimony on the part of plaintiff tended to show, and this the jury have accepted, that plaintiff, with a lot of hands, under the charge and direction of Ben Wright, the foreman and vice principal, were engaged in moving from a higher to a lower level a lot of economizers, weighing each not less than 2,000 pounds, and in
(748) shape something like a steam radiator. It was not a work of an ordinary kind, simple in its nature and placing, involving the principles applied in *Dunn v. R. R.,* 151 N. C., 313, or in *House v. R. R., ante,* 397, or *Brookshire v. Electric Co., ante,* 669, but to do it properly and in safety required careful management and supervision. The method pursued in the present case was for some of the hands to push the implement to the edge of the higher platform until it was nearly on a balance, and then when the skids were placed by other hands it was toppled over onto the skids and allowed to slide to the lower level. The hands who were shoving the economizer were not in a position to see those who were placing the skids, and, in the present instance, the foreman, who was standing to one side and in a position to see and observe both, and charged with the duty of giving careful directions, ordered the plaintiff and another hand to place the skids, and before they could step back he ordered the men on the upper platform to shove the economizer forward onto the skids, and plaintiff's hand was thereby caught and injured.

The jury, we think, were well justified in finding this to be a negligent order, and the case is one very similar to that of *Wade v. Contracting Co.,* 149 N. C., 177.

On the facts established by the verdict, this authority is decisive against defendant. There is

No error.

Cited: Beal v. Fiber Co., 154 N. C., 155, 157; *Russ v. Harper,* 156 N. C., 448.

J. S. BAILEY ET AL. v. W. R. HOPKINS ET AL.

(Filed 30 May, 1910.)

1. Reference—Findings by Judge—Conclusiveness.

The findings of fact by the trial judge upon the report of a referee under The Code, are conclusive on appeal when supported by any evidence.

2. Deeds and Conveyances—Descriptions—Meanderings of Stream—Straight Line.

The description in a grant of land being that it began at a certain point "at the State line near the mouth of Slick Rock Creek, and runs south 25 E. with said line 220 poles to a stake in said line," the ruling of the judge upon the referee's report that the line followed the meanders of the creek (the State line) and thus stops at a measurement of 220 poles, and not by measuring a straight line, was correct.

3. Reference—Modifications—Judgment—Corrections.

When a correction of a boundary line to lands in dispute is made by the judge in passing upon a referee's report which slightly modifies two or three other lines as found by the referee, which corrections the judgment of the court did not embrace, the final judgment entered must be made to conform to these modifications.

4. Judgments—Collateral Attack—Fraud—Motion in Cause—Unreasonable Delay—Estoppel of Record.

A deed to lands made in partition proceedings in pursuance of a decree therein, subsequently confirmed, cannot be attacked by strangers in another and independent action involving title, upon the allegation that the affidavit for the publication of the summons therein was defective, wherein there is no averment of fraud. The procedure is by motion in the cause, which should be made in a reasonable time (after twenty years held to be too late), and here the motion is precluded by the recital appearing of record that "service had been made by publication."

5. Parties—Conditions—Further Relief—Appeal and Error.

When parties are permitted by the trial court to file answer upon the recited condition that they be alone permitted to defend title to land as against the plaintiff, but should not raise an issue thereto as between themselves and their codefendants concerning which there is prior action pending in the Federal courts, a judgment in their favor against their codefendants is error.

6. Limitations of Actions—Cloud on Title—Assertion of Ownership—Interpretation of Statutes.

The ten-year statute of limitations as to the time of bringing an action to remove a cloud upon title to lands is not a bar to the action when the party has claimed title within that period.

APPEAL from *Peebles, J.*, at Fall Term, 1909, of GRAHAM.

Action to remove cloud from and quiet title to certain lands (749)

in Graham County to which both plaintiffs and defendants claim title by virtue of different grants from the State. From the judgment rendered both parties appealed.

The facts are stated in the opinion of the Court.

Adams & Adams, J. H. Merrimon and Avery & Avery for plaintiffs.
Davidson, Bourne & Parker, F. A. Sondley and Dillard & Bell for defendants.

CLARK, C. J. This is a contest over some timber lands, lying on Cheoah and Tennessee rivers in Graham County. The plaintiffs' chief claim is under an entry numbered 920 and the defendants' under entry number 1035. These entries were of "Cherokee" lands, (750) and were both made 1 June, 1853, the first day these lands were opened to entry. Entry 1035 embraced a large scope of country and specified that eight other entries already made were excepted. After excepting entry 920 and other entries, as found by the referee, the acreage left to the defendants, claiming under 1035, comes up to that specified therein.

The cause was referred to W. D. Turner, Esq., under The Code. He made a very full and careful report. Both sides filed numerous exceptions to the findings of fact and conclusions of law. His Honor overruled all the exceptions of the defendants, and sustained on plaintiffs' part one exception of fact and one of law, which action the defendants added to their exceptions on appeal to this Court.

Both sides filed exceptions to his Honor's judgment. The judge's findings of fact are conclusive, except when there is no evidence to sustain it, which we do not find to be the case here, and would not likely be the case, when the parties have been represented by so many able counsel and the cause has been twice argued fully and elaborated before the very careful and able and experienced gentlemen who were the referee, and the judge who reviewed his findings, in this case. This eliminates the bulk of the exceptions, for many of the exceptions to the conclusions of law are based upon the hypothesis of erroneous finding of facts or failure to find facts. *Thornton v. McNeely,* 144 N. C., 622; *Frey v. Lumber Co., ib.,* 759; *Henderson v. McLain,* 146 N. C., 329.

The record is very voluminous, some 800 printed pages, but after careful consideration of the many exceptions, on both sides, and with the aid of the oral argument and very full briefs, we do not think the judgment below should be disturbed, on either appeal.

The referee found that entry 920 lay within the limits of the outer boundaries of 1035, and that the plaintiffs and those under whom they claim had been in possession thereof under color of title for more than seven years, holding adversely. He also found that the defendants had

been in possession of that part of No. 1035 included in the boundaries found by him as its true boundaries, excluding the lands above held to be excepted from the limits of 1035, for more than seven years under color of title, holding adversely. He laid down on the map sent up the boundaries of both tracts as he found them to be, and the dividing line between 920 and 1035. The referee also made findings of fact and of law as to other tracts—1726, 1727 and 1969, as to which he was confirmed by the judge, and in which we find no error.

Upon plaintiffs' exceptions, his Honor found that the first (751) line called for should "follow the meanders of Slick Rock Creek (the State line) and stop at the end of 220 poles, and not by measuring a straight line." The language of the call was, "Beginning at a stake and three chestnuts on the bank of Tennessee River, at the State line near the mouth of Slick Rock Creek, and runs south 25 E, with said line 220 poles to a stake in said line." The evidence was that Slick Rock Creek is the State line. We concur with the judge. This was a boundary of another tract (Grant 611) and was only material as locating the beginning corner of No. 920. The correction thus made somewhat modifies, though not greatly, two or three lines of 920 as found by the referee. The plaintiffs contend that the judgment of the court did not embrace this modification. Of course, the final judgment entered below must conform to this change of boundary to accord with the findings of the judge.

The plaintiffs excepted to the finding of the referee, that he held that the judgment in the partition proceeding in *Bartlett v. Peet* (under the decree of sale and confirmation in which, and administrator's deed in 1882, the defendants claim) could not be collaterally attacked in this case, upon allegation that the affidavit for publication for the defendants therein (the heirs of W. H. Peet, who were nonresidents) was defective. His Honor, reversing the referee on this point, held that the proceeding was void. The point was elaborately discussed on appeal.

We think the court erred in overruling the referee, whose ruling upon this point we reinstate. This action was not brought to vacate the proceedings in *Bartlett v. Peet,* and the pleadings do not contain any averment of irregularity or invalidity, nor any reference in regard thereto. In fact, an attack upon it could only be made (unless for fraud, which is not alleged) by a motion in the cause, and not by an independent action, much less collaterally and incidentally in this action. *Rackley v. Roberts,* 147 N. C., 201; *Hargrove v. Wilson,* 148 N. C., 439. Besides, such proceedings, if taken in the proper mode, would be too late. The petition in *Bartlett v. Peet* was begun 30 March, 1871, the decree of sale was made 5 June, 1871, and the sale made was confirmed 9 July, 1881;

deed to the purchaser was made in December, 1881, and registered 11 February, 1882. Nearly a quarter of a century elapsed before this action was begun. It has been often held that an attack is not brought within a reasonable time after the lapse of twenty years. *England v. Garner,* 90 N. C., 197; *Yarborough v. Moore,* 151 N. C., 116.

(752) There are no merits, for the order of sale was based upon a valid judgment against the deceased. Even if the attack had been made by a proper party, in a reasonable time, and merits had been shown, the record here recites that "service had been had by publication." *Smathers v. Sprouse,* 144 N. C., 637; *Harrison c. Hargrove,* 120 N. C., 96. Nor could the plaintiffs in this action take steps to impeach a proceeding to which they are strangers.

There is further error in the ruling of the judge as to said tract 1969 in that he held that the Gilberts held an undivided one-half interest therein. The Gilbert heirs had been permitted at Fall Term, 1907, to file an answer, by order of *Judge Cooke,* on the condition recited therein that they should only defend the title as against the plaintiffs, but should not raise an issue as between themselves and their codefendants, as to which litigation was already pending when this action was begun, and is still pending in the United States Circuit Court, and this Court leaves that point undecided.

As to the plea of the ten-year statute of limitations to an action to remove cloud upon title (Laws 1893, ch. 6), if the defendants had not again claimed title within ten years the bar would be good. As they have, the statute does not apply, and it is immaterial that they also made such claim before the ten years. A landowner cannot be expected to bring action against every man who, while not in possession, shall declare he claims an interest in the property, under penalty to the owner after the lapse of ten years, of being barred of action for a later assertion of title.

We have not failed to consider any of the numerous questions which have all been so earnestly pressed upon us. But most of them are eliminated by the findings of fact, and we do not consider it necessary to discuss others.

The appellants in each case will pay their own costs.

In plaintiffs' appeal, affirmed.

In defendants' appeal, modified and affirmed.

Cited: McDonald v. Hoffman, 153 N. C., 256; *Drainage District v. Parks,* 170 N. C., 440; *In re Inheritance Tax,* 172 N. C., 175; *McGeorge v. Nicola,* 173 N. C., 710.

J. N. YEATS v. R. F. FORREST.

(Filed 25 February, 1910.)

1. Issues Submitted—Harmless Error.

Though the court refused correct issues tendered by defendant, if it appears that the error was harmless, the result will not be disturbed on appeal.

2. Trespass—Issues—Evidence.

This action of trespass was correctly made to turn upon the location of a certain line, and as there was plenary evidence of trespass by defendant, there was no error in rendering judgment against him upon the issues, which were clearly and fairly submitted to the jury.

APPEAL from *Ward, J.*, December Term, 1909, of BEAUFORT. (753)

Issues tendered by defendant:

1. Is the plaintiff the owner and in possession of the land in controversy?

2. Has defendant entered and trespassed thereon, as alleged?

3. If so, what damage has plaintiff sustained thereby?

Issues submitted by the court:

1. Is the plaintiff the owner in fee and entitled to the possession of the land located on the plat between the red and green lines? Answer: "Yes."

2. Did defendant enter on said land and cut timber and carry off, as alleged? Answer: "Yes."

3. What are plaintiff's damages therefor? Answer: "$21.21."

From the judgment rendered, the defendant appealed.

Ward & Grimes for plaintiff.

Small, MacLean & McMullan for defendant.

PER CURIAM. Strictly speaking, the issues tendered by defendant were the correct issues arising upon the pleadings in this case, but we are unable to discover that any harm came to defendant because the first issue, as formulated by him, was not submitted.

The defendant tendered certain prayers for instruction, and those of them given by the court made the case turn solely upon the location of the Dowty or Gurganus line and recognize the fact that the plaintiff's land is on one side and defendant's land on the other side of that line.

No point is made that there is no evidence of trespass by defendant on plaintiff's side of the line as located by the jury, the evidence as to that being plenary.

The matter in controversy was brought down to the location of the Dowty and Gurganus line, and the jury so instructed. This was submitted to the jury fairly and clearly, and we find no merit in the exceptions to the evidence or the charge.

No error.

Cited: *S. c.*, 153 N. C., 17.

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(754)

R. L. SMITH ET AL. v. F. J. FRENCH.

(Filed 9 March, 1910.)

Issues Objectionable—Harmless Error—Purchasers at Own Sale—Accountability.

Upon examination of the record on appeal, no substantial error was found, when there was an issue to which there was no exception, being objectionable but clearly understood in connection with the charge, and evidence that plaintiffs' agent purchased a part of the property at their own sale, making them accountable for its true value.

APPEAL by plaintiffs from *O. H. Allen, J.*, November Term, 1909, of CRAVEN.

Moore & Dunn for plaintiff.
E. M. Green and W. D. McIver for defendant.

PER CURIAM. This case was before the Court at a former term, and is reported 141 N. C., 1.

Issues were submitted by his Honor, to which we find no exception. While the form of the fourth issue is objectionable and somewhat indefinite, yet, taken in connection with the charge of the judge, we think the jury fully understood what was the real question submitted.

There is evidence in the record that plaintiffs' agent purchased a portion of the property at their own sale, thereby making plaintiffs accountable for its true value.

We have examined the several exceptions to the evidence and the charge and are of opinion that no substantial error was committed which necessitates another trial.

No error.

Cited: *Gavin v. Matthews, ante,* 196.

HENDERSON-JARRETT COMPANY v. BUILDING AND LUMBER COMPANY.

(Filed 9 March, 1910.)

Verdict—Counterclaim—Issue Unanswered — Appeal and Error — Harmless Error.

In an action involving a claim for damages for plaintiff and a set-off by defendant, an issue being submitted as to each: *Held*, no reversible error arose from the failure of the jury to answer the issue upon the set-off, and judgment accordingly, it appearing in this case that the jury had considered the second issue in answering the first one.

APPEAL from *Cooke, J.*, at April Term, 1909, of PITT. (755)

These issues were submitted to the jury:

1. In what amount, if any, is the plaintiff entitled to recover of the defendant in this action? Answer: Yes; $1,000.

2. In what amount, if any, is defendant entitled to recover of the plaintiff on account of its counterclaim, set out in its answer?

The jury answered the first, but did not answer the second issue.

The court rendered judgment for plaintiff, and defendant appealed.

Moore & Long for plaintiff.
Skinner & Whedbee for defendant.

PER CURIAM. We have examined the several assignments of error of the defendant, and are of opinion that no error was committed upon the trial below which is of sufficient importance to justify us in directing another trial.

The form of the first issue is such that it is evident that the jury considered the set-offs claimed by defendant under that issue.

Taking the charge as a whole, and from the verdict of the jury as it stands, it becomes apparent that the jury did consider the set-off and claims of the defendant, and reduced the amount of the recovery of plaintiff to $1,000, and in doing so they could not have done other than consider the matters in evidence under the second issue. This is doubtless the reason the experienced judge who tried this case did not send the jury back with instructions to answer the second issue.

A consideration of the entire record convinces us that substantial justice has been done upon the trial and that no reversible error has been committed.

No error.

D. H. TRUELOVE v. W. B. NORRIS.

(Filed 23 March, 1910.)

1. Appeal and Error—Laches—Motion to Dismiss.

Transcripts of cases on appeal should be docketed in the Supreme Court, under Rule 5, seven days before the beginning of the call of the district; and if not, the appeal may be dismissed under Rule 17. The appellant having failed to print and file his brief by the following Saturday, appellee could have filed his motion to dismiss with the clerk on that ground under Rule 34.

2. Attorney and Client—Same—Duty of Attorney.

It is the duty of appellant to see that the transcript of the case on appeal is sent up in apt time, docketed, printed, and the brief prepared and printed, and upon his failure to do so without a sufficient legal excuse, the case will be dismissed on proper motion made by the appellee.

3. Appeal and Error—Laches—Clerk's Fees—Motion to Dismiss.

The mere fact that appellant tendered payment to the Superior Court Clerk of his fees for transcript on appeal, and the clerk said he would send up the transcript without payment, that the bond was good, etc., is no sufficient legal excuse for the failure to docket under Rule 5.

4. Appeal and Error—Laches of Attorney—Remedy.

The appellant's attorney is his agent to attend to the perfecting of the appeal, and his remedy is against the agent in event of loss by the latter's laches.

(756) APPEAL by plaintiff from *W. R. Allen, J.*, at November Term, 1909, of HARNETT Superior Court.

The facts are stated in the opinion of the Court.

L. B. Chapin for plaintiff.

E. F. Young and N. L. Godwin for defendant.

PER CURIAM. Motion to docket and dismiss under Rule 17 for failure to send up transcript in proper time. Also to dismiss under Rule 30 for failure to print record, and under Rule 34 for failure to print appellant's brief by noon of Saturday before the call of the district to which this appeal belongs. The appellant's counsel opposes these motions, and asks to docket the appeal now and to continue the cause.

It appears that at November Term, 1909, of Harnett, there was a motion to set aside a judgment which had been rendered at the preceding term. By consent, judgment was to be entered out of term, as of November term. On 10 January, 1910, the judgment setting aside the previous judgment was filed. By agreement of counsel, the record was to constitute the case on appeal and time was allowed till 10 February to file appeal bond, which was done.

The transcript should have been docketed here under Rule 5, by 10 a. m., 8 March, *i. e.,* seven days before the beginning of the call of the district to which the case belongs. This not being done, the appellee could have then docketed and moved to dismiss, and as the appellant's brief was not printed and filed with the clerk by noon of the following Saturday, the appellee could have then filed his motion in the clerk's office to dismiss on that ground. *Vivian v. Mitchell,* 144 N. C., 472; *Cozart v. Assurance Co.,* 142 N. C., 523; *Brober v. Justice,* 138 N. C., 21.

Appellant's counsel files his affidavit that he asked the clerk (757) to send up the appeal and said to him that if he wanted his fees he would pay them in advance, and the clerk said the bond was good and he would send up the transcript. The clerk says he has no recollection of such conversation. But it is immaterial how that may be. As we said, in *Pain v. Cureton,* 114 N. C., 606, even if appellant had paid the clerk's fees for the transcript, he could not "thereafter leave the appeal to take care of itself like a log floating down a river or corn put into the hopper of a mill." The appellee has rights, and among them the right to have the appeal dismissed if not docketed in the prescribed time—unless the appellant is without laches. It was the duty of the appellant not merely to ask the clerk to send up the transcript, but to see that it was sent up in apt time, docketed, printed, and brief prepared and printed. The counsel is merely the agent of appellant in the duties of sending up, docketing and printing the transcript, and his negligence is that of the client. This has been often held. *Vivian v. Mitchell,* 144 N. C., 477, citing *Calvert v. Carstarphen,* 133 N. C., 26, 27; *Edwards v. Henderson,* 109 N. C., 84.

Neglect could scarcely have been greater than in this case. The appellant knew not only that the transcript should have been sent up before 10 a. m., 8 March, but docketed by that time. He took no steps to ascertain that these things were done. He knew that, in addition, his brief must be prepared, printed and filed by noon of the Saturday following, and that the transcript must also be printed. He took no steps to these ends.

If an appellant is damaged by the negligence of his agent in these matters, his remedy for any loss is against his agent. The appellee cannot be deprived of his rights by the negligence of the appellant or his agent.

Appeal dismissed.

Cited: Hawkins v. Tel. Co., 166 N. C., 214.

D. L. HEWITT AND WIFE v. SAMUEL BECK ET AL.

(Filed 23 March, 1910.)

1. Appeal and Error—Failure to Docket—Laches—Discretion of Court.

Upon failure of appellant to docket his case on appeal as required by Rule 5 of the Supreme Court, the appellee may move to docket the certificate and dismiss under Rule 17 (unless a sufficient legal excuse is shown by the appellant for his delay) and therein the Supreme Court has no discretionary power.

2. Appeal and Error—Failure to Docket—Laches—Certiorari.

It is no sufficient excuse for the appellant's failure to docket his appeal under Rule 5 of the Supreme Court that the case was delayed in being settled and that the clerk was too busy with a term of court to make out the transcript, as it was the duty of appellant to have moved the Supreme Court in apt time for a *certiorari*, and to have seen to the copying of the transcript.

3. Appeal and Error—Failure to Docket—Subsequent Term—Laches.

When an appeal is not docketed in accordance with Rule 5, it is too late to do so at a subsequent term of the Court.

4. Appeal and Error—Failure to Docket—Laches of Attorney—Client's Responsibility.

Appellant's counsel is his agent or attorney in fact for the purpose of perfecting his appeal, and the principal is responsible for the negligence of the attorney.

(758) APPEAL from *Guion, J.*, at January Special Term, 1910, of SAMPSON.

The facts are stated in the opinion of the Court.

Cranmer & Davis and Meares & Ruark for plaintiff.
C. E. Taylor for defendant.

CLARK, C. J. This case was tried at August Term, 1909, of Brunswick, which began 9 August. It should have been docketed here at last term. Not being docketed when the district was called at this term, the appellee moved to docket the certificate and dismiss under Rule 17. On behalf of the appellant there is presented to us a letter from his counsel to the clerk of this Court to ask this Court to use its discretionary power to refuse the motion, and enclosing the clerk's certificate "that the case on appeal" settled by the judge did not reach the clerk till 1 March, and he was too busy then, preparing for his coming term of the Superior Court (which began 21 March), to prepare the transcript, though the appellant had paid his fees and filed the appeal bond.

This appeal should have been docketed at last term, by 5 October, *i. e.*, "seven days before the beginning of the call of the district to which

it belongs." Rule 5 of this Court, 140 N. C., 655. If, without fault of appellant, the judge had not then settled the case on appeal, it was the duty of the appellant to have filed then a transcript of the record proper and have asked for *certiorari* at that term. It would be too late at this term. *Pitman v. Kimberly,* 92 N. C., 562, and numerous cases, citing that case in the Annotated Edition.

It is too late to docket the appeal at this term, unless consent of appellee was shown. *Porter v. R. R.,* 106 N. C., 478, where the rules governing this matter are stated. See, also, cited cases in the Annotated Edition.

"Compliance with the regulations as to appeals is a *condition* (759) *precedent* without which (unless waived) the right of appeal does not become potential. Hence it is no defense to say that the negligence is the negligence of counsel and not the negligence of the party." *Vivian v. Mitchell,* 144 N. C., 472, citing *Cozart v. Assurance Co.,* 142 N. C., 523; *Barber v. Justice,* 138 N. C., 21.

For this purpose, counsel is the agent, or attorney in fact, of his client, and his negligence is the negligence of the appellant. The appellee has a legal right to have his judgment executed if the rules regulating appeals are not complied with, and it is not "discretionary" with the Court. Sufficient legal excuse must be shown.

The clerk of the Superior Court received the "Case on Appeal," so he states, 1 March. As the appeal was required to be docketed here (if this had been the proper term), by 15 March, and his fees were paid, the transcript should have been copied in that time, as there were many who could have been employed to copy the transcript. If the appellant had lost his appeal by the clerk's failure to make out the transcript promptly, the clerk under some circumstances would be liable to indictment. *S. v. Deyton,* 119 N. C., 881; *Fain v. R. R.,* 130 N. C., 30; and he might have been liable to an action for damages also—but for the fact that the appellant, not having docketed the transcript of the record proper at last term and applied then for a *certiorari,* had already lost the right to docket at this term. The motion to dismiss under Rule 17 is allowed.

Appeal dismissed.

Cited: Hawkins v. Tel. Co., 166 N. C., 214; *S. v. Goodlake, ib.,* 436; *Transportation Co. v. Lumber Co.,* 168 N. C., 61.

DREWRY-HUGHES COMPANY v. B. & S. McDOUGALD, L. A. MONROE.

(Filed 13 April, 1910.)

Partnership—Dissolution—Notice.

It appearing from the record that defendant Monroe had given due notice to plaintiff's mercantile agency that he had dissolved or failed to perfect his contract of partnership with the other defendant, and that the plaintiff had not, at that time, become a creditor of the firm so as to require direct notice, this appeal is controlled by the former decision. 145 N. C., 286.

(760) APPEAL from *W. J. Adams, J.*, at October Term, 1909, of SOTLAND.

This is an action brought to recover of the defendants the amount claimed to be due plaintiffs by defendants. Judgment was rendered against the plaintiffs and in favor of the defendant L. A. Monroe, and thereupon the plaintiffs appealed.

The following issue was submitted: Is L. A. Monroe liable with the firm of B. & S. McDougald for the said debt? Answer: No.

McLean & McLean, J. G. McCormick for plaintiff.
M. L. John, W. H. Neal for defendant.

PER CURIAM. This cause was before this Court at Fall Term, 1907 (145 N. C., 286). We have examined the record and are of opinion that there was ample evidence to go to the jury that defendant Monroe had given Dun & Co. due notice that he had dissolved or failed to perfect his connection with the McDougalds. The plaintiff had not at that time become a creditor of the McDougalds, and therefore no direct notice to it or its agents could be given.

That is really the only point in this case. We think the exceptions to the evidence are untenable and that the court fairly and correctly placed the matter before the jury.

No error.

S. H. USURY v. M. L. WATKINS AND SOUTHERN RAILWAY COMPANY.

(Filed 20 April, 1910.)

Carriers of Passengers—Freight Trains—Customary Jolting—Negligence.

It appearing in this case that the injury complained of was proximately caused by the jolting and jarring usual to freight trains, upon which plaintiff was a passenger, there was error in rendering judgment against the defendant railway company.

USURY *v.* WATKINS.

APPEAL from *Biggs, J.*, at November Term, 1909, of GRANVILLE.

Action for personal injury against defendant Watkins, as the engineer, and the Southern Railway, as the common carrier operating a freight train with passenger coach attached, between Oxford and Keysville.

Plaintiff was a passenger, and, while standing up near car door when train had stopped at a water tank, the train was started, and as plaintiff testifies, he was thrown down and injured.

At conclusion of all the evidence plaintiff stated he did not (761) desire or ask that an issue be submitted as to Engineer Watkins.

There was a verdict and judgment against the defendant railway company, from which it appealed.

B. S. Royster for plaintiff.

T. T. Hicks and A. A. Hicks for defendants.

PER CURIAM. The assignments of error present two questions: 1. Is there any sufficient evidence of negligence? 2. In view of the action of plaintiff in respect to the defendant Watkins, can plaintiff recover of his principal, the railway company?

We are unanimous in the opinion that there is no sufficient evidence of negligence, and that his Honor should have so held.

The train was a long freight with passenger coach attached at end. It was properly equipped with air-brakes and managed by a competent engineer. In starting the train and taking up the slack, it is conceded that much jolting and jarring is inevitable. We do not think the evidence is sufficient to show that the jolting complained of was due to the negligence of the engineer, or could have been reasonably avoided in starting so long a train, or that the engineer managed the train in a negligent manner. We are somewhat confirmed in this view by the action of the plaintiff at the close of the evidence, who was manifestly unwilling to ask a verdict against the engineer Watkins, upon the evidence.

If the engineer was not guilty of negligence, then upon the evidence of this case the employer could not be held. *Smith v. R. R.*, 151 N. C., 482. We recur to what is said in *Marable v. R. R.*, 142 N. C., 557: "In taking passage on a freight train a passenger assumes the usual risks incident to traveling on such trains, when managed by prudent and competent men in a careful manner." We see nothing that takes this case out of this rule.

In this view it is unnecessary to consider the second ground so elaborately discussed before us.

Error.

Cited: *Kearney v. R. R.*, 158 N. C., 526, 540, 553.

(762)

GILES INGRAM v. SOUTHERN RAILWAY COMPANY.

(Filed 20 April, 1910.)

Parent and Child—Employer and Employee—Damages—Loss of Services—Emancipation of Son.

A father cannot recover in his action for the loss of services of his minor son, caused by the negligence of his employer, when it appears that he approved and confirmed the contract of employment whereby the son was to receive the wages earned by him, such being an act of emancipation by the father of his son in respect to the employment. In this case the son had recovered damages for the injury complained of.

APPEAL from *Long, J.*, at October Term, 1909, of IREDELL.

The action was brought to recover for loss of services of plaintiff's son for about two years preceding his majority. The son was injured by the negligence of defendant's employees and had recovered damages for the injury.

These issues were submitted:

1. Was Grady Ingram injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Was said Grady Ingram guilty of contributory negligence, as alleged in the answer? Answer: No.

3. What damage, if any, is plaintiff entitled to recover? Answer: No damage.

From the judgment rendered plaintiff appealed.

George W. Garland, Armfield & Turner for plaintiff.

L. C. Caldwell for defendant.

PER CURIAM. We find no error in the rulings of the court below. There is ample evidence tending to prove an emancipation by the parent of the son. It is well settled that if a contract of employment is made by a minor and approved and confirmed by his father, and under such contract the son is to receive the wages earned by him, the father, by approving and confirming the agreement, in effect emancipates his son, as to wages earned by him under the contract, which becomes the property of the son, and not the property of the father. *Party v. Windlass Co.*, 19 R. I., 461.

If a minor son contracts on his own account for his services with the knowledge of his father, who makes no objection thereto, there is an implied emancipation and an assent that the son shall be entitled to the earnings in his own right. *Burdsall v. Waggoner*, 4 Col., 261; *Arm-*

strong v. McDonald, 10 Barb., 300; *Jenny v. Alden,* 12 Mass., 375; *Campbell v. Campbell,* 11 N. J. Eq., 268; *Taylor v. Welch,* 36 N. Y. Supp., 592.

No error.

Cited: Lowrie v. Oxendine, 153 N. C., 269.

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(763)

J. R. DAVIS v. THE LOWERY COFFEE COMPANY.

(Filed 20 April, 1910.)

Contracts—Corporation—Copartnerships—Judgment, Reformation of.

In an action of attachment brought by plaintiff as salesman for defendant corporation to recover his salary and expenses under contract, it is immaterial whether the defendant was a corporation or firm, and it appearing that defendant was a firm and not a corporation, the judgment below will be reformed so as to express that it is rendered against the individuals composing the firm.

APPEAL from *Long, J.,* at November Term, 1909, of ROWAN.

Writs of attachment were issued and property of defendant attached. The defendant gave bond, and released the property.

Issues were submitted to the jury as follows:

1. Prior to the commencement of this action, did the defendants inform plaintiff that The Lowery Coffee Company was a corporation of Pennsylvania, as alleged in plaintiff's complaint? Answer: Yes.

2. Did the defendants enter into said contract with plaintiff under the name and style of "The Lowery Coffee Company" as a corporation, as alleged in the pleadings of the plaintiff? Answer: Yes.

3. Was plaintiff induced by defendants' information alleged in paragraph "C" of the complaint, and by defendants' entering into the contract under the style of "The Lowery Coffee Company," to commence this action against defendant as a corporation, and levy the attachment as set out in the record on defendants' property in North Carolina? Answer: Yes.

4. What sum, if any, are defendants indebted to plaintiff J. R. Davis? Answer: $483.23, with interest from 1 August, 1908.

5. What amount, if any, is plaintiff J. R. Davis indebted to defendants, The Lowery Coffee Company? Answer: Nothing.

6. Were the obligations set forth in paragraph "H" of the amended complaint incurred in said coffee business, as alleged? Answer: Yes.

From the judgment rendered defendants appealed.

Overman & Gregory for plaintiff.
Hatcher & Smoot for defendant.

PER CURIAM. It is immaterial whether The Lowery Company is a corporation or a copartnership composed of Alfred Lowery, William C. Lowery and James M. Rogers, doing business as The Lowery
(764) Coffee Company. It is admitted that the plaintiff was their salesman, and this action is brought to recover the compensation and expenses due him.

The three copartners gave bond and released the attachment and also entered a general appearance, and in their answer admit that they constitute the copartnership doing business under the above name, and that plaintiff was their salesman. In view of this, the first three issues were unnecessary.

Considering all the exceptions relating to the remaining issues, we find no merit in them.

The matter seems to be one largely of fact and has been settled by the verdict of the jury.

The judgment should be reformed so as to express that it is rendered against William C. Lowery, Alfred Lowery and James M. Rogers, doing business as The Lowery Coffee Company, and the American Bonding Company as surety for them.

No error.

G. O. HAIRE ET AL. v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 27 April, 1910.)

APPEAL by defendant from *Jones, J.*, at Fall Term, 1909, of ASHE.

Disposed of under the opinions in *Gunter's case,* 85 N. C., 310; and *Dean's case,* 107 N. C., 686.

T. C. Bowie and W. C. Fields for plaintiff.
Watson, Buxton & Watson for defendant.

PER CURIAM. Upon an examination of this record we find that the assignments of error all relate to the prayers for instruction and the charge of the court.

We are of opinion that the charge is a clear exposition of the law as laid down in many decisions of this Court. *Gunter's case,* 85 N. C., 310; *Dean's case,* 107 N. C., 686.

No error.

A. STEINHAUSER v. JOHN G. WEBER.

(Filed 4 May, 1910.)

The issues in this case are almost entirely of fact, and upon examination of the record and assignments of error the judgment of the lower court is sustained.

APPEAL by defendant from *Webb, J.*, at October Term, 1909, (765) of MECKLENBURG.

These issues were submitted to the jury:

1. Did the defendant unlawfully assault the plaintiff, as alleged in the complaint? Answer: Yes.

2. Did the defendant willfully assault the plaintiff, as alleged in the complaint? Answer: Yes.

3. Did the defendant maliciously assault the plaintiff, as alleged in the complaint? Answer: Yes.

4. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $300.

From the judgment rendered defendant appealed.

Cameron Morrison for plaintiff.
Stewart & McRae, Osborne, Lucas & Cocke for defendant.

PER CURIAM. Upon an examination of the record and assignments of error we are unable to find an error of sufficient importance to warrant another trial.

The questions at issue are almost entirely of fact and appear to have been fairly submitted to the jury.

No error.

L. W. PEGRAM v. G. W. HESTER.

(Filed 17 May, 1910.)

Appeal and Error—Exceptions—Rule 27—Procedure.

Upon motion, the Supreme Court will affirm the judgment of the lower court for failure of the appellant to make the assignment of errors of record required by Rule 27, after examination of the record proper and no errors appearing thereon.

APPEAL by plaintiff from *Jones, J.*, at September Term, 1909, of FORSYTH.

J. S. Grogan for plaintiff.
Lindsay Patterson for defendant.

PER CURIAM. There are no assignments of error in the record, as required by Rule 27 of this Court. The appellant moves to affirm the judgment on that ground, and the motion must be allowed, there being no errors apparent on the face of the record proper. At the last term, in *Smith v. Manufacturing Company,* 151 N. C., 261, *Walker, J.,* said: "We must insist upon a strict compliance with the rule, which requires an assignment of errors relied on in this Court." Then, after giving the reason for the rule, he adds that without such assign-
(766) ments of error the Court would not enter upon a consideration of the case on its merits, but would examine the record proper only, and if no errors appeared thereon would affirm the judgment, as the Court had heretofore done, citing *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. The judgment is therefore

Affirmed.

Cited: Jones v. R. R., 153 N. C., 423; *Wheeler v. Cole,* 164 N. C., 380; *Carter v. Reaves,* 167 N. C., 132.

W. F. DOBSON v. W. U. TELEGRAPH COMPANY, APPELLANT.

(Filed 25 May, 1910.)

Upon examination of assignments of error in this case, no substantial error is found.

APPEAL from *Justice, J.,* at December Term, 1909, of BURKE.

Action to recover damages for negligence and unreasonable delay in the delivery of the following telegram:

BRIDGEWATER, N. C., 10-19-1908.

To FLETCHER DOBSON, *Morganton, N. C.*

Lillie Hicks is dead. Bury to-morrow at 3 p. m.

JOHN HICKS.

These issues were submitted:

1. Did defendant company negligently fail to transmit and deliver the telegram, as alleged in the complaint? Answer: Yes.

2. If the telegram had been delivered without unnecessary delay, could and would the plaintiff have attended the funeral of Lillie Hicks? Answer: Yes.

3. What damage, if any, is plaintiff entitled to recover of defendant? Answer: $500.

From the judgment rendered, the defendant appealed.

Avery & Ervin for plaintiff.
Avery & Avery and G. H. Fearons for defendant.

PER CURIAM. We have examined the record and considered the assignment of error of the defendant, and are unable to find any substantial error committed which warrants us in directing another trial.

The cause seems to have been tried in line with the settled principles laid down in the decisions of this Court.

No error.

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(767)

W. L. BRYAN v. CALVIN J. COWLES ET AL.

(Filed 27 May, 1910.)

Principal and Agent—Contracts of Sale—Quantum Meruit—Verdict—Harmless Error.

In an action to recover for services rendered in the sale of defendants' timber lands, the plaintiff relied upon an offer made and accepted by letter as a complete written agreement that he should receive all moneys obtained above a fixed price; and, also, upon a *quantum meruit* for services rendered in eventually effecting the sale, which was accordingly accepted by the defendant: *Held*, the correspondence was insufficient upon its face to entitle the plaintiff to recover upon it, as on contract, but as he was entitled to recover upon a *quantum meruit* for services rendered, and the verdict of the jury upon its face necessarily established that it was rendered as on a *quantum meruit*, no reversible error is found.

APPEAL from *Councill, J.*, at September Term, 1909, of WATAUGA.

Plaintiff brought this action against C. J. Cowles, deceased, defendant's testator, before his decease, and after his death the present defendants qualified as his executors and were made parties. Plaintiff in first cause of action sues for $10,950, which he alleges is due him under a paper-writing dated 13 February, 1897, and hereinafter set out, on account of the alleged sale of the defendants' testator's timber lands; and in a second cause of action he sues for the same amount, which he alleges is due him upon the *quantum meruit* on account of alleged sale of said lands.

Defendants denied any and all liability for plaintiff's claim. On the trial the jury rendered the following verdict:

"In what sum, if any, are defendants indebted to the plaintiff? Answer: $5,000."

Judgment on verdict for plaintiff, and defendants appealed.

L. D. Lowe and T. A. Love for plaintiff.

Finley & Hendren, T. C. Bowie and Manly & Hendren for defendant.

PER CURIAM. We have carefully considered the record and exceptions noted, and are of opinion that there has been no reversible error committed to defendants' prejudice.

It appeared that in 1903-4-5, the testator, Calvin J. Cowles, had conveyed large bodies of mountain land, to wit, over 7,300 acres, to
(768) certain purchasers at an average price of $4 per acre, the amount received therefor being $29,364.40, and plaintiff claimed that these sales were brought about as result of plaintiff's labor and efforts, and under and by virtue of a special contract between plaintiff and defendant, plaintiff was to have all the proceeds of said sale over and above $2.50 per acre net to the owner, C. J. Cowles. The amount of plaintiff's demand in this aspect of the case being something over $10,000. In case this claim is not established, plaintiff makes a demand on a *quantum meruit* for services rendered in effecting said sales. The court submitted the claim to the jury in both aspects and on a single issue, and the jury, as stated, rendered a verdict in plaintiff's favor for $5,000, for which judgment was entered.

On consideration of the testimony, we concur with defendants in the position that the plaintiff has failed to establish his claim made on the special contract. According to plaintiff, this phase of his demand was made to rest on a letter written by the testator to plaintiff in reference to a sale of these lands, bearing date 13 February, 1897, and in terms as follows:

WILKESBORO, N. C., 13 February, 1897.

W. L. BRYAN, ESQ.

DEAR SIR:—I am glad you contemplate a visit to Washington City to effect a sale of a large body of mountain land; and as I have property of that kind which I would like to find a market for, I authorize you to make sale of as much as 6,000 acres, at not less than $2.50 per acre, net, $1.25 cash, and $1.25 on one, two and three years, bearing 6 per cent interest, interest payable annually, and the deferred payments secured by mortgage on the land situated in Wilkes and Watauga counties and west of Lewis Creek Fork. I repeat the price per acre, which is to be $2.50, net. Of course, I give good titles; but to enable me to

clear them of liens it may be necessary for the purchasers to advance money or to pay into the office a part of the above purchase money.

Wishing you success, I am, respectfully,

CALVIN J. COWLES.

With evidence tending to show a sale after and in pursuance of authority in the letter.

Defendants, denying that plaintiff properly interpreted the letter, further offered in evidence two letters of later date in terms as follows:

WILKESBORO, N. C., 1 July, 1897. (769)

W. L. BRYAN, ESQ.

DEAR SIR:—Yours of the 12th ult. duly received. Nothing since from you. We are now four (4) months away from the period of your deal with Pennsylvania friends; and, so far as I can see, there is little if any progress to the goal. The money promised and so much needed. This is extremely discouraging. Being compelled to have money, I have concluded to throw my lands open to the first applicant. If you come first, you have it; but if others come first, with the cash or its equivalent, before you do, why, just let him have it. So you see where I stand. Land for sale. "First come, first served." I hope you will get it, but all depends on celerity.

Respectfully yours,

CALVIN J. COWLES.

WILKESBORO, N. C., 19 July, 1897.

W. L. BRYAN, ESQ.

DEAR SIR:—Yours of 2d, 3d and....inst., to hand—three letters. So far, nobody has appeared amongst us with money to buy lands; and, speaking for myself, I repeat that I am open for a trade. You have doubtless been disappointed. This has led to disappointment all long the line. If your folks were here now, or if they beat the Dotson set, you will get my land; *but I cannot extend the time only when the money is in sight.* My necessities are too great to allow much lapse. S. J. G. and Absher have given H. an opinion of thirty days only.

Yours truly,

CALVIN J. COWLES.

And we are disposed to agree with defendants that if the letter relied on by plaintiff had amounted to the contract, as claimed by him, these subsequent letters written before any sale or contract or option looking to that end had been effected would have amounted to a revocation of the agreement; but we do not think a proper construction of the first letter supports the plaintiff's position, that it was a binding agreement to allow plaintiff all over $2.50 that the lands might net defend-

ant. It was simply an authority to sell at the price indicated, and if more was obtained the increase was to inure to the owner's benefit, the plaintiff to be paid for what his services were worth, if such was the understanding and agreement of the parties in the light of all the attendant facts and circumstances. We are of opinion, there-
(770) fore, that his Honor should not have submitted the plaintiff's demand to the jury in the aspect of a claim under and by virtue of a special contract. We do not think, however, that this should be held for reversible error, because it is perfectly plain, from a perusal of the testimony and the charge of the court and verdict, that this claim was rejected by the jury. The lands sold were over 7,000 acres at an admitted price of $4 per acre, and, if the jury had sustained plaintiff's demand on a general contract, the claim would have been not less than $10,000. The jury have, therefore, evidently awarded this verdict on the *quantum meruit,* and unless there was error in submitting the claim in this phase of the matter, we do not think the result of the trial should be disturbed. *Rhyne v. Rhyne,* 151 N. C., 400.

There was abundant testimony to support such a claim. The evidence on the part of plaintiff tended to show that after the writing of the letter of February, 1897, the plaintiff was engaged for six years and over in the endeavor to effect a sale of these lands for testator; that he spent both time and money in such service, and that this was done with the full knowledge and approval of the testator; and that the sale was brought about by reason of plaintiff's labor and efforts to that end.

This view of the case was submitted to the jury under a charge free from error, and their verdict is justified on the testimony and the familiar principle last stated in *Winkler v. Killian,* 141 N. C., 575, as follows:

"It is ordinarily true that where services are rendered by one person for another, which are knowingly and voluntarily accepted, without more, the law presumes that such services are given and received in expectation of being paid for, and will imply a promise to pay what they are reasonably worth."

No error.

STATE v. T. C. WHEDBEE.

(Filed 25 February, 1910.)

1. False Pretense—Definition of.

A criminal false pretense is a false representation of a subsisting fact, whether by oral words or conduct, which is calculated to deceive, intended to deceive, and which does, in fact, deceive, and by means of which one person obtains value from another without compensation.

2. False Pretense—Indictment—Sufficiency.

An indictment for obtaining goods under false pretense must show upon its face that the offense charged has been committed and the evidence must correspond with and support the allegations of the bill.

3. Same—Deceit—False Statements—Causal Connection.

An indictment for obtaining a note for a subscription to stock in a proposed corporation by false pretense is fatally defective which fails to state the facts showing a causal connection between the deceit, the obtaining of the note, and the statements alleged to have been false; and the mere charge in the bill, that the representations induced the making of the note, is insufficient, where there appears to be so semblance of connection between them.

4. Same.

A bill of indictment charging that defendant obtained a note for subscription to stock in a certain proposed corporation by false pretenses, that the defendant falsely represented the corporation as being formed for the purpose of creating a surplus in a kindred corporation, must set forth such facts as to show the causal connection between the obtaining of the note and the representation alleged to be false; or for what the note was given, or its relation to the negotiations and dealings with respect to the organization or management of the two companies.

5. Same—Constitutional Law.

The accused has the constitutional right to be informed of the charge against him, and an indictment which fails to state such facts as show the causal connection between the alleged deceit and the false representations, or, in other words, sufficient facts to inform of the particular offense, deprives him of this right and is fatally defective.

CLARK, C. J., dissenting; HOKE, J., concurring in the dissenting opinion.

APPEAL from *W. J. Adams, J.*, August Term, 1909, of UNION. (771)

This is an indictment against the defendant for cheating and defrauding W. C. Heath by means of a false and fraudulent pretense. As the case is decided upon the validity of the indictment, it will be necessary to set it out. It is as follows:

STATE *v.* WHEDBEE.

NORTH CAROLINA—Union County.

Superior Court, March Term, 1909.

STATE *v.* T. C. WHEDBEE.

The jurors for the State upon their oath present that T. C. Whedbee, late of the county of Union, in said State, with force and arms, at and in said county of Union and State of North Carolina, with intent to cheat and defraud one W. C. Heath, did on the 29th day of May, in the year of our Lord one thousand nine hundred and eight
(772) (1908), then and there unlawfully, falsely, designedly, knowingly, feloniously and fraudulently pretend to W. C. Heath, for the purpose of inducing him, the said W. C. Heath, to purchase stock in the Seminole Securities Company, a corporation; that Wylie Jones and W. A. Clark, bankers of Columbia, in the Sate of South Carolina, were at the head of the Seminole Securities Company, and large stockholders in said company, and directing its management; that no salaries were being paid the officers of said Seminole Securities Company; that it was not costing exceeding 10 per centum to organize the Seminole Securities Company; that said T. C. Whedbee was not receiving anything in excess of 6 per centum for his services in selling stock in said Seminole Securities Company; that the stock of the Seminole Securities Company was then being sold for the sole purpose of capitalizing with the proceeds realized from the sale of stock of the Seminole Securities Company, a corporation being created under the laws of the State of North Carolina as an accident, indemnity and employers' liability insurance company, to be known as the Sterling Casualty Company; that the 50 per centum premium at which the said T. C. Whedbee offered for sale and did sell said stock of the Seminole Securities Company was being used for the sole purpose of creating a surplus fund for the operation of the said Sterling Casualty Company; that a charter had been applied for by himself and others to the State of North Carolina for said accident, indemnity and employers' liability company to be known as the Sterling Casualty Company; that to secure the holders of stock and policies in said accident, indemnity and employers' liability insurance company, to be known as the Sterling Casualty Company, one hundred thousand dollars in securities had been deposited with James R. Young, Insurance Commissioner of North Carolina; by means of which said representations and pretenses said T. C. Whedbee unlawfully, willfully, knowingly, designedly, fraudulently and feloniously did obtain from W. C. Heath his promissory note in the sum of seven hundred and fifty dollars, of the value of seven hundred and fifty dollars, being then and there the property of the said

W. C. Heath, with the intent to feloniously cheat and defraud said W. C. Heath of his moneys, goods and chattels; to the great damage of said W. C. Heath.

Whereas, in truth and in fact, Wylie Jones and W. A. Clark, bankers of Columbia, in the State of South Carolina, were not at the head of said Seminole Securities Company, and were not large stockholders in said company and were not directing its management; salaries were being paid to the officers of the said Seminole Securities Company; it was costing more than 10 per centum to organize the (773) said Seminole Securities Company; T. C. Whedbee was receiving in excess of 6 per centum for his services in selling the stock in the Seminole Securities Company; the stock in the Seminole Securities Company was not then being sold for the sole purpose of capitalizing with the proceeds realized from the sale of the stock of the Seminole Securities Company, a corporation being created under the laws of the State of North Carolina as an accident, indemnity and employers' liability company; that the 50 per centum premium at which the said T. C. Whedbee offered for sale and did sell the stock of the said Seminole Securities Company was not being used for the sole purpose of creating a surplus fund for the operation of the said Sterling Casualty Company; a charter had not been applied for by said T. C. Whedbee and others to the State of North Carolina for said accident, indemnity and employers' liability insurance company; and to secure the holders of stock and policies in said accident, indemnity and employers' liability company, to be known as the Sterling Casualty Company, one hundred thousand dollars in securities had not been deposited with James R. Young, Insurance Commissioner of North Carolina, as he, the said T. C. Whedbee, then and there well knew, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State.

The indictment was signed by the solicitor and was duly returned into court as a true bill by the grand jury. The defendant was convicted by the jury and, judgment having been entered upon the verdict, he excepted and appealed to this Court.

Attorney-General Bickett, Adams, Jerome & Armfield and Redwine & Sikes for plaintiff.

Osborne, Lucas & Cocke, A. M. Stack, Burwell & Cansler, W. H. Venable, Charles Whedbee, and P. W. McMullan for defendant.

WALKER, J., after stating the case: The indictment in this case is palpably defective. A criminal false pretense may be defined to be the false representation of a subsisting fact, whether by oral or written

words or conduct, which is calculated to deceive, intended to deceive, and which does, in fact, deceive, and by means of which one person obtains value from another without compensation. *S. v. Phifer,* 65 N. C. 321. That case has been repeatedly approved by this Court in numerous subsequent decisions involving the question as to the true nature and the constituent elements of a false pretense. Among others (774) are *S. v. Mangum,* 116 N. C., 998; *S. v. Matthews,* 121 N. C., 604; *S. v. Davis,* 150 N. C., 851. In *S. v. Matthews, supra,* the present Chief Justice analyzes the offense and states its component parts with great clearness. This Court, in that case, speaking by *Justice Clark,* holds squarely that, in order to convict one of this crime, the State must satisfy the jury beyond a reasonable doubt, (1) that the representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; (5) that it actually did deceive and defraud the person to whom it was made. The universal rule of civil and criminal pleading requires that the facts, constituting the cause of action, the defense thereto or a crime, must be stated, leaving nothing to inference or to the imagination. The Constitution of our State requires this in the case, for it says that the accused is entitled to be informed of the accusation made against him. It is a fundamental principle of the common law, or at least of Magna Charta, and has been explicitly guaranteed to the citizen in every great reform of our jurisprudence. It is nothing but right and just, and any other rule would be clearly oppressive, if not cruel, in its operation. The indictment must be so drawn and the facts so stated therein that this Court can see upon its face that an offense has been committed, if the evidence corresponds with and supports the allegations of the bill.

Clark, in his great treatise on Criminal Procedure, at pages 153 and 154, states the law with such clearness and precision that we cannot do better than state, at least substantially, what he lays down as the correct rule. "The indictment must show on its face that if the facts alleged are true, and assuming that there is no defense, an offense has been committed. It must therefore state explicitly and directly every fact and circumstance necessary to constitute the offense, whether such fact or circumstance is an external event, or an intention or other state of mind, or a circumstance of aggravation affecting the legal character of the offense.

"Unless the indictment complies with this rule, it does not state the offense. The charge must always be sufficient to support itself. It must directly and distinctly aver every fact or circumstance that is essential, and it cannot be helped out by the evidence at the trial or be

aided by argument and inference. With rare exceptions, offenses consist of more than one ingredient, and in some cases of many; and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested or be reversed on error. What facts (775) and circumstances are necessary to be stated must be determined by reference to the definitions and the essentials of the specified crimes. Having ascertained them, every essential fact must not only have arisen, but it must be stated in the indictment. To constitute the statutory offense of obtaining property by false pretenses, there must have been a representation by the defendant of a past or existing fact or circumstance; it must have been in fact a false representation; it must have been known by him to be false; it must have been made with intent to defraud; it must have been believed by the other party; and he must have parted with his property to the defendant because of it. If an indictment for this offense fails to state any one or more of these facts or circumstances, it fails to charge the offense, and would not support a conviction, even though every essential fact were shown by the evidence to have existed." He supports his text by citing the highest and most reliable authorities.

The bill we now have under consideration is fatally defective in not stating the causal connection between the alleged false representation and the execution of the note for $750 by W. C. Heath by means of the representation. It does not show why the alleged false statements should have caused W. C. Heath to make the note, nor does it show to whom the note is payable. If we were permitted to look at the evidence, upon the defendant's motion in arrest of judgment, we would learn that the note was actually payable to his own order and indorsed in blank by him. It is not stated for what the note was given, whether for stock in either of the corporations mentioned or for something else of value to W. C. Heath. "To make a long story short" and to express the very point more tersely, it does not appear by direct or express allegation, or even by implication, what causal connection the false statements had with the note, or how W. C. Heath was induced thereby to make and indorse the note. We must see by the very indictment itself, not only that false representations were made, but, as we have already said, that they were calculated to deceive W. C. Heath, and that by the deception he was actually induced to give the note. The indictment, therefore, fails at its vital point. We are not allowed to infer that the representations induced the making of the note merely because it is so alleged in the bill, unless we can see the causal relation of the one to the other. So far as appears in the bill, the two transactions, Whedbee's represen-

(776) tation to Heath and the giving of the note, were separate and independent transactions, having no relation to each other, unless we are bound by the allegation that Heath was induced to give the note by reason of the false statements of Whedbee.

We must remember that the false representation must be "calculated to deceive," and this must be shown by the evidence. What is material to be proved, must also be alleged. It is a cardinal rule of every system of pleading that there must be *"allegata"* as well as *"probata,"* and that they should, at least substantially, correspond with each other.

Where we should have had light upon an essential fact, one of the important ingredients if not the capital element of the crime, we are left entirely in darkness. If we should hold this indictment to be good, our ruling would be violative of every constitutional right of the defendant, of every principle of pleading relating to the subject and of every consideration of justice. It will not do to say in this land of freedom, where the rights of every citizen are carefully guarded and preserved, that a man should be convicted. He must be convicted, if at all, according to the law, and in that way only. We sum up on this point as follows: It is obvious, therefore, that the bill fails to show any causal connection between the representations and the giving of the note, or any logical sequence of the latter from the former. It does not appear for what the note was given or what part it played in the negotiations and dealings with respect to the organization and management of the two corporations, the "Seminole Securities Company" and the "Sterling Casualty Company."

The precedents sustaining our conclusion in this case are numerous, and we are not risking anything when we say that they are superabundant. We will refer to some of them later on.

The defendant relies upon *S. v. Dickson,* 88 N. C., 643. We have examined that case with the greatest care. The judge who wrote the opinion for the Court was not only one of the ablest judges who ever sat in this Court, but is entitled to be considered as having as great a knowledge of the criminal law, its principles and procedure, as any of his contemporaries, his predecessors or successors. We would, therefore, pause a long time and take our bearings before overruling anything that he had said. But it is not necessary that we should hold that *S. v. Dickson* is in conflict with our decision in this case. The Court had already decided against the defendant upon other grounds, before the question we are now discussing was reached in that case, and what was said about the question now raised was merely a *dictum,* even if it is susceptible of the construction placed upon it. That (777) decision was the correct one upon the facts of that case. But we need not resort to any evasion of that ruling, even if it was a

dictum as to the principle involved in this case, for we think there was a sufficient allegation in the indictment against Dickson to show that his false representation had induced the prosecutor to pay him the money for rafting the timber. It is almost patent upon the face of that bill that the relation of employer and employee existed between John McRae and the defendant, and that the latter had agreed to raft the timber from Davis' bridge to the mouth of Rockfish Creek, and that he had represented to McRae that he had done so, when, in truth and in fact, he had not. We affirm that decision, and add that it does not support the contention of the State in this case. But it is evident that the Court, when deciding that case, had overlooked the case of *S. v. Fitzgerald,* 18 N. C., 408, in which *Judge Gaston* delivered the opinion of the Court and asserted, as a well-established principle of criminal pleading, that it must appear in the bill, by the statement of facts sufficient for the Court to see, that there was a causal connection between the false representation and the giving of the note, and that the prosecutor was induced by that false representation to execute the note. No judge can improve upon that great jurist's statement of the law, so we will rely upon his own words and not upon our own. He said at page 411: "The indictment in this case charged that the defendant having, as a constable, levied certain executions on the property of the prosecutor, did falsely pretend that a certain paper written by him, presented to the prosecutor and William Wrathbone, was a bond for the delivery of property of the prosecutor theretofore levied on; when in truth and in fact the same was not a bond for the delivery of the said property, but a promissory note for the sum of $26.37½; by means of which false affirmation the defendant did unlawfully procure to be signed and sealed by the prosecutor and the said William, and to be delivered to him, the defendant, a promissory note unsealed for the sum of $26.37½, with intent to defraud the prosecutor and the said William Wrathbone. It is not necessary to inquire whether by means of such false affirmation a cheat or fraud might not be practiced under circumstances which would subject the offender to a criminal prosecution; but *it seems to us essential, in a case where there is no obvious connection between the result produced and the falsehood practiced, that the facts should be set forth which do connect the consequence with the deceitful practice.* It is a general rule in indictments, that 'the special manner of the whole fact ought to be set forth with such certainty that it may judicially appear to the court that the in- (778) dictors have gone upon insufficient premises.' Hawkins b. 2, ch. 55, sec. 57. Now, it is impossible for us to see, upon such a vague and defective statement, how a false representation by the defendant of the

nature of an instrument which he had and exhibited, or presented, could have induced any person to give the defendant a bond for the payment of money."

This would seem to be all-sufficient to sustain our ruling, but the reports of the decisions in other jurisdictions are full of cases to the same effect.

In *People v. Brown,* 38 N. W., 916, the Court held "that an information charging the obtaining of the signature of a person to two certain promissory notes on false and fraudulent representations as to a company, of which the defendant claimed to be the agent, which does not state the consideration of the notes, to whom they were payable, and whether negotiable or not, or whether they were used in any dealings between the maker and such company, or respondent and the company, is insufficient, as not showing any causal connection between the false representations and the giving of the notes." And in *People v. White,* 7 Cal. App., 98, the Court said: "This analysis of the information shows that there does not appear to be any natural connection between the representations charged to have been made by the defendants and the delivery of the money to the defendants. The representations were concerning a company with which it is not alleged that defendants had any connection, nor which said Furrar entered into any relations because of said representations. 'The indictment must show that the property was obtained by means of the false pretense alleged. Accordingly, when there appears to be no causal connection between the pretense and the delivery of the property, such additional facts as are necessary to show the relation must be alleged. A defect in the indictment arising from failure to show the connection between the false pretense and the obtaining is a material one, and it is not cured by verdict.' 19 Cyc., 420, and numerous authorities cited under Note 37." In *S. v. Connor,* 110 Ind., 469, the principle was thus stated by the Court: "An indictment for obtaining goods by false pretenses, which charged the accused with representing that his firm had commenced business with a certain capital; that, at the date of the representations, they had goods on hand and debts due to them equal to that amount; that the total indebtedness of the firm only amounted to a specified sum, and that it was doing a certain amount of business each year; and that a merchant 'relying on said representations and pretenses, and believing the same to be true, and being deceived thereby,' sold
(779) a quantity of goods on credit, is insufficient if it is not averred that it was by means of such false representations that the merchants were induced to part with their goods." The Court said, at pages 455 and 456: "Counsel agree that the motion to quash the indictment was sustained upon the ground that both counts failed to show

with sufficient certainty that the possession of the property referred to was retained by the firm of Connor & McClellan by means of the false pretenses alleged to have been made by the appellee. To sustain a prosecution for obtaining goods under false pretenses, it must be in legal effect charged in the indictment, as well as proved at the trial, that the goods were obtained by means of the alleged false pretenses. Whart. Crim. Law, sec. 1175; 2 Bish, Cr. Law, sec. 461; Moore's Cr. Law, sec. 739; *S. v. Orvis,* 13 Ind., 569; *Todd v. State,* 31 Ind., 514; *S. v. Williams,* 103 Ind., 235, 2 N. E. Rep., 585. The false pretenses charged must have at least entered into the transaction, and have constituted a material inducement to the transfer of the possession of the goods. Both counts of the indictment in this case averred with sufficient certainty the falsity of the representations alleged to have been made by the appellee, and that Kellogg & Co. were induced to part with the possession of the goods in question. The succeeding allegation, that eighteen days after the false representations were so made and relied on, Kellogg & Co. sold and delivered these goods to Connor & McClellan on credit, at their (the latter's) special instance and request, failed to indicate any natural or logical connection between the false representations and the sale and delivery of the goods. The indictment must show that the property was obtained by means of the false pretense alleged. Accordingly, when there appears to be no natural connection between the pretense and the delivery of the property, such additional facts as are necessary to show the relation must be alleged." 19 Cyc., 429. We could cite authorities without number to sustain the conclusion in this case, but we will not prolong the opinion by such a course, as the cases are all collated in the excellent and exhaustive brief of defendant's counsel.

The case of *S. v. Fitzgerald, supra,* is of itself sufficient as authority in condemnation of this indictment. It was decided by a Court composed of *Chief Justice Ruffin, Judge Daniel* and *Judge Gaston,* and we are perfectly safe in relying upon what they have declared is the law. That case is not overruled by *S. v. Dickson.* It was not even cited in the latter case, and we have no idea that the decision in that case was intended to be considered as bad law.

There were many other exceptions taken, during the trial of (780) the case, to the rulings of the court, which, if the indictment had been good, would deserve our most *serious* consideration.

Without intimating, in the least, any opinion upon the law, as applied to the evidence in the case, we would suggest to the solicitor that he consider most carefully whether, upon the facts which the evidence tends to prove, he can make out a case against the defendant for criminal false pretense. This is only a suggestion and nothing more. If

the defendant is guilty, he should be convicted and punished, but it is well to pause sometimes and consider whether a defendant is guilty merely because he has been indicated by the grand jury. The great and central principle in this case is that the law, not law made by us, but the law of the centuries, has required that the indictment must show a state of causation—that is, that the false representation induced the prosecutor to incur a liability or to surrender something which otherwise he would not have done. This is the crucial test.

The statute dispensing with the necessity of alleging or proving an intent to defraud any particular person has no bearing whatever upon this case, but is as foreign to the point presented as it could possibly be. It is not the general allegation or proof of an intent to defraud that is missing, but the causal relation between the alleged false pretense and the deceit, and the indictment, therefore, did not inform the defendant of the crime charged against him. It is his constitutional right to be so informed; and what power have we to ignore this plain mandate of the Constitution and deny him this invaluable privilege? If he asserts it, we must grant it, or we fail in our duty to administer justice according to the law which protects him in his rights as a citizen.

S. v. Matthews, 91 N. C., 637, and *S. v. Mikle,* 94 N. C., 843, and the other authorities relied on do not sustain the position of the State in this case. In all of them causal connection appeared most clearly. *Thomas v. People,* 34 N. Y., 351, which is specially relied on, sustains our ruling, and the text-books, when properly construed, are to the same effect. A cursory reading of them will show this to be the case.

As to *S. v. Dickson,* the Court manifestly overlooked the decision in *S. v. Fitzgerald,* wherein the law is firmly established as we say it now is, and the opinion was written by one of the greatest jurists this or any other State has produced, *Judge William Gaston.* He was careful and painstaking and always fortunate in stating and applying a legal principle. He had no sympathy with the law-breaker, but, great
(781) magistrate as he was, discharged the duties of his high office "with the cold neutrality of the impartial judge" and according to the laws of his State as he understood them. Have we ever had a greater or more masterful intellect in this Court? By his side sat one of the greatest of our Chief Justices, *Thomas Ruffin,* a noted criminal lawyer, and *Judge Daniel,* who was also a thoroughly trained and well-equipped lawyer. His opinions deservedly rank among the very best ever delivered by this Court. *S. v. Fitzgerald* condemns the indictment in this case as being insufficient to inform the defendant, under the Constitution, of the offense charged against him.

Before taking leave of the case, it may be well to remark that the indictment charges the false pretense to have been made with the intention of inducing W. C. Heath to subscribe to stock in the Seminole Securities Company, whereas it is not anywhere alleged that he actually subscribed to any such stock, but that the defendant obtained a note from the said Heath, for what purpose it does not appear, nor does it appear to whom the note was payable or what connection, if any, it had with the purchase of the stock; and further, it does not appear that the Seminole Securities Company ever received even a penny from W. C. Heath for its stock or for any other consideration.

As the indictment is fatally defective, we must remand the case with directions to arrest the judgment.

Judgment arrested.

CLARK, C. J., *dissenting:* The exceptions require no discussion. The defendant moves in this Court in arrest of judgment.

This is a statutory offense (Rev. 3432), and differs materially from "cheating" at common law. The indictment charges specifically everything required by the statute to constitute the offense of "false pretense." "An indictment is sufficient under Rev., 3254, if it charges in the words of the statute." *S. v. Roberson,* 136 N. C., 587; *S. v. Whitley,* 141 N. C., 823; *S. v. Harrison,* 145 N. C., 408; *S. v. Leeper,* 146 N. C., 655.

That statute (Rev., 3284) was enacted because of the finespun technicalities which had often aided the guilty to escape justice and thereby "brought reproach upon the courts." *Ruffin, C. J.,* in *S. v. Moses,* 13 N. C., 465, cited *S. v. Barnes,* 122 N. C., 1035. It provides that no indictment "shall be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding sufficient matters appear to enable the court to proceed to judgment." Necessarily, sufficient matter appears if the indictment charges every ingredient which the statute provides shall constitute the (782) offense.

The statute creating this offense of "cheating by false pretense" (Rev., 3432) provides: "If any person shall knowingly, designedly, by . . . any false pretense whatsoever, obtain from any person . . . any promissory note . . . with intent to cheat and defraud any person . . . he shall be guilty of a felony." This is the whole statute, eliminating duplicating words and those stating other kinds of false pretense.

This indictment charges that the defendant, with intent to cheat and defraud W. C. Heath, did falsely, knowingly, designedly and feloniously make to him certain statements (explicitly and fully stating them),

and explicitly stating that each statement was untrue, and by means of which false representations and false pretenses the defendant knowingly, designedly and feloniously did obtain from said Heath his promissory note in the sum of $750 and of the value of $750, with intent to cheat and defraud said Heath to his great damage. The indictment is much fuller, but contains the above, which is a full compliance with the statute. *S. v. Eason,* 86 N. C., 674; *S. v. Mikle,* 94 N. C., 846. Indeed, the proviso to the statute (Rev., 3432), in order to prevent technical defenses, provides that it shall not be necessary to allege or prove an intent to defraud any particular person. Nor was it necessary to allege that the prosecutor subscribed to the stock. The statute, which creates the offense, and not the court, makes the offense complete if in consequence of the false pretense the defendant procured the note.

The defendant, who found means to retain nine able and influential counsel, who presented every possible defense, with the utmost vigor, was tried by an impartial jury, to not one of whom he raised any objection, yet was convicted. The indictment gave him information of every ingredient that the statute required to constitute the offense. It is beyond credibility that he was not well advised of what offense he was charged.

Yet he now moves in this Court to arrest the judgment because the indictment does not charge how the false representations enabled him to cheat and defraud. The statute does not require this, nor the precedents. If the false representations were not sufficient to cheat and defraud, that was a matter of defense upon the proof, and the many able counsel of the defendant surely presented every possibility of a defense on that and every other ground to the jury.

In *S. v. Dickson,* 88 N. C., 644, the same point was made, and *Ashe, J.,* said: "This bill contains *all the essential elements* of an
(783) indictment for false pretense. It sets forth the false pretense of a subsisting fact, the knowledge of the defendant, the negation, the intent to cheat, and that the money of the prosecutor was unlawfully obtained by the false pretense. *Whether the false pretense was calculated to impose on the prosecutor, and induce him to part with his money, or was in fact the means of obtaining his money, were questions that properly belonged to the province of the jury.* Russell on Crimes, 622, and Note L."

The indictment in the present case charges that the false representations set out were the means by which the prosecutor was cheated. Whether it was not calculated to do so was a matter of defense on the proof. To allege how the defendant was deceived is not required by the statute beyond the allegation of the falsity of the statements and that by means thereof he was cheated, and it was not needed to be charged to

give any information to the defendant. The charge and proof that by such means the defendant did deceive and cheat the prosecutor, and that he so intended, is *prima facie* sufficient, and it was for the defendant thus charged to show that the trick and deceit were insufficient. Such technicality as is here set up by the defendant could never be of any aid to an innocent man. It could only avail to protect a guilty one.

The learned solicitor followed our statute and our latest decision, as well as the approved precedents in Archbold, Wharton and others. He could not be required or expected to do more. *S. v. Dickson, supra,* is cited and approved in *S. v. Matthews,* 91 N. C., 637, where the defendant set up the "lame defense" (as the Court calls it) that the defendant was deceived by charitable motives, which had been roused by the defendant's false representations. That case in turn is approved, *S. v. Mikle,* 94 N. C., 846, in which case the indictment is set out, and is exactly such as in this case.

In *Meek v. State,* 117 Ala., 121, the Court says: "We do not understand that the indictment for obtaining goods by false pretenses must necessarily show that the alleged false pretense was *capable of inducing* the party to whom made to part with his goods, *further than the allegation that by means of the pretense the goods were obtained.* . . . Whether or not the pretense really operated as such material inducement is a matter of proof."

In *Thomas v. The People,* 34 N. Y., 351, it is said: "It is sufficient to state, negate and prove the false pretense. The materiality and influence of such pretense is a question for the jury, unless upon the face of the indictment the pretense appears clearly to be immaterial."
To the same purport *Cowan v. State,* 22 Neb., 519, and many (784) other cases.

In Clark's Criminal Law, p. 321, he says it is not necessary "that the pretense shall be such that ordinary care and common prudence could not guard against it, as is the case of cheating at common law," citing cases.

The defendant relies upon an old case, *S. v. Fitzgerald,* 18 N. C., 408. Not only was that case (unlike *S. v. Dickson,* 88 N. C., 644, and other late cases above cited) decided upon a statute different in some respects from that now in force and under the influence of the decisions upon "cheating at common law"—a very different offense—but on page 411 the Court concludes, "Where there is no obvious connection between the result produced and the falsehood practiced, the facts should be set forth which do connect the consequences with the deceitful practice," and states as a basis a rule as to indictments in Hawkins P. C., which has been repealed by Rev., 3254, above cited. In this case.

however, as a matter of fact, the jury found the connection between the false pretense and the cheating obvious, notwithstanding a most strenuous defense.

Our decisions for fifty years past or more are uniform that an indictment for any statutory offense whatever is sufficient if (as in this case) it follows the words of the statute, and it is not necessary to charge the means used or the circumstances. Among numerous cases to this effect are *S. v. George,* 93 N. C., 567; *S. v. Brady,* 107 N. C., 822; *S. v. Haddock,* 109 N. C., 875. Even in an indictment for murder, it is no longer necessary to allege the weapon, the nature of the wound or the "instigation of the devil."

In *S. v. Harwood,* 104 N. C., 728, the Court says: "Nor is it necessary to specify by what acts or words the enticing was effected. It is generally sufficient to charge the statutory offense in the words of the statute, and it is necessary to be specific in setting out the facts only when the statute is, in terms, too comprehensive, and this to show that the offense is embraced in it.

"In the indictment under a statute which prohibits the abducting, or by any means inducing a child under fourteen years of age to leave the relative mentioned, or school where he or she may be placed, providing that the one so acting shall be guilty of a crime, etc., it was held sufficient to use the words of the statute defining the offense, nor was it needful to set out the means by which the abduction was effected. *S. v. George,* 93 N. C., 567."

In Joyce on Indictment, sec. 328, the author says: "In an (785) indictment for an offense done with intent to defraud, it is sufficient to aver, in the general words, that it was done with intent to defraud, it being held that the pleader is not required to set out the evidence or facts going to prove the intent to defraud, or the particular matters by which the party named in the indictment was to be defrauded." The author cites *McCarty v. U. S.,* 101 Fed., 113, and *U. S. v. Ulrici,* Fed. Cases, No. 16594, which cases support the text.

Besides, the indictment in this case is an exact copy of the approved Forms of Indictment for False Pretense, Archbold Cr. Pl. (3 Ed.), 245; Wharton Cr. Pl. & Pr., 528. In none of the Precedents of Forms for this offense is it set out how the false pretense deceived, beyond, as in this case, the allegation that there was a false statement of a subsisting fact with intent to cheat and defraud and that *by means thereof* the prosecutor was defrauded.

HOKE, J., concurs in dissenting opinion.

Cited: *S. v. Claudius,* 164 N. C., 525; *S. v. Carlson,* 171 N. C., 824.

STATE v. NORFOLK AND SOUTHERN RAILWAY COMPANY.

(Filed 25 February, 1910.)

1. Corporations—Nuisance—Indictment—Process.

When a railroad corporation is indicted for obstructing a public road with cars, a notice issued to the corporation is the proper method of bringing it into court to answer the indictment.

2. Same—Receivers—Two Bills—Counts.

A summons having been served on the receivers of a railroad corporation and it appearing that notice was not served on the corporation, the purpose of the summons being to bring them all into court to answer an indictment for blocking a public road, upon a true bill found under another like indictment, which had been properly served on the corporation, it is proper to proceed with the trial of the case upon both bills, treating the second bill as an additional count, or the two indictments as separate counts of the same bill.

3. Corporations—Receivers—Indictment—Nuisance—Liability of Corporation.

A railroad corporation in the hands of receivers is not indictable for blocking or obstructing, with cars, a public road, as the receivers hold the property in *custodia legis*, and as the corporation has no control over the acts of the receivers, it is not criminally liable therefor.

4. Corporations—Indictment—Nuisance—Liability of Receivers.

The receivers of a railroad corporation may be liable individually for commissing a nuisance in obstructing with cars a public road.

APPEAL from *Ward, J.*, Fall Term, 1909, of WASHINGTON. (786)

The facts are stated in the opinion of the Court.

Attorney-General Bickett for the State.
Gaylord & Gaylord for defendant.

WALKER, J. This is an indictment against the Norfolk and Southern Railway Company and H. M. Kerr and Harry Woolcott, receivers thereof, appointed by the Federal court, for obstructing a public highway in Washington County. The obstruction consisted in leaving cars in the public road, contrary to the statute of this State. A summons was issued to the defendants, requiring them to appear at the October Term, 1909, of the Superior Court of said county and plead to the bill. This summons was returned by the sheriff as having been served upon W. J. Nicholson, local agent for the receivers, but there was no service of the notice upon the agents of the defendant corporation, and upon this ground a motion was made at the October term to quash the bill. The solicitor sent another indictment against the railroad company, which was returned a true bill by the grand jury, and

the trial of the case proceeded upon both bills, the second bill being treated as an additional count, or the two indictments as separate counts of the same bill. *S. v. Perry,* 122 N. C., 1018, and *S. v. R. R.,* 125 N. C., 666. See, also, *S. v. Johnson,* 50 N. C., 221; *S. v. McNeill,* 93 N. C., 552; *S. v. Lee,* 114 N. C., 844. The defendant entered a special appearance and objected to being tried on the new bill, on the alleged ground that no notice had been issued and served upon it, and for that reason it was not properly before the court; but it appears from the record that a notice was issued both against the corporation and the receivers. This was the proper way to bring the corporation into court to answer the indictment. *S. v. R. R.,* 89 N. C., 584. It does not appear clearly in the record that this notice was served upon any agent of the corporation, as such, but only upon the agent of the receivers; but it is not necessary for us to discuss whether the corporation was properly brought into court, as it is our opinion that it was not, under the facts and circumstances of this case, liable to be indicted for the alleged nuisance. This Court has held that service on the receivers of a corporation in a civil suit is service against the corporation itself. *Farriss v. R. R.,* 115 N. C., 600. Whether, if the corporation had been (787) liable to an indictment for the nuisance, this was a sufficient service to bring them into court for the purpose of answering or pleading to the indictment, is a question not necessarily before us. The court overruled the motion of the railway company to quash the bill, for the reason just assigned, and the defendant excepted.

The State introduced evidence tending to establish the nuisance. The defendants offered no testimony. The receivers, Kerr and Woolcott, moved the court to quash the indictment as to them, which motion was allowed. The Attorney-General admitted in this Court, orally and also in his able and learned brief, that the Court erred in discharging the receivers, and wittily remarked that "the court had the sow by both ears and needlessly turned loose one. Had the court turned loose the wrong one?" This, he says, is the point raised by the several motions and exceptions of the railway company. The Attorney-General then admits that the authorities are against the State upon this question. In Bishop's new Criminal Law (a work of great merit), at page 257, secs. 421 and 422, it is said: "If the affairs of a railway corporation are under the sole management of a receiver, over whose acts it has no control, it is not liable to a criminal prosecution for the nuisance of obstructing a highway by stopping thereon its trains; because, said *Bennett, J.,* 'no man or corporation should be made criminally responsible for acts which he has no power to prevent.'"

It is stated in 24 A. & E. Enc. 12, that where a corporation is in the hands of a receiver, who has full possession of its property and entire

charge of its affairs, the corporation cannot be prosecuted for crimes and misdemeanors committed by the agents or servants of the receiver. See, also, *R. R. v. Com.*, 33 S. W., 822; *S. v. R. R.*, 88 Iowa, 689; *S. v. R. R.*, 115 Ind., 466; *S. v. R. R.*, 30 Vt., 108. In all of the cases just cited it is held that a corporation cannot be convicted for crimes committed by the agents and employees of its receivers, and the decisions are based upon the ground that as a corporation can do no act which will be an interference with the operation of the road or the proper discharge of the duties committed to the receivers, while they are in full control, it consequently can commit no criminal offense through those who act only for the receivers.

We think it would be manifestly unjust and contrary to every elementary and settled principle of the criminal law to hold a natural person or corporation liable for an act which, according to the laws of the State where it is committed, is criminal, when the corporation or individual did not have the power to commit the act and which act was committed by receivers who, by the appointment and (788) authority of the court, had temporary charge of the assets of the individual or corporation when the act was committed. It would shock every man's sense of justice to lay down such a principle and it would make the innocent suffer for the wrongdoing of others over whom they had no power or control. The alleged nuisance was committed, if at all, in the operation of the railway company by the receivers, who were appointed by the Federal court, and the corporation had no right, through its officers or agents, to interfere with the receivers in the discharge of their duties. Any such interference would have been a contempt of the court which appointed the receivers, and subjected the corporation to a fine. Clark on Corporations (1897 Ed.), p. 200.

It is very true that a corporation may be liable criminally for unlawful acts committed by its agents. Mr. Clark, at pages 199 and 200 of his learned treatise, which we have just cited, says: "We have seen that a corporation may be held liable in tort for malicious wrongs, such as libel and malicious prosecution, and for fraud, the malice or evil intent of its agents being imputed to it; and that it may also be held liable in a civil action for assault and battery; and that exemplary or punitive damages may be recovered in proper cases. There is a strong tendency in some jurisdictions to extend this doctrine so as to include criminal prosecutions. Dr. Wharton says that there is no good reason why the same acts for which corporations are subject to civil suit may not equally be the basis for criminal proceedings, when they result in injury to the public at large. And it has been said in a late New Jersey case, after adverting to the fact that a corporation is civilly liable for malicious wrongs: 'It is difficult, therefore, to see how a corporation

may be amenable to civil suit for libel and malicious prosecution and private nuisance, and be mulcted in exemplary damages, and at the same time not be indictable for like offenses where the injury falls upon the public. That malice and evil intent may be imputed to corporations has been repeatedly adjudged.' There are no cases thus far in which a corporation has been held liable criminally for malicious wrongs, or for wrongs involving a specific evil intent, or for wrongs involving the element of personal violence. On the contrary, actual authority, as far as it goes, is against any such doctrine. A corporation may be guilty of a contempt of court by reason of acts or omissions of its officers, as where they violate an injunction. And in such a case it is well settled that the court has the same power to punish it by a fine as it would have (789) in the case of a natural person." See, also, 1 Wharton's Criminal Law, sec. 87; *S. v. Agricultural Society,* 54 N. J. L., 260 (23 Atl., 680); Clark's Criminal Law, p. 79; *Orr v. Bank,* 1 Ohio, 36; *Com. v. Proprietors,* 2 Gray (Mass.), 339; *Mayor v. Ferry Co.,* 64 N. Y., 624; *U. S. v. R. R.,* 6 Fed., 237. Other authorities will be found cited in Clark on Corporations, at pages 199 and 200.

However this may be, the law will not punish a man or hold him to answer an indictment for an act which he did not and could not himself commit, or in the commission of which he did not participate. Whenever property has been seized by an officer of the court, by virtue of its process, it is to be considered as in the custody of the court and under its control for the time being, and this principle applies to property which has been taken into possession by receivers, who are considered as acting for the court and also, in a certain sense and in civil cases, in behalf of the corporation. A receiver is a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit merely to take possession of and preserve, *pendente lite,* the fund or property in litigation, when it does not seem equitable to the court that either of the litigants should have possession of it. He holds the property for the benefit of all the parties interested. His title and possession is that of the court, and any attempt to disturb his possession or to interfere with him, when he is acting under the authority and orders of the court, is contempt, and punishable accordingly. 3 Purdy's Beach on Private Corporations (1905), sec. 1195.

Our opinion is that the receivers were indictable, at least individually, for having committed the nuisance, but that the defendant railway company was not so indictable. The judge charged the jury that if they were satisfied beyond a reasonable doubt, from the evidence, that since the defendant railway company had been placed in the hands of receivers by the Federal court, the receivers had, by their servants or agents, operated the same and willfully allowed their cars to remain in

the public road for one or two hours at a time and thereby obstructed it, and that said obstruction was not necessary to the proper management of the road, they should return a verdict of guilty against the railway company, to which charge the defendant railway company excepted and assigned the said instruction as error. It is our opinion that in the charge, as given to the jury, the law was not properly explained to them and the court committed error in holding that the railway company, in any view of the evidence, was criminally liable under the indictment returned by the grand jury. This error entitles the said de- (790) fendant to another jury; but in view of what we have said, we presume that the solicitor will not proceed further in the case as against the railway company.

New trial.

BROWN, J., not sitting—not being present.

Cited: *S. v. Stephens,* 170 N. C., 746.

STATE v. MODIN PARKER.

(Filed 2 March, 1910.)

Carrying Concealed Weapon—Verdict Unresponsive—Intent.

A verdict of "guilty of carrying a concealed weapon in a suitcase" is not responsive to the charge in a bill of indictment for carrying a concealed weapon, contrary to the statute, and on motion made, it should be set aside as failing to find the fact of concealment and the intent.

APPEAL by defendant from *Guion, J.,* at August Term, 1909, of PITT.

The facts are stated in the opinion of the Court.

Attorney-General Bickett and G. L. Jones for plaintiff.
Julius Brown for defendant.

WALKER, J. The defendant was indicted, in the court below, for the statutory crime of carrying a concealed weapon. The case shows that testimony was introduced by the State tending to prove that the defendant had been seen with a pistol in his hand. The defendant testified in his own behalf that he had not carried the pistol, as charged in the indictment, but on cross-examination he admitted that about two months before the indictment was found he had moved from his former residence to another house in the town where he lived, and while so moving

his household effects he put his pistol in his dress-suit case and carried it from his old to his new home. This was all the testimony in the case.

The defendant requested the court to charge the jury that, upon all the evidence, they should render a verdict of not guilty. This prayer of the defendant was refused by the court and he duly excepted, but it is not necessary for us to consider this exception, as we are of the opinion that the verdict rendered by the jury is not sufficient in form or substance to sustain the judgment which was rendered by the
(791) court thereon, and by which the defendant was required to pay a fine of $10 and the costs.

The jury, under the instructions of the court and the evidence in the case, returned the following verdict: "Guilty of carrying a pistol in his suitcase." The defendant moved to set aside this verdict as uncertain and not responsive to the charge contained in the indictment and, therefore, as insufficient to support the judgment of the court. This motion was denied and the defendant excepted. In this ruling against the defendant, we are of the opinion that the court committed an error. The Attorney-General, with his accustomed frankness and fairness, and evidently after a thorough investigation and consideration of the questions involved in this exception of the defendant, admitted that the verdict is fatally defective. We quote from his excellent brief, as follows: "This exception, I think, should have been sustained. The verdict is not responsive to the charge in the bill of indictment. There is no such offense as 'carrying a pistol in a suitcase' known to our criminal law. The verdict does not purport to be a special one and cannot be so regarded. As a general verdict, it establishes nothing—neither the guilt nor the innocence of the defendant. The essence of the statutory offense, which is alleged in the indictment to have been committed by the defendant, is an intentional concealment of the deadly weapon, and this vital and, of course, essential fact is not established by the verdict, either expressly or by necessary implication. *S. v. Arrington,* 7 N. C., 571; *S. v. Whitaker,* 89 N. C., 472; *S. v. Hudson,* 74 N. C., 246; *S. v. Godwin,* 138 N. C., 586; *S. v. McKay,* 150 N. C., 816."

In *Hudson's case* the defendant was indicted for an assault, and the verdict was "Guilty of shooting," with reference to which the Court said: "The verdict, standing by itself, is, therefore, senseless; centainly it is not responsive to the indictment. The court should never allow such absurd and irresponsive verdicts to be recorded."

In *Whitaker's case* the defendant was indicted for larceny of cotton belonging to one Parker, with a count in the bill for receiving the cotton, knowing it to have been stolen. The verdict was, "Guilty of receiving stolen cotton," and the Court held that it was insufficient as a basis for a judgment, using the following language: "The verdict is not suffi-

ciently responsive to the issue, and whenever it is imperfect, informal, insensible, or one that is not responsive to the indictment, the jury may be directed to reconsider it, with a proper instruction as to the form in which it should be rendered. But if such a verdict is received by the court, it will be error to pronounce judgment (792) upon it." To the same effect are the following authorities: Abbott's Trial Brief (2 Ed.), p. 745; Clark's Criminal Procedure, p. 485; Wharton's Cr. Pl. & Pr., sec. 756.

A very instructive opinion on the general subject of uncertain or indefinite verdicts will be found in *S. v. Newsome,* 3 W. Va., 859. At the close of an able and lengthy opinion, the judge who spoke for the Court says: "We cannot approve of taking from a citizen his liberty upon a verdict that neither alludes to the indictment nor uses language to show a conviction of the crime charged therein. If the jury intended to find the defendant guilty of the offense as charged in the indictment, they should have said so, and the court should have seen that the verdict so declared, or should have refused to receive it."

If the verdict is treated as a special one, the facts found do not warrant the court in proceeding to judgment. A careful examination of the decisions of this Court upon the question will reveal the fact that the gist of the offense, under the law, is the intentional concealment of the weapon. The present Chief Justice, in *S. v. Dixon,* 114 N. C., 850, reviews the authorities and concludes as follows: "In trials for this offense it should be borne in mind that the guilty intent is the intent to carry the weapon concealed, and does not depend upon the intention to use it." We held in *S. v. Simmons,* 143 N. C., 616, as follows: "It is not necessary to a conviction of this offense that the State should show an intention to use the deadly weapon for any unlawful purpose, for it is the intent to conceal and not the intent to use, in any particular way, that renders the act of carrying a weapon criminal."

The jury, by their verdict in this case, have not found the fact of the concealment or the intention to conceal. As stated by the Attorney-General in his brief: "The facts contained in the verdict may constitute evidence of concealment and of intent to conceal, but such proof does not take the place of a verdict. The verdict may be entirely consistent with the guilt of the defendant, but is not inconsistent with his innocense. In *S. v. Gilbert,* 87 N. C., 527, *Justice Ruffin,* for the Court, said that concealment means something more than being out of sight. 'It implies an assent of the mind and a purpose to so carry the weapon that it may not be seen.' When it clearly appears, as shown in *Simmons' case,* that a man willfully and knowingly conceals a deadly weapon, an intention to conceal may be predicted upon such a finding by the jury. But no such fact is stated in the verdict under consideration."

(793) Our conclusion is that the judgment of the court is not supported by the verdict as rendered by the jury, and for this reason it is ordered that the judgment and verdict be set aside.

New trial.

Cited: *S. v. Gregory,* 153 N. C., 649.

STATE v. SIMON YELLOWDAY.

(Filed 23 March, 1910.)

1. Indictment—Unlawful Entry—Amendments—Deemed Made.

When upon a trial under warrant for unlawfully and willfully entering upon land, etc. (Revisal, sec. 3688), on appeal from a justice of the peace, the Superior Court ordered an amendment by the insertion of the words "without license to do so," which amendment was not actually made, but the trial proceeded to verdict upon the assumption that it had been made, a motion in arrest of judgment on that ground will not be granted.

2. Indictment—Amendment—Superior Court—Power of Court.

The Superior Court has the power to order an amendment made to a warrant on appeal from the court of a justice of the peace. Revisal, sec. 1467.

3. Indictment—Unlawful Entry—Good Faith.

When the allegations in an affidavit and warrant for unlawfully and willfully entering upon lands, etc., under Revisal, sec. 3688, substantially comply with the statute, it is sufficient, and an averment that defendant did unlawfully and willfully enter is inconsistent with a claim of title thereto in good faith by defendant, or any right of entry.

4. Indictment—Affidavits Attached—How Construed.

When a warrant clearly refers to an attached affidavit and calls upon defendant to answer its allegations, these allegations become a part of the warrant itself, as if written therein.

5. Indictment—Unlawful Entry—Premises—Land—Synonymous Words.

The word "premises" is synonymous with the word "land," and an indictment for the unlawful and willful entering upon the "premises," etc. (Revisal, 3688), is not defective for the failure of the use of the word "land."

6. Indictment—Unlawful Entry — Possession, Constructive — Principal and Agent.

When an indictment for unlawfully and willfully entering upon the lands of another, etc. (Revisal, sec. 3688), alleges the possession of an agent for the owner named, the owner is in constructive possession, and the allegation of possession is sufficient, the charge not being one for forcible trespass.

7. Instructions — Allusion to Charge — Special Instructions — Appeal and Error.

Upon a trial under a warrant for unlawfully and willfully entering upon the lands of another (Revisal, sec. 3688), it is not reversible error for the trial judge to fail to charge the jury upon the good faith or belief of the defendant as to his ownership, when such had not been requested by special instruction, and the instruction substantially required a finding which excluded the idea of an entry in good faith.

8. Principal and Agent—Witness—Testimony—Declarations.

The testimony of a witness as to his own agency is competent, and not objectionable as evidence of declarations of agency.

APPEAL by defendant from *W. R. Allen, J.,* at September (794) Term, 1909, of WAKE.

The facts are stated in the opinion of the Court.

Attorney-General Bickett for the State.
Douglass & Lyon for defendant.

WALKER, J. The defendant was charged, before a justice of the peace, with the crime of unlawfully and willfully entering upon land, after being forbidden to do so, contrary to the provisions of the Revisal, sec. 3688. The affidavit upon which the warrant issued did not state, in so many words, that the defendant entered "without a license so to do," and after the jury had returned a verdict of guilty, he moved in arrest of judgment upon the grounds that the affidavit did not contain that allegation; that the affidavit, and the statement therein made, were not recited in the warrant, and therefore, did not constitute a part thereof; and lastly, because the affidavit failed to charge an entry upon land, or that the land was in the possession of or owned by any person. We will consider these objections in the order in which they have been stated by us.

It appears from the record that the court ordered an amendment of the warrant, by the insertion therein of the words, "without a license so to do," but the words were not actually inserted in the complaint or the warrant by the solicitor. The order of the court, as has been decided by this Court several times, was self-executing. In *Holland v. Crow,* 34 N. C., at p. 280, *Ruffin, C. J.,* for the Court, says: "The variance between the relators in the petition and the *scire facias* is cured by the order for amendment. It is true, the amendment was not actually made. But the *scire facias* was issued upon the assumption of the amendment, and all the subsequent proceedings were based upon the supposition that one was as properly a relator as the other, and in such cases the course is to consider the order as standing for the amendment itself." He cited *Ufford v. Lucas,* 9 N. C., 214, in (795)

which it is held, as it was in the case just cited, that where, during the pendency of the suit, leave is obtained to amend the writ and change the form of action, if such amendment be not made on the record, and the suit be tried in its amended form or as if the amendment had been actually made, this Court will consider the case as if the amendment had been properly inserted in the writ, warrant or complaint at the time the order was made by the court. This is a most just and reasonable rule and is essential to the due administration of the law. It is analogous to the rule in equity which considers that to have been done which ought to have been done, and the defendant has no reason to complain that the amendment was not actually inserted in the complaint at the time the order was entered, because he has been fully informed of the nature of the charge against him, and has had every opportunity for presenting every defense which, if found to be true by the jury, would acquit him of the offense. He has been deprived of no substantial right, for the case shows that he proceeded, during the trial, in every respect as if the amendment had been duly made. We find that our decisions are fully supported by those in other States. In *Palmer v. Lesne,* 3 Ala., 741, it was held by the Court that, where leave, granted to the plaintiff to amend his declaration, was special and pointed out the particulars in which the amendment was to be made, it did not require a new declaration to be filed, as in the case of an order to amend generally by filing a new declaration or adding a distinct count, in which case the law would require it to be made in point of fact, but the court will consider the leave granted as operating in itself to complete an insufficient or defective statement of the cause of action or of the specific charge made against the defendant. To the same effect is *Fulkerson v. Missouri,* 14 Mo., 49. This objection of the defendant is, therefore, untenable.

It is not necessary that we should decide whether it was essential that the omitted words should have been inserted in the complaint in order to make it a complete and valid charge against the defendant, as what we have said has fully answered the objection which has been made to the affidavit and warrant. We will refer, though, to *S. v. Whitehurst,* 70 N. C., 85, which seems to hold that such an averment in the affidavit upon which the warrant issued for unlawful trespass on land is not necessary. It cannot be doubted that the court had the power to order the amendment to be made. It is provided by the Revisal, sec. 1467, that, "No process or other proceeding begun before a jus-

(796) tice of the peace, whether in a civil or a criminal action, shall be quashed or set aside for the want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending shall have power to amend any warrant, process,

pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time, either before or after judgment." See *S. v. Vaughan,* 91 N. C., 532; *S. v. Smith,* 103 N. C., 410.

It is difficult to understand how the defendant was prejudiced by the omission of the words which the court ordered to be inserted in the complaint or affidavit. It is distinctly charged that he entered upon the land unlawfully and willfully, and if this be true, it is inconsistent with the idea that he entered in good faith claiming title to the land, or the right to enter, or that he entered with a license so to do. It is well, though, for the justices and the solicitors of the different courts to make the accusation against the defendant as nearly as possible in the language of the statute, but a substantial compliance with the statute is all that the law really requires. If, though, care be taken in the respect indicated, such an objection as is now urged cannot possibly be available to the defendant.

The second objection is that the allegations of the complaint or affidavit were not inserted in the warrant; but this is untenable, as the warrant clearly refers to the affidavit and called upon the defendant to answer its allegations. This is all that the law requires in such a case. *S. v. Winslow,* 95 N. C., 649; *S. v. Davis,* 111 N. C., 729; *S. v. Sharp,* 125 N. C., 634; *S. v. Yoder,* 132 N. C., 1113.

The third ground for the motion in arrest of judgment is that the affidavit does not charge an entry upon the land, but upon the "premises" of Mrs. Perkinson, the said premises being in charge of the affiant, who was J. O. Morgan. The word "premises," by repeated rulings of the Court, is now understood to be synonymous with the word "land." The same question as we now have under consideration was raised in the case of *S. v. French,* 120 Ind., 229, which was an indictment for the same kind of offense as is charged in this case to have been committed by the defendant. In that case the Court said: "It is contended with some force and plausibility that the charge is insufficiently made because the word 'premises' is employed instead of the word 'land.' . . . The word 'premises' is now commonly used to mean land and tenements. Possibly usage has corrupted the meaning of the word, but the authors of our law and the lexicographers say that one of the meanings of the word is that which we have given it."

It seems to be contended by the defendant that it is not suffi- (797) ciently charged in the affidavit that the owner of the land, or any one representing her, was in possession of the same; but this objection also fails, as it is distinctly alleged that the defendant entered upon the premises of Mrs. Perkinson, which were, at the time, in charge of J. O. Morgan, who was acting as her agent. She was, therefore, by

her agent, in actual possession of the land, and if Morgan had not been in possession for her, she would have been in the constructive possession of it, which would be sufficient if the defendant had been forbidden to enter upon the land and had no *bona fide* claim thereto or license to enter, because this is not an indictment for forcible trespass, which would require the presence of the owner or some one representing him, and which would involve a breach of the peace.

The defendant excepted to the charge of the court, upon the ground that the jury were not instructed as to whether the defendant entered upon the land in good faith or not. He had been indicted for this same offense once before and was convicted, and the evidence in the case does not tend to show that his last entry was made under circumstances showing an honest belief, on his part, that he had the right to enter. But there is another more conclusive answer to this objection. The defendant complains that the court failed to charge as to this matter and, in such a case, the omission should have been called to the attention of the court by a prayer for instruction. He should not be permitted to remain silent until the court had completed its charge, and then, because the judge, by inadvertence, has omitted to instruct as to some particular feature of the case, assign the same as error. We have repeatedly overruled a similar objection in other cases. *Simmons v. Davenport,* 140 N. C., 407. In that case we said: "If a party desires fuller or more specific instructions, he must ask for them, and not wait until the verdict is given against him, and then, for the first time, complain of the charge. If he would have the evidence recapitulated or any rulings of the court arising thereon presented in the charge, a special instruction should be requested." *Boon v. Murphy,* 108 N. C., 187; *McKinnon v. Morrison,* 104 N. C., 354; *S. v. Debnam,* 98 N. C., 712; *Kendrick v. Dellinger,* 117 N. C., 492; *S. v. Groves,* 119 N. C., 824; *S. v. Ridge,* 125 N. C., 657; *Emry v. R. R.,* 109 N. C., 602. This principle has been so often announced that it may be considered as thoroughly well settled, if not elementary.

It appears, in this case, that the land had been processioned as between the parties, and the dividing line established, and further, that the defendant, as we have said, had been prosecuted once before
(798) for the same offense of which he is now accused. In view of this and other testimony, we do not think he has any reason to complain of the verdict. The charge of the court was a full and accurate statement of the law applicable to the facts of the case, and after a careful perusal of it we find no error therein.

The defendant's counsel, in their brief, complain that the agency of Morgan was proved by the declaration of himself and of Dr. McCullers, but we think this is an error. They testified as witnesses in the case to

the fact of the agency, and the general rule, that an agency cannot be proved by a declaration of the agent, has no application to the facts of this case.

A review of the whole case shows that it was correctly tried in the court below.

No error.

Cited: *Trollinger v. Fleer,* 157 N. C., 85; *S. v. Hinton,* 158 N. C., 626; *S. v. Powell,* 168 N. C., 142.

STATE v. STEPHEN SMITH.

(Filed 23 March, 1910.)

Spirituous Liquors—Procuring Sale—Police Officers—Evidence—"Connivance."

A conviction for retailing whiskey, contrary to statute, is not affected by the fact that it was obtained upon evidence obtained by police officers furnishing money and employing one to buy it from defendant, without suggestion that any inducement to the sale had been held out to him. There is a distinction from those cases holding that a "connivance" of the parties will bar a cause of action.

APPEAL by defendant from *W. R. Allen, J.,* at February Term, 1910, of WAKE.

The facts are stated in the opinion of the Court.

Attorney-General for the State.
Douglass & Lyon for defendant.

CLARK, C. J. The defendant was indicted for retailing whiskey. The evidence for the State tended to show that J. P. Stell, the chief of police of Raleigh, furnished certain money to witness Hammock with which to buy liquor, and, also, additional pay for his services in the matter, and under orders of the chief of police he went to the defendant, in company with one Pope, a city policeman, and purchased intoxicating liquor of the defendant, with the view of having him indicted and punished in the court of the police justice of the city of Raleigh.

The sole question presented by the appeal is whether this (799) conduct on the part of the chief of police is a bar to the prosecution. In McLean on Criminal Law, sec. 118, it is said: "A question analogous to the one discussed in the preceding section, and yet depending for its solution on somewhat different principles, is as to

whether one who has been decoyed into a criminal act for the purpose of securing his detection and punishment is relieved from criminal liability by that fact. It is sometimes suggested that it is very improper and unworthy on the part of prosecuting officers to induce men to be criminals for the purpose of securing their conviction, and such conduct has been criticised; but it is a well-settled principle that the wrongful acts of officers of the State in connection with a prosecution will not be imputed to the State so as to excuse the defendant from criminal liability for what he actually does."

Evanston v. Myers, 172 Ill., 266, is directly in point. "A driver of a beer wagon who sells beer in violation of city ordinances is liable to punishment, though the city furnished the money and employed the purchaser as a detective to discover violations of the ordinance, where no fraud or deceit was used in the purchase or any inducement offered other than a willingness to buy."

In *Rater v. State,* 49 Ind., 508, it is held that "the fact that a party was deceived into violation of the law by one who was employed as a detective will not be a justification."

In *People v. Rush,* 113 Mich., 539, it is held: "The fact that a witness to whom an unlawful sale of liquor was made was employed by the prosecuting attorney as a detective with a view to respondent's prosecution is no defense."

Many other cases are to the same purport. Among them, *Grimm v. U. S.,* 156 U. S., 604, where a detective suspecting a person was using the mail for sending out obscene matter, wrote a letter, in response to which the defendant mailed such matter. It was held that the defendant could not set up the defense that but for such application he would not have sent out this response. In *People v. Everts,* 112 Mich., 194, and *People v. Rush,* 113 *ib.,* 539, it was held no defense in an indictment for an unlawful sale of liquor that it was made to a detective sent by a prosecuting attorney that he might use such purchase and sale as evidence. Indeed, the authorities are numerous, and it would cripple the effective enforcement of the criminal law if it were not permissible to thus procure evidence.

There are some seeming exceptions, for instance, in larceny, whenever the conduct of the owner amounts to a consent that his property may be taken. The reason is that in larceny it is an indispensa-
(800) ble element of the offense that the property shall be taken "against the will of the owner." Also, in proceedings for divorce, if the plaintiff secures some one to entice the defendant into illicit acts. The reason is that "connivance" is always a bar to the plaintiff's cause of action. *Dennis v. Dennis,* 57 Am. St., 95. But as to prosecution for offenses, not against individuals, but against the public, like the pres-

ent, it is no defense that the illegal sale was made to a party who bought not for his own use, but to aid in convicting the seller. It is not the motive of the buyer, but the conduct of the seller which is to be considered.

The Attorney-General in concluding his brief says: "In the case at bar it does not appear that the chief of police told Hammock to induce any sale. He simply furnished the money and told him to endeavor to buy the liquor. The officer doubtless had the best of reasons for believing there was a live 'tiger' in the house of defendant. He put out his bait and the tiger, for all his cunning, 'bolted it,' and now complains that the law of the jungle was violated, else he would not have been entrapped." The defendant's counsel, in reply to this, strenuously contended that his client was a donkey, not a tiger. As to that controversy, *"Non nostrum est, tantas componere lites."*

In the appeal, we find

No error.

Cited: S. v. Hopkins, 154 N. C., 624; *S. v. Ice Co.,* 166 N. C., 370; *S. c., ib.,* 406.

STATE v. J. E. CLIFTON.

(Filed 6 April, 1910.)

1. Cities and Towns—Ordinances—Police Powers—Killing of Dogs—"Willfully"—Words and Phrases.

A police officer of a town, acting within his duties imposed by an ordinance, in killing a dog running at large within the town limits without a muzzle, when not on the owner's premises, cannot be convicted, under the statute, of "unlawfully, willfully and wantonly," etc., killing a certain useful animal, etc., the word willful meaning not only designedly, but with a bad purpose.

2. Cities and Towns—Police Powers—Ordinances—Validity—Killing Dogs.

An ordinance of a city authorizing its police officers to kill, under certain circumstances, dogs running at large without being muzzled within the town limits, upon which city the charter confers police powers, is a valid one.

APPEAL from *Lyon, J.,* at November Term, 1909, of ROBESON.

The indictment charged that defendant did "unlawfully, will- (801) fully and wantonly ill-use, torment, wound, injure, poison and needlessly kill" a certain useful animal, to wit, "one hound dog, the property of E. E. McNair." From the judgment imposed defendant appeals.

Attorney-General Bickett, George L. Jones, and McIntyre, Lawrence & Proctor for the State.

McLean & McLean for defendant.

BROWN, J. The defendant offered no evidence, but rested his case upon the proof offered by the State.

The evidence tended to prove that the dog was running at large off his owner's premises within the town of Lumber Bridge in Robeson County, unmuzzled, and was killed by defendant by the administration of poison. There is also evidence that the defendant was the town constable, charged with enforcement of the municipal ordinances which prohibited the running at large within the town of dogs without muzzles. The ordinance provided further that any dog found running at large after 24 April, 1909, without a muzzle, might be killed by any resident of the town, and that the dog in question was killed by the defendant, the constable of the town, after that date. The ordinance also imposed a fine upon the owner of the dog.

The defendant in apt time by proper prayers for instruction requested the court to charge the jury that if there was such an ordinance in force, and he killed the dog in obedience to it, he was not guilty.

We think the defendant was clearly entitled to this instruction.

It is needless to consider whether a private citizen could justify under the ordinance, or whether the ordinance is too broad in providing such a general method of enforcement, for the defendant was a police officer whose duty it was to execute the lawful and valid ordinances of the town.

The town of Lumber Bridge is invested with the police powers of the State conferred by the general law upon all the cities and incorporated towns of the State. Such powers are usually exercised to further and protect the comfort and safety of citizens generally.

The keeping of animals of all kinds is classified as one of "the main subjects of police regulation." Horr and Bemis Municipal Ord., sec. 212.

A very general police regulation found in the ordinances of municipalities in this country is one "to require dogs to be muzzled and to authorize the police officers to kill those to be found at large and (802) unmuzzled." Horr and Bemis, subdiv. 3, sec. 213, and cases cited in note to p. 200. In addition, the following cases are authority for the text: *Faribault v. Wilson,* 34 Wis., 255; *Blair v. Forehand,* 100 Mass., 136; *Morey v. Brown,* 42 N. H., 373; *Mitchell v. Williams,* 27 Ind., 62.

The word willful as used within the meaning of the statute implies something more than a mere voluntary purpose. When used in criminal statutes the word willful means not only designedly, but also with a "bad

purpose." 8 Words and Phrases, p. 7469, citing *Potter v. United States,* Sup. Court U. S., 39 Law Ed., 214; *Commonwealth v. Kneeland,* 37 Mass., 206, and other cases.

A police officer who in good faith kills a dog under color of the authority of a municipal ordinance cannot be said to do so willfully, within the meaning of the statute upon which this indictment is founded. We think the rulings of the judge deprived defendant of the benefit of a valid defense.

New trial.

Cited: S. v. Lumber Co., 153 N. C., 613; *S. v. Smith,* 156 N. C., 635.

STATE ET AL. v. D. A. MCDONALD.

(Filed 6 April, 1910.)

1. Bastardy—Civil Nature.

Under Revisal, sec. 8, a proceeding in bastardy is of a civil character and to enforce a police regulation.

2. Bastardy — Evidence — Affidavit of Prosecutrix — Paternity — Burden of Issue.

The affidavit of the prosecutrix formally filed and presented before a justice of the peace in proceedings in bastardy, when offered in evidence by the prosecution on the trial in the Superior Court on appeal, raises the presumption that the defendant was the father of the child, and the burden of rebutting this presumption is on him. Revisal, 255.

3. Same—"Prima Facie"—Presumptive.

Proceedings in bastardy are of an anomalous nature, and therefore, though such proceedings are of a civil character, the decisions that the terms "*prima facie*" and "presumptive," when applicable to civil issues, affect only the burden of proof, and not of the issue, are not applicable in proceedings in bastardy; and the affidavit of the prosecutrix, when properly made and presented in evidence, changes the burden of the issue as to defendant's paternity, and places on the defendant the burden of showing to the contrary.

4. Bastardy—Evidence—Change of Rule—Legislative Power—Constitutional Law.

Revisal, sec. 255, making the examination of the prosecutrix in bastardy proceedings, whether taken before a justice or at term, presumptive evidence against the accused, is constitutional and valid, being a change made in the rule of evidence, within the legislative power.

5. Instructions—Term "Satisfy"—Words and Phrases.

Where the principle applies, the terms "must satisfy" and must "satisfy by the preponderance of the evidence" are of equivalent import, and in a charge to the jury, in proper instances, the use of the first-named expression is not reversible error.

6. Bastardy—Paternity—Burden of Issue — State's Evidence — Instructions Erroneous.

When, in bastardy proceedings, under the charge of the court upon the burden of the issue, the jury are instructed, in effect, that the evidence to rebut the presumption of paternity raised by the affidavit of the prosecutrix must come from the defendant, and there is evidence introduced by the State making in defendant's favor, it is reversible error; for both in criminal and civil cases the issue must be determined from all the testimony properly admitted which is relevant to the inquiry.

BROWN, J., concurs in result.

(803) APPEAL from *Lyon, J.*, at October Term, 1909, of ROBESON.

Proceedings in bastardy under the statute, heard on appeal from a justice's court.

The plaintiff filed affidavit in due form as prescribed by the statute appertaining to such cases, and on the hearing before the justice of the peace the issue as to the paternity of the child was found against the defendant. Appeal having been duly taken from the judgment rendered on the trial in the Superior Court, the plaintiff offered in evidence her affidavit which had been formally filed by plaintiff. Defendant, a witness in his own behalf, denied the paternity of the child, and denied that he had ever had intercourse with the prosecutrix, and introduced other evidence tending to contradict that of the prosecutrix and to corroborate his own statement. Prosecutrix was herself examined as a witness, and offered other testimony tending to corroborate the facts contained in her affidavit. In apt time defendant requested the court to charge the jury, "That from all the evidence the State and Mary Shaw must satisfy you by the greater weight of the evidence that D. A. McDonald is the father of the child, or you will answer the issue 'No.'" This prayer was refused.

Among other things, the court charged the jury, "That the affidavit of the prosecutrix is *prima facie* evidence that the defendant is the father of the child, and that the burden is upon the defendant
(804) to rebut the presumption raised by the affidavit, by introducing evidence to satisfy you that he is not the father of the child; and unless the defendant has so satisfied you by the evidence he has introduced in this case, you will answer the issue 'Yes.'" To this instruction defendant excepted, assigning for error that the charge imposes the burden of the issue on the defendant; that it is erroneous as to the

quantum of proof required of defendant, and erroneous in that, so far as the defendant was concerned, the jury was not permitted to consider evidence offered by the State making in favor of the defendant.

On an issue as to the paternity of the child, there was verdict in favor of the prosecutrix; judgment on the verdict, and defendant excepted and appealed.

Attorney-General and McLean & McLean for the State.
McIntyre, Lawrence & Proctor and Shaw & Johnson for defendant.

HOKE, J., after stating the case: It is now established that under our statute on the subject, Revisal 1905, sec. 8, a prosecution of this character is a civil proceeding to enforce a police regulation. *S. v. Addington,* 143 N. C., p. 683; *S. v. Liles,* 134 N. C., p. 735. There was a time, from 1894 to 1904, when the Court held, reversing its former ruling on the subject, that a bastardy proceeding under the statute was in the nature of a criminal prosecution, a position which provoked vigorous protest from two of the Associate Justices, expressed in a strong dissenting opinion of the present Chief Justice, in *S. v. Ostwalt,* 118 N. C., p. 208, and later, as stated, the Court returned to its original construction, holding that the prosecution, while possessing some anomalous features, was a civil proceeding. An informing account of the debates on these differing views will be found in the opinion of the Court in *S. v. Lisle, supra,* the case in which the Court returned to its original position, a decision which was approved and confirmed in *S. v. Addington, supra;* and, as the statute now stands, this may be taken for accepted law.

These cases, too, which uphold the view which now prevails, are also to the effect that where the mother, according to the provisions of the statute, has formally filed her affidavit charging the paternity, this, on the hearing either before the justice's court or in term, shall have the force and effect of changing the burden of the issue as to the paternity of the child, and that on the introduction of the affidavit on the part of the mother, the testimony introduced and relevant must be considered and the question determined according to this ruling. Undoubtedly, the Legislature has the power to give this artificial weight to the affidavit of the prosecutrix. This has been held (805) under given conditions even in criminal cases. *S. v. Barrett,* 138 N. C., 630; *S. v. Dowdy,* 145 N. C., 432. In this last case the Court, speaking to the general principle and in reference to the former decision, said: "In *Barrett's case* we have held that the Legislature had the constitutional power to change the rules of evidence and to declare that certain facts and conditions when shown shall constitute *prima facie* evidence of guilt, the limitation being that the facts

and conditions should be relevant to the inquiry and tend to prove the fact in issue." And see, on this point, *S. v. Rogers,* 119 N. C., 793.

Recurring to the principal question, the section of the statute more especially applicable, Revisal, sec. 255, provides in part as follows:

"255. *Procedure on appeal.* Upon the trial of the issue, whether before the justice or at term, the examination of the woman, taken and returned, shall be presumptive evidence against the person accused, subject to be rebutted by other testimony which may be introduced by the defendant, etc."; and some of the decisions upholding the construction indicated will be found in *S. v. Mitchell,* 119 N. C., 784; *S. v. Cagle,* 114 N. C., 835-839; *S. v. Williams,* 109 N. C., 846; *S. v. Rogers,* 79 N. C., 609; *S. v. Bennett,* 75 N. C., 305.

In *S. v. Mitchell, Avery, J.,* delivering the opinion, said: "The charge that the oath and examination of the mother of the bastard child was *prima facie* evidence of the defendant's guilt was not erroneous. *S. v. Rogers,* 79 N. C., 609; The Code, sec. 32. *Prima facie* evidence is that which is received or continued until the contrary is shown. *Kelly v. Johnson,* 6 Peters (U. S.), 622. It is clear from the terms of the statute (Code, sec. 32) that the word 'presumptive' is used there to define evidence that must be received and treated as true 'till rebutted by other testimony, which may be introduced by the defendant,' and that it is therefore synonymous with *prima facie.* We see no force in the suggestion that there was error in the use of one of the terms rather than the other."

In *S. v. Williams supra,* the following charge was approved: "In an issue of paternity in a bastardy proceeding the written examination of the mother is presumptive evidence that defendant is the father of the child, and when such written examination is introduced by the State, as in this case, it devolves upon the defendant, by a preponderance of the evidence, to show that he was not the father. Upon the failure of the defendant to so show, by a preponderance of the evidence, that he is not the father, it is the duty of the jury to convict. If the de-
(806) fendant has satisfied the jury, by a preponderance of the evidence, that he is not the father of the child, then the jury should acquit. If, however, the oral testimony taken together, both for the prosecution and defendant, left the minds of the jury in doubt, then the presumption raised by the written examination would not be rebutted, and the defendant would be guilty."

In *S. v. Rogers,* 79 N. C., *supra,* it was held: "On the trial of an issue of bastardy, the court below charged the jury that 'The written examination of the woman was presumptive evidence that the defendant was the father of the child, and that it devolved on him by a preponderance of the evidence to show that he was not; and that if, taking

all the evidence into consideration, both sides were evenly balanced, the State was entitled to a verdict': *Held,* not to be error"; and substantially the same ruling was made in *S. v. Bennett, supra.*

So far as examined, we find nothing in opposition to the principle announced in these decisions, except in the case of *S. v. Rogers,* 119 N. C., 795. In that case the Court, wrestling with some of the perplexities incident to the position then entertained, that bastardy proceedings under the statute being of a criminal nature, to wit, (1) that the artificial weight given to the woman's affidavit violated defendant's constitutional right to be confronted with the witness; (2) that it trenched upon the time-honored principle that guilt in criminal matters could only be established by proof beyond a reasonable doubt: *Held,* that notwithstanding the express provisions of the statute to the contrary, that when the defendant denied the paternity and testified contradicting the plaintiff, the matter then was at large, and defendant's guilt must be established beyond a reasonable doubt. The Court, as heretofore stated, having abandoned this interpretation of the statute and returned to the original ruling that the proceedings were of a civil nature, it would seem that the former construction should prevail, to the effect that when the affidavit of the woman charging paternity on defendant was formally filed and presented, this raised a presumption that the defendant was the father of the child, and the burden of rebutting this presumption was on the defendant.

We are not inadvertent to several of our recent decisions to the effect that in ordinary civil issues the terms *"prima facie"* and "presumptive," when applicable, have been held to affect the burden of proof only and not the burden of the issue (see cases collected and referred to in *Winslow v. Hardwood Co.,* 147 N. C., 275); but this bastardy proceeding has been said in frequent cases to be of anomalous nature and we do not think it well to apply such a principle to the construction of (807) this statute and overturn so many repeated and well-considered decisions to the effect that in these cases the affidavit of the woman changes the burden of the issue and places on the defendant the burden of showing the contrary. See, further, *S. v. Patton,* 27 N. C., 180; *S. v. Goode,* 32 N. C., 49.

We are, therefore, of opinion that defendant's prayer for instruction was properly overruled, and the exception to the charge as given on the first ground stated was not well taken.

Nor can the defendant's exception on the second ground as stated by him be sustained, that there was error in charging the jury that the presumption of paternity having been raised by the woman's affidavit, the burden was on the defendant to satisfy the jury to the contrary, the position being that the term "must satisfy" is stronger than the law re-

quires. This proceeding being, as stated, of a civil nature, we have held in several recent cases that the terms "must satisfy" and must "satisfy by the preponderance of the evidence," are of equivalent import, and certainly the distinction suggested will be no longer held for reversible error. *Fraley v. Fraley,* 150 N. C., 504, citing with approval, on this point, the well-considered opinion of *Associate Justice Walker* in *Chaffin v. Manufacturing Co.,* 135 N. C., 95.

We think, however, that the exception to the charge on the third ground noted by defendant must be sustained, to wit, that in meeting the burden placed on defendant by the presumption of law the charge restricts the defendant to the testimony introduced by him. It is accepted doctrine that both in criminal and civil causes the issue must be determined from all the testimony properly admitted which is relevant to the inquiry and whether it comes from plaintiff or defendant. *S. v. Hicks,* 125 N. C., 636; *S. v. Rogers,* 79 N. C., 609; and on the facts presented in restricting the defendant to the evidence tending to exculpate introduced by him, there was reversible error which entitled the defendant to a

New trial.

BROWN, J., concurs in result.

Cited: S. v. Currie, 161 N. C., 278; *S. v. Randall,* 170 N. C., 758; *Land Co. v. Floyd,* 171 N. C., 546.

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(808)

STATE v. JOHN STACKHOUSE.

(Filed 6 April, 1910.)

Murder—Verdict—Recommendation for Mercy—Appeal and Error.

A recommendation for mercy by the jury in their verdict of guilty of murder is not considered on appeal, but is a matter for the Chief Executive, and the lower court having accurately followed in this case the precedents established by this Court upon the questions of deliberation and premeditation, no error is found.

APPEAL from *W. J. Adams, J.,* at November Term, 1909, of SCOTLAND.

Indictment for murder. The prisoner was convicted of murder in the first degree, and from the judgment and sentence of death appeals to this Court.

Attorney-General for the State.
Cox & Dunn for prisoner.

BROWN, J. The prisoner was convicted of the premeditated and deliberate murder of his wife. The killing with a deadly weapon, a shotgun, was admitted. There are no exceptions to the evidence.

The only assignments of error relate to the charge of the judge upon the question of premeditation.

We have examined the entire record with the care which the importance of the case deserves, and we have weighed the well-considered argument of the learned counsel for the prisoner. We are compelled to say that we find no merit in the exceptions pressed so earnestly upon our attention. His Honor followed accurately the well-settled principles laid down by this Court in numerous cases as to what constitutes deliberation and premeditation, and we think it is needless to repeat them here. *S. v. Thomas,* 118 N. C., 1113; *S. v. Dowden,* 118 N. C., 1145; *S. v. Norwood,* 115 N. C., 790; *S. v. Covington,* 117 N. C., 834; *S. v. McCormac,* 116 N. C., 1033.

It is true, the provocation which led to the crime was such that it induced the jury to attach to their verdict a recommendation for mercy. That is a matter for the consideration of the Chief Executive of the State.

In the rulings of the court below we find

No error.

Cited: S. v. Daniels, 164 N. C., 470.

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(809)

STATE v. JAKE SHUFORD AND LOUIS CLEMENT.

(Filed 20 April, 1910.)

1. Evidence—Objections and Exceptions—General Objections.

A general objection taken to evidence on the ground of incompetency cannot be sustained when a part of the evidence objected to is competent.

2. Evidence, Competent—Larceny.

Upon trial under an indictment for burglary in the second degree testimony of a witness that "parties had been in our room" is not objectionable as a mere expression of witness's opinion, he having no knowledge that defendants had been there, when it appears from his evidence that he intended to testify that some one had been there, judging from the appearance of the room.

3. Evidence—Former Evidence—Opinion—Harmless Error.

Testimony of a justice of the peace before whom defendant had had a preliminary trial, that the defendant had substantially testified in the Superior Court to what he had testified before him, is not reversible error

when the witness has stated what the defendant had testified before him, thus giving the jury full opportunity to pass upon the question whether there was any discrepancy or conflict in the testimony.

4. Appeal and Error—Evidence in Rebuttal—Discretion of Court.

The trial judge may in his discretion refuse to allow additional testimony in rebuttal, after the case has been closed, and his ruling is not reviewable on appeal.

5. Larceny from Dwelling—Night-time—Value of Property—Interpretation of Statutes.

Revisal, sec. 3506, providing that "in all cases of larceny where the value of the property stolen does not exceed $20 the punishment shall, for the first offense, not exceed imprisonment . . . for a longer term than one year. If the larceny is from . . . the dwelling-house by breaking and entering in the daytime, this section shall have no application," means that a larceny committed by breaking and entering a dwelling-house in the night-time cannot be punished by imprisonment for more than one year when the value of the property stolen does not exceed the amount named; for while a penal statute should be strictly construed, it must be reasonably construed. Revisal, sec. 3500.

APPEAL by defendant from *Long, J.*, at November Term, 1909, of ROWAN.

The facts are stated in the opinion of the Court.

Attorney-General Bickett and G. L. Jones for the State.
Clement & Clement and Whitehead Kluttz for defendants.

(810) WALKER, J. This was an indictment against the defendants for burglary in the second degree, and the allegation in the indictment is that they did break and enter the house of B. F. McDaniel and did feloniously steal and carry away therefrom certain articles of personal property described in the indictment.

The defendants were convicted of larceny, and appealed to this Court form the judgment of the court below, upon exceptions and assignments of error stated in the record.

The first exception is to the statement of B. F. McDaniel, a witness for the State, as follows: "The parties had been in our bedroom." The defendants contended that this was a mere expression of opinion on the part of the witness, as it appeared that he had no knowledge of the fact. The statement is found in a mass of testimony, some of which is clearly competent, and to which the defendant entered a general objection. This would be sufficient to dispose of the exception, as the defendant should have pointed out the part of the evidence to which he objected. If the answer of a witness is blended with other testimony which, or a part of which, is competent, and a general objection be taken to the whole, the objection fails, though a part of the testimony may be incom-

petent. This is a well-settled rule. But we do not think the testimony of the witness, to which, perhaps, objection was intended to be taken, is incompetent. He did not refer to the defendants in the case, but intended to say that it was evident that, from appearances, somebody had entered the room during the night, and this more clearly appears from the statement which follows, that the house had been closed before his family had retired for the night. *S. v. Ellsworth,* 130 N. C., 690.

The next exception, upon which the defendants rely, relates to the testimony of the justice of the peace, who stated that Oscar Hudson, who had also been indicted with the other two defendants for the same burglary, had testified in the trial of the case in the Superior Court substantially as he had in the justice's court before him; but this objection cannot be sustained, because the witness stated what the testimony of Hudson was in the justice's court. It was, of course, the province of the jury to pass upon the question whether there was any discrepancy or conflict between the testimony of the witness, Oscar Hudson, before the magistrate and his testimony at the trial in the Superior Court, and it appears in this case that they had full opportunity to do this. The same question, as now presented, was raised in *S. v. McLaughlin,* 126 N. C., 1080, in which the Court held, it is true, that the bare statement of the justice that the testimony of the witness before him and before the Superior Court was the same, was incompetent; but the Court further said that it was competent for the justice to state what (811) the witness had testified before him, in order that the jury might pass upon the question as to whether the testimony in both courts is substantially the same. The mere opinion of the witness, expressed in this case, did not prevent the jury from passing upon the disputed fact as to the correspondence of the testimony of the witness in the two courts. The judge might well have instructed the jury not to consider the opinion of the witness; but if there was any error in his failure or omission to do so, we think that, considering this case in all its aspects, it was harmless error.

The State had introduced evidence tending to establish the guilt of the defendants, and the testimony of the defendants themselves tended to show their innocence. The State, after the defendants had rested their case, offered in rebuttal, evidence of the fact that the defendants Hudson and Clement were at Knox's store, which is not far from McDaniel's house, at 9 o'clock the night of the burglary. After the State had closed its case, the defendants proposed to prove that, before 9 o'clock on the same night, the defendants were at Floyd Alexander's. The court, at first, and in the exercise of its discretion, refused to hear further testimony from the defendants, but afterwards allowed them to examine George Gordon, one of their witnesses, and they proposed

to prove by him that he was at Floyd Alexander's house before 9 o'clock on the same night. His Honor thereupon, in the exercise of his discretion, refused to hear further testimony, and the defendant excepted. The testimony of the witnesses Smith and Thompson, who were introduced by the State to rebut the testimony of the defendants, was not new and substantive testimony, but tended merely to contradict the testimony of the defendants, and it was competent for this purpose. It was, therefore, discretionary with the judge whether he would allow additional testimony to be introduced by the defendants. *Dupree v. Insurance Co.*, 92 N. C., 417. We think that, in this case, the judge merely exercised his discretion in refusing to hear further testimony, and, besides, the evidence offered by the defendants did not tend to contradict what was said by the witnesses Smith and Thompson, in rebuttal, because the defendants proposed to show that they were at Floyd Alexander's prior to the time that it was testified by Smith and Thompson that they were at Knox's store.

The last exception taken by the defendants relates to the degree of punishment imposed by the judge. The defendants were sentenced to imprisonment for a term of three years. The defendants contended

(812) that, as the value of the property was not more than $20, the sentence could not exceed a term of one year. It is provided by the Revisal, sec. 3506, as follows: "In all cases of larceny where the value of the property stolen does not exceed $20, the punishment shall, for the first offense, not exceed imprisonment in the State's Prison or common jail for a longer term than one year. If the larceny is from the person, or from the dwelling-house by breaking and entering in the daytime, this section shall have no application. In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen."

Surely, the Legislature did not intend that a larceny committed by breaking and entering a dwelling in the night-time should not be punished as severely as one committed in the daytime. It was evidently the intention of the Legislature, in passing the statute, that where there were circumstances of aggravation, the value of the property should not be considered in passing sentence, that is, where the larceny was committed by taking property from the person or by breaking and entering a dwelling-house. This is not one of the cases where a penal statute should be construed strictly, and thereby defeat the manifest intention of the Legislature. Indeed, while we have often said that a penal statute should be construed strictly, it should also be construed reasonably, so as to ascertain what was meant by the Legislature and to execute its intention. We think it would be giving a strained construction to section 3506 if we should hold that a larceny committed by breaking and entering a dwelling-house in the night-time cannot be

punished by imprisonment for more than one year, and that larceny from the person, or by breaking and entering in the daytime, may be punished by a much longer imprisonment. Revisal, sec. 3500, provides in regard to the punishment of larceny, that in cases of aggravation or of hardened offenders, the court may, in its discretion, sentence the offender to the State's Prison for a period not exceeding ten years.

Upon a careful review of the whole case, we find no error in the rulings of the court or in the record.

No error.

Cited: In re Holley, 154 N. C., 171; *S. v. Smith,* 157 N. C., 585.

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(813)

STATE v. PINK DRY AND GASTON BLAKE.

(Filed 4 May, 1910.)

1. Appeal and Error—Motion to Discharge—Final Judgment—As on Return to Certiorari.

Refusing a motion to discharge the prisoner is not a final judgment, but in this case, with the consent of the Attorney-General, the record is regarded as an application for and a return to an order for *certiorari*, and so treated in the Supreme Court, in order to avoid delay and circumlocution.

2. Capital Felonies—Absence of Prisoner — Mistrial — Order — Discretion — Ends of Justice—Joint Acts.

After the temporary but voluntary absence of a prisoner who is being tried for a capital offense, by the inadvertent permission of the judge, his attorneys stated that they would ask for a new trial on that account. The court thereupon made a mistrial. This does not entitle the prisoner to a discharge upon motion after the entry of the order for a new trial, to which no exception was taken; for while it is not in the discretion of the trial judge to order a mistrial in case of a capital felony, he may do so to attain the ends of justice; and the prisoner not having excepted to a mistrial, he cannot afterwards be heard to object. This principle holds when there are two prisoners being jointly tried for a capital felony for a joint act, and one of them was thus absent.

APPEAL from *Jones, J.,* at January Term, 1910, of CABARRUS.

The facts are stated in the opinion of the Court.

Attorney-General and George L. Jones for the State.
Montgomery & Crowell and W. G. Means for defendant.

CLARK, C. J. The prisoners were on trial for murder. During the taking of the evidence the judge learned for the first time that during the

selection of the jury one of the prisoners (Blake) had left the courtroom and gone into an adjoining room, for a short while, to speak with the coroner, without the knowledge of the court, solicitor, or his counsel, though the court had in fact given permission for said Blake to go into the adjoining room with the coroner, not knowing that he was one of the parties on trial. Upon learning the above facts, the court asked the counsel for the prisoners if they intended to except because the prisoner Blake had been absent a few minutes from the courtroom, while the jury was being selected. Counsel replied that they did. The charge against the prisoners was for a joint capital felony, and there was no severance asked or ordered. The court stated that under these conditions he would withdraw a juror and order a mistrial. It does not appear that the prisoners objected. Certainly, they took no exception. The order was accordingly made, the facts being found in full, and the clerk, under the direction of the court, copied the findings of fact (814) and the order for a mistrial upon the minutes. The counsel for prisoners then moved for the discharge of the prisoners. The motion was overruled, and the prisoners excepted to the denial of the motion to discharge, and appealed.

Refusal of the motion to discharge is not a final judgment, but an interlocutory order, and no appeal lies at this stage. *S. v. Jefferson,* 66 N. C., 311; *S. v. Wiseman,* 68 N. C., 205; *S. v. Locke,* 86 N. C., 649; *S. v. Twiggs,* 90 N. C., 686, where the authorities are reviewed; *S. v. Scruggs,* 115 N. C., 806. But these same authorities and others hold that upon application to this Court upon a proper state of facts *certiorari* will issue. *S. v. McGimsey,* 80 N. C., 377; *S. v. Bell,* 81 N. C., 593. Whatever the reason for the distinction, the Attorney-General very properly consents, in order to avoid delay and circumlocution, that the record on appeal may be treated as an application for and a return to an order for *certiorari,* and we will so treat it.

In every criminal prosecution it is the right of the accused to be present throughout the trial. In misdemeanors this right can be waived by the defendant with the consent of the court, through his counsel. In felonies other than capital the right to be present can be waived only by the party himself. *S. v. Jenkins,* 84 N. C., 813. "In capital trials, this right cannot be waived by the prisoner, but it is the duty of the court to see that he is actually present at each and every step taken in the progress of the trial." *S. v. Jenkins, supra; S. v. Paylor,* 89 N. C., 539; Wharton Cr. Pl. & Pr. (9 Ed.), sec. 540 *et seq.;* 1 Bishop New Cr. Proc., sec. 271 (2), 273. This last section cites numerous authorities. It is true that the prisoner is not required to be present during the argument of a motion for a new trial and similar motions. 1 Wharton Cr. Pl. & Pr. (9 Ed.), sec. 548. That the privilege of being

present can be waived except in capital felonies is held, reviewing the authorities, in *S. v. Mitchell,* 119 N. C., 786; *S. v. Pierce,* 123 N. C., 748.

The earlier decisions in this State restricted the right of the court to order a mistrial in capital felonies to cases of "urgent and overruling necessity," and it was even held that the expiration of the term of court was not such a necessity. A statute was promptly passed to extend the term of court whenever a capital felony was being tried. Since then, the decisions have much broadened the meaning of the word "necessity," holding that in a capital case the judge may order a mistrial against the objection of the prisoner, when it appears that there has been an attempt to influence the jury, even though the prisoner was not privy to it. *S. v. Wiseman,* 68 N. C., 206. In *S. v. McGimsey,* (815) 80 N. C., 377, it was held that a finding of fact by the court that the jury could not agree was sufficient "necessity" to justify the order for a mistrial, and that in mistrials the findings of fact by the judge are conclusive, and only his application of the law to the facts found is reviewable. Also, that where a mistrial in a capital case is made with the consent of the prisoner he is not entitled to be discharged. *S. v. Davis,* 80 N. C., 385.

It was also held that tampering with the jury, or keeping back witnesses, or procuring the selection of a juror pledged to acquit the prisoner, are acts justifying a mistrial in a capital case (*S. v. Bell,* 81 N. C., 594), and even though the prisoner was not cognizant of the intended fraud (*S. v. Washington,* 89 N. C., 538). A mistrial was held proper where a juror was found to be intoxicated. *S. v. Tyson,* 138 N. C., 627.

The Court has often called attention to the fact that in the United States courts and in most of the other States a mistrial in a capital felony rests in the sound discretion of the trial judge, as in all other cases with us; but we have not gone further than to modify the stringent rules heretofore prevailing. *S. v. Washington,* 90 N. C., 666.

Where the prisoners assent to a mistrial, they cannot afterwards be heard to object. *S. v. Whitson,* 111 N. C., 697; *S. v. Davis,* 80 N. C., 384. In *S. v. Guthrie,* 145 N. C., 495, it is held that though it is not a matter of sound discretion in the judge to order a mistrial in a capital felony, as it is in all other cases, it is now settled that he may "order a mistrial when it is necessarw to attain the ends of justice."

In reply to the inquiry of the court, the counsel of the prisoners, who were on trial together for a homicide committed jointly, frankly admitted that they would insist upon the nullity of the whole proceeding because of the absence of one of them from the courtroom during part of the time the jury was being selected. If their contention was correct,

and there are authorities which seem to so hold (and the prisoners cannot be heard to the contrary), the prisoners were not in jeopardy, and the mistrial was properly ordered.

But if the temporary absence of the prisoner, by his own volition, cannot be justly held to have that effect, still the court might well, "in the interest of justice," refuse to go on with an important trial, with such an objection pending, whose effect would be to place the State at a great disadvantage. He thought it would be in the interest of justice that there should be a new trial when no such doubt would thus hang over the validity of the entire proceeding. A moving consider-
(816) ation with him was doubtless the fact that he had given the prisoner, though inadvertently, permission to be absent from the courtroom.

Certainly, when in answer to the inquiry of the judge, counsel for the prisoners admitted that they would insist on a new trial for the invalidity of the proceeding, the prisoners cannot object that the judge ordered such new trial, then and there. They were assenting to a new trial. They did not object to the order for a mistrial and entered no exception thereto. Had they done so, the judge would doubtless have proceeded with the trial. Having entered no exception then, the prisoners cannot be heard to make it for the first time in this Court.

The exception presented by the record is not to the entry of the order for mistrial, but to the refusal of the discharge as a result of the mistrial—an entirely different matter. The prisoner's counsel did not oppose the mistrial. They doubtless desired it, especially after the offer of evidence of a confession. What they are presenting, and all that they can present on this record, is the exception to the refusal to discharge them upon a motion which could have been made only after the entry of the order for a mistrial.

This is not the case of exception taken to matters occurring during the trial, as exceptions to a juror, to evidence, or to the charge. These matters would not justify a mistrial in a capital case. But here the objection was not to any legal ruling of the judge, but that the whole proceeding was void because of the absence of one of the prisoners from the courtroom, and the judge, "in the interest of justice," admitting the plea of invalidity, ordered a mistrial, the prisoners not excepting.

It is true that only one of the prisoners absented himself, but it was a joint trial for a joint act, and both the prisoners relied on the objection as invalidating the entire trial.

In 12 Cyc., 260, the law is thus stated: "A person who has been placed on trial before a competent court and a jury impaneled and sworn, who, by his own act, during the course of the proceeding, makes it

impossible for a valid verdict or judgment to be rendered against him, is not entitled on a subsequent indictment for the same offense to urge the defense of former jeopardy."

In *People v. Higgins,* 59 Cal., 357, it is held: "The defendant being charged with felony, was required to be present during the whole of the trial, including the rendition of the verdict. By voluntarily absenting himself from the court, he made it impossible for the jury to render a verdict in the case. His own act created the necessity for the discharge of the jury without verdict. Having been so discharged, no actual jeopardy ever attached to the defendant on that trial." (817)

It would surely be trifling with the serious and solemn proceedings of a court of justice if a prisoner can absent himself from the trial, temporarily, during its progress, and upon asserting that the trial is for that reason henceforward a nullity, shall become entitled to discharge because the judge, not contesting his plea, orders a mistrial which he insisted he was entitled to.

The motion for discharge of the prisoners was properly denied, and the case will be remanded that they may be duly put on trial.

Remanded.

Cited: S. v. Upton, 170 N. C., 770.

STATE v. JUNE BOWMAN AND FRANK PROPST.

(Filed 11 May, 1910.)

1. Murder—Conspiracy—Evidence—Question for Jury.

Upon a trial for murder, evidence of unfriendly feeling between the defendants and deceased; that the deceased struck one of them, who said, "I will get you later"; that the two defendants then drove off some distance in a buggy, then returned, quarreled with deceased, and one of them untruthfully said, "He is coming on me with a knife"; the deceased advanced upon him, he drew back, and fell with deceased on top of him, whereupon he cried that he was being cut to pieces, and the other defendant rushed in and killed the deceased with a knife, the first defendant having been but slightly cut, is sufficient to take the case to the jury upon the question of conspiracy.

2. Instructions Requested—Language of Court.

It is not error for the court to charge the jury in his own language correct special prayers of instruction, when he does not weaken the force of the instruction requested.

3. Instructions—Exceptions Specific—Appeal and Error.

While an instruction as to one of the defendants on trial for murder may not be strictly correct in law, yet when it is correct as to him and another defendant upon the question of conspiracy, his exception must specify the particular part of the charge claimed to be erroneous for it to be considered on appeal.

4. Murder—Conspiracy—Act Committed by Another—Instructions.

When upon trial for a conspiracy to murder deceased there is evidence that a third person did the killing, a charge by the court, that if this person inflicted the wounds which caused the death they should return a verdict of not guilty as to both defendants, and also charging fully and correctly on the doctrine of reasonable doubt, etc., is sufficient and renders immaterial his failure to give defendants' requested instructions upon this phase of the case.

5. Murder—Conspiracy—Jeopardy of Another—Defense Excluded.

When under a correct charge of the court upon the evidence the jury has rendered a verdict that the two defendants murdered the deceased in accordance with a conspiracy they had previously entered into, the idea is excluded that the one who did the deed was convicted, notwithstanding the jury may have found from the evidence that he had intervened and delivered the fatal blow to prevent the deceased from committing a felony by killing his codefendant and companion without legal excuse, when he had reason to believe that such would otherwise have resulted.

6. Murder — Conspiracy — Manslaughter — Defense Excluded — Appeal and Error.

The defense of manslaughter is inconsistent with a conviction of the defendants for murder in the second degree for a conspiracy to murder the deceased, and when the jury have found that the conspiracy resulting in murder had been formed between the defendants, they will not on appeal be permitted to aver that they killed the deceased in the heat of passion, or upon any legal provocation, or for any other reason which would reduce the crime to the degree of manslaughter.

(818) APPEAL by defendants from *Councill, J.*, at September Term, 1909, of ALEXANDER.

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

Attorney-General Bickett, George L. Jones, M. N. Harshaw, and J. L. Gwaltney for the State.

A. A. Whitner, W. A. Self, and W. C. Feimster for defendants.

WALKER, J. The defendants were indicted for the murder of John Hafer, and were convicted of murder in the second degree. They appealed from the judgment rendered upon the verdict. There are thirty-four exceptions in the record, but we think they can all be reduced, substantially, to one or two questions which require consideration. The evidence tends to show that, on the day the homicide was committed,

the deceased and several other persons had assembled in the woods for the purpose of fighting chickens, and while they were thus assembled defendant Propst and the deceased exchanged some angry words, whereupon the deceased struck Propst in the face, and the latter said to him: "I will get you later." They continued to use insulting language towards each other, each cursing the other. Bowman and Propst drove off some distance in their buggy, and after a short time returned to the place from which they had started, and immediately upon their return Propst commenced to quarrel with the deceased, who (819) was at that time preparing to leave the place for his home. It also appears that before Hafer had done anything at all, or attempted to do anything, Propst was heard to call out: "He is coming on me with a knife!" whereupon Propst stepped back and the deceased advanced upon him. Propst fell down and the deceased fell on top of him, and then Propst cried out that he was being cut to pieces. Bowman immediately rushed in and stabbed the deceased twice, inflicting wounds from which he died. Propst received no serious wounds, but was slightly cut.

There was evidence of the state of feeling between the defendants and the deceased, which was not friendly.

The testimony on the part of the defendants tended to contradict that of the State. It was contended by the latter, though, that there was sufficient evidence for the consideration of the jury to show that the defendants had conspired to attack John Hafer, the deceased, and that they returned to the place where he was for that purpose, it being their understanding and agreement that Propst should cause young Hafer to advance on him so that the defendant Bowman should have an excuse for assaulting the deceased.

Upon a careful examination of the testimony to be found in the record, we think the question as to whether there was a conspiracy between the defendants to make an assault upon the deceased was properly submitted to the jury. There was, at least, more than a scintilla of evidence, and it was for the jury, under proper instructions from the court, to find how the fact was. The conduct of Propst himself was very suspicious, as Hafer had done nothing, and was doing nothing, when Propst said that he was advancing on him, and cried out for help. It is true that the defendants alleged that they returned to the place where the deceased was cut, because one of them had left his coat and not for the purpose of having any quarrel or difficulty with Hafer. It is evident, from the case as stated in the record, that the jury rejected this part of the defendants' testimony because they found, from all the facts and circumstances of the case, that a conspiracy had been formed between the defendants for the purpose of making an assault upon the deceased. The case, in this respect, was fairly submitted to the jury, under proper instructions from the court.

The defendants requested the court to give several instructions to the jury, but we think that those which were proper were substantially given by the court. It is true that the language of the prayers for instructions was not used by the court, but this was not necessary, (820) provided the court did not weaken the force of the instruction which was requested, by the use of other language. *Chaffin v. Manufacturing Co.*, 135 N. C., 95. It may be that one of the instructions given by the court, as to Bowman, was not strictly correct in law, but the said instruction was given in connection with another in regard to the conspiracy, which was undoubtedly correct, and, therefore, the exception must fail, as the defendant should distinctly point out the particular part of the charge which he alleges to be erroneous, and if he covers by his exception instructions, some of which are erroneous and some of which are not, the invariable rule is to disregard the exception, as the court is not called upon to decide, upon an exception so general in its form, which one of the instructions is alleged to be erroneous. *S. v. Hall,* 132 N. C., 1094; *Gwaltney v. Assurance Society, ibid.*

The defendants alleged that the deceased had been cut by Earle Brinkley, and asked for an instruction as to this phase of the case, which they contended was based upon evidence tending to show that the deceased had not been cut by Bowman, but by Brinkley. We think this request for instructions was fully met by the charge of the court, because the court told the jury that if Earle Brinkley inflicted the wounds which caused the death of Hafer, they should return a verdict of not guilty as to both defendants; and the court further instructed the jury fully as to the doctrine of reasonable doubt, charging them that, in order to convict the defendants, or either of them, they must be fully satisfied, under the evidence and the instructions of the court, of the existence of each fact necessary to establish their guilt, one of the facts being, as stated by the court, that Bowman had inflicted the fatal wound.

It may be further remarked, as to the defendant Bowman and with reference to the prayers for instructions submitted in his behalf by his counsel, that the jury could not have convicted him of murder in the second degree because he had intervened and delivered the fatal blows to prevent John Hafer from committing a felony by killing his co-defendant and companion without legal excuse, when he had reason to believe that such a felony was about to be committed, for the court charged the jury that if they found from the evidence that a conspiracy had not been formed between the two defendants to make an assault upon John Hafer, as contended by the State, they should acquit the defendant Propst, and in that case they could convict Bowman only for using excessive and unnecessary force in his attack upon the deceased

with a knife. The jury convicted Propst under this charge, and they must have found, therefore, that such a conspiracy had existed between the two defendants. (821)

This brings us to what we consider as the defendants' principal assignment of error. The court charged the jury that in no view of the case was there any element of manslaughter in the homicide committed by the defendants, and, therefore, they must either convict of murder in the second degree, as to both of the defendants, or of murder in the second degree as to Bowman and acquit Propst, or they must return a verdict of not guilty as to both.

The verdict established the fact that a conspiracy had been entered into between the defendants to provoke a difficulty with John Hafer, with the ultimate design of assaulting him and of taking his life, if necessary, in the affray which was likely to ensue. Such a conspiracy was totally inconsistent with any idea of manslaughter, for it shows both malice and premeditation in the killing, and these are elements of murder. The jury having found the actual facts to be that a conspiracy had been formed between the defendants, they will not be permitted now to aver that they killed the deceased in the heat of passion, or upon a legal provocation, or for any other reason which would reduce the crime to the degree of manslaughter. It therefore follows logically that any error which the court may have committed in its charge, as to that offense, upon a hypothetical state of facts, which the jury, by their verdict, have repudiated, is immaterial and harmless, even if any such error was committed. *S. v. Munn,* 134 N. C., 680.

The exceptions taken to the admission or exclusion of evidence are, in our opinion, without merit, or if an error was committed in respect thereto, it was harmless. We do not mean to imply that there was any error.

Upon a review of the whole case, we think the defendants have been fairly tried according to law, and that they have no ground to complain of the ruling of the court, or of the verdict and judgment.

No error.

Cited: S. v. Knotts, 168 N. C., 190; *S. v. Merrick,* 170 N. C., 794, 798.

(822)

STATE v. WILLIAM BALDWIN.

(Filed 17 May, 1910.)

1. Murder—Malice—Mitigating Circumstances—Manslaughter.

While malice, in the popular sense of personal hatred or ill-will, is not always required to convict of the crime of murder, and may be said to exist whenever there has been an unlawful and intentional homicide without excuse or mitigating circumstance, its presence is always necessary to that crime, whether in the first or second degree. Revisal, sec. 2631.

2. Same—Passion.

Manslaughter is the unlawful killing of another without malice, and under given conditions this crime may be established, though the killing has been both unlawful and intentional, as when the passion, if aroused by provocation which the law deems adequate, displaces malice and is regarded as a mitigating circumstance reducing the degree of the crime.

3. Same—Previous Ill-will—Accidental Meeting.

When previous ill-feeling has existed between the parties, and they meet accidentally and a fight ensues in which one of them is killed, malice will not be presumed from the existence of the old grudge unless the circumstances of the case make it appear.

4. Same—Evidence.

While there is evidence in this case tending to show animosity between the deceased and the defendant on trial for his murder, the idea of malice is repelled when it is established that the deceased accidentally met the prisoner, when the prisoner was peaceably going on his way, and hailed him for the purpose of arresting him on an invalid warrant, overtook him and unjustifiably made the arrest with force, turning the prisoner back and shoving him twice before he made any active resistance, and threatened the prisoner with a pistol before he did the fatal firing; and the question on the issue of manslaughter is alone presented.

5. Murder—Malice—Evidence—Expressions of Prisoner—Provocation.

The prisoner being tried on the charge of murder was asked by witness, within five minutes after he had fired the fatal shot, "You have about fixed yourself to be hung, haven't you?" to which the prisoner replied, "I have done what I intended to do, and I don't care what in the hell they do with me": *Held*, the question was well calculated to arouse the prisoner, and the conversation at the time and place it occurred, and under the attendant facts, should be regarded as the not unnatural expression of an angered man who had passed through a fatal encounter with his fellowman, and should be referred to the occurrence itself, and not construed as an expression of a preconceived definite purpose to kill.

(823) APPEAL from *Councill, J.*, at Fall Term, 1909, of WATAUGA.

Indictment for murder. There was evidence on the part of the State tending to show that on 6 July, 1909, the prisoner shot

and killed J. W. Miller, deceased, who was at the time the town marshal of Blowing Rock, N. C.; that prisoner was going out of town towards Linville, when the deceased, who was fifty steps behind, called to prisoner, overtook him, and, claiming to have a warrant for prisoner, arrested him and started him back towards town; that he shoved the prisoner twice to hurry him along, and the second time the prisoner pulled loose and, turning, shot and killed deceased; that deceased had no valid warrant at the time, and was armed with a billy and pistol, and himself fired once, and one or two of the cartridges in his pistol showed that they had been snapped on.

Henry Coffey, an eye-witness, testified for the State, in part, as follows: "Live at Blowing Rock. I was present at time the prisoner shot and killed Miller, the deceased. The shooting occurred near shop in Blowing Rock. I walked with the deceased to shop just before the shooting. The place where the shooting occurred is beyond the shop a little. When Miller and I were going towards the shop we saw the prisoner come out of the shop and walk off; went in road toward Linville. At this time Baldwin was about fifty yards from Miller and I. Miller then holloed and said: 'Hold, Mr. Baldwin; I have got a warrant for you.' Mr. Baldwin continued to walk on, did not look back; Miller walked on after him and overtook him in a few steps. When Miller overtook Baldwin, he pulled out a paper. [Here defendant excepts.] Mr. Baldwin then said: 'Go off and let me alone; I have started to leave here.' Then Mr. Miller pulled out his 'billy' like he would use it if Baldwin resisted; then Mr. Miller put his hand on Baldwin or give him a little shove and started toward Blowing Rock. While they were walking along Baldwin reached his hand to his left bosom and then seemed to drop it to his side. Mr. Miller about this time kinder give him a little shove and told Baldwin to walk along a little faster. About this time Baldwin got away from Miller some five or six feet and made a little circle, moving to the front of Miller; then presented a pistol on Miller and snapped it at him. At the time Baldwin drew his pistol and snapped it, Miller seemed to be trying to put his paper away and draw his pistol. Mr. Baldwin drew his pistol first; Miller drew his a second after, as well as I could tell. When Baldwin snapped his pistol at Miller, Miller was then drawing his pistol. Immediately after the pistol snapped, Baldwin then shot [indicates time by slapping hands]. After first shot, Baldwin continued in rapid succession to shoot until he fired four shots. After the four shots by Baldwin, I then heard the report of another pistol; it sounded louder and was (824) a few seconds after the four shots I first heard that Baldwin fired. Miller fired the last shot; had pistol in his right hand, but put up his left hand to his right and shot. He only shot once; did not hit Baldwin. When Miller fired at Baldwin, then Baldwin caught Miller

by the coat sleeve and began to beat Miller over the head with the pistol. [Pistol is shown witness and he says it looks like the Baldwin pistol—it is the same pistol.] Baldwin struck Miller some four to five licks over the head. The guard on the pistol is bent. The Baldwin pistol is an S. & W. double-action, rapid fire, caliber 32. When Baldwin was beating Miller over the head with the pistol, Miller holloed, 'Help me, boys!' and I said, 'Come on, boys, and let's stop this.' Mr. Robbins then came out in the yard, then turned and went back. I went on and took hold of Baldwin's pistol and took it from him and put it in my pocket. I took hold of Baldwin's arm, and then Mr. Johnson took hold of Miller and led him off. Baldwin was taken in charge by the officers. I went to Miller and helped to carry him home. Saw Dr. Parleir with Miller. This shooting occurred at Blowing Rock, N. C., the 6th July, and some time after 4 p. m., in daylight. The pistol Baldwin used was a six-shooter, and had five shells shot out and one snapped on. When Miller first got up to Baldwin he just kinder put up his hand and touched Baldwin and said, 'I have a warrant for you,' and took out a paper. Miller never struck Baldwin before Baldwin began firing."

Cross-examined: "I had seen Baldwin that day at Blowing Rock, prior to the shooting. Next saw Baldwin when he came out of the shop. I just struck up with Miller as he was going out toward the shop. Miller asked me to walk with him. Miller overtook Baldwin in twenty yards from shop. Miller said Baldwin had gone out about the shop of Ed. Robbins and was going to hang out there that night, and that he was going to arrest him and take him to jail." Witness described billy that Miller carried. "Miller's pistol had one chamber shot and three cartridges snapped on. Miller was fighting all he could. When I took hold of Baldwin and took pistol from him, I stood where I could see it all. Never knew anything against the deceased as to truth."

Redirect: "No injury on Baldwin—a little smut on his cheek."

With a view of showing malice, and with a view of showing that the killing was premeditated and deliberate, D. S. Lee was examined by the State, and testified:

(825) "I know prisoner when I see him. I know the deceased man, Miller. I heard a conversation between the deceased and prisoner on Friday evening before this killing on Tuesday, the 6th of July last. Mr. Miller and I met in front of Mr. Holsouser's store and were talking, and Baldwin came up. When Mr. Baldwin came up Mr. Miller said: 'All I need to arrest a man with is the billy I have in my hand.' Mr. Baldwin then said: 'If you ever attempt to arrest or hit me with that billy I will kill you.' Mr. Miller said: 'I hope I will never have any cause to arrest you; but if I do, you or any other man, this is all I need to arrest you.' Baldwin then said: 'By God, if you

ever attempt to arrest me with it, you or I will one die.' I think this is the expression. By this time both Miller and Baldwin seemed to be a little mad and Baldwin walked off, and Miller continued to talk to me. When Baldwin came up to where Miller and I were talking he was very abrupt."

For like purpose, M. T. Shoemaker was introduced, and testified: "I saw the prisoner in about five minutes after the shooting occurred. I went up to where the shooting occurred. When I got there Henry Coffey said, 'Mr. Baldwin has shot Mr. Miller and killed him,' and I said to Mr. Baldwin, 'You have about fixed yourself to be hung, haven't you?' and Baldwin replied and said, 'I have done just what I intended to do, and I don't care what in the hell they do with me.'"

William Edmisten testified: "I accompanied defendant to jail from Blowing Rock. I asked him who shot first. He said, 'I did.' I said, 'You got yourself in trouble.' He said, 'I do not care; there would not have been anything of it if Miller had not followed him (me)'"—Baldwin.

Cross-examined: "Miller said he shot once. Showed me how he shot. Could not shoot any more on account of being wounded. I heard Miller tell Baldwin to leave town. He said Baldwin concealed whiskey and, if he did not leave, he would get warrant and arrest him. The evening of the shooting Baldwin told Miller he would be damned if he would go."

For the defendant, it appeared that the warrant under which deceased professed to act was void, and the court so held.

Defendant, a witness in his own behalf, testified to the occurrence as follows: "I am defendant. Live at Blowing Rock. Am 57 years old. Lived at Blowing Rock since 1865. Have been working for Ritter Lumber Company for last two years—only returned to Blowing Rock three or four days before the trouble with Miller. I returned home because my wife was sick. I went to Blowing Rock on Tuesday; and had been to Boone, and was returning home. I got to Blowing Rock about 12 o'clock. I rested and was looking for a man to go on a Mr. Greene's bond. I was on the porch of the drug store at Blowing Rock, and Mr. Miller came up and ordered me off. When he (826) did this, he talked ill to me. After he ordered me off, I sat there about five minutes. Frank Robbins, Dr. Rabey and others were present. I walked away and left Miller standing there. After I left I went home and laid down on the bed; I was sick. William Edmisten came to my house while I was on the bed and told me I had better leave; that they were about to issue a warrant for me. I told him I was not able to leave. My wife was sick at the time. I had no one to leave with her. After Edmisten left I got up and left. I told the 'old woman' I guess I had

better go. I started to my work at Ritter Company's. I got as far as Robbins' shop, and there came up a shower of rain and I went in to keep from getting wet. Stayed there a while, 15 or 20 minutes. I then started off. I then heard some one holloaing behind. I just kept walking on. First thing I knew a man took me by the coat collar, and I looked around and saw it was Miller. I then turned around and said: 'I am going to my work—let me go; I have started, as you told me to do.' Miller then pulled his billy out of his pocket; and when he did so I jerked loose from him, and he then drew his pistol out of his pocket. I then jerked mine out and told him to stop. He then threw his pistol in my face and I threw mine in his face and Miller's pistol snapped; and I then began shooting and fired about four shots in rapid succession. [Identified pistol as his.] During the time I was firing, the deceased was trying to shoot me. I never heard Miller shoot but once; that was last shot. I heard Miller snap once, this before I fired. Held pistol on me all time I was shooting, trying to shoot me. He held pistol in one hand. After last shot he grabbed me. We faced each other until Miller grabbed me. I did not know I had hit him until the firing was all over. We were right up to each other when Miller shot. Powder burned me in face. Henry Coffey took my pistol from me right after shooting. After shooting was over took me to Mr. Holsouser's store. Mr. Lentz and Robbins in shop while shooting was going on. I did not know who called me, and I walked on. I never had had any trouble with Miller. I shot Miller because he threw his pistol in my face and would not stop when I told him, and I thought he was going to kill me. We were right up together when pistols were drawn and shooting occurred. After the shooting, Miller caught hold of me and I tapped him a few times over the head. During this time he was trying to shoot me or trying to hit me with the pistol. Miller and I were perfectly friendly—no trouble between us. I deny the conversation that Lee testified
(827) to about billy, also threats made about Miller. I do not use liquor—have not touched it in thirteen or fourteen years."

Defendant admitted having been sentenced to the penitentiary many years ago for stealing money, and testified that he was not guilty and had been pardoned; and further, that deceased had reputation of being a dangerous, violent man, using weapons on people when in difficulties with them.

Frank Robbins for defendant, testified: "Was not present at shooting. Present at drug store time of conversation between Miller and Baldwin. I heard Miller tell Baldwin he must leave town. Baldwin said he was sick and his wife was sick, and he had not done anything to leave for, and he would not be run off from home; that he had not done anything to leave, and he was not going to do so. Baldwin

then walked off and Miller asked the mayor, Mr. Sudderth, for a warrant, or demanded one. Said if he could not get a warrant there he would go to where he could get one. Miller seemed a little wrought up, or a little mad, when he was talking and when he called for the warrant."

C. A. L. Holsouser, for defendant, testified: "Some four or five days before the killing I heard a conversation between Miller and Baldwin. Baldwin said: 'If you ever hit me with that billy, I will kill you.' Miller said: 'If I can't arrest you with that, I got something in my pocket that I can arrest you with; and if it will not do, I have a Winchester rifle I can get you with.' "

There was other evidence that the deceased was a resolute and determined man and officer, high-tempered and dangerous when aroused, and when he had animosity towards one. George Sudderth, the mayor of the town testified, among other things, "that Henry Coffey told me he saw only a part of the difficulty; that he went into the shop and peeped out, etc.; that he knew Will Baldwin; that he had the reputation of being a good kind of man and attended to his business; that Miller was a man of high temper—so said; he had the reputation of being a man who would use a weapon in a difficulty."

Moses Johnson, for defendant, testified, telling about the difficulty between Baldwin and Miller: "Saw Baldwin with pistol; then shooting followed. After the shooting was over, I went up. Miller had pistol presented on Baldwin when I got there. Saw bullet-hole in shop. I think I got to parties first after shooting. One could kill a man with billy—it weighs about a pound."

J. B. Clarke testified: "Know defendant. Except charge against Baldwin going to pen., he is man of very good character—a harmless fellow and good worker."

J. W. Farthing testified: "Knew deceased. Character of Miller (828) was, he was a hasty man; liked to exhibit his firearms, would make motion like drawing weapon when things did not suit him. He was hasty; drank while he was in Boone."

George W. Robbins testified: "Reputation of Miller was that he was a man who would carry out his purposes regardless of consequences. Would arrest a man regardless of danger."

Cross-examined: "Was a brave officer. Would go when called to do so. Never considered the danger."

The prisoner was convicted of murder in the first degree. Motion for new trial by prisoner on the ground that the court should have held that, upon the entire testimony, the prisoner could not be convicted of murder in the first degree. Overruled and exception. There was judgment on the verdict, and prisoner excepted and appealed.

Attorney-General and G. L. Jones for the State.
L. D. Lowe, M. N. Harshaw, and T. A. Love for defendant.

HOKE, J., after stating the case: We have given the appeal the extended and careful consideration that a case of this character should always receive, and are of opinion that, on the facts as they now appear, the element of malice, required by the law as a constituent feature of the crime of murder, has been negatived, and that if on another trial the facts should be substantially the same, the prisoner is entitled to have his cause submitted and determined on the question of his guilt or innocence of the crime of manslaughter.

In *S. v. Banks,* 143 N. C., 652-656, speaking of malice as an element of the crime of murder, and of the suggested effect upon it of our statute dividing the crime of murder into two degrees, the Court said:

"There has been no change wrought in this respect by the statute dividing the crime of murder into two degrees (Revisal, sec. 3631), as to the element of malice which must exist to make out the crime.

"Both before and since the statute, murder is the unlawful killing of another with malice aforethought. See Clark's Crim. Law, p. 187. This malice may arise from personal ill-will or grudge, but it may also be said to exist whenever there has been a wrongful and intentional killing of another without lawful excuse or mitigating circumstance. The statute does not undertake to give any new definition of murder, but classifies the different kinds of murder as they existed at common law, and which were, before the statute, all included in one and the same degree.

(829) "Thus, all murder done by means of poison, lying in wait, etc., or by any other kind of willful, deliberate or premeditated killing, or murder done in effort to perpetrate a felony, shall be murder in the first degree and punished with death. All other kinds of murder shall be deemed murder in the second degree, and punished by imprisonment in the State's Prison."

It will thus be seen that the constituent definition of murder remains as it was, and, while malice, in the popular sense of personal hatred or ill-will, is not always required, and may be said to exist whenever there has been an unlawful and intentional homicide without excuse or mitigating circumstance, its presence is always necessary to the crime of murder, whether in the first or the second degree. Manslaughter is the unlawful killing of another without malice, and, under given conditions, this crime may be established, though the killing has been both unlawful and intentional. Thus, if two men fight upon a sudden quarrel and on equal terms, at least at the outset, and in the progress of the fight one kills the other—kills in the anger

naturally aroused by the combat—this ordinarily will be but manslaughter. In such case, though the killing may have been both unlawful and intentional, the passion, if aroused by provocation which the law deems adequate, is said to displace malice and is regarded as a mitigating circumstance reducing the degree of the crime.

This position, and the reason upon which it is properly made to rest, is well stated by *Judge Gaston,* delivering the opinion of the Court in *S. v. Hill,* 20 N. C., 491-496, as follows:

"If instantly thereupon (after being previously assaulted), in the transport of passion thus excited, and without previous malice, the prisoner killed the deceased, it would have been a clear case of manslaughter. Not because the law supposes that this passion made him unconscious of what he was about to do, and stripped the act of killing of an intent to commit it, but because it presumes that passion disturbed the sway of reason, and made him regardless of her admonitions. It does not look upon him as temporarily deprived of intellect, and therefore not an accountable agent; but as one in whom the exercise of judgment is impeded by the violence of excitement, and accountable, therefore, as an *infirm* human being. We nowhere find that the passion which in law rebuts the imputation of malice must be so overpowering as for the time to shut out knowledge and destroy volition. All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which during the *furor brevis* renders a man deaf to the voice of reason, so that *although the act done was intentional of death,* it was not the result of malignity of heart, but imputable to human infirmity." (830)

Our decisions are also to the effect that though there may have been previous ill-feeling between the parties, yet if they afterwards meet accidentally, and a fight ensues, in which one of them is killed, it shall not be intended that they were moved by the old grudge, "unless it so appear from the circumstances of the affair."

This was directly held in the case of *S. v. Hill, supra,* where there had previously been a fight between the parties. The ruling being expressed as follows: "Where two persons have formerly fought on malice and are apparently reconciled, and fight again on a fresh quarrel, it shall not be intended," etc. The principle was affirmed and again applied in *S. v. Jacob Johnson,* 47 N. C., 247, and in the opinion of this case is put by way of illustration: "But where A. bears malice against B., and they meet by accident, and upon a quarrel B. assaults A. with a grubbing-hoe, and thereupon A. shoots B. with a pistol, the rule of referring the motive to the previous malice will not apply." And this is in accord with the doctrine generally prevailing.

Applying these principles to the facts presented, while the evidence tends to show that there was some animosity between these parties, there was nothing in the conversations between them, according to any version of them, which would indicate a fixed and definite purpose to take the life of the deceased. The expressions imputed to the prisoner seem to have been in reply to a threat or boast by the officer that he could easily effect the arrest of the prisoner, and, according to all the testimony, the meeting in which the killing occurred was entirely accidental, certainly on the part of the prisoner. The witnesses for both the State and the prisoner who saw the occurrence say that the prisoner at the time was apparently leaving the town and going toward his place of work some distance away, when he was hailed by the officer, overtaken, arrested without any warrant or any conduct that presently justified it, turned back and physically shoved along at least twice before he offered any active resistance. If these facts are established, we are of opinion, as stated, that they repel the idea of malice, and the question is presented only on the issue as to manslaughter, and the judge should so have instructed the jury.

Speaking to the question, in *S. v. Miller,* 112 N. C., 885, an authority not inapplicable to the facts presented here, *Avery, J.,* delivering the opinion, said:

"It is true that when the killing with a deadly weapon is (831) proved and admitted, the burden is shifted upon the prisoner, and he must satisfy the jury, if he can do so from the whole of the testimony, as well that offered for the State as for the defense, that matter relied on to show mitigation or excuse is true. *S. v. Vann,* 82 N. C., 631; *S. v. Willis,* 63 N. C., 26; *S. v. Brittain,* 89 N. C.,481. But when it appears to the judge that in no aspect of the testimony, and under no inference that can be fairly drawn from it, is the prisoner guilty of murder, it is his duty, certainly when requested to do so, to instruct the jury that they must not return a verdict of any higher offense than manslaughter, just as it would be his duty to instruct, in a proper case, that no sufficient evidence had been offered to either excuse or mitigate the slaying with a deadly weapon. Though the law may raise a presumption from a given state of facts, nothing more appearing, it is nevertheless the province of the court, when all the facts are developed and known, to tell the jury whether in every aspect of the testimony the presumption is rebutted. *S. v. Roten,* 86 N. C., 701; *Doggett v. R. R.,* 81 N. C., 459; *Ballinger v. Cureton,* 104 N. C., 474."

Nor do we think that the statement of the prisoner to the witness Shoemaker within five minutes of the occurrence should be allowed to affect the view we take of the case. This witness testified that, going to the place five minutes after the shooting, Henry Coffey said to

witness, "Mr. Baldwin has shot Mr. Miller and killed him," and witness said to Mr. Baldwin, "You have about fixed yourself to be hung, haven't you?" and Baldwin replied, "I have done what I intended to do, and I don't care what in the hell they do with me." The question as put by the witness was well calculated to arouse the prisoner, and the conversation at the time and place it occurred, and under the attendant facts, should be regarded, we think, as the not unnatural expression of an angered man who had just passed through a fateful encounter with his fellowman, and should properly be referred to the occurrence itself and not by any fair intendment construed as an expression of a preconceived definite purpose to kill.

In awarding a new trial to the prisoner, with an intimation that his cause should be submitted to the jury on an issue as to manslaughter, we give such intimation only on the assumption that the facts shall be again developed substantially as they now appear, and especially on the theory that the arrest of the prisoner was without a valid warrant or other lawful authority. The court so held in the case, and the presumption is that this ruling was correct. If it should otherwise appear on a second trial, the case would be presented in an entirely different aspect. Under our authorities, the new trial is at large, and the case will be proceeded with in accordance with law and on (832) the facts as they may be disclosed on a second hearing.

For the error indicated, there must be a new trial, and it is so ordered.

New trial.

Cited: *S. c.*, 155 N. C., 495; *S. v. Pollard,* 168 N. C., 124; *S. v. Kennedy,* 169 N. C., 295; *S. v. Hand,* 170 N. C., 706; *S. v. Merrick,* 171 N. C., 790.

STATE v. WILL WEST.

(Filed 17 May, 1910.)

1. Secret Assault—Evidence Direct—Instructions Inapplicable—Circumstantial Evidence.

When the evidence relied on by the State for a conviction for a secret assault with intent to kill is wholly direct, tending to show the opportunity and that the prisoner had confessed to the crime to the witnesses testifying, and the prisoner relies upon an *alibi* in defense, the doctrines that the prisoner should be acquitted if there are circumstances which, upon a reasonable hypothesis, are consistent with his innocence, and, also, as to

the sufficiency of circumstantial evidence have no application; and though a requested prayer for special instruction correctly states these legal principles, it is not available if unsupported by evidence.

2. Secret Assault—Evidence Direct—One Intent—Instructions Inapplicable.

The prisoner having pleaded an *alibi* in defense to an indictment for a secret assault, and the State relying upon direct evidence tending to show opportunity and the admission of prisoner that he followed the assaulted one and his companion, slipping through the woods in the darkness of the night, hiding himself, and that he fired his gun loaded with shot at close range and inflicted the injury upon the one he had not intended to injure, the doctrine as applied in *S. v. Neely*, 74 N. C., 425, "that it is neither charity, nor common sense, nor law, to infer the worst intent which the facts admit of," has no application; for if the jury find the facts to be as contended for by the State, the prisoner is guilty of the offense charged.

APPEAL from *Councill, J.*, at March Term, 1910, of BURKE.

Indictment for secret assault with intent to kill.

The defendant was indicted, tried and convicted of a secret assault upon one J. D. Morgan, with intent to kill, on the night of 24 January, 1910, in Burke County. The presecuting witness, Morgan, testified that he, in company with several other men, were walking along a road, he and one Fisher in front. That a gun fired; his eye was shot out, leaving him totally blind, as he had previously lost the sight of one eye; that it was between 9 and 10 o'clock at night; there were bushes on the side of the road which concealed the presence of
(833) the person who shot; that he did not know of the presence of the man who shot him, or see or hear him until he was shot. Blackwood Warlick testified, for the State, that he saw the defendant the morning after the shooting and heard him say that he had shot at Wyatt Fisher and couldn't shoot Fisher without hitting Morgan, and described how he slipped along through the woods and bushes until he got opposite Fisher and Morgan, when he shot. There were other witnesses offered by the State, who testified to similar statements of the defendant, and who detailed other circumstances connecting the defendant with the shooting. The only witnesses for the defendant were himself and his wife. This evidence tended to prove an *alibi*. The jury returned a verdict of guilty, and from the judgment the defendant appealed.

Attorney-General Bickett and George L. Jones for the State.

R. L. Huffman for defendant.

MANNING, J. The assignments of error insisted upon by the defendant are to the refusal of his Honor to give three special instructions.

There were no exceptions taken to the evidence, and two of the errors assigned to the charge are abandoned in the brief of the learned counsel for the defendant.

The defendant requested the judge to charge the jury: "That every man is presumed to be innocent until the contrary is proven, and it is a well-established rule in criminal cases that if there is any reasonable hypothesis upon which the circumstances are consistent with the innocence of the accused, the jury should render a verdict of not guilty." The particular part of the instruction which defendant insists should have been given by his Honor is that, "if there is any reasonable hypothesis, etc." The prayer correctly states the rule of law which has been approved by this Court in *S. v. Massey,* 86 N. C., 658; *S. v. Smith,* 136 N. C., 686.

The third rejected prayer was as follows: "That before you can convict the defendant upon the circumstantial evidence relied upon by the State, you must be satisfied that such circumstantial testimony, the facts, their relation, connections and combinations, are reasonable, clear and satisfactory; and the court further charges you that when circumstantial evidence is relied upon to convict, that it should be clear, convincing and conclusive in its connections and combinations and such as to exclude all rational doubt as to defendant's guilt." This instruction embodies substantially the language of *Chief Justice Merrimon* in *S. v. Goodson,* 107 N. C., 798; *S. v. Wilcox,* 132 N. C., 1120. It is essential, however, that an instruction, the refusal to give which (834) is assigned as error, should contain not only a correct statement of law, but that it should be sustained by and be applicable to some view of the evidence. *S. v. McDuffie,* 107 N. C., 885; *S. v. Hicks,* 130 N. C., 705.

The State relied upon the confessions of the defendant, as well as evidence of threats, declarations and opportunity to commit the crime; the defendant relied upon an *alibi.* The State said to the defendant: "You had the opportunity and you confessed that you committed the crime." The defendant said: "I did not have the opportunity and did not commit the crime, because I was in another place when the crime was committed." In this conflict of the evidence, unless the evidence of the State carried to the minds of the jury conviction of its truth, and satisfied them beyond a reasonable doubt of defendant's guilt, it was their duty to acquit. We do not, therefore, think it was error to refuse the instructions prayed in this case, as the State relied upon direct evidence—the defendant's confessions, supported by circumstances showing opportunity to commit the crime. *S. v. Flemming,* 130 N. C., 688; *S. v. Crane,* 110 N. C., 536; *S. v. Shines,* 125 N. C., 730. Another rejected instruction of which defendant complains is taken from *S. v.*

Neely, 74 N. C., 425, that "it is neither charity, nor common sense, nor law, to infer the worst intent which the facts admit." This doctrine was applied in that case to a state of facts very different from the present case. How can but one intent be inferred when the defendant, in the darkness of the night, followed Morgan and Fisher, slipping through the woods, hiding himself, and when the favorable moment came, fired his gun, loaded with shot, directly at them and at close range? If the jury believed the defendant was the man who fired the shot, charity should not be invoked to acquit him, but the law, so grossly violated, demanded his conviction. The correctness of the judge's charge that, if the defendant, intending to shoot Fisher, shot Morgan, he would be guilty as charged, was not questioned in this Court, and we think it could not be successfully challenged. The jury have convicted the defendant, and as we find no error, the judgment is affirmed.

No error.

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(835).

STATE v. WOODFIN GREEN.

(Filed 17 May, 1910.)

1. Murder—Transitory Insanity—Communications to Prisoner—Evidence.

The defense in a trial for murder being a plea of transitory insanity caused by the communications of the prisoner's wife to him of deceased's improper conduct towards her, evidence is competent by the wife of what she had told her husband, as it was upon this communication that the prisoner acted in committing the deed and was claimed to have caused the insanity; but evidence of the truth or falsity of the communication was immaterial and incompetent, as also the reason why the wife called the prisoner away from the house of deceased early in the morning before she had communicated to him the occurrences of the night before upon which the plea of transitory insanity was founded.

2. Murder—Transitory Insanity—Defendant's Character—Drink—Evidence.

The defense in a trial for murder being a plea of transitory insanity caused by the communication of the prisoner's wife to him of deceased's improper conduct towards her, it was competent for the prisoner, not examined as a witness, to offer testimony of his good character and for the State to offer testimony that prisoner was "two-thirds" drunk on the morning of the homicide, and under such conditions was violent in speech and conduct, being directed to the plea of "transitory insanity."

3. Evidence—Irrelevant Answers—Procedure—Appeal and Error.

When the answers of witnesses are not responsive to the questions asked by defendant, and objectionable as incompetent, the defendant should ask that they be stricken out and that the judge direct the jury not to consider them.

STATE *v.* GREEN.

Appeal from *Councill, J.*, at November Term, 1909, of MITCHELL.

Indictment for murder.

The prisoner was convicted of murder in the second degree, and from the judgment of the court appealed. The evidence tended to prove that the prisoner shot and killed Ed. L. Young on 9 September, 1909, about 12 o'clock in the day; that prisoner entered the house of the deceased while he was asleep, shot twice in the ceiling of the room, presumably to awaken the deceased, and then shot him four times. Death resulted in a few minutes. As prisoner walked out of the house he was asked what was the matter, and he replied that "there was a man hurt, and hurt bad, and that I had better come and take care of him."

The prisoner, not having offered himself as a witness, rested his defense upon the plea of insanity—transitory insanity; that this condition of irresponsibility was occasioned by a statement to (836) the prisoner by his wife a few hours before the homicide. The prisoner was engaged in working at night, in or about the Cranberry mines, and on the morning of 9 September, about 6 o'clock, he came to his home, met the deceased at his gate and walked with him to his home, a distance of about 300 yards; in a short time prisoner's wife came for him; they went to their house, ate breakfast, and, as was his custom, prisoner went to his bedroom to sleep. In a short time prisoner's wife came in the room, lay down on another bed, and, thinking the prisoner asleep, began to cry. The prisoner was not asleep, but upon his inquiry as to what was the matter, the wife narrated this occurrence: "Fin, Ed. Young made me drunk last night and overpowered me, and threw me back on the bed and, in spite of my efforts and my telling him to leave, he accomplished his purpose. Young said to me, 'God damn you, I have fixed you.'" That the prisoner jumped up in the floor, wringing his hands and saying, "I want my pistol; I want my pistol. My life is wrecked, my home is ruined!" That she refused to give him the pistol, having hidden it; that prisoner demanded it, and struck her; that she ran to her sister's and then to her father's; that prisoner followed her, demanding his pistol; that she had a difficulty with him and threw an axe at him; that finally she told him where his pistol was, when he left her, and the next thing she heard was that he had killed deceased. There was much evidence of prisoner's excited condition and his wild looks and his open threats to kill Young.

There was evidence on the part of the State tending to prove that prisoner had been drinking that morning; that he said he was two-thirds drunk, and that when drunk he was very rowdy. The testimony of prisoner's unusual condition came from nonexpert witnesses—his kinspeople who saw him that day before the homicide. Immediately after the homicide the insanity seems to have passed away, as he was

apparently as rational as ever, and escaped to the woods, where he remained for a day, when he surrendered himself. There was evidence of previous threats made by prisoner against deceased; and there was also evidence of very friendly relations between them. Both men drank whiskey to excess. The contest between the State and the prisoner was over the defense of insanity, and both State and prisoner offered much evidence tending to support the one theory or the other.

Attorney-General Bickett, Geo. L. Jones and W. C. Newland for the State.

Charles E. Greene and S. J. Ervin for defendant.

(837) MANNING, J. The record contains no exception to the refusal of the trial judge to give special instructions, and no exception to his Honor's charge to the jury. The entire charge is included in the record, and it contains an able and elaborate presentation of the law of the case as applicable to facts as the jury should find them to be. The contentions of both State and the prisoner are stated fully and impartially. We have, therefore, a verdict resting upon a charge so clear and just and able that the learned counsel of the prisoner have not complained to us of any error in it prejudicial to the prisoner's rights. The errors assigned by the prisoner are directed solely to the admission of incompetent and the rejection of competent testimony.

The trial judge permitted the prisoner's wife to rehearse to the jury, in minute detail, everything she told the prisoner about the conduct of the deceased the night before. The prisoner offered to prove as a substantive and independent fact the truth of the narrative by the wife, but this was excluded by his Honor. His Honor's ruling is, we think, clearly sustained by the decision of this Court in *S. v. Banner,* 149 N. C., 519, in which this Court held: "When the defense is a plea of insanity and not self-defense, a witness may not testify, as tending to show self-defense, that he had seen deceased armed, on a dark night, at a place where the prisoner would likely pass, some two weeks before the occurrence, though he may testify that he had told the prisoner concerning it, and what the prisoner said and did in consequence, only so far as it may affect the question of insanity, and for that purpose alone."

In *People v. Wood,* 126 N. Y., 249, *Judge Peckham,* in a learned and elaborate opinion, held that it was competent for a defendant to offer evidence of communication made to him (in that case, the communications offered were of a similar character to those in this case), "for the purpose of showing an adequate cause for the state of mind existing subsequent to the communication. The subsequent conduct, appearance

and conversation of the person to whom the communication is made are the proper subjects of proof, for the one purpose of showing what effect upon him such communications had, and that it rendered him insane within the legal definition of the term at the very time of the commission of the deed." The evidence was held competent, "for the reason that all the facts are material for the purpose of enabling the jury to say what was the condition of mind of defendant when the deed was perpetrated." This being the sole purpose of the evidence, the truth or falsity of the communication is not material, and it is not competent to inquire into it. It is, of course, competent to challenge the fact of communication, but not its truth or falsity. (838)

In the present case, his Honor permitted the prisoner to show in minute detail the communication to him by his wife, and his conduct, appearance, utterances and acts immediately thereafter and to the time of the homicide. This was, in our opinion, as far as it was permissible to go. There was no evidence of any disorder of the brain prior to the morning of 9 September, the day of the homicide; the evidence tended to show the prisoner to be a man possessed of an ordinarily normal mind, except occasional outbursts when intoxicated. In a few hours after the homicide, the prisoner's mind seemed to recover its balance and to resume its normal condition. It was the contention of the prisoner that the sudden "brain storm," which was so violent as to dethrone reason and make him irresponsible for his acts, was caused by his wife's communication. Of its truth or falsity he could know nothing, and could not have been influenced by such knowledge. The theory of the defense and its plea is that he believed it so strongly and so absolutely that the prisoner was made insane. If the purpose was to show the character of the deceased for violence, it was inadmissible, because it did not fall within one of the exceptions to the rule settled in this State for admitting such evidence. *S. v. Banner, supra; S. v. Turpin,* 77 N. C., 473; *S. v. Byrd,* 121 N. C., 688; *S. v. McIver,* 125 N. C., 646. In our opinion, therefore, the offered testimony of the wife that the occurrence communicated by her to the prisoner, her husband, was true as an independent and substantive fact, was properly excluded.

Nor do we think there was error in refusing to permit the prisoner's wife to give her reason for going to the house of deceased for her husband, whom she had seen, early in the morning of the homicide, go there with the deceased, and before she had communicated to him the occurrences of the night before. She testified that she saw her husband walk with the deceased to his house, that she went after him, called him out of the house, and they walked together to their home.

The prisoner objected to certain testimony offered by the State, that when drinking he was violent in speech and conduct. The State offered

evidence tending to show that prisoner was "two-thirds" drunk on the morning of the homicide. The prisoner, not having been at the trial examined as a witness, offered testimony of his good character. It was competent for him to do so. *S. v. Hice,* 117 N. C., 782. This evidence offered by the State as to the effect produced upon prisoner by whiskey was directed to his plea of "transitory insanity." We cannot see
(839) that its admission was prejudicial to the prisoner or that it was incompetent for the purpose it was offered. If the answers of some of the witnesses were not responsive, or not, in themselves, competent, the prisoner's right was to move to strike out such answers and to request his Honor to direct the jury not to consider such answers in reaching their verdict. We have carefully read the entire record and examined all the cases cited by the learned counsel of the prisoner, and we find no error committed at the trial prejudicial to the prisoner's rights. The jury of his county, who saw the witnesses and their demeanor, who heard the entire testimony, have, by their verdict, given to the sudden "brain storm" of the prisoner, created by his wife's communication, such weight and influence as to acquit the prisoner of the capital felony, but not to acquit him of all responsibility for his act. We find

No error.

STATE v. AUGUSTUS HOLLY ET ALS.

(Filed 25 February, 1910.)

Master and Servant—Unlawful Enticing Servant—Statutory Offense.

In order to constitute the offense prescribed by Revisal, sec. 3365, it must be something more than the mere employment of a servant or employee who is under contract to serve another. It must be shown that defendant enticed, persuaded or procured the servant to leave his master; but as in this case there was evidence tending to show this, it was properly submitted to the jury.

APPEAL by defendants from *Ward, J.,* at Fall Term, 1909, of CHOWAN.

Indictment for procuring and enticing a servant or employee to unlawfully leave his employer under section 3365 of the Revisal. *Nol. pros.* was entered as to defendant Outlaw. There was a verdict of guilty as to the defendants Augustus Holly and George Holly, who appealed.

Attorney-General and W. M. Bond for plaintiff.

W. D. Pruden and S. B. Shepherd for defendants.

PER CURIAM. The only question discussed in the brief of defendants' counsel relates to the sufficiency of the evidence to convict of the crime created by the statute.

We agree with counsel that the mere employment of one who is under contract to serve another is not a violation of the statute. It must be shown that the defendant did something to entice, (840) persuade or procure the servant to leave his master.

After a careful examination of the evidence a majority of the Court are of opinion that the evidence discloses some facts and circumstances tending to prove that these defendants induced, enticed and assisted Outlaw to leave his employer and enter into their service under conditions which make their conduct a violation of the statute, and that the court was warranted in submitting the question to the jury.

No error.

STATE v. B. F. POWELL.

(Filed 25 February, 1910.)

APPEAL from *Cooke, J.*, at September Term, 1909, of HALIFAX.

Indictment for incest of defendant in marrying his daughter and living with her in the marriage relation. The defendant was convicted, and appeals.

Attorney-General and George L. Jones for the State.
E. L. Travis for the defendant.

PER CURIAM. The evidence in this case fully warranted the court in submitting the case to the jury. The only assignment of error relates to the evidence of the State's witness, Richard Ivey, for the purpose of contradicting or impeaching by his own declarations the defendant's witness, William Powell.

We do not deem it necessary to pass on the exception, because, in view of all the evidence, it is not of sufficient importance to warrant a new trial.

No error.

STATE v. JOSEPH STEVENS.

(Filed 9 March, 1910.)

Appeal and Error—Criminal Cases—Service—Solicitor—Case Remanded—Procedure.

In criminal cases the trial judge cannot authorize the case on appeal to be served upon any other than the solicitor, or counsel acting as such *pro tem.* in his absence; and when such is done a motion by the Attorney-General to remand the case for proper service will be granted. The appeal in this case being thus remanded, it is continued by the Supreme Court, to be heard at the end of the docket in its regular order, unless upon motion, after the return of the case on appeal, it is set for an earlier day.

(841) APPEAL by defendant from *O. H. Allen, J.,* at September Term, 1909, of NEW HANOVER.

Attorney-General Bickett for the State.
Herbert McClammy for defendant.

PER CURIAM. The Attorney-General moves to remand the case on appeal, that it may be served on the solicitor and (if objected to by him) settled by the judge.

It appears that the judge made an entry allowing the case on appeal to be served "on Joseph W. Little, one of the attorneys of record (assisting in the prosecution), in lieu of the solicitor." The defendant's case on appeal was served on said Little, not on the solicitor, and no exceptions or counter-case having been tendered, the defendant's case on appeal has been sent up to this Court. The conviction is of murder in the first degree and there are sixty-eight assignments of error.

In *S. v. Cameron,* 121 N. C., 572, it was held that the case on appeal must be served on the solicitor and that service upon the assistant counsel is not sufficient, and that service on any one other than the solicitor is valid only when, the solicitor being absent, a solicitor *pro tem.* is acting by his authority or by appointment of the judge, duly recorded; and where counsel other than the *pro tem.* solicitor (in the absence, from the trial, of the solicitor) has accepted service or acted in settling the case, this Court will remand for service upon the solicitor. This was cited and approved in *S. v. Chaffin,* 125 N. C., 665, and *S. v. Conly,* 130 N. C., 684.

In *S. v. Clenny,* 133 N. C., 662, it was again held that service on or acceptance by counsel who appeared with solicitor was not valid, even though such counsel had gone before the judge and there agreed upon a case, and the Court remanded the case with direction to the clerk

to send immediately to the solicitor a copy of defendant's case on appeal, to the end that the case should be settled, in the manner provided by law. The Court "laid down the rule that the signature of the solicitor, a sworn officer, should appear in the make-up of all criminal actions on appeal, where he is present at the trial."

The judge below ignored this rule, doubtless by inadvertence. He could not authorize service of the case on appeal to be made upon any one other than the solicitor, or counsel acting as solicitor (842) *pro tem.* in the solicitor's absence. *S. v. Cameron,* 121 N. C., 572.

The clerk of the court below will at once transmit a copy of the defendant's case on appeal to the solicitor, who will within fifteen days thereafter serve on the defendant's counsel his exceptions or countercase, unless he accept the same. To that end, this case on appeal is remanded and this case is continued here to be heard in regular order at the end of the docket, unless upon motion, after the return of the case on appeal, it is set for an earlier day.

Motion allowed.

STATE v. JOHN SMITH.

(Filed 20 April, 1910.)

Appeal and Error—Forma Pauperis—Averments of Good Faith—Defect Jurisdictional.

The omission in an affidavit to appeal *in forma pauperis* of the averment that it was made "in good faith" is of a matter of jurisdiction; and the appeal must be dismissed on motion, as a matter of right, and is not one of discretion.

APPEAL by defendant from *Long, J.,* at March Special Term, 1910, of FORSYTH.

Attorney-General for the State.
J. S. Grogan for defendant.

PER CURIAM. The affidavit to appeal *in forma pauperis* is fatally defective, as it omits the averment that it is made "in good faith," which is required by Rev., 3278. The appeal must be dismissed on motion as a matter of right, not of discretion. *S. v. Harris,* 114 N. C., 830; *S. v. Rhodes,* 112 N. C., 856; *S. v. Jackson, ib.,* 849; *S. v. Shoulders,* 111 N. C., 637; *S. v. Wylde,* 110 N. C., 500; *S. v. Tow,* 103 N. C., 350; *S. v. Moore,* 93 N. C., 500; *S. v. Payne, ib.,* 612; *S. v. Jones, ib.,*

617; *S. v. Morgan,* 77 N. C., 510; *S. v. Divine,* 69 N. C., 390, cited and approved. *S. v. Bramble,* 121 N. C., 603; *S. v. Atkinson,* 141 N. C., 734.

In *S. v. Parish,* 151 N. C., 659, the Court said: "Unless the requirement of the statute, both as to time and to manner, are complied with, the appeal is not in this Court. The defect is jurisdictional, and we have no power to allow amendment, and the appellee has a right to have the appeal dismissed. *S. v. Bramble,* 121 N. C., 603; *S. v.* (843) *Gatewood,* 125 N. C., 695, and numerous cases there cited."

To same effect *S. v. Duncan,* 107 N. C., 818; *S. v. Payne,* 93 N. C., 613.

In *S. v. Keebler,* 145 N. C., 562, it is said: "In this State an appeal is a right, but not an absolute right. If the appeal bond is not given, or the proper certificate in lieu thereof, the appeal is dismissed."

Appeal dismissed.

Cited: *S. v. DeVane,* 166 N. C., 283.

STATE v. M. H. TWEED.

(Filed 25 May, 1910.)

1. Murder—Previous Quarrel—"Bad Blood"—Evidence.

Upon a trial for murder, it is competent to show that the deceased and the prisoner had a quarrel previous to the killing, as evidence of bad blood between the parties.

2. Murder—Confusing Degrees—Instructions—Charge—Harmless Error.

Upon a trial for murder, an incorrect instruction of the trial judge in the first of the charge, confusing murder in the second degree with murder in the first degree, the accused having been convicted of murder in the second degree, is not reversible error, his Honor having thereafter correctly charged thereon in several parts of his charge so as to render it impossible that the jury could have been misled.

APPEAL by defendant from *J. S. Adams, J.,* at November Term, 1909, of BUNCOMBE.

The defendants were indicted for the murder of Arthur Franklin, and convicted of murder in the second degree. From the judgment rendered, the defendant M. H. Tweed appealed.

Attorney-General Bickett, George L. Jones and Frank Carter for the State.

Moore & Rollins, Gudger & McElroy and Craig, Martin & Thomason for defendants.

PER CURIAM. The typewritten record in this case embraces 174 pages, and there are twenty-three exceptions, all of which have been examined. There is only one exception to the admissibility of evidence, and that relates to the admission of testimony in regard to the previous quarrel on Saturday night between Major Tweed and Arthur Franklin. This was clearly competent to show bad blood between the parties. The remaining exceptions (except those purely formal and those relating to the service of case on appeal) appertain to the charge of the court, which is set out in full in the record. (844)

We are of opinion that the charge is full and correct and follows carefully the well-settled decisions of this Court. A discussion of them again is unnecessary in an opinion.

It is true, his Honor defined murder in the second degree as the felonious killing of a human being, in the first of his charge, but immediately thereafter he defined it correctly, as follows: "Murder in the second degree is the felonious killing of a human being in the peace of the State, by a person of sound memory and discretion, with malice aforethought; and this malice may be either express or implied." This was repeated again in the charge. We do not think it possible that the jury could have been misled.

There is abundant evidence to justify the verdict of the jury, and we find no error of sufficient importance to warrant us in ordering another trial.

No error.

Cited: *S. v. McKenzie,* 166 N. C., 294.

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MEMORANDUM CASES

SPRING TERM, 1910

The following cases were affirmed by *per curiam* orders:

OWENS *v.* NAVIGATION COMPANY (appellant), from Chowan. February 24. *W. S. Privott* and *W. M. Bond* for plaintiff; *Pruden & Pruden* for defendant.

STATE *v.* FAIRCLOTH (appellant), from Sampson. March 16. *Attorney-General* for State; *Fowler & Crumpler* for defendant.

MONROE (appellant) *v.* OWEN, from Cumberland. April 6. *Sinclair & Dye* for plaintiff; *A. S. Hall* for defendant.

BUCHANAN (appellant) *v.* BUCHANAN, from Lee. April 6. *H. F. Seawell* for plaintiff; *Seawell & McIver* for defendant.

GRESHAM MANUFACTURING COMPANY *v.* CARTHAGE BUGGY COMPANY (appellant), from Moore. April 6. *Aycock & Winston* for plaintiff; *H. F. Seawell* and *U. L. Spence* for defendant.

SIKES *v.* WILLIAMS (appellant), from Union. April 6. *Redwine & Sikes* for plaintiff; *J. J. Parker* for defendant.

MANUFACTURING COMPANY *v.* R. R. (appellant), from Guilford. April 13. *Justice & Broadhurst* for plaintiff; *Wilson & Ferguson* for defendant. Affirmed on authority of *Wall-Huske Co. v. R. R.*, 147 N. C., 407.

STATE *v.* CATON (appellant), from Mecklenburg. May 4. *Attorney-General* and *G. L. Jones* for State; *T. A. Adams* for defendant.

STATE *v.* KILGORE (appellant), from Henderson. May 17. *Attorney-General* and *G. L. Jones* for State; no counsel *contra.*

STATE *v.* SMITH (appellant), from Burke. May 17. *G. L. Jones* for plaintiff; *A. A. Whitener, R. L. Huffman* and *J. M. Mull* for defendant.

PADGETT (appellant) *v.* R. R., from Rutherford. May 17. *B. A. Justice* and *R. S. Eaves* for plaintiff; *J. D. Shaw, Ryburn & Hoey* and *Murray Allen* for defendant.

(846) WILLIAMS *v.* BRANCH (appellant), from Burke. May 17. *Avery & Avery* for plaintiff; *S. J. Ervin, J. F. Spainhour* and *J. M. Mull* for defendant.

MEMORANDUM CASES.

EARLY (appellant) *v.* R. R., from Buncombe. May 25. *Zebulon Weaver, Gay Weaver* and *Craig, Martin & Thomason* for plaintiff; *Moore & Rollins* for defendant. Affirmed on authority of *Vassar v. R. R.*, 142 N. C., 69.

STEVENS (appellant) *v.* R. R., from Madison. May 25. *C. B. Marshburne* and *Gudger & McElroy* for plaintiff; *Moore & Rollins* for defendant.

REDMOND (appellant) *v.* R. R., from Buncombe. May 25. *Frank Carter* and *H. C. Chedester* for plaintiff; *Craig, Martin & Thomason* for defendant.

COWAN *v.* WARD (appellant), from Swain. May 25. *A. M. Fry* and *G. L. Jones* for plaintiff; *F. C. Fisher* for defendant.

COZAD *v.* MCADEN, petitioner, from Graham. April 22. *Zebulon Weaver* and *J. D. Murphey* for plaintiff; *Tillett & Guthrie, Merrick & Barnard* and *Dillard & Bell* for defendant. Petition to dismiss by consent.

STATE *v.* BLIZZARD (appellant), from Duplin. May 25. *Attorney-General* for State; *Stevens, Beasley & Weeks* for defendant.

STATE *v.* LEWIS (appellant), from Nash. *Attorney-General* for State; *T. T. Thorne* for defendant. Motion to reinstate appeal denied.

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ABATEMENT.

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APPEAL AND ERROR. See Instructions, 3.

1. *Supreme Court—Newly Discovered Evidence—New Trial—Questions of Law.*—When the Supreme Court has determined and certified down its opinion that the statute of limitations has run against the judgment sued on, the granting of a new trial for newly discovered evidence is not discretionary in the Superior Court, it appearing that the newly discovered evidence did not change the legal aspect of the case. *Matthews v. Peterson*, 168.

2. *Pleadings—Amendments—Discretion.*—Amendments to pleadings are within the discretion of the trial judge, excepting that a new and different cause of action cannot be thus introduced. *Biggs v. Gurganus*, 173.

3. *Instructions, Special—When Offered.*—It appearing of record that a request for special instructions had been refused because offered too late, after three speeches had been made, an exception thereto cannot be considered on appeal. *Ibid.*

4. *"Broadside Exceptions."*—A "broadside exception" to the charge cannot be sustained. *Jackson v. Williams*, 203.

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7. *Principal and Agent—Judgment—Lower Court—Validity Presumed—Statement of Facts.*—Error in the judgment of the lower court will not be presumed on appeal, and when it appears that a surety bond under seal given by a surety company has been delivered for the purpose of vacating an attachment, and its execution appears to be sufficient, the judgment of the Superior Court, establishing its validity, will be sustained, and not declared void for the alleged want of authority of the agents in signing and delivering it, in the absence of any statement of facts by the lower court upon which its judgment was declared. *Bowers v. Lumber Co.*, 604.

8. *Deeds and Conveyances—Statute of Frauds—Findings of Court—Evidence—Nonsuit.*—When there appears in the record on appeal no sufficient evidence of the execution of the paper-writing which the plaintiff seeks in his action to enforce for the conveyance of mineral interest in lands, and the court below has held there was no such evidence, and it appears that the statute of frauds has been sufficiently pleaded in the answer, the judgment of the lower court sustaining defendant's motion to nonsuit upon the evidence will not be disturbed on appeal. *Miller v. Monazite Co.*, 608.

9. *Partition—Costs—Discretion.*—The taxing of costs among the parties to proceedings to partition land is left in the discretion of the court, and will not be reviewed on appeal. Revisal, sec. 1267 (7). *Fortune v. Hunt*, 715.

10. *Parties—Conditions—Further Relief.*—When parties are permitted by the trial court to file answer upon the recited condition that they be alone permitted to defend title to land as against the plaintiff, but should not raise an issue thereto as between themselves and their codefendants concerning which there is prior action pending in the Federal courts, a judgment in their favor against their codefendants is error. *Bailey v. Hopkins*, 748.

11. *Verdict—Counterclaim—Issue Unanswered—Harmless Error.*—In an action involving a claim for damages for plaintiff and a set-off by defendant, an issue being submitted as to each: *Held*, no reversible error arose from the failure of the jury to answer the issue upon the set-off, and judgment accordingly, it appearing in this case that the jury had considered the second issue in answering the first one. *Henderson v. Building Co.*, 754.

12. *Laches—Motion to Dismiss.*—Transcripts of cases on appeal should be docketed in the Supreme Court, under Rule 5, seven days before the beginning of the call of the district, and if not the appellant may be dismissed under Rule 17. The appellant having failed to print and file his brief by the following Saturday, appellee could have filed his motion to dismiss with the clerk on that ground under Rule 34. *Truelove v. Norris*, 755.

13. *Laches—Clerk's Fees—Motion to Dismiss.*—The mere fact that appellant tendered payment to the Superior Court Clerk of his fees for transcript on appeal, and the clerk said he would send up the transcript without payment, that the bond was good, etc., is no sufficient legal excuse for the failure to docket under Rule 5. *Ibid.*

APPEAL AND ERROR—*Continued.*

14. *Laches of Attorney—Remedy.*—The appellant's attorney is his agent to attend to the perfecting of the appeal, and his remedy is against the agent in event of loss by the latter's laches. *Ibid.*

15. *Failure to Docket—Laches—Discretion of Court.*—Upon failure of appellant to docket his case on appeal as required by Rule 5 of the Supreme Court, the appellee may move to docket the certificate and dismiss under Rule 17 (unless a sufficient legal excuse is shown by the appellant for his delay), and therein the Supreme Court has no discretionary power. *Hewitt v. Beck*, 757.

16. *Failure to Docket—Laches—Certiorari.*—It is no sufficient excuse for the appellant's failure to docket his appeal under Rule 5 of the Supreme Court that the case was delayed in being settled and that the clerk was too busy with a term of court to make out the transcript, as it was the duty of appellant to have moved the Supreme Court in apt time for a *certiorari*, and to have seen to the copying of the transcript. *Ibid.*

17. *Failure to Docket—Laches of Attorney.*—When an appeal is not docketed in accordance with Rule 5, it is too late to do so at a subsequent term of the Court. *Ibid.*

18. *Failure to Docket—Laches of Attorney—Client's Responsibility.*—Appellant's counsel is his agent or attorney in fact for the purpose of perfecting his appeal, and the principal is responsible for the negligence of the attorney. *Ibid.*

19. *Exceptions—Rule 27—Procedure.*—Upon motion, the Supreme Court will affirm the judgment of the lower court for failure of the appellant to make the assignment of errors of record required by Rule 27, after examination of the record proper and no errors appearing thereon. *Pegram v. Hester*, 765.

20. *Instructions—Allusion to Charge—Special Instructions.*—Upon a trial under a warrant for unlawfully and willfully entering upon the lands of another (Revisal, sec. 3688), it is not reversible error for the trial judge to fail to charge the jury upon the good faith or belief of the defendant as to his ownership, when such had not been requested by special instruction, and the instruction substantially required a finding which excluded the idea of an entry in good faith. *S. v. Yellowday*, 784.

21. *Murder—Verdict—Recommendation for Mercy.*—A recommendation for mercy by the jury in their verdict of guilty of murder is not considered on appeal, but is a matter for the Chief Executive, and the lower court having accurately followed in this case the precedents established by this Court upon the questions of deliberation and premeditation, no error is found. *S. v. Stackhouse*, 808.

22. *Evidence in Rebuttal—Discretion of Court.*—The trial judge may in his discretion refuse to allow additional testimony in rebuttal, after the case has been closed, and his ruling is not reviewable on appeal. *S. v. Shuford*, 809.

23. *Motion to Discharge—Final Judgment—As on Return to Certiorari.*—Refusing a motion to discharge the prisoner is not a final judgment, but in this case, with the consent of the Attorney-General, the record

APPEAL AND ERROR—*Continued.*

is regarded as an application for and a return to an order for *certiorari*, and so treated in the Supreme Court, in order to avoid delay and circumlocution. *S. v. Dry*, 813.

24. *Instructions—Exceptions Specific.*—While an instruction as to one of the defendants on trial for murder may not be strictly correct in law, yet when it is correct as to him and another defendant upon the question of conspiracy, his exception must specify the particular part of the charge claimed to be erroneous for it to be considered on appeal. *S. v. Bowman*, 817.

25. *Criminal Cases—Service—Solicitor—Case Remanded—Procedure.*—In criminal cases the trial judge cannot authorize the case on appeal to be served upon any other than the solicitor, or counsel acting as such *pro tem.* in his absence; and when such is done a motion by the Attorney-General to remand the case for proper service will be granted. The appeal in this case being thus remanded, it is continued by the Supreme Court, to be heard at the end of the docket in its regular order, unless upon motion, after the return of the case on appeal, it is set for an earlier day. *S. v. Stevens*, 840.

26. *Forma Pauperis—Averments of Good Faith—Defect Jurisdictional.*—The omission in an affidavit to appeal *in forma pauperis* of the averment that it was made "in good faith" is of a matter of jurisdiction; and the appeal must be dismissed on motion, as a matter of right, and is not one of discretion. *S. v. Smith*, 842.

APPOINTMENT. See Guardian and Ward.

APPOINTMENT, POWER OF. See Wills.

ARBITRATION. See Insurance.

Water and Watercourses—Obstruction—Damages—Boundaries—Matters Concluded.—When it appears from an award made in an arbitration submitted by the upper and lower riparian owners of land that only the question of boundary was determined, the award does not conclude or estop one of the parties from asserting his rights in an action brought by the lower owner involving the question of damages and an injunction against the upper owner in wrongfully diverting the waters of the stream. *Power Co. v. Navigation Co.*, 474.

ASSAULT.

Secret—Evidence Direct—Instructions Inapplicable—Circumstantial Evidence.—When the evidence relied on by the State for a conviction for a secret assault with intent to kill is wholly direct, tending to show the opportunity and that the prisoner had confessed to the crime to the witnesses testifying, and the prisoner relies upon an *alibi* in defense, the doctrines that the prisoner should be acquitted if there are circumstances which, upon a reasonable hypothesis, are consistent with his innocence, and, also, as to the sufficiency of circumstantial evidence, have no application; and though a requested prayer for special instruction correctly states these legal principles, it is not available if unsupported by evidence. *S. v. West*, 832.

ASSUMPTION OF RISK. See Master and Servant.

ATTACHMENT.

1. *Evidence—Examination of Books—Testimony as to Contents, When.*—In proceedings in attachment levied on the proceeds of a draft with bill of lading attached, drawn on plaintiff by defendants in payment for a carload of goods, the draft made payable to a bank, an intervenor, it is competent for the cashier of the bank to testify that the bank books showed that the bank purchased the draft for value before sending it out for collection, and that, at the time the attachment was levied, it was the property of the bank; though he had no personal knowledge of the transaction and had based his testimony upon an examination of the books of the bank. This is of necessity so in a case when the books are without the State, and beyond the jurisdiction of the court, and could not well be introduced without stopping the business of the bank. *Horse Exchange v. Wilson*, 21.

2. *Motion to Vacate Refused—Appeal and Error—Procedure.*—Upon the refusal of the trial court, on special appearance, to grant a motion to vacate an attachment on property for defects in the affidavit, and because of no service of process, an appeal will lie. *Finch v. Slater*, 155.

3. *Affidavit Defective—Motion to Vacate—Procedure.*—An affidavit for the issuance of a warrant of attachment is fatally defective when merely alleging that defendant is about to remove some of his property from the State, with intent to defraud, etc., without stating the grounds upon which the belief is based, and which does not definitely and distinctly state any fact which would entitle the plaintiff to this process. *Ibid.*

4. *Process—Summons—Service—Motion to Vacate—Procedure.*—The summons in the suit must be served either personally or by publication to entitle the plaintiff to a warrant of attachment against the defendant's property; and when this has not been done within the proper time a motion to vacate should be allowed in the lower court. The court may extend the time for serving the summons in its discretion. *Ibid.*

ATTORNEY AND CLIENT. See Fraud, 5; Wills, 7; Usury, 4; Appeal and Error.

1. *Termination of Relationship.*—The termination of the relationship of attorney and client depends upon the facts and circumstances and nature of the attorney's employment and the retainer he had received, and as a general rule, and in the absence of special circumstances to the contrary, the authority ceases with the termination of the suit for which his services are engaged. *Newkirk v. Stevens*, 498.

2. *Same—Subsequent Dealings.*—The defendant having acquired an undivided one-half interest in the *locus in quo* as a contingent fee in successfully representing the plaintiff to final judgment in an action brought against him involving his title, may then deal with the plaintiff in any transaction respecting the sale of land to a third person, for the relationship of attorney and client ceased upon the rendition of the said judgment, and plaintiff is not entitled to any of defendant's personal profits in the sale of his own interests by reason of the former relationship. *Ibid.*

3. *Duty of Attorney.*—It is the duty of appellant to see that the transcript of the case on appeal is sent up in apt time, docketed, printed, and the

ATTORNEY AND CLIENT—*Continued.*

brief prepared and printed, and upon his failure to do so without a sufficient legal excuse, the case will be dismissed on proper motion made by the appellee. *Truelove v. Norris*, 755.

4. *Appeal and Error—Laches—Remedy.*—The appellant's attorney is his agent to attend to the perfecting of the appeal, and his remedy is against the agent in event of loss by the latter's laches. *Ibid.*

ATTORNEY IN FACT. See Deeds and Conveyances.

AUTOMATIC COUPLERS. See Negligence.

AUTOMOBILES. See Negligence.

AVOIDANCE. See Burden of Proof.

BALLOTS. See Elections.

BANKRUPTCY.

"*Four Months*"—*Creditors—Trustees.*—Revisal, sec. 1131, gives to the tort-claimant the right to follow and subject to the payment of his claim such property as the corporation had disposed of by mortgage, even when the sale under mortgage has taken place before judgment has been rendered in favor of the one who has suffered damage from the tort of the corporation; and when the mortgage and a sale made in pursuance thereof antedates the four months provided by the bankrupt act, the mortgaged property does not pass to the trustees in bankruptcy, and the rights under Revisal, sec. 1131, given to such judgment creditor, being good as against the claims of all other creditors, his judgment is good against them and the trustee in bankruptcy, though obtained within the four-months period. *Clement v. King*, 456.

BASTARDY.

1. *Civil Nature.*—Under Revisal, sec. 8, a proceeding in bastardy is of a civil character and to enforce a police regulation. *S. v. McDonald*, 802.

2. *Evidence—Affidavit of Prosecutrix—Paternity—Burden of Issue.*—The affidavit of the prosecutrix formally filed and presented before a justice of the peace in proceedings in bastardy, when offered in evidence by the prosecution on the trial in the Superior Court on appeal, raises the presumption that the defendant was the father of the child, and the burden of rebutting this presumption is on him. Revisal, 255. *Ibid.*

3. *Same—"Prima Facie"—Presumptive.*—Proceedings in bastardy are of an anomalous nature, and therefore, though such proceedings are of a civil character, the decisions that the terms "*prima facie*" and "presumptive," when applicable to civil issues, affect only the burden of proof, and not of the issue, are not applicable in proceedings in bastardy; and the affidavit of the prosecutrix, when properly made and presented in evidence, changes the burden of the issue as to defendant's paternity, and places on the defendant the burden of showing to the contrary. *Ibid.*

4. *Evidence—Change of Rule—Legislative Power—Constitutional Law.*—Revisal, sec. 255, making the examination of the prosecutrix in bas-

BASTARDY—*Continued.*

tardy proceedings, whether taken before a justice or at term, presumptive evidence against the accused, is constitutional and valid, being a change made in the rule of evidence, within the legislative power. *Ibid.*

5. *Paternity—Burden of Issue—State's Evidence—Instructions Erroneous.* When, in bastardy proceedings, under the charge of the court upon the burden of the issue, the jury are instructed, in effect, that the evidence to rebut the presumption of paternity raised by the affidavit of the prosecutrix must come from the defendant, and there is evidence introduced by the State making in defendant's favor, it is reversible error; for both in criminal and civil cases the issue must be determined from all the testimony properly admitted which is relevant to the inquiry. *Ibid.*

BEQUESTS FOR LIFE. See Estates.

BILL OF LADING, OPEN. See Penalty Statutes.

BILLS OF LADING. See Carriers of Freight.

BOARD OF EXAMINERS. See Optometry.

BOND ISSUES.

Taxation — Necessaries — Vote of People — Legislative Intent.— While a municipality may ordinarily provide for the lighting of its streets by electricity, as a necessary expense, by an issue of bonds without submitting the question to the qualified voters (Constitution, Art. VII, sec. 7), it may not do so when there is an existing special legislative act requiring it to be so submitted, whether the act in question be expressed in terms permissive or mandatory, for such a statute in either case is equivalent to a legislative declaration and requirement that the sense of the voters shall be had before the undertaking is entered upon. Constitution, Art. VIII, sec. 4. *Ellison v. Williamston*, 147.

BOOK EVIDENCE. See Evidence.

BOOKS. See Evidence.

BOUNDARIES.

1. *Trespass—Dividing Line—Variation of Magnetic Needle—Questions for Jury—Line Trees—Evidence.*—In an action of trespass to determine the dividing line between the adjoining lands of the parties, there was evidence of a variation of the magnetic needle since the time of the original survey, and that to fix the line as given by the deed, by running from an admitted corner, without allowing for this variation, would establish the line contended for by defendant; there were other surveys made from this admitted corner to locate this line, allowing for the variation of the needle, and there was testimony that on one of them there were certain marked stumps, regarded as line trees. There was evidence on plaintiff's part that he had been cultivating the land for fifty years in accordance with this last-named line, and that it was the true dividing line: *Held*, (1) a question of fact for the jury; (2) it was not error to refuse defendant's prayer for instruction that the line which was run without allowing for the

BOUNDARIES—*Continued.*

variation of the magnetic needle should be established as the true line; (3) the line stumps should be regarded as evidence tending to show the location of the true line. *Whitfield v. Robeson*, 97.

2. *Water and Watercourses — Obstruction—Damages—Arbitration—Matters Concluded.*—When it appears from an award made in an arbitration submitted by the upper and lower riparian owners of land that only the question of boundary was determined, the award does not conclude or estop one of the parties from asserting his rights in an action brought by the lower owner involving the question of damages and an injunction against the upper owner in wrongfully diverting the waters of the stream. *Power Co. v. Navigation Co.*, 473.

3. *Same—Established.*—The first call in a grant of lands being 100 poles from an established corner to a stake in the line of M., and it appearing that the surveyor and grantee did not know at the time where that line was located, and there was no actual survey, the M. line will not be regarded as established so as to control the call and extend the line 274 poles in disregard of the call sufficiently established by the description in the grant. *Lumber Co. v. Hutton*, 537.

4. *Same.*—When the course and distance of a grant, purporting to convey 50 acres of land, are clear and definite, the adjoining owners being given, and from the plat attached it appears that the acres granted were in the form of a parallelogram 80 by 100 poles, with boundaries and acreage exactly corresponding to those of the grant, the record call, "80 poles W. to a stake," cannot be filled by running from a stake, an unknown point, "S. W. 319 poles" to the third call, which was a point in dispute and unsettled at the time of the survey, and which would cut in half a tract of an adjoining owner; nor can the third call be filled by running from a disputed point a greater number of poles than that given by the grant; nor the last call, "then E. (with a certain line) to the beginning," be filled by running 400 poles, the description contended for embracing an acreage of fourteen times that which the grant purports to convey. *Ibid.*

5. *Deeds and Conveyances — Descriptions — Meanderings of Stream—Straight Line.*—The description in a grant of land being that it began at a certain point "at the State line near the mouth of Slick Rock Creek, and runs south 25 E. with said line 220 poles to a stake in said line," the ruling of the judge upon the referee's report that the line followed the meanders of the creek (the State line) and thus stops at a measurement of 220 poles, and not by measuring a straight line, was correct. *Bailey v. Hopkins*, 748.

CALLS. See Deeds and Conveyances.

CANCELLATION. See Contracts; Deeds and Conveyances.

CARRIERS OF FREIGHT.

1. *Consignor and Consignee—Open Bill of Lading—Presumption—Party Aggrieved.*—When goods are shipped under an open bill of lading and the consignor has never in any way rescinded or abandoned the contract of sale with the consignee, or resumed possession of the goods, but still holds him responsible, and they are in the railroad warehouse at their destination, the former is not the "party ag-

CARRIERS OF FREIGHT—*Continued.*

grieved," and may not maintain his action for damages to the goods, there being no evidence to rebut the presumption of *prima facie* ownership by the consignee arising from the consignor's delivery of the goods to the carrier upon a bill of lading of this character. *Buggy Corporation v. R. R.*, 119.

2. *Negligence—Contracts—Restricting Liability.*—A common carrier cannot, in its contract of shipment, stipulate against recovery for a loss or damage occasioned by its own negligence, whether such loss or damage is a total or partial one. *Stringfield v. R. R.*, 125.

3. *Same—Live Stock—Agreed Valuation—Negligence—Restricting Liability.*—By a stipulation in an ordinary live-stock contract of shipment a common carrier cannot restrict the amount of recovery brought about by its own negligence, it appearing that the contract was for the shipment of a valuable horse, that there was no effort of the parties to fix upon or approximate its correct value, but the restriction was inserted according to an arbitrary and inadequate valuation clause in a printed formula, predetermined and without reference to the real value of the animal, and without effort to ascertain such value. (*Jones v. R. R.*, 128 N. C., 449, cited and distinguished.) *Ibid.*

4. *Bills of Lading—Notice of Loss—Thirty Days.*—A provision in a bill of lading that the carrier would not be liable if claim for loss in shipment were delayed for more than thirty days after the delivery of the property, is unreasonable and void. *Deans v. R. R.*, 171.

5. *Bill of Lading—Restricting Liability—Live Stock—Valuable Horse.*—When under instructions from the shipper of a valuable race horse, who was unaware that there were several rate classifications of such animals, to ship by the usual classification, the agent of the railroad company made a freight rate in accordance with ordinary live-stock bill of lading which limited the recovery to a maximum amount of $100, but which restriction was not incorporated into the bill of lading used and of which nothing was said to the shipper, the question as to whether the recovery should be restricted to the maximum of $100 under the bill of lading customarily used for a shipment of live stock is not presented, as that character of bill of lading was neither used nor referred to; and, if otherwise, the restriction would be void under *Stringfield v. R. R.*, *ante*, 125. *Kissenger v. Fitzgerald*, 247.

6. *Same—Notice Implied.*—The fact that the agent of a railroad company issuing a bill of lading for the shipment of a valuable race horse knew that the animal was shipped for racing purposes, and had seen it "go round the race track," is sufficient to put him upon notice that the value of the animal exceeded the average value of $100 contained as a restriction of its liability for damages in its ordinary live-stock bill of lading. *Ibid.*

7. *Interstate Commerce—Discrimination—Knowledge of Shipper—Fraud.* One who ships a horse and pays the freight charged by the carrier's agent in ignorance of the various classifications of freight rates on horses, and who does not know that the agent, in order to give the rate charged, had put a lower value upon the animal than its actual value, cannot be held guilty of "knowingly and willfully" committing a fraud, and of a criminal offense against the United States statutes

CARRIERS OF FREIGHT—*Continued.*

in obtaining a preference by reason that the rate of freight charged by the agent was less than the schedule of rates published by the carrier under the Federal statutes relating to interstate commerce. *Ibid.*

8. *Same—Restricting Liability—State's Policy—Void Stipulations.*—And in such interstate shipments, there being no regulation by Congress or the Interstate Commerce Commission affecting the policy of this State that common carriers may not contract against loss or damage occasioned by their negligence, any stipulation in the bill of lading to that effect cannot be enforced here. *Ibid.*

9. *Bill of Lading—Presumption—Good Order.*—A bill of lading given by the carrier for a shipment of goods raises a presumption that they were delivered for shipment in good order. *Sumrell v. R. R.*, 269.

10. *Pleadings — Demurrer—Penalty Statutes—Some Damages—Interstate Shipments—Refusal to Accept.*—The complaint in an action for damages alleged by failure of carrier to accept a tender of an interstate shipment, and for the penalty under Revisal, sec. 2631, sufficiently alleging a ground for the recovery of nominal damages at least, the question of whether the statutory penalty may be imposed upon an interstate shipment does not arise upon defendant's appeal from an order of the trial judge overruling a demurrer to the complaint defendant had interposed. *Olive v. R. R.*, 279.

11. *Pleadings—Demurrer—Rebate—Discrimination—Connecting Carrier—Allowance.*—A complaint alleging that defendant railroad company agreed to pay the plaintiff a sum equivalent to ½ cent per 100 pounds for lumber delivered to it by the plaintiff's connecting tramroad for shipment, and that the amount demanded was for lumber thus delivered, a demurrer on the ground that, in effect, it was a rebate or discrimination in rates in plaintiff's favor, is bad, it not appearing that any of plaintiff's lumber was embraced in the shipments. Ch. 320, sec. 4, Laws of 1891 (then in force). The demurrer was properly overruled and defendant allowed to answer over. Revisal, 506. *Wilcox v. R. R.*, 317.

12. *Live-stock Bills of Lading—Valuable Horse—Delivery—Special Contract—Measure of Damages.*—A valuable race horse was shipped with knowledge by the carrier's agent under its ordinary live-stock bill of lading, limiting the amount of recovery to $100, and under the terms of which the shipper assumed to indemnify the carrier against all claims arising from heat, etc. The carrier's agent, knowing that the horse was shipped for races to be held at its destination at a certain time, made a special contract that it would reach its destination accordingly. The animal finally died from the effects of being overheated in the car, and then exposed to cold, and its bad condition was at once made known to the agent at its destination before its removal: *Held*, recovery for full damages should be allowed, under *Stringfield v. R. R.*, *ante*, 125. *Breeding Assn. v. R. R.*, 345.

13. *Transportation—Private Tracks—Delivery—Accessible for Unloading—Interpretation of Statutes.*—Revisal, sec. 2632, penalizing a railroad company for failure, etc., to transport freight (amended so as to include delivery at destination under ch. 461, Laws 1907), does not

CARRIERS OF FREIGHT—*Continued.*

apply to a delivery on the private tracks of a consignee; but to avoid the penalty it is required of the carrier to place for delivery a carload shipment on its track at destination at a place reasonably accessible. *Mfg. Co. v. R. R.*, 665.

CARRIERS OF PASSENGERS.

1. *Wrong Train — Wrong Information—Passenger—Alight—Assistance—Negligence.*—The purchaser of a ticket who has taken the wrong train in accordance with the information given by its porter, is a passenger thereon until she leaves the train, and the company is liable in damages proximately caused by the failure of the conductor or porter to stop the train at a suitable place, or to provide the proper steps or assistance for her to alight. *Bullock v. R. R.*, 66.
2. *Railroads—Regular Stops—Train Orders—Rights of Passengers—Substantial Damages.*—There was evidence tending to prove that plaintiff was a passenger on defendant's train scheduled to stop at McFarland; that he tendered his fare to conductor, who refused to receive it; that conductor had orders to stop at McFarland; that he willfully disobeyed them; that plaintiff told conductor that he must stop at McFarland to attend his child's funeral, and that then conductor refused to stop: *Held*, that the evidence justified the court in submitting the question of punitive damage to the jury. *Owens v. R. R.*, 439.
3. *Railroads—Moving Trains—Passengers Alighting—Instructions of Conductor—Contributory Negligence—Questions for Jury.*—The question of contributory negligence of plaintiff in alighting from a moving train should be submitted to the jury upon evidence tending to show that the train had slowed down, so that it was moving very slowly, and that, as plaintiff was alighting, under the instruction of the conductor, it started to go more rapidly and threw plaintiff to the ground and inflicted the injury. *Ibid.*
4. *Freight Trains—Customary Jolting—Negligence.*—It appearing in this case that the injury complained of was proximately caused by the jolting and jarring usual to freight trains, upon which plaintiff was a passenger, there was error in rendering judgment against the defendant railway company. *Usury v. Watkins*, 760.

CARTWAYS. See Highways.

CASH. See Wills.

CAUSAL CONNECTION. See Damages; Negligence; Indictment; Principal and Surety.

CERTIORARI. See Appeal and Error.

CHARACTER. See Evidence.

CITIES AND TOWNS.

1. *Streets—Necessary Expense.*—The cost of maintaining, repairing and paving the public streets of a city is a necessary expense. *Jones v. New Bern*, 64.
2. *Bond Issues—Elections—Majority Vote—Constitutional Law.*—When a debt to be contracted by a city is for a necessary expense, the restrictive provision of the Constitution, requiring a majority of the qualified voters, does not apply. *Ibid.*

CITIES AND TOWNS—*Continued.*

3. *Same—Legislative Control.*—The issue of bonds by a city to meet its necessary expense is controlled by a special legislative enactment relative thereto; and the bonds are valid if the requirement of the act is met, that a majority of the votes cast shall be in favor of the issue. *Ibid.*

4. *Bond Issues—Sinking Fund—Interest—Validity of Bonds.*—A failure to provide a sinking fund for the payment of principal, or a special tax for the payment of interest, does not affect the legality of the bonds issued by a city, but only the means and method of payment. *Ibid.*

5. *Contracts—Principal and Agent—Ratification—Easement—Liability Imposed by Third Person.*—Defendant having a body of land north of Greensboro, desired the extension of a public street through his property, and, at his instance, plaintiff, who owned a lot between the town and defendant's property, was induced to join in the application for such extension. When the matter came on for decision plaintiff was absent, but submitted a written proposition as to the terms upon which he would grant the city a right of way through his lot. The municipal board having rejected plaintiff's proposition, defendant, who was present, without authority from plaintiff, agreed with the authorities for a right of way through both properties on payment by the city to defendant of $1,500, defendant agreeing to pay all costs and charges against abutting owners. Later, defendant told plaintiff of his agreement, saying he had agreed to bear all the costs, and plaintiff thereupon ratified defendant's action, conveyed the right of way: *Held*, that on the facts stated a primary liability was created against defendant for the costs lawfully imposed upon abutting owners, and plaintiff, having been compelled by the city to pay his *pro rata* of the costs of paving the sidewalk through his property, was entitled to recover said sum of defendant. *Bailey v. Bishop*, 383.

6. *Closing Streets—Public Safety—Damnum Absque Injuria.*—The courts will not interfere with the exercise of a discretionary power conferred upon a town by its charter in temporarily closing a street at a dangerous railroad crossing, and ordering an overhead bridge to be built there for the safety and convenience of the public, and damages thereby caused to the land of a citizen is *damnum absque injuria*, in the absence of express legislation permitting its recovery. *Crowell v. Monroe*, 399.

7. *Discretion—Bond Issues—"Streets"—Scheme of Streets—Lawful Expenditures.*—When under the authority of a legislative power a town issues valid bonds in the aggregate of $20,000 for the improvement of its "streets," the term "streets" will be held to include sidewalks or driveways within its meaning; and when the petition upon which the election was ordered, the bonds sold and the proceeds received for expenditures, particularly desired the commissioners "to adopt a general scheme of street and sidewalk improvement for the town," it is left to the discretion of the commissioners to employ competent engineers for the proper grading of the streets and sidewalks, to determine how much grading any particular street shall receive, how its natural configuration shall be graded, etc., have the work done, and pay for such expenses out of the funds received from the sale of the bonds. *Smith v. Hendersonville*, 617.

CITIES AND TOWNS—*Continued.*

8. *Bond Issue—Water System—Necessary Purpose.*—An issue of bonds for water-works and sewerage in a town where the wells are contaminated with typhoid germs, and there is no adequate protection from fire, and no other supply of water, is for a necessary purpose. *Underwood v. Asheboro*, 641.

9. *Same—Taxation—Limitations of Levy—Injunction—Burden of Proof.* The limitations of Revisal, secs. 2974, 2977, 2924, 5110, do not apply to a tax levy for the necessary municipal purpose of a water and sewer system; and, if otherwise, the party seeking to restrain a bond issue for such purpose has the burden of proof that after deducting rentals and profits of the water system, the levy to pay interest on these bonds would probably swell the total levy, for other than special purposes authorized by statute, beyond the limitations in either Rev., 2924 or 5110. *Ibid.*

10. *Streets—Grading—Lateral Support—Negligence.*—When changing the grade of an existing street under the proper authorities of a town involves an excavation of 12 or 14 feet, and leaves the plaintiff's property abutting on an embankment of the height nearly perpendicular, with a soil showing a tendency to crumble away, a rotten, ashy kind of soil with a "good deal of isinglass," having no body, which will not stand as left after the excavation, a failure to provide a support for it is evidence of actionable negligence on the part of the town in doing the work, for which, if established, the plaintiff may recover damages. *Harper v. Lenoir*, 723.

11. *Streets—Grading—Lateral Support—Negligence—Damages.*—The doctrine that the withdrawal of lateral support to adjoining lands is not actionable until damage accrues, and to the extent it has accrued, does not apply to further grading of an established street done under statutory authority. In such case an action lies only in case the work is negligently done and damages are awarded which are properly attributable to such negligence. *Ibid.*

12. *Streets—Grading—Negligence—Measure of Damages.*—The work being done under statutory authority, and the injury regarded as permanent in its nature, the proper rule for the admeasurement of damages is the impaired market value of the property arising and likely to arise by reason of the negligence established, determined on consideration of the entire damages from the wrong—past, present and prospective. *Ibid.*

13. *Same—Supporting Walls—Cost—Evidence.*—In an action for damages against a town for negligently leaving plaintiff's abutting land, elevated by reason of grading down a street, insecure and unsupported, evidence of the cost of a retaining wall is competent as a fact relevant to the inquiry as to the amount of permanent damages recoverable, and under some circumstances might be adopted as determinative, particularly when such cost is reasonable and operates in restriction of the amount demanded. *Ibid.*

14. *Streets—Grading—Damages—Experts Upon the Facts—Evidence—Tax Value—Relevant Circumstances.*—In an action for damages to plaintiff's abutting land caused by the negligence of defendant town in lowering a street in grading it, opinions of witnesses who have had a

CITIES AND TOWNS—*Continued.*

personal observation of relevant facts and conditions, and whose opinions are calculated to aid the jury in coming to a correct conclusion, are competent. *Ibid.*

15. *Police Powers—Ordinances—Validity—Killing Dogs.*—An ordinance of a city authorizing its police officers to kill, under certain circumstances, dogs running at large without being muzzled within the town limits, upon which city the charter confers police powers, is a valid one. *S. v. Clifton*, 800.

CLAIM AND DELIVERY.

1. *Pleadings — Mortgagor and Mortgagee — Counterclaim — Accounting—Questions for Jury.*—In an action to declare valid a sale of property under mortgage described in the pleadings, the possession of which had been obtained under claim and delivery proceedings, damages by way of counterclaim being alleged in the answer, the defendant mortgagors are entitled to an accounting to ascertain the amount realized at the sale in excess of the mortgage debt, and for such excess, if any, they are entitled to judgment, thus raising a question for the jury; and therefore plaintiff's motion for judgment upon the pleadings should be denied. *Penny v. Ludwick*, 375.

2. *Wrongful Seizure—Damages—Tender.*—The fact that the verdict of the jury has established that the plaintiff wrongfully seized, under claim and delivery proceedings, and sold defendant mortgagor's property, and tendered the unsold property in excess of the debt, without a finding that such excess of property is not in plaintiff's possession or under his control, does not discharge the plaintiff from liability to defendant; and the question as to whether the tender was a valid one and would thereafter relieve the plaintiff from paying interest, does not arise. *Ibid.*

3. *Prosecution Bond—Plaintiff's Default—Inquiry—Assessment of Damages—Judgment—Procedure.*—The plaintiff in claim and delivery proceedings, having filed his complaint, given the bond, and obtained the property sought therein, and having failed to appear at the trial and prosecute his action, judgment of nonsuit was entered, and the jury having ascertained on issue submitted the amount of damages defendant had sustained by reason of the seizure and detention of the property: *Held*, no error in the judgment of the lower court, in effect that the property seized under claim and delivery be returned to defendant, and if this could not be done, that defendant recover of plaintiff and his surety the penal sum of the bond, to be discharged upon payment of the damages assessed by the jury, with order that execution issue to enforce the judgment. *Phipps v. Wilson*, 125 N. C., 106, cited and distinguished. *Mfg. Co. v. Rhodes*, 636.

CLOUD ON TITLE. See Limitation of Actions; Equity; Injunctions.

COCAINE. See Pharmacists.

COLOR. See Deeds and Conveyances.

COMMON LAW. See Judgments.

COMMUNICATIONS AND TRANSACTIONS. See Evidence.

COMPENSATION. See County.

CONCEALED WEAPONS.

Verdict Unresponsive—Intent.—A verdict of "guilty of carrying a concealed weapon in a suitcase" is not responsive to the charge in a bill of indictment for carrying a concealed weapon, contrary to the statute, and on motion made, it should be set aside as failing to find the fact of concealment and the intent. *S. v. Parker*, 790.

CONFESSION AND AVOIDANCE. See Judgments, 5.

CONSIDERATION. See Contracts; Principal and Agent.

CONSPIRACY. See Murder.

CONSTITUTION, STATE.

Art. II, sec. 14. The Legislature may correct its journals of the regular session, at a special session, to show that an act passed allowing counties, etc., to pledge their credit had been regularly passed. *Commissioners v. Bank*, 387.

Art. V, sec. 3. A resolution of the county commissioners requesting a taxpayer to properly list his taxes is not a revision of the assessment. *Wolfenden v. Commissioners*, 83.

Art. VII, sec. 7. A bond issue for necessaries must be submitted to the vote of the people when required by a legislative enactment. *Ellison v. Williamston*, 147.

Art. VII, sec. 7. This section does not apply to assessments made in accordance with the benefits derived by a general system of drainage. *Sanderlin v. Luken*, 738.

Art. VIII, sec. 4. A bond issue for necessaries must be submitted to a vote of the people when required by legislative enactment. *Ellison v. Williamston*, 147.

CONSTITUTIONAL LAW. See Cities and Towns.

1. *Carriers of Freight—Penalty Statutes—Refusal to Receive—Interstate Commerce.*—It is established by the former decisions of this Court that Revisal, 2631, imposing a penalty on the refusal to accept interstate shipments, does not contravene the commerce clause of the Federal Constitution, both because the act is prior to the beginning of transportation and because there is no provision of the act of Congress attempting to regulate it; and further, the State act is in aid of, not an interference with, interstate commerce, *Lumber Co. v. R. R.*, 70.

2. *Legislature—Correction of Journals.*—The same Legislature has power to correct its records or journals so as to make them speak the truth, and, when corrected, the journals shall stand as if originally so made. *Commissioners v. Bank*, 387.

3. *Same—Bond Issue—Special Session.*—While the provisions of Art. II, sec. 14, of the Constitution are mandatory as to the manner in which counties, cities, and towns may pledge their faith or credit to the payment of their debts, it does not prohibit a subsequent special session of the same Legislature from correcting its journals of the regular session so as to show in point of fact that a bill of this character was properly passed in accordance with these provisions. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

4. *Same.*—When an issue of bonds of a county, appearing to be regular on the journals of the Legislature at its regular session, except for an inadvertence of the clerk of one branch of the Legislature to note that the bill passed its third and final reading by the recorded "aye" and "no" vote, and at a subsequent special session of the same Legislature the defect was called to the attention of that branch, the matter referred to the Committee on the Journal, which, after investigation, reported that a majority, giving the names of the voters, had voted "aye," with none voting to the contrary, the adoption of this report, and the correction of the journals accordingly, establishes the validity of the bonds in respect to the defect complained of. *Ibid.*

5. *Municipal Corporations—Bond Issues—Necessary Improvements—Legislative Restrictions.*—The Legislature has the constitutional power and authority to prescribe the terms and conditions upon which municipal corporations may enter into a contract by which a debt is incurred and limit the amount to such sum as it deems necessary; and having done so, the municipality is without power to exceed the amount of the indebtedness prescribed by the act. *Highway Commissioners v. Webb*, 710.

6. *Water and Watercourses—Drainage Commissioners—General Scheme—Public Interest—Legislature—Delegation of Power.*—Chapter 442, Laws 1909, authorizing the establishment of certain levee or drainage districts, is to present a scheme for the drainage of lowlands in which the public of the locality are generally interested, at once comprehensive, adequate, and efficient, in which the rights of all persons to be affected have been fully considered and protected, and is not objectionable on the ground that it is for the benefit of private landowners and not for public purposes, and an unconstitutional delegation of legislative powers. *Sanderlin v. Luken*, 738.

7. *Legislature—Delegation of Authority—Judicial Powers—Clerk of Court.* The authority and powers conferred by chapter 442, Laws 1909, upon the clerk of the court is not a delegation of legislative power and duty to the judicial department of the State prohibited by the Constitution, the powers and duties conferred being of a judicial nature in relation to the prescribed proceedings to be instituted. *Ibid.*

8. *Drainage Commissioner—"Lowest Responsible Bidder"—Discretionary Powers—Power of Courts.*—Chapter 442, Laws of 1909, directs that the levee or drainage commissioners shall convene with the superintendent of construction and let the work contemplated to the "lowest responsible bidder," thereby conferring a discretionary power in adjudging the responsibility of the bidder, in all respects, with which the courts will not interfere in the absence of undue influence or a procurement by fraud. *Ibid.*

9. *False Pretense—Indictment—Deceit.*—The accused has the constitutional right to be informed of the charge against him, and an indictment which fails to state such facts as show the causal connection between the alleged deceit and the false representations, or in other words, sufficient facts to inform of the particular offense, deprives him of this right and is fatally defective. *S. v. Whedbee*, 770.

CONSTITUTIONAL LAW—*Continued.*

10. *Bastardy—Evidence—Change of Rule—Legislative Power.*—Revisal, sec. 255, making the examination of the prosecutrix in bastardy proceedings, whether taken before a justice or at term, presumptive evidence against the accused, is Constitutional and valid, being a change made in the rule of evidence, within the legislative power. *S. v. McDonald*, 802.

CONTINUING NEGLIGENCE. See Negligence.

CONTRACTS. See Usury.

1. *Place of Delivery.*—When in a written contract it appears that the plaintiff agreed to furnish certain piles at an agreed price, and sued upon the contract for the piles sold and delivered, it is competent to show by parol, the instrument itself being silent as to the place of delivery, excepting the expression "f. o. b. cars N. and S. rail," the agreed place of delivery. *Willis v. Construction Co.*, 100.

2. *Entire—Part Performance—Default of Other Party.*—One who has violated his contract in such manner as to prevent its fulfillment by the other party may not escape liability under his contract on the ground that the contract was entire and only partly performed by the other party. *Ibid.*

3. *Entire—Delivery—Weekly Inspection—Construed.*—When it is established that, under a contract between the plaintiff and defendant railroad company, the former had sold and was to deliver certain piles to the latter, to be weekly inspected and a certain percentage of the price to be then paid, until the complete performance by plaintiff, when the retained percentage was to be paid, the contract will not be construed as "entire and indivisible," so as to prevent recovery of the contract price for the piles delivered, on the ground that all the piles specified by the contract had not been delivered. *Ibid.*

4. *Oral—Reference to Writing—Parol Evidence.*—Under a verbal contract for plaintiff to deliver sand to defendants for the latter to use under a written construction contract between them and a city, in the latter of which there was a stipulation that all materials must meet requirements of the city engineer, it is competent to show by parol evidence that the plaintiff had refused to agree that the city engineer should pass upon the sand to be delivered, but that the defendants had agreed to take the sand which was shown to them prior to delivery. *Brown v. Alsop*, 114.

5. *Express Warranty—Counterclaim—Breach—Vendor's Rights.*—A party relying upon and setting up a written warranty of the quality in the sale of personal property and a counterclaim for damages for its breach, in an action by the seller for the purchase money, is bound by the terms of the warranty, and must comply with them in order to recover. *Piano Co. v. Kennedy*, 196.

6. *Same.*—In an action by the vendor to recover the purchase money of a piano sold under a sales contract containing a warranty of the piano, a counterclaim for damages set up by the vendee for a breach of the warranty cannot be sustained, when it appears that the vendor had repaired the piano, the vendee had examined it and declared it

CONTRACTS—*Continued.*

all right, and continuously thereafter asked the vendor's indulgence in making payments under the contract, without complaint of the piano, until after the term of the warranty had expired. *Ibid.*

7. *Sales—Monthly Rental—Mortgagor and Mortgagee—Foreclosure—Vendee's Rights—Procedure.*—In an action upon a sales contract for a piano stipulating for the payment of a monthly rental, it appearing that the writing sued on was essentially a mortgage by its terms and provisions, the provision is void that the vendor retain the monthly payments made as rent, he being entitled only to proper interest on the purchase price. In this case a decree of foreclosure was directed to be entered, requiring the vendee to pay the debt, interest, and cost of action, and upon his failure to do so, a sale of the piano was decreed for that purpose, the residue, if any, to be paid him. *Ibid.*

8. *Timber Deeds—Oral Agreement—Consideration—Statute of Frauds.*—Testimony as to an alleged oral agreement made subsequent to the execution of a timber deed, two of the parties being absent and minors, is incompetent. If relied on to convey trees cut under contract size, it is without consideration; and, further, it should be in writing unless explanatory of an ambiguity in the written contract. *Whitfield v. Lumber Co.*, 211.

9. *Carriers of Freight—Interstate Commerce—Bill of Lading—Live Stock—Discriminative Rate—Validity.*—A rate of freight on an interstate shipment forbidden by the United States statutes as a discrimination, and which is set out in the bill of lading, does not render the contract of carriage void, but the forbidden rate may be set aside: *Hence*, when the stipulation in a bill of lading unlawfully restricts the recovery of a valuable horse to the average value of such animals, the shipper is not thereby prevented from recovering the actual damages he has sustained by the carrier's negligence in transporting the animal. *Kissenger v. R. R.*, 247.

10. *Guaranty—Failure of Consideration—False Representations.*—In an action to recover upon contract for the installing a system of accounts or bookkeeping for defendant's business, the answer alleged that the plaintiff guaranteed the system to be more economical and better than the one defendant had been using, which after a fair trial defendant found not to be as good or as economical, and this the defendant could not have previously ascertained: *Held*, answer sufficient, for it sets up a total want of consideration and a breach of guarantee; and the allegation of representations knowingly and falsely and fraudulently made are not necessary. *Audit Co. v. Taylor*, 272.

11. *Written—Failure of Consideration—Parol Evidence.*—When the writing contains only a part of the contract, the other part may be shown by parol, when not within the statute of frauds. *Ibid.*

12. *Husband and Wife—Agent of Husband—Appointment.*—A wife may appoint her husband to act as her agent in the same manner as one *sui juris* may appoint an agent; and the formality required by Revisal, sec. 2107, regarding the execution of contracts concerning lands made between husband and wife, is not necessary when the wife's interest in her lands is not affected. *Stout v. Perry*, 312.

CONTRACTS—*Continued.*

13. *Personal Property—Sale Without Warranty.*—Personal property may be sold with or without warranty, and a warranty cannot be implied from a written contract of purchase expressly stipulating that the property was not warranted. *Machine Co. v. McClamrock*, 405.

14. *Same — Written — Variance—Evidence—Principal and Agent—Representations of Agent.*—Vendees of a certain machine, who could read and write and were afforded full opportunity to read a written contract of purchase voluntarily executed by them without fraudulent inducement or device of vendor, cannot show that vendor's agent by parol warranted the machine, or that it was not a second-hand machine, when it expressly and clearly appears that the contract was for the sale of a second-hand machine, that it was not warranted, and that the agent was without authority to vary its written terms. *Ibid.*

15. *Contracts to Convey Lands—Title in Trust—Parol Evidence.*—The plaintiff and defendant held an undivided interest in the *locus in quo.* Plaintiff agreed by parol to sell his part, and conveyed it to defendant to be held by him until his part of the purchase price had been paid, upon the payment of which defendant was to convey to the purchaser: *Held*, that evidence of the parol agreement of plaintiff to sell the land was not within the statute of frauds, and that it was competent, especially in this case, upon the allegations of defendant's fraud. *Newkirk v. Stevens*, 498.

16. *Fraud—False Representations—Sufficiency—Questions for Jury.*—Positive statements made at the time of the sale of a certain machine as an inducement thereof, containing averments as to the weight and capacity of the machine, the quality of work it would do and the amount of power it would take to properly run it, are considered as material, and when there is evidence that they were falsely and fraudulently made to induce the sale, there is no error to vendor's prejudice in submitting them to the jury on the question of fraud in the treaty or negotiation between the parties, to avoid the written contract of sale. *Machine Co. v. Feezer*, 516.

17. *Written—Fraud—Void in Toto—Stipulations.*—When a sale has been effected by actionable fraud the purchaser may restore the consideration and rescind the trade *in toto*, and when he has so elected and has promptly acted, stipulations contained in the written contract of sale, requiring previous notice and certain tests of the article sold as a condition precedent, or that the vendor would not be bound by representations of the sales agent as an inducement to the sale, fail with the contract, and the defense indicated is open to the purchaser. *Ibid.*

18. *Fraud—False Representations—Financial Responsibility—Equality.*—When a party to a contract has induced the other party, by false and fraudulent representations as to his own financial condition, to assume all liability under the contract, the other party will not be presumed to deal upon equal footing, for the party making the representations will be presumed to know his own financial condition. *Helms v. Holton*, 587.

19. *Same—Measure of Damages.*—In this case, as the defendant cannot rescind the contract and restore the *status quo* existent at the time

CONTRACTS—*Continued.*

of the false representations, the courts hold the measure of damages to be the difference between the value of the assets of the corporation, with full performance of his part by the plaintiff, and the value thereof with plaintiff's obligations unperformed. *Ibid.*

20. *Sale—Commission Man—Advances—Executory Liens—Title.*—A contract between a commission company and a manufacturing plant whereby the former was to have exclusive sale of the product of the latter at an agreed commission, and to advance a certain per cent of the value of the goods on hand stored in the mill, which were to be billed to it and kept stored in a separate warehouse and insured for its benefit, does not of itself create a lien on the goods for advances made: (*a*) the contract is executory, that the goods should be shipped for sale on commission; (*b*) there is no lien given or recorded; (*c*) an invoice alone does not transfer title, and marking and invoicing the goods does not create a lien for the advances. *Garrison v. Vermont Mills*, 643.

21. *Acquiescence—Silence.*—A commission man claiming a lien under the terms of his contract of exclusive sale by reason of having advanced money on goods manufactured by a corporation and stored at its mills, does not show the possession necessary to his lien by establishing as a fact that after making the advances he went to the mill, and asked the superintendent of the mill to take charge of the goods for him, the president of the latter standing by, but not assenting. *Ibid.*

22. *Commission Man — Advances—Superintendent—Agency—Possession.*— The superintendent of a manufacturing company has no authority to transfer possession of the company's property to a stranger, unless authorized by the company; and when a commission man has made advances on the goods of the company without taking possession, but by verbal agreement with him the superintendent has attempted to give him possession, with the understanding that it should be held for him, it is insufficient for the purpose of creating a lien for the advances made. *Ibid.*

23. *Statute of Frauds—Debt of Another—Consideration—New Promise.*— The defendant contracted with W. that the latter should cut, saw, log, and stack certain timber; the plaintiff did the logging work for W. under this contract, and there was evidence tending to show that subsequent to the original agreement the parties agreed that the defendant should retain for plaintiff, under contract with W. and with the consent of W., certain moneys earned by the plaintiff under his agreement with W. to do this work. Defendant finally refused to pay these moneys to plaintiff, alleging and contending that W. was indebted to it, that he had been overpaid, and setting up the statute of frauds: *Held*, the promise of defendant to retain the moneys for plaintiff under the circumstances does not fall within the meaning of the statute of frauds, that to answer the debt, default, or miscarriage of another the promise must be in writing; (*a*) the defendant had a direct pecuniary interest in the work to be performed by plaintiff, and received the benefit of it; (*b*) the promise was, in effect, to see the plaintiff's claim paid out of the amount to be earned under the contract of W., the original debtor, and the

CONTRACTS—*Continued.*

amount so earned becomes a fund applicable, by the agreement, to plaintiff's debt, affording the consideration to support the defendant's promise as a new and original obligation. *Dale v. Lumber Co.*, 651.

24. *Deeds and Conveyances—Insane Persons—Knowledge—Valid—Loss.*—A contract made with an insane person by one with knowledge of the fact of insanity, is void, and the one so contracting must bear the loss attendant upon the void transaction: *Hence*, when the one thus dealing has erected a building on the land contracted for, he is not entitled to betterments. *Godwin v. Parker*, 672.

25. *Standing Timber—Contract to Convey—Title.*—Deeds and conveyances of standing timber are governed in their effect by the law regarding a conveyance of real property; and, in this case, the paper-writing, invalid as a deed because not properly sealed and signed by an attorney in fact, is admitted to be sufficient as a contract to convey the standing timber and sawmill plant. *Woodbury v. King*, 676.

26. *Principal and Agent—Independent Contractor—Negligence—Explosives—Necessary Methods—Owner's Liability.*—The defendant railroad company cannot avoid the payment of damages caused to the deceased, the wife of plaintiff, a woman then in delicate health, by explosions in blasting a way for defendant's railroad near her dwelling, after notice, by setting up the defense that the work was done by an independent contractor, it appearing that defendant had commenced the work and carried it on in the manner indicated, and that the contractor carried it on in like manner, and that was the only way in which it could be accomplished. *Hunter v. R. R.*, 682.

CONTRIBUTORY NEGLIGENCE. See Negligence.

CORPORATIONS.

1. *Mortgages—Materials Furnished—Liens.*—A mortgage on the property of a corporation or its earnings is not now postponed to a judgment for materials furnished under Revisal, sec. 1131, as the words for "materials furnished" have been omitted therefrom. *Cox v. Lighting and Fuel Co.*, 164.

2. *Mortgages—Labor Performed—Interpretation of Statutes.*—The preference given by Revisal, 1131, for "labor performed" over prior mortgages of corporations applies only to the laborers employed by the corporation in carrying on its ordinary business, including repairs and upkeep, and does not confer such preference upon contractors who employ labor under a contract to place "betterments" upon the company's property. *Ibid.*

3. *Labor Performed—Interpretation of Statutes.*—A foreman of a corporation is a laborer and entitled under Revisal, sec. 1131, to any preference for "labor performed" which is given his colaborers whom he supervises and with whom he works. *Ibid.*

4. *Corporations Insolvent—Receiver's Sale—Purchaser's Defective Title—Cost to Perfect—Purchase Money—Interest.*—Upon petition of a purchaser at a receiver's sale of an insolvent corporation, setting forth that the title to a certain tramroad, necessary for the hauling of lumber from the lands purchased, and sold with the land, was, as to certain parts, defective, and that the receiver announced at the sale

CORPORATIONS—*Continued.*

that he would sell the property, including the tramroad, free from liens or encumbrances, the court referred the matter for a report of the facts, and found and adjudicated from the facts appearing that the receiver made no misrepresentations, that there was no element of fraud, and that the purchaser had not tendered a certain balance of the purchase price, but it had cost him the sum of $20 to perfect his title to the tramway: *Held*, that it was not error to enter judgment that the purchaser pay the balance of the purchase price, less the $20 so paid by him, with interest; and the question as to whether the sale of the property of an insolvent corporation is a judicial sale is not presented. *Whitlock v. Lumber Co.*, 192.

5. *Receivers—Parties—Process.*—An action against the receivers of a railroad company for injuries to a shipment of goods alleged to have been caused by the company's negligence is, in effect, an action against the company. *Kissenger v. Fitzgerald*, 247.

6. *Order of Court.*—When the complaint alleges a cause of action against an insolvent railroad company in the hands of receivers as defendants, and the summons has been issued against the receivers as defendants, and it appears that the cause had been prosecuted to final judgment against the corporation under an order obtained from the Federal court on special petition that the plaintiff be allowed to do so, the fact that the name of the corporation does not appear in the summons is not of the substance and should not be allowed to affect the validity of the judgment. *Ibid.*

7. *Insolvency—Receivers—Fund—Costs—Lowest Lien.*—The effect of taxing court cost and compensation of the receiver of an insolvent corporation against the fund is to tax the whole sum against the holder of the lowest lien, and to pay prior liens in full if the fund be sufficient. *Lumber Co. v. Lumber Co.*, 270.

8. *Corporations—"Voting Trusts"—Public Policy—Void.*—A "voting-trust" agreement which, under certain conditions respecting the sale of stock, giving the trustees option of purchase at the book value, etc., provides for the transfer of the controlling vote of the shares of stock in a National bank to its president, vice-president, and cashier, for a term of fifteen years, in order to control the management of the bank for that period, is held void as against the public policy of this State, there being no controlling decisions of the United States courts on the subject. *Bridgers v. Bank*, 293.

9. *Wills—Shares of Stock—Bequest for Life—Trustees—Voting Powers.*—When the terms and provisions of a will bequeathing a life interest in certain shares of stock in a corporation are construed to be that the shares be held and controlled by trustees therein named as executors and trustees, the trustees may vote the same in stockholders' meetings under Revisal, sec. 1185, and sec. 1186, providing for the voting of the shares by the life tenant, has no application. *Haywood v. Wright*, 421.

10. *Title.*—The sale of mortgaged property of a corporation under a valid mortgage and in pursuance of the power therein divests the equitable title of the corporation in the property conveyed; and a sale thereof

CORPORATIONS—*Continued.*

under execution issued upon judgments obtained on contract after the due registration of the mortgage is ineffectual to pass title to the purchaser, and his deed is a nullity. *Clement v. King*, 456.

11. *Mortgages—Torts—Judgments—Priorities.*—A prior registered mortgage of a corporation is ineffectual to pass title to the property described as against a judgment for damages obtained against the corporation arising from its torts, etc., under Revisal, sec. 1131. *Ibid.*

12. *Same — Bankruptcy — "Four Months"—Creditors—Trustees.*—Revisal, sec. 1131, gives to the tort-claimant the right to follow and subject to the payment of his claim such property as the corporation had disposed of by mortgage, even when the sale under mortgage has taken place before judgment has been rendered in favor of the one who has suffered damage from the tort of the corporation; and when the mortgage and a sale made in pursuance thereof antedates the four months provided by the bankrupt act, the mortgaged property does not pass to the trustees in bankruptcy, and the rights under Revisal, sec. 1131, given to such judgment creditor, being good as against the claims of all other creditors, his judgment is good against them and the trustee in bankruptcy, though obtained within the four months period. *Ibid.*

13. *Torts—Judgments—Priorities—Cloud on Title.*—The plaintiff in this case being a purchaser at the sale under execution of a judgment having superiority under Revisal, sec. 1131, to a mortgage given by a corporation and to several judgments obtained upon contract under which the property had been sold and invalid deeds given, the Court, in reversing the lower court, orders the invalid deeds canceled of record in order to remove cloud upon plaintiff's title. *Ibid.*

14. *Foreign Corporations—Process Agents—Statute of Limitations—Judgments—"Full Faith and Credit"—Constitutional Law.*—A foreign corporation which had complied with the requirements of Revisal, sec. 1243, in maintaining an agent in this State upon whom process may be served, together with public-service corporations doing business in this State, may plead the statute of limitations. The test of the availability of the plea is whether they were amenable to the process of our State courts. *Volivar v. Cedar Works*, 656.

15. *Rehearing — Dividends Reserved — Stock and Cash Dividends — Purchaser—Interest Acquired.*—The interest of stockholders in a corporation remains unchanged upon the latter declaring a so-called stock dividend, as such stock dividend neither takes from nor adds to the corporate wealth; and an accepted offer to sell certain shares of stock in a corporation at a certain price, reserving dividends to be declared at a certain date, refers only to dividends payable in cash, and not to stock dividends which had already been declared, to be effective at the date specified: *Hence*, by buying the shares so offered, the purchaser acquired the stock dividend thereon, and the seller under the contract of sale is entitled to the regular and special cash dividends payable in January following. *Trust Co. v. Mason*, 660.

16. *Foreign Corporations—Process—Limitation of Actions—Plea.*—Public-service corporations chartered in other States, but doing business in this State, upon whose agents service of proofs may be made, have the legal right to plead the statutes of limitation to the same extent

CORPORATIONS—*Continued.*

and under the same conditions as citizens and corporations of this State. *Volivar v. Cedar Works, ante*, 656, is decisive of this case. *Bennett v. Telegraph Co.*, 671.

17. *Same—Highway Commissioners.*—A highway commission having been authorized by a legislative act to improve the roads of its township, and, for that purpose, to issue coupon bonds of the township "for an amount sufficient, not exceeding $25,000," cannot issue an additional amount of bonds for the necessary purpose of completing the work undertaken, without authority from the Legislature to do so. *Highway Commissioners v. Webb*, 710.

18. *Nuisance—Indictment—Process.*—When a railroad corporation is indicted for obstructing a public road with cars, a notice issued to the corporation is the proper method of bringing it into court to answer the indictment. *S. v. R. R.*, 785.

19. *Same—Receivers—Two Bills—Counts.*—A summons having been served on the receivers of a railroad corporation and it appearing that notice was not served on the corporation, the purpose of the summons being to bring them all into court to answer an indictment for blocking a public road, upon a true bill found under another like indictment, which had been properly served on the corporation, it is proper to proceed with the trial of the case upon both bills, treating the second bill as an additional count, or the two indictments as separate counts of the same bill. *Ibid.*

20. *Receivers—Indictment—Nuisance—Liability of Corporation.*—A railroad corporation in the hands of receivers is not indictable for blocking or obstructing, with cars, a public road, as the receivers hold the property in *custodia legis*, and as the corporation has no control over the acts of the receivers, it is not criminally liable therefor. *Ibid.*

21. *Indictment—Nuisance—Liability of Receivers.*—The receivers of a railroad corporation may be liable individually for committing a nuisance in obstructing with cars a public road. *Ibid.*

CORPORATIONS, FOREIGN. See Limitations of Actions.

COSTS. See Judgments; Partition.

COUNTERCLAIM. See Issues; Contracts; Pleadings.

COUNTY. See Taxation.

1. *County Commissioners—Proceedings to Lay off Roads—Appeal, When Taken—Trial de Novo.*—An appeal from the final order of the county commissioners in proceedings to lay off a road carries the whole matter to the Superior Court for trial *de novo*. The appeal is properly taken from the final order of the board confirming the report of the jurors. *Keaton v. Godfrey*, 16.

2. *County Commissioners — Contracts—Courthouses—Inspection—Acceptance—Damages—Estoppel.*—The county commissioners, having contracted for the erection of a courthouse and provided in the contract for a method of inspection and acceptance as the work progressed, and when completed, which method had accordingly been followed and the work finally accepted upon the completion of the building,

COUNTY—*Continued.*

without evidence of misconduct on the part of the contractor or that they were in any manner prevented from inspecting the work, are concluded from a recovery of damages alleged to be caused by the faulty construction of the building or improper material therein used. *County v. Construction Co.*, 23.

3. *Same—Subsequent Board — Incompetency—Fraud—Evidence—Burden of Proof.*—The county commissioners are concluded by an acceptance by a former board of a courthouse built under a contract with a provision for inspection as the work progressed, which was inspected and accepted accordingly, and may not recover of the contractor damages alleged by reason of faulty construction and material used, upon the charge of incompetency of the former board and those appointed by it to inspect and accept the building, in the absence of affirmative proof that the contractor knowingly and deliberately took advantage of said incompetency and ignorance to deceive and mislead, and that he thereby did deceive and mislead them. *Ibid.*

4. *Meetings of Board.*—The power of the county commissioners to revise the tax list of a county for the year 1909 is derived from sec. 68, ch. 440, of the legislative acts of that year, which requires that they shall meet on the second Monday in July, and shall sit for one day at least, and, when necessary, until the revision is complete; and when they, in attempting to revise the tax list, have increased the value of a solvent credit of a taxpayer without regard to this requirement, at a subsequent and separate meeting, the increase in the valuation is void. *Wolfenden v. Commissioners*, 83.

5. *Same.*—When the board of county commissioners have completed the revision of the tax lists as authorized and empowered by sec. 68, ch. 440, Laws 1909, its duties and powers as a revising board cease and determine, until the time appointed by the statute for the next succeeding year. *Ibid.*

6. *Taxation — County Commissioners—Board of Equalization—Distinct Entities.*—The powers and duties of equalization conferred by sec. 18, ch. 440, Laws 1909, are not conferred upon the board of county commissioners as a distinct corporate body, but as a board of equalization to act every fourth year, when taxable property is revalued. *Ibid.*

7. *Taxation—County Commissioners—Revision—Notice—Hearing.*—It is necessary for the board of county commissioners at its meeting for the revision of the list of taxable property under the power conferred by statute, to give notice to the owner, or his agent, of property it has determined to increase the tax value of, and to fix a time for a hearing. *Ibid.*

8. *Taxation — County Commissioners—Revision—Solvent Credits—Meetings of Board—Interpretation of Statutes.*—The board of county commissioners having fixed the value for taxation of certain solvent credits of plaintiff, which was not thereafter changed at its meeting as a board of revision, and having raised the tax value of the notes at a regular and not at the meeting prescribed by the statute for revision, in accordance with the sum realized by a sale of land under mortgage securing the notes, without notice to plaintiff or his agent, their action is void, and the increase in value is a nullity. *Ibid.*

COUNTY—*Continued.*

9. *County Commissioners—Special Service—Compensation.*—A member of the board of county commissioners who, under the direction of the board, inspected and reported upon a bridge over a stream where it crossed the public road, with recommendations, cannot recover in his action for the services rendered or mileage; he is forbidden to do so as a county commissioner under Revisal, 2785, and is indictable if claiming compensation for extra services under either an express or implied contract with the board. Revisal, 3572. *Davidson v. Guilford*, 436.

10. The decision in this case is governed by that in *Davidson v. Guilford*, next above, ch. 166, Laws 1903, providing that the highway commission shall be entitled to the same per diem, etc., as the board of commissioners. *King v. Guilford*, 438.

11. *County Commissioners — Sheriff's Bond—Default—Sureties—Liability of Commissioners—Interpretation of Statutes.*—The county commissioners are not liable to the sureties on the bond of a defaulting sheriff and tax collector whose defalcations they were required to pay, for a failure to comply with Revisal, sec. 5241, in demanding of the sheriff his receipts in full for the taxes collected the previous year before permitting him to receive the tax duplicate for the current year; for, construing this section in connection with sections 2812, 2813, 2814, and 313, Revisal, the evident purpose is only to protect and safeguard the public revenue and to insure its honest collection and application. *Hudson v. McArthur*, 445.

12. *Same.*—The failure of the county commissioners to require the sheriff and tax collector to produce his receipts, etc., in 1904, as required by Revisal, sec. 2812, could not injure plaintiffs, the subsequent sureties on the sheriff's bond, for default of the sheriff in the following year in which he was permitted to perform the duties of his office. *Ibid.*

13. *Same.*—The duties imposed upon the county commissioners by Revisal, secs. 5241 and 5250, are of a public character, and for the benefit and protection of the public revenue; and the commissioners are not liable to the sureties on the bond of a defaulting sheriff and tax collector, who have been compelled to make good their principal's default, as such is not within the purview of the statute and there being no express legislative authority to make them thus liable. *Ibid.*

14. *Same—Causal Connection.*—The sureties on the bond of a defaulting sheriff cannot recover of the county commissioners for failure to comply with Revisal, secs. 2812, 5241, and 5250, the amount of the default they were required to pay, as the losses thus sustained by them are not the necessary, direct, or immediate results of the acts complained of; for as the default could have resulted the same if the statutory requirements had been complied with, there is no causal connection between the alleged acts and the default. *Ibid.*

15. *Roads—Construction—Damages—Repealing Statute—Interpretation of Statutes.*—Chapter 201, Laws of 1907, repeals chapter 420, Laws of 1903, in reference to the assessment of damages caused to a landowner in building a county road, and affords effective and adequate means of redress to such owner who is damaged in his land by reason of the building of the road thereon under the provisions of the act repealed. *Bost v. Cabarrus*, 532.

COUNTY—*Continued.*

16. *Roads—Construction—Benefits—Measure of Damages.*—In an action to assess damages to plaintiff's land by the construction of a county road, under chapter 201, Laws of 1907, it was not error in the court below to modify a question asked of the witness by his attorney, "Has plaintiff received any special and peculiar benefits to her property on account of the construction of the road?" so as to direct it to such benefits as were "not common to her and others," the modification being more explicit of the accepted principle relating to the reduction of damages in an action of this character. *R. R. v. The Platt Land*, 133 N. C., 266, cited and approved. *Ibid.*

17. *Same—Proper Placing—Torts.*—In an action against the county to assess damages to plaintiff's land caused by the location thereon of a county road, evidence is competent to show that the road as constructed destroyed plaintiff's valuable spring and interfered with the approach to her residence, there being nothing of record tending to show that the road was not properly placed or was negligently constructed, and, therefore, not being objectionable as evidence of a tort by reason of the negligent construction of the road. *Ibid.*

18. *Counties—Jail—Necessary Expense—Bond Issue.*—A jail is a necessary county expense, and in the absence of statutory restrictions, the county commissioners may pledge the credit of the county in order to obtain one. *Haskett v. Tyrrell*, 714.

19. *Same—Legislative Powers—Restriction — Retroactive — Previous Contract—Validity.*—The county commissioners entered into a contract for the building of a jail, as a necessary county expense; issued bonds for payment and sold them, receiving part payment and a check on a bank, until the payment of which they kept the bonds for security. The check was paid and the bonds delivered, but after the sale and before the physical delivery of the bonds the Legislature passed an act requiring the commissioners to advertise for bids on the jail, and annulled the commissioners' resolution to issue the bonds: *Held*, the contract for the sale of bonds was valid; the delivery in effect was made when payment, under the circumstances, was received, and the legislative act came too late to affect the transaction. *Ibid.*

COURTHOUSES. See County.

COURTS. See Reference.

1. *Instructions—Verdict Directing—Nonsuit—Estoppel—Appeal and Error —Procedure.*—A party is estopped by a verdict by not immediately taking a nonsuit and appeal before verdict entered upon an instruction by the trial judge to the jury, or upon his intimation that he would so instruct or render judgment for the other party to the action. *Everett v. Williams*, 117.

2. *Instructions—Verdict Directing—Burden of Proof.*—The trial judge can always direct a verdict against the party to an action on whom rests the burden of proof, if there is no evidence or presumption in his favor. *Ibid.*

3. *Jurors—Taking Paper Evidence—Error Corrected—Instructions—Parties—Court Sittings—Notice.*—When it is contended that the divisional line in dispute between the defendant's and the plaintiff's lands

COURTS—*Continued.*

should be in accordance with a certain deed, introduced and read by plaintiff, and the jury, without the knowledge of the court, had taken the paper itself into the jury-room, and when called to the judge's attention, after the jury had considered the case for several hours, he instructed them, in the absence of the plaintiff and his attorneys, that they should consider the entire evidence and not the deed alone; that they should not have taken it into the jury-room: *Held*, no reversible error, (*a*) if error, it was not attributable to the court; (*b*) he corrected it as soon as discovered; (*c*) the parties must take notice of the sittings of the court, and their absence did not invalidate the proceedings. *Biggs v. Gurganus*, 173.

4. *Receivers—Parties—Process—Order.*—When the complaint alleges a cause of action against an insolvent railroad company in the hands of receivers as defendants, and the summons has been issued against the receivers as defendants, and it appears that the cause had been prosecuted to final judgment against the corporation under an order obtained from the Federal Court on special petition that the plaintiff be allowed to do so, the fact that the name of the corporation does not appear in the summons is not of the substance and should not be allowed to affect the validity of the judgment. *Kissenger v. Fitzgerald*, 247.

5. *Appeal and Error—Jurors—Relationship—Discretion.*—It is within the discretion of the trial judge to allow a new trial on the ground that a juror was related to one of the parties, and his refusal to do so is not appealable. *Boggan v. Somers*, 390.

6. *Drainage Commissioner—"Lowest Responsible Bidder"—Discretionary Powers.*—Chapter 442, Laws of 1909, directs that the levee or drainage commissioners shall convene with the Superintendent of Construction and let the work contemplated to the "lowest responsible bidder," thereby conferring a discretionary power in adjudging the responsibility of the bidder, in all respects, with which the courts will not interfere in the absence of undue influence or a procurement by fraud. *Sanderlin v. Luken*, 739.

7. *Reference—Findings by Judge—Conclusiveness.*—The findings of fact by the trial judge upon the report of a referee under The Code, are conclusive on appeal when supported by any evidence. *Bailey v. Hopkins*, 748.

8. *Appeal and Error—Failure to Docket—Laches—Discretion.*—Upon failure of appellant to docket his case on appeal as required by Rule 5 of the Supreme Court, the appellee may move to docket the certificate and dismiss under Rule 17 (unless a sufficient legal excuse is shown by the appellant for his delay), and therein the Supreme Court has no discretionary power. *Hewitt v. Beck*, 757.

9. *Indictment—Amendment—Superior Court—Power of Court.*—The Superior Court has the power to order an amendment made to a warrant on appeal from the court of a justice of the peace. Revisal, sec. 1467. *S. v. Yellowday*, 793.

10. *Appeal and Error—Evidence in Rebuttal—Discretion.*—The trial judge may in his discretion refuse to allow additional testimony in rebuttal, after the case has been closed, and his ruling is not reviewable on appeal. *S. v. Shuford*, 809.

COURTS—*Continued.*

11. *Capital Felonies—Absence of Prisoner—Mistrial—Order—Discretion—Ends of Justice—Joint Acts.*—After the temporary but voluntary absence of a prisoner who is being tried for a capital offense, by the inadvertent permission of the judge, his attorneys stated that they would ask for a new trial on that account. The court thereupon made a mistrial. This does not entitle the prisoner to a discharge upon motion after the entry of the order for a new trial, to which no exception was taken; for while it is not in the discretion of the trial judge to order a mistrial in case of a capital felony, he may do so to attain the ends of justice; and the prisoner not having excepted to a mistrial, he cannot afterwards be heard to object. This principle holds when there are two prisoners being jointly tried for a capital felony for a joint act, and one of them was thus absent. *S. v. Dry*, 813.

CUMULATIVE EVIDENCE. See New Trial.

CUSTOM. See Railroads.

DAMAGES. See Negligence; Cities and Towns; Water and Watercourses.

1. *Title—Evidence—Questions for Court—Instructions.*—In an action for damages for cutting timber, plaintiffs claimed title as heirs at law of T. and R. D., Jr., deraigning title from a 60,000-acre grant to C., and from him to R. D., Sr., the father of T. and R. D. Jr., who conveyed 57,000 acres to one H., leaving a residue of 3,000 acres. R. D., Sr., devised his lands to his sons, T. and R. D., Jr., and his executor in 1823 sold the lands of R. D., among them "1,300 acres, the residue of said C. tract of 3,000 acres," to pay his debts, under a decree of court, and made deed to the purchaser under whom defendants claim by *mesne* conveyances, being purchasers for value. Since the deed of 1823 neither plaintiffs nor those under whom they claimed have exercised ownership of the *locus in quo*, or set up claim thereto, or paid taxes thereon: *Held*, no error to charge the jury, that if they found the facts as testified to, to find for defendants. *Belangia v. Mfg. Co.*, 3.

2. *Nominal.*—The plaintiff sued the telegraph company for damages alleged to have resulted from the negligent delay in transmitting or delivering a message sent to it by its commission merchant, to the effect asking it, the sendee, if it would accept a certain price for a certain quantity of cloth on hand, which it manufactured, if an offer could be obtained, to which plaintiff replied, authorizing sale at the price named, provided no better price was obtainable. The damages claimed were the difference between the price suggested and the market price at which plaintiff subsequently sold. There was no notice given to the company, apart from that which the messages disclosed, as to the character of damages likely to result from its negligence: *Held*, only nominal damages, or the toll paid for the message, was recoverable, there being nothing upon the face of the messages to indicate that the reply would make a binding contract of sale, or that the telegram was anything more than a mere trade inquiry. *Mfg. Co. v. Telegraph Co.*, 157.

3. *Timber Deeds—Injunction—Measure of Damages—Questions for Jury.* The jury having established the plaintiff's right to cut timber on the *locus in quo* under a timber deed, running for a period of ten years,

DAMAGES—*Continued.*

and a restraining order withholding such rights for a period of several years being dissolved, it was error for the trial judge to charge the jury that only nominal damages were recoverable by the plaintiff. It was for the jury to say, upon competent evidence, whether the reduction of the term for cutting the timber had caused damage to plaintiff. *Newton v. Brown*, 200.

4. *Timber Deeds—Wrongful Cutting—Measure of Damages.*—Damages to the land and undergrowth, etc., by reason of the unlawful cutting and removal of trees cut under the size contracted for in a timber deed are recoverable. *Whitfield v. Lumber Co.*, 211.

5. *Timber Deeds—Wrongful Cutting—Burden of Proof.*—When defendant admits he has cut some trees under the size contracted for in his timber deed, the burden is on plaintiff to show his damages arising on that account. *Ibid.*

6. *Timber Deeds—Wrongful Cutting—Witnesses—Estimate—Evidence.*—Witnesses having long familiarity with the land and who had examined the stumps, may give their estimates as to damages thereto caused by defendant's cutting under the sizes specified in his timber deed. *Ibid.*

7. *Timber Deeds—Wrongful Cutting—eMasures of Damages.*—In an action for damages for cutting trees under the size specified in a timber deed, their measure, if recovery is had, is the value of the trees unlawfully cut, with incidental damages therefrom to the other growth. *Ibid.*

8. *Pleadings—Demurrer—Misjoinder—Causes—Cancellation of Contract.* And when the complaint states two causes of action growing out of the injuries to plaintiff's interest in the corporation caused by this unlawful combination, the first asking that plaintiff's agreement to take the stock be delivered up and canceled, and the second for damages arising by the way of profits lost to the plaintiff, both by reason of defendants' breach of contract, a demurrer on the ground of inconsistency of the two causes of action is bad, as both proceed upon the theory of the disaffirmance of the contract, leaving the rule for the admeasurement of damages to be laid down by the trial judge in case a cause of action is therein established in plaintiff's favor, and on the facts as they may properly develop. *Worth v. Trust Co.*, 242.

9. *Rights of Way—Permanent—Generally Increased Values—Evidence.*—In an action to recover damages of defendant for a permanent appropriation of a right of way over plaintiff's lands, it is not competent for this defendant to show the generally increased value of lands after the construction of defendant's overhead electric system, common to the entire community. *Lambeth v. Power Co.*, 371.

10. *Rights of way—Permanent—Measure.*—The measure of permanent damages against this defendant for appropriating a right of way over plaintiff's lands for the construction of an electrical overhead system is the difference between the fair market value of the land before the right of way was taken and its impaired value, directly, materially and proximately resulting to plaintiff's land by the placing of the power line across the premises in the manner, and to the extent, and in respect to the uses for which the easement was acquired. *Ibid.*

DAMAGES—*Continued.*

11. *Same—Imaginary Causes.*—The charge to the jury, that they may not allow damages based upon unknown or imaginary contingencies or events, eliminates the objection by defendant, in this case, that the jury might have considered the possible dangers from wires falling from its overhead electrical system on plaintiff's land, in assessing permanent damages. *Ibid.*

12. *Claim and Delivery—Wrongful Seizure—Issues.*—When the pleadings in an action to declare valid a sale of property under mortgage raise questions as to whether the mortgage had been released, and the sale was unlawful, and the property wrongfully seized under claim and delivery proceedings, the defendant, if successful, is entitled to judgment "for a return of the property, or for the value thereof in case return cannot be had, and damages for taking and withholding the same" (Revisal, sec. 570), and issues were properly submitted to the jury to ascertain the value of the property alleged to have been wrongfully converted. *Penny v. Ludwick*, 375.

13. *Claim and Delivery—Mortgagor and Mortgagee — Excess — Verdict—Judgment—Interest—Unliquidated.*—When the verdict of the jury has only established that plaintiff has wrongfully converted to his own use an excess of property in a certain sum over that required to pay off defendant's mortgage to him, the judgment thereon should not include interest from the time of the alleged conversion, but only from the date of the judgment, the conversion being a tort and the damages unliquidated; and when on appeal the judgment of the court is erroneous in this respect only, it will be ordered to be amended and affirmed. *Ibid.*

14. *Release—Avoidance—Burden of Proof.*—A release of claim for damages for personal injury based upon a valuable consideration is a complete defense to an action to recover them, and when its execution is admitted or established by the evidence the plaintiff must prove matter in avoidance. *Aderholt v. R. R.*, 411.

15. *Release—Signing—Knowledge Presumed.*—One who has voluntarily signed a release for damages, being able to read and having been afforded full opportunity to do so, is charged with knowledge of its contents. *Ibid.*

16. *Release—Fraud—Intent—Evidence Insufficient.*—Evidence that plaintiff, an employee, voluntarily signed a conditional release for the damages for personal injury sought in his action, about two months after the injury, and a final release about two weeks thereafter, upon receiving the valuable consideration therein named, and that, at the time the conditional release was signed, the defendant's claim agent said that plaintiff could retain his position as employee of defendant as long as he could do the work satisfactorily, is no sufficient evidence of a fraudulent intent on defendant's part in procuring the release, it appearing that plaintiff was again employed, but was discharged by one of defendant's vice-principals for inefficiency, and without knowledge of the release or plaintiff's claim therein. *Ibid.*

17. *Railroads—Regular Stops—Train Orders—Rights of Passengers—Substantial.*—There was evidence tending to prove that plaintiff was a passenger on defendant's train scheduled to stop at McFarland; that he tendered his fare to conductor, who refused to receive it; that

DAMAGES—*Continued.*

conductor had orders to stop at McFarland; that he willfully disobeyed them; that plaintiff told conductor that he must stop at McFarland to attend his child's funeral, and that then conductor refused to stop: *Held*, that the evidence justified the court in submitting the question of punitive damage to the jury. *Owens v. R. R.*, 439.

18. *Personal Injury—Written Release—Fraudulent Inducements—Calculated to Deceive—Evidence Sufficient.*—The defendant in an action to recover damages for personal injury alleged by reason of its negligence, sets up plaintiff's written release in defense. There was evidence for plaintiff tending to show that soon after the injury and when plaintiff was suffering from its effect, defendant's manager sent for him and induced the execution of the release by falsely representing that it was only a receipt necessary for defendant to have in order to collect insurance money due to it by reason of the injury, and that it did not affect plaintiff's claim: *Held*, evidence sufficient to avoid the release, if the jury should find, under the circumstances, that the representations were calculated to and did deceive the plaintiff, whether he at the time had mental capacity to understand it or not; and it was error, therefore, to put the burden upon plaintiff of showing both actual fraud and mental incapacity. *McCall v. Tanning Co.*, 649.

19. *Negligence—Notice—Particular Consequences.*—The defendant cannot escape liability for the death of another proximately caused by its own tortious acts, after being notified to desist, because the result in the particular form of injury was not foreseen. *Hunter v. R. R.*, 682.

DEBTS, ANTENUPTIAL. See Husband and Wife.

DECEIT. See Indictment.

DECLARATIONS. See Evidence; Tenants in Common; Principal and Agent; Estates.

DEEDS AND CONVEYANCES. See Executors and Administrators; Liens.

1. *Purchaser—Notice Implied.*—When executors sell certain lands to make assets to pay debts, the lands are bid in by the widow at a fair price, and one of the executors charges himself therewith in his account, makes deed to the widow and takes a mortgage back for the purchase price, and after the lapse of years buys the lands from the widow at a fair price and at the time cancels the mortgage, the widow and her son remaining in possession as tenants and paying rent therefor, his vendee is not, by the former relationship of mortgagor and mortgagee and the recorded but canceled mortgage deed, impressed with notice of any equities *dehors* the deeds existing between him and the widow. *Smith v. Fuller*, 7.

2. *Limitations of Actions—Deeds of Executors—Color—Adverse Possession.*—A deed of lands sufficient upon its face to pass title, made by the executors of deceased erroneously under the impression that their testator had not parted with the title, is "color" of title, under which title will ripen in the vendee by open, notorious and adverse possession for seven years. *Bond v. Beverly*, 56.

3. *Color—Limitation of Actions—Adverse Possession—Presumption.*—When there is no delimitation to the possession of those claiming title

DEEDS AND CONVEYANCES—*Continued.*

to land by adverse possession under a deed describing the *locus in quo*, the possession will be taken as extending to the outer boundaries of the land described in the deed. *Ibid.*

4. *Voluntary Gift—Creditors—Judgment Sale—Purchasers—Title—Rights of Donee—Retaining Property Sufficient—Burden of Proof.*—The burden of proof is upon those claiming title to lands under a deed of a voluntary donor, the express consideration being $1 and love and affection, to show that the grantor had, at the time of making the deed, retained property "fully sufficient to pay his debts" (Revisal, sec. 962); and where it appears that a judgment had been obtained by the grantor's creditors before making the deed, and that the land had been sold at a judicial sale at the suit of the donor's creditors, the plaintiffs suing to establish title as against the purchaser must show that their donor had complied with the statute in retaining sufficient property, and on conflicting evidence the question is one for the jury. *Hobbs v. Cashwell*, 183.

5. *Timber Deeds—Injunction—Measure of Damages—Questions for Jury.* The jury having established the plaintiff's right to cut timber on the *locus in quo* under a timber deed, running for a period of ten years, and a restraining order, withholding such right for a period of several years, being dissolved, it was error for the trial judge to charge the jury that only nominal damages were recoverable by the plaintiff. It was for the jury to say, upon competent evidence, whether the reduction of the term for cutting the timber had caused damage to plaintiff. *Newton v. Brown*, 200.

6. *Timber Deeds—Measurement, Time of.*—The measurements for cutting trees given in a timber deed refer to sizes at the date of the deed, unless other intention is expressed. *Whitfield v. Lumber Co.*, 211.

7. *Timber Deeds—Sizes, How Measured—Timber—Square Measurement.*—The measurement for cutting given in a timber deed as "merchantable timber 12 inches square," means wood measurement exclusive of bark and slabs, for timber is not merchantable until these are removed; and it is error for the court to charge that the contract called for timber with bark edges, as such reduces the diameter of the trees sold. *Ibid.*

8. *Timber Deeds—Larger Sizes—Evidence—Harmless Error.*—Evidence that a number of trees cut under a timber deed calling for a measurement of 12 inches were over 27 inches, though irrelevant, is harmless error. *Ibid.*

9. *Timber Deeds—Sizes—"Rings in Wood"—Evidence.*—Testimony of rings in a section of a tree as indicative of years of growth is admissible, it being a question of fact for the jury under the evidence. *Ibid.*

10. *Timber Deeds—Dimensions—Observation—Evidence.*—It is competent for a witness, speaking from his own observation, to testify as to the size of a tree from outside bark to outside bark, that would square 12 inches at the stump, wood measurement. *Ibid.*

11. *Timber Deeds—Wrongful Cutting—Measure of Damages.*—Damages to the land and undergrowth, etc., by reason of the unlawful cutting and removal of trees cut under the size contracted for in a timber deed are recoverable. *Ibid.*

DEEDS AND CONVEYANCES.—*Continued.*

12. *Timber Deeds—Wrongful Cutting—Damages—Burden of Proof.*—When defendant admits he has cut some trees under the size contracted for in his timber deed, the burden is on plaintiff to show his damages arising on that account. *Ibid.*

13. *Timber Deeds—Square Measurement—Diameter of Trees—Evidence.*—As to the diameter of a tree which squares 12 inches, it is a practical question based on experience and observation, and one on which a qualified witness may testify. *Ibid.*

14. *Timber Deeds—Wrongful Cutting—Witnesses—Estimate of Damages—Evidence.*—Witnesses having long familiarity with the land and who had examined the stumps, may give their estimate as to damages thereto caused by defendant's cutting under the sizes specified in his timber deed. *Ibid.*

15. *Timber Deeds—Experts Upon the Facts—Estimate of Growth.*—Witnesses testifying to the facts and observations upon which they base their opinion, and who are skilled and experienced in timber and mills, may give their opinion as to the rate of growth of pine trees, when this question is involved in the action. *Ibid.*

16. *Timber Deeds—Oral Agreement—Contracts—Consideration—Statute of Frauds.*—Testimony as to an alleged oral agreement made subsequent to the execution of a timber deed, two of the parties being absent and minors, is incompetent. If relied on to convey trees cut under contract size, it is without consideration; and, further, it should be in writing unless explanatory of an ambiguity in the written contract. *Ibid.*

17. *Timber Deeds—Wrongful Cutting—Measure of Damages.*—In an action for damages for cutting trees under the size specified in a timber deed, their measure, if recovery is had, is the value of the trees unlawfully cut, with incidental damages therefrom to the other growth. *Ibid.*

18. *Heirs—Construction—Intent—Fee Simple.*—While the common law was exacting in its requirement that, to make a fee-simple conveyance, the word "heirs" should appear either in the premises or *habendum* of the deed, our courts construe the instrument more liberally for the intent of the grantor, transposing words and disregarding punctuations when such may reasonably be done. Hence, the words in the conveyance clause in a deed to lands being J. D. P., with warranty to him, "his heirs and assigns," it will be construed as a fee simple. Acts of 1879, ch. 148; Revisal, sec. 946. *Real Estate Co. v. Bland*, 225.

19. *Construction—Heirs—Fee, Prior to* 1879.—Deeds to lands made prior to the statute of 1879 will not be construed as a conveyance of the fee in the absence of the use of the word "heirs" in the conveyance, connected with the name of the grantee, and descriptive in some way of the estate he is to take; and a fee will not pass when it appears only in connection with the name of the grantor. *Boggan v. Somers*, 390.

20. *Same—Descriptio Personæ.*—The word "heirs" not appearing in the conveyance clause in a deed of lands to M., in connection with the name of the grantee, made before the statute of 1879, the *habendum* clause being to her "own and separate use during her natural life, and at her death, then to her daughters" and "issue of such as may not

DEEDS AND CONVEYANCES—*Continued.*

be living at the time, equally to be divided between them," the issue, if any, to take the share of their deceased parent, the words, "and issue of such as may not be living at the time to be equally divided," etc., are merely *descriptio personæ*, indicating that the children, grandchildren, or other lineal descendants should represent their ancestor, *per stirpes*, in the event provided, and take the estate conveyed by the deed, *i. e.*, a life estate. *Ibid.*

21. *Description—Calls—Natural Boundaries—Interpretation—Exception to Rule.*—A natural boundary called for in the description of land in a grant controls course and distance, for the reason that it is usually considered more certain, but when the course, distance, number of acres and plat given are more definite, and the application of the general rule inconsistent, the latter must give place to the former, the reason for the rule ceasing, and presenting a case which forms an exception to the rule. *Lumber Co. v. Hutton*, 537.

22. *Same—Established Boundaries.*—The first call in a grant of lands being 100 poles from an established corner to a stake in the line of M., and it appearing that the surveyor and grantee did not know at the time where that line was located, and there was no actual survey, the M. line will not be regarded as established so as to control the call and extend the line 274 poles in disregard of the call sufficiently established by the description in the grant. *Ibid.*

23. *Title—Common Source—Timber Rights.*—When defendant takes as plaintiff's grantee a restricted interest in plaintiff's land under his deed, in this case standing timber of a given dimension, and enters upon the land and cuts the timber accordingly, his motion to nonsuit upon the ground that plaintiff has not shown title thereto will be denied, as defendant will not be heard to deny or question the validity of the title of the plaintiff, having acquired possession under and by virtue of the deed. *Foy v. Lumber Co.*, 595.

24. *Execution Denied—Burden of Proof—Statute of Frauds—Plea Sufficient.*—Whether the written contract to sell mineral interests in land is an option of purchase or a contract to sell, the party seeking its enforcement must introduce sufficient evidence tending to show its execution by the vendor; and when the vendee, the defendant in the action, by answer denies the execution of the paper-writing, it is sufficient to protect him under the statute of frauds without specially pleading the statute. *Miller v. Monazite Co.*, 608.

25. *Same—Findings of Court—Evidence—Nonsuit.*—When there appears in the record on appeal no sufficient evidence of the execution of the paper-writing which the plaintiff seeks in his action to enforce for the conveyance of mineral interest in lands, and the court below has held there was no such evidence, and it appears that the statute of frauds has been sufficiently pleaded in the answer, the judgment of the lower court sustaining defendant's motion to nonsuit upon the evidence will not be disturbed on appeal. *Ibid.*

26. *Trust Deeds—Fraud—Cestui Que Trust—Book Evidence—Res Inter Alios—Incompetency.*—In an action to set aside a deed of a purchaser at a sale of land under a deed of trust made to an officer of a bank to secure a bank loan, the books of the bank are incompetent

DEEDS AND CONVEYANCES—*Continued.*

to show fraud in the dealings of the officer with his bank, without evidence of agency existing between the purchaser and such officer, it being *res inter alios acta. Calvert v. Alvey*, 610.

27. *Trust Deeds—Fraud of Grantor—Grantee—Burden of Proof.*—In an action to set aside a deed for fraud, it is necessary for the plaintiff to show that the grantee was guilty of the fraud, or that he knew of, or participated in, the fraud of the grantor. *Ibid.*

28. *Trust Deeds—Fraud—Bona Fide Debt—Cestui Que Trust—Purchaser at Sale—Title.*—A *cestui que trust* of a deed conveying a naked title to land to a trustee to secure a *bona fide* debt, without knowledge at the time of its execution of fraud of the trustee practiced upon the grantor, may thereafter, with knowledge of such fraud, bid in the property at a sale, under a power in the deed, to save his debt. *Ibid.*

29. *Trust Deed—Fraud—Knowledge of Trustee—Evidence—Cestui Que Trust.*—The knowledge of fraud sufficient to avoid the deed of one holding a naked trust to foreclose a deed of trust on lands in default of the payment of a loan, whose duties are merely nominal, except in case of foreclosure, and then clearly marked and defined in the deed, is not imputable to the *cestui que trust. Ibid.*

30. *Trust Deeds—Bona Fide Debt—Fraud—Relationship—Presumptions—Burden of Proof.*—In an action to avoid a deed of trust on lands given to secure a loan made by the *cestui que trust*, and alleging fraud on the part of the grantor, the burden of proof is not on the *cestui que trust* to show the *bona fides* of the transaction, there being no averment or evidence of kinship or other relationship between them to raise a presumption of fraud; and even if it were otherwise here, the plaintiff's evidence has established its *bona fides* by producing the paid check given for the loan secured. *Ibid.*

31. *Timber—Description Indefinite—Voidable—Identification.*—A conveyance of "all my pine, oak and poplar timber that J. D. P. may want for lumber," of a certain measure across the stump, is an insufficient description to pass the title, and will not support an action brought by the grantee for damages for the cutting of such timber, in the absence of evidence tending to show that at the time of the conveyance the grantor and grantee in the deed had marked or otherwise sufficiently identified the timber trees for the cutting of which the damages are sought. *Pitts v. Curtis*, 615.

32. *Timber—Description—Lands.*—Growing timber is a part of the realty, and deeds and contracts concerning it are governed by the laws applicable to that kind of property. *Ibid.*

33. *Same—Judgments—Equity.*—In this case the plaintiff sued for the specific performance of a contract made with an insane person, and the verdict of the jury established the fact of insanity and plaintiff's knowledge thereof at the time. It likewise appeared that plaintiff had erected a building on the land at a cost, by his own evidence, of $475, found by the verdict to be now worth $1,000, but had been in possession for eight years, collecting an annual rent of $100: *Held*, a judgment should be entered decreeing that defendant recover possession; that the alleged contract be canceled of record; that de-

DEEDS AND CONVEYANCES—*Continued.*

fendant be not charged with taxes paid by plaintiff on the property, and that the latter be not required to account for the rents and profits by him received. *Godwin v. Parker*, 672.

34. *Attorney in Fact—Insufficient Execution.*—A paper-writing purporting to be a deed to land by an attorney in fact does not bind the principal, if not signed and sealed by the attorney in fact *eo nomine*. *Woodbury v. King*, 676.

35. *Mortgages—Husband and Wife—Fraud—Bona Fide Debt—Fraudulent Intent—Knowledge.*—In an action brought by the creditors of the husband to set aside his mortgage to his wife, given to secure a loan of money made by the latter to the former, on the ground of fraudulent intent to delay or defeat his other creditors in the collection of their debt, the questions involved are whether the husband had the fraudulent intent and whether the wife had notice of it; and evidence of the latter that she had no knowledge or notice of her husband's unlawful purpose, is competent. *Sanford v. Eubanks*, 697.

26. *Estates in Remainder—Remainderman—Direction to Pay Moneys—Interpretation of Deeds.*—A deed conveying for the consideration of $800 lands to E., the widow of A., "during her widowhood, then to her children, the heirs of A.," and in the warranty clause, "to said E. during her lifetime or widowhood, then to the said heirs of her husband, A., forever," directing payments to be made by W., one of the sons, a remainderman, in various amounts to certain of his brothers and sisters, and this being done, "the lands above described to belong to W. and his heirs forever," at the death of E., the life tenant: *Held*, (1) the children took as heirs in fee simple; (2) the warranty clause will be construed so as to vest in W. his part of the remainder interest in the lands upon the payment of the sums directed, and not to contradict the express terms of the deed by giving the interests of all the remaindermen to him upon his so doing; (3) should the payment by W. of the various sums directed be construed to cancel the previous parts of the deed, his failure to pay said charges for forty years would bar his recovery in this case. *Fortune v. Hunt*, 716.

37. *Repugnant Clauses—First Controls—Interpretation of Deeds.*—When there are repugnant clauses in a deed, the first clause will control. *Ibid.*

38. *Foreign Countries—Probate—Title of Officer—Clerical Error.*—A deed made in England to the *locus in quo*, the evidence showing it was in fact probated before a United States Vice and Deputy Consul General there, but giving the title to the probate officer as "Née" and Deputy Consul, etc., will be adjudged "duly acknowledged," it appearing that the word "née" was a clerical error and intended for the word "vice," as indicated. U. S. Rev. Statutes, sec. 1674; Code, sec. 1245 (4). *Powers v. Baker*, 718.

39. *Foreign Countries—Probate—Validating Acts—Interpretation of Statutes.*—Revisal, sec. 1024, validating acknowledgment of deeds in foreign countries before "vice consuls and vice consuls general," though not valid against a deed from the same grantor duly registered or a lien against the grantor acquired before the validating act (Laws 1905, ch. 451), is good as against the plaintiff in this action not claiming under the grantor therein. *Ibid.*

DEFAULT. See Contracts; Mortgages; Principal and Surety

DEFAULT AND INQUIRY. See Judgments.

DEMAND. See Telegraphs.

DEMURRER.

1. *Pleadings—Practice Suggested.*—The allegations of a complaint are taken as true upon demurrer. It is suggested that on such allegations as contained in the complaint in this case the defendant should answer, and not by demurrer ask the court to justify, as a matter of law, its conduct. *Bullock v. R. R.*, 66.

2. *Pleadings—Misjoinder—Parties.*—When the complaint sufficiently alleges that the plaintiff was induced by defendants' fraudulent representations as to certain facts and concealment of others, to subscribe to the stock of a corporation to be formed for certain specified purposes; that he had paid in a material part of his subscription, the balance to be paid in certain amounts upon notice, and that, without plaintiff's knowledge, by the forming of an unlawful combination the corporation was being dominated and controlled by the defendants to their own personal advantage and profit and to the destruction or serious impairment of plaintiff's subscription therein, with averment that the defendants either originally or afterwards knowingly entered upon the scheme and enterprise complained of as partners therein, a demurrer for improper joinder of parties is bad. *Worth v. Trust Co.*, 242.

3. *Pleadings—Measure of Damages.*—A demurrer to the complaint cannot be sustained when under the allegations the plaintiff is entitled to some damages, but the measure of damages cannot be considered upon demurrer. *Olive v. R. R.*, 279.

4. *Pleadings—Overruled—Costs—Procedure—Answer Over.*—It is error to tax defendant with costs upon overruling its demurrer to the complaint, when there is no suggestion of its being frivolous. In such case the judgment should be that defendant answer over. *Ibid.*

5. *Pleadings — Principal and Agent—Allegations Sufficient.* — As a demurrer to the complaint admits the truth of its allegations, a demurrer thereto on the ground that it was not alleged that the superintendent of a corporation had the power to make contracts of the nature claimed, is bad, the complaint alleging that the contract was made with the corporation. *Wilcox v. R. R.*, 316.

6. *Pleadings—Rebate Discrimination—Connecting Carrier—Allowance.*—A complaint alleging that defendant railroad company agreed to pay the plaintiff a sum equivalent to ½ cent per 100 pounds for lumber delivered to it by the plaintiff's connecting tramroad for shipment, and that the amount demanded was for lumber thus delivered, a demurrer on the ground that, in effect, it was a rebate or discrimination in rates in plaintiff's favor, is bad, it not appearing that any of plaintiff's lumber was embraced in the shipments. Ch. 320, sec. 4, Laws of 1891 (then in force). The demurrer was properly overruled and defendant allowed to answer over. Revisal, 506. *Ibid.*

DESCRIPTIO PERSONÆ. See Deeds and Conveyances.

DEVICE. See Elections.

DISCRETION. See Pleadings; Cities and Towns; Courts.

DISCRIMINATION. See Carriers of Freight.

DISQUALIFICATION. See Jurors.

DOGS. See Cities and Towns.

DOWER. See Trespass.

DRAINAGE COMMISSIONERS. See Water and Watercourses.

EASEMENTS. See Railroads; Cities and Towns.

ELECTIONS.

Ballots Prescribed—Difference in Size—Device.—When the statute contains directions to be observed at the count of the ballot, and expresses the classes of ballots to be excluded from the enumeration and declared void, and a charter empowers the board of aldermen of a city to determine upon the size of the ballots to be used, without declaring ballots of other sizes to be void, an election of an alderman receiving a majority ballot is not void by reason that the ballots for him were cast on paper 1½x3 inches, when the size prescribed was 1x3 inches. The mere difference in such sizes is an irregularity, and may not be regarded as a device to be condemned and rejected. *S. v. Spires*, 4.

ENTICING SERVANT. See Master and Servant.

EQUALIZATION, BOARD OF. See Taxation.

EQUITABLE OWNER. See Notes.

ESTATES.

1. *Deeds and Conveyances—Estates Tail—Fee.*—An estate devised to D. "and the lawful heirs of his body lawfully begotten," conveys the fee, under Revisal, sec. 1528. *Perrett v. Bird*, 220.

2. *Same—Contingent Remainders—Fees Qualified.*—O. devised his lands to certain of his children, S., D. and J. By item 3 of the will a certain tract was devised to D. and "the lawful heirs of his body lawfully begotten"; by item 9 it was provided that in case of death of either of the children his portion should revert to the surviving one, with further contingent limitations: *Held*, these items should be construed together, and that the estate devised to D. was not in fee simple, but a base and qualified fee, defeasible on the death of D. without leaving living lineal descendants. Revisal, sec. 1581. *Ibid.*

3. *Same—Termination.*—Under a devise of an estate in fee with a limitation over on the death of the devisee without heir or heirs of the body, the event by which such estate is to be determined will be referred not to the death of the devisor, but to that of the devisees taking such estate. *Ibid.*

4. *Deeds and Conveyances—Life—Tenants in Common—Adverse Possession—Title.*—H. conveyed by deed certain lands to his daughter M. for life, then to her daughters for life, with limitation over. M. having reconveyed her interest, died leaving her daughters in possession, all of whom have since died, except one, who is a lunatic, in the asylum, and whose son lived on the lands with his grandmother and

ESTATES—*Continued.*

aunts until their death, and now lives there representing his mother: *Held*, that upon the death of each of the daughters her interest reverted to the grantor, or to *feme* plaintiff, the devisee of the property under the grantor's will, constituting them tenants in common as to such interest with the others. *Boggan v. Somers*, 391.

5. *Contingent Remainders—Waste—Injunction.*—An estate devised to the wife of the testator for life and at her death to S., the grandson, for life with limitation over, etc. An action for waste and forfeiture brought by the grandson against the wife of the testator, the first tenant for life, cannot be maintained, as his interest is contingent upon his surviving the death of the first taker; for if the life estate is destroyed by forfeiture resulting from waste under the statute, Revisal, sec. 858, the event upon which the plaintiff is to take his estate in remainder, the death of the first taker, has not happened; and the remedy is by injunction. *Richardson v. Richardson*, 705.

ESTOPPEL. See Judgments; Instructions.

EVIDENCE. See Fraud; Contracts; Harmless Error; Burden of Proof; Nonsuit; Questions for Jury; Issues; Instructions.

1. *Minors—Dangerous Machines—Presumption of Intelligence—Rebuttal—Evidence.*—There is a presumption in law that a boy over fourteen years of age, who is employed by a cotton mill company to operate a picker machine, has sufficient intelligence to perform the work, which may be rebutted by the evidence. *Burnett v. Mills Co.*, 35.

2. *Contracts, Written—Inspection—Omission—Parol Evidence.*—A written agreement to furnish piles to a railroad company f. o. b. cars, etc., being silent as to which party is to procure or furnish cars for the loading, or how often inspection by the company was to be made, under a written provision that inspection be made, it is competent to show by parol which of the parties was to furnish the cars and how often the piles were to have been inspected, as such is not required by law to be in writing, and is not a variance of the written terms of the instrument. *Wills v. Construction Co.*, 100.

3. *Deceased Persons—Communications and Transactions—Services of Physician.*—Testimony by a physician, the plaintiff, that he attended deceased as such, for which he had an account against him, of the number of visits, sum due therefor, etc., is incompetent, as being "personal transactions" with the deceased prohibited by the statute (Revisal, sec. 1631), the defendant not having testified as to such matters. *Knight v. Everett*, 118.

4. *Mistake of Record—Secondary Evidence.*—And it further appearing that the report fully described the dower, but had been lost, and the omission of the line was made in copying it upon the docket, the report is a part of the record, and secondary evidence of its contents is admissible. *Wells v. Harrell*, 218.

5. *Insurance, Fire—Inventory—Estimate of Values—Evidence Corroborative.*—Under a nonwaiver agreement the adjusters of an insurance company and the insured made an estimate of insured's loss of buggies, etc., covered by the policy, by going over the debris left by the fire, and counting the irons and gearings. Subsequently, the in-

EVIDENCE—*Continued.*

ventory which it was thought had been destroyed was found in the iron safe, and the estimated value and the amount of the inventory approximated each other: *Held*, the estimate of value was not relevant as tending to show compliance with the iron-safe clause, but afforded strong confirmatory proof as to the correctness of the inventory, which was produced and relied on. *Arnold v. Insurance Co.*, 232.

6. *Insurance—Principal and Agent—Scope of Authority—Hearsay—Statement of Vice President.*—Hearsay evidence of a statement of a vice president of an insurance company that its agent had authority to borrow money in its behalf is incompetent; and, not being within the usual scope of such agencies, it must be shown by direct evidence. *Underwood v. Insurance Co.*, 274.

7. *Usury—Elements of Oppression.*—In an action against a mortgagee of plaintiff's land, consisting of several tracts, to recover a usurious charge of interest by his failing to give proper credits on the principal sum out of payments made in excess of the legal rate, it is competent for plaintiff to show that he had had offers of purchase of each of the tracts in a sum total of more than sufficient to pay the mortgage debt, and that the defendant's refusal to release the mortgage lien as to each caused a failure of the various sales. *Cuthbertson v. Austin*, 336.

8. *Contradiction—Declarations—Witness — Character.* — The declarations of a witness made to others, who corroborate them on the witness stand, are competent by way of corroboration when the testimony of the witness is contradicted, though his credibility and character have not been directly attacked. *Ibid.*

9. *Contracts—Principal and Agent—Satisfaction—Fraud.*—Parol evidence that the sales agent of a feeder for a threshing machine warranted the feeder in a sale to the plaintiffs, and that his representations thereof were false, is not sufficient upon the question of fraud, when it appears that the purchase was made under a written contract expressly setting out that the feeder was second-hand and not warranted, that the salesman had no authority to vary these terms, and that after the feeder had been attached to the thresher and demonstrated and used, the plaintiffs signed a "satisfaction slip" to the effect that they were well pleased, and that it was satisfactory. *Machine Co. v. McClamrock*, 405.

10. *Malicious Prosecution—Malice—Advice of Counsel.*—In defense to an action for malicious prosecution, the fact that the defendant acted in the criminal suit upon advice of counsel learned in the law, on a full statement of the facts, does not of itself, and as a matter of law, constitute a complete defense; for such advice is only evidence to be submitted to the jury on the issue of malice. *Downing v. Stone*, 525.

EXECUTORS AND ADMINISTRATORS.

1. *Deeds of Administrator—Fraud on Heirs—Equity.*—The evidence fairly tending to establish the allegations of the complaint, held in this case, reported in 144 N. C., 31, to be sufficient to set aside a conveyance of land procured through collusion with an administrator in fraud of the rights of the heirs at law of the intestate, *it was error* in the

EXECUTORS AND ADMINISTRATORS—*Continued.*

lower court to sustain defendant's motion for nonsuit upon the evidence; and the mere statement of the administrator that he had no fraudulent intent would not be decisive. *Morton v. Lumber Co.*, 54.

2. *Debts—Sale of Lands—Rights of Creditors.*—A creditor of a deceased person may maintain an action against the administrator to compel him, in proper instances, to proceed to sell his intestate's lands for the payment of his debts. *Hobbs v. Cashwell*, 183.

EXEMPTIONS. See Taxation.

EX MERO MOTU. See Courts.

EXPERT EVIDENCE. See Evidence.

EXPLOSIVES. See Negligence.

FALSE PRETENSE. See Indictment.

Definition of.—A criminal false pretense is a false representation of a subsisting fact, whether by oral words or conduct, which is calculated to deceive, intended to deceive, and which does in fact deceive, and by means of which one person obtains value from another without compensation. *S. v. Whedbee*, 770.

FALSE REPRESENTATIONS. See Contracts; Insurance.

FEIGNED ISSUES. See Issues.

FELLOW-SERVANT ACT. See Evidence; Railroads; Street Railways.

FINDINGS OF FACT. See Removal of Causes; Appeal and Error.

FOREIGN COUNTRIES. See Deeds and Conveyances.

FORMA PAUPERIS. See Appeal and Error.

FRAUD.

Contracts—Evidence—Burden of Proof.—It is incumbent upon the party alleging fraud in a contract to prove it by the preponderance of the evidence to the satisfaction of the jury, and the mere allegation of fraud with vituperative epithets has no such effect. *County v. Construction Co.*, 23.

FRAUD, STATUTE OF. See Deeds and Conveyances; Contracts.

GOODS ON APPROVAL. See Penalty Statutes.

GRANTS. See State's Lands.

GUARDIAN AND WARD.

Judicial Sale—Purchase by Ward—Personal Interest—Innocent Purchaser.—While, ordinarily, a guardian may not purchase the property of his ward at a judicial sale, he may do so where he has a personal interest in the land sold and it is necessary to protect his own interest; and the title of his vendee for value will not be disturbed by reason thereof. *Credle v. Baugham*, 18.

HARMLESS ERROR. See Evidence; Issues; Partition.

1. *Procedure—Rulings.*—A ruling of the court upon the admissibility of evidence not seriously controverted, and which could not have prejudiced the objecting party, if erroneous, is harmless. *Burnett v. Mills Co.*, 35.

2. *Instructions—Limitations of Actions.*—When by the exclusion of evidence on appeal the plaintiff cannot recover in his action, it is unnecessary for the Supreme Court to consider the charge of the court on the statute of limitations on a different branch of the case, as such, if erroneous, would be harmless error. *Knight v. Everett*, 118.

3. *Contracts—Guaranty—False Representations.*—A complete defense to an action upon contract being a want of consideration and a breach of guarantee, it is not error to plaintiff's prejudice for the court to impose on defendant the additional burden of proving that representations made by plaintiff to induce the contract were falsely and fraudulently made. *Audit Co. v. Taylor*, 272.

4. *Principal and Agent—Contracts of Sale—Quantum Meruit—Verdict.*—In an action to recover for services rendered in the sale of defendants' timber lands, the plaintiff relied upon an offer made and accepted by letter as a complete written agreement that he should receive all moneys obtained above a fixed price; and, also, upon a *quantum meruit* for services rendered in eventually effecting the sale, which was accordingly accepted by the defendant: *Held*, the correspondence was insufficient upon its face to entitle the plaintiff to recover upon it, as on contract, but as he was entitled to recover upon a *quantum meruit* for services rendered, and the verdict of the jury upon its face necessarily established that it was rendered as on a *quantum meruit*, no reversible error is found. *Bryan v. Cowles*, 767.

HEIRS. See Fraud; Deeds and Conveyances.

HIGHWAYS. See Counties.

1. *Townships—Board of Supervisors—Cartways—Proceedings Upon Petition—Lands of Another.*—A cartway may be awarded over the lands of another in favor of an individual citizen, when the necessity for it exists, in a manner that is reasonable and just, by proper proceedings upon petition to the township board of supervisors. *Ford v. Manning*, 151.

2. *Same—Meetings.*—In proceedings upon petition before the township board of supervisors to lay out a road over the lands of another in favor of an individual citizen, the board may determine the matter upon a call meeting after giving notice to the parties; and the meeting of the board designated by Revisal, sec. 2712, to be on the first Saturday in February and August "for the purpose of consulting on the subject of the condition of the roads in their townships," etc., does not confine the board to action in matters pertaining to cartways and like questions to those meetings alone. Revisal, sec. 2715. *Ibid.*

3. *Townships—Roads—Board of Supervisors—Justices of the Peace—Majority.*—Revisal, sec. 2681, constituting the justices of the peace in each township "its board of supervisors," refers to those who are qualified and acting; and in proceedings upon petition to lay off a

HIGHWAYS—*Continued.*

cartway over the lands of another, etc., where the township is entitled to four justices of the peace, and only two have qualified or are acting, the award of those two is valid. *Ibid.*

4. *Municipal Corporations—Bond Issues—Highway Commissioners.*—A highway commission having been authorized by a legislative act to improve the roads of its township, and, for that purpose, to issue coupon bonds of the township "for an amount sufficient, not exceeding $25,000," cannot issue an additional amount of bonds for the necessary purpose of completing the work undertaken, without authority from the Legislature to do so. *Highway Commission v. Webb*, 710.

HUSBAND AND WIFE. See Principal and Agent.

1. *Coverture—Color—Adverse Possession—Limitation of Actions.*—Chapter 78, secs. 2 and 3, of the Laws of 1899 (now Revisal, sec. 363), repealed the disability of coverture, and when it appears that defendant had taken actual possession by his tenants of the *locus in quo* and subjected himself to a suit in ejectment by plaintiff to have his deed canceled as a cloud on her title, and her right of entry and title were defeated by defendants' adverse possession for seven years under color before the action was commenced, the plea of coverture will not avail her. *Bond v. Beverly*, 56.

2. *Antenuptial Debts—Notes—Charge in Equity—Trusts and Trustees.*—In an action brought by the administrator of the deceased wife against the administrator of the deceased husband for the proceeds of certain notes given as purchase money for the wife's land, secured by mortgage thereon and made payable to the husband at her request, it is competent to show by the one who drafted the notes and mortgage that, at the time, the wife directed the husband to collect the notes as they fell due, for the purpose of paying her antenuptial debts, and use whatever surplus then remained for the support of her aged mother, then living with them. *Stout v. Perry*, 312.

3. *Married Women—Husband as Agent—Sign Required—Constitutional Law.*—Revisal, sec. 2118, declaring a married woman a free trader as to goods purchased in conducting a mercantile business, in charge of her husband as agent, etc., without displaying a sign to that effect in the manner directed, is constitutional and valid. *Scott v. Ferguson*, 346.

4. *Married Women—Sign Required—Goods Sold and Delivered—Interpretation of Statutes.*—The stock of goods of a *feme covert* in charge of her husband as her agent, etc., when the provisions of section 2118 have not been complied with, requiring the sign to be displayed showing her christian name, and the fact that she was a *feme covert*, is liable for debts for goods sold to the husband for the business, notwithstanding the vendor knew the fact and that the husband, for a brief interval previous to the purchase in question, did not run the business. *Ibid.*

5. *Married Women—Sign Required—Goods Sold and Delivered—Justice's Court—Jurisdiction.*—An action to make a stock of goods liable for a debt of a *feme covert* for goods sold and delivered, the business being hers and run by the husband as her agent, without complying with the

HUSBAND AND WIFE—*Continued.*

provisions of Revisal, sec. 2118, requiring the sign to be displayed showing such fact and the christian name of the *feme covert*, is cognizable in the court of a justice of the peace when the amount is within his jurisdiction. *Ibid.*

6. *Negligence—Death of Wife—Executors and Administrators.*—A husband as administrator may sue for damages for the wrongful death of his wife caused by tortious acts of another. *Hunter v. R. R.*, 682.

7. *Presumption—Burden of Proof.*—When the husband makes a mortgage to his wife to secure a debt admittedly *bona fide* and due at the time of the execution of the mortgage, in a suit by other creditors of the husband to set aside the deed as fraudulent for the purpose of delaying or defeating the collection of their debt, there is nothing in the transaction to raise a presumption of fraud, and the burden of proof is on the plaintiff to establish it. *Sanford v. Eubanks*, 697.

8. *Deeds and Conveyances—Mortgages—Debt, Bona Fide—Fraud—Evidence—Instructions—Questions for Jury.*—In an action by the creditors to set aside a mortgage given by the husband to his wife to secure a debt admittedly due at the time of its execution, it is for the jury to find, upon the evidence, the actual intent of the husband to defraud his other creditors, and whether the wife knew or had notice thereof, or acted in good faith in the transaction; and it is no error for the trial court to instruct the jury to answer the issue of fraud in the negative if they found that the wife acted in good faith, without knowledge of the husband's wrongful intent. *Ibid.*

9. *Deeds and Conveyances—Probate—Defective—Married Women—Title.* The exception that there is a defect in the privy examination of a married woman to a conveyance made to the husband's land, is irrelevant in the lifetime of the grantor in an action involving the question of title thereunder. *Powers v. Baker*, 718.

ILL-WILL. See Murder.

INDEPENDENT CONTRACTOR. See Contracts.

INDICTMENT. See Evidence.

1. *False Pretense—Sufficiency.*—An indictment for obtaining goods under false pretense must show upon its face that the offense charged has been committed and the evidence must correspond with and support the allegations of the bill. *S. v. Whedbee*, 770.

2. *Same—Deceit—False Statements—Causal Connection.*—An indictment for obtaining a note for a subscription to stock in a proposed corporation by false pretenses is fatally defective which fails to state the facts showing a causal connection between the deceit, the obtaining of the note, and the statements alleged to have been false; and the mere charge in the bill, that the representations induced the making of the note, is insufficient where there appears to be no semblance of connection between them. *Ibid.*

3. *Same.*—A bill of indictment charging that defendant obtained a note for subscription to stock in a certain proposed corporation by false pretenses, that the defendant falsely represented the corporation as

INDICTMENT—*Continued.*

being formed for the purpose of creating a surplus in a kindred corporation, must set forth such facts as to show the causal connection between the obtaining of the note and the representation alleged to be false; or for what the note was given, or its relation to the negotiations and dealings with respect to the organization or management of the two companies. *Ibid.*

4. *Unlawful Entry—Amendments—Deemed Made.*—When upon a trial under warrant for unlawfully and willfully entering upon land, etc. (Revisal, sec. 3688), on appeal from a justice of the peace, the Superior Court ordered an amendment by the insertion of the words "without license to do so," which amendment was not actually made, but the trial proceeded to verdict upon the assumption that it had been made, a motion in arrest of judgment on that ground will not be granted. *S. v. Yellowday*, 793.

5. *Amendment—Superior Court—Power of Court.*—The Superior Court has the power to order an amendment made to a warrant on appeal from the court of a justice of the peace. Revisal, sec. 1467. *Ibid.*

6. *Unlawful Entry—Good Faith.*—When the allegations in an affidavit and warrant for unlawfully and willfully entering upon lands, etc., under Revisal, sec. 3688, substantially comply with the statute, it is sufficient, and an averment that defendant did unlawfully and willfully enter is inconsistent with a claim of title thereto in good faith by defendant, or any right of entry. *Ibid.*

7. *Affidavits Attached—How Construed.*—When a warrant clearly refers to an attached affidavit and calls upon defendant to answer its allegations, these allegations become a part of the warrant itself, as if written therein. *Ibid.*

8. *Unlawful Entry—Premises—Land—Synonymous Words.*—The word "premises" is synonymous with the word "land," and an indictment for the unlawful and willful entering upon the "premises," etc. (Revisal, 3688), is not defective for the failure of the use of the word "land." *Ibid.*

9. *Unlawful Entry — Possession, Constructive — Principal and Agent.* When an indictment for unlawfully and willfully entering upon the lands of another, etc. (Revisal, sec. 3688), alleges the possession of an agent for the owner named, the owner is in constructive possession, and the allegation of possession is sufficient, the charge not being one for forcible trespass. *Ibid.*

INFANTS.

Insurance—Action on Policy—Ratification.—An action brought by one after reaching his majority, to recover benefits under an accident policy of insurance, taken out by him during his minority, is an affirmance or ratification of the contract; and the stipulation of the policy requiring that suit thereon shall be brought in one year is binding upon him. Should he elect to disaffirm his contract, his action would be to recover the premiums or assessments paid by him during his minority. *Heilig v. Insurance Co.*, 358.

INFORMATION FOR COURT. See Reference.

INJUNCTIONS. See Water and Watercourses; Equity.

1. *Parties—Strangers—Damages—Evidence.*—Upon the dissolution of the defendant's restraining order, evidence of damages sustained by a corporation, not made a party, claimed upon the ground that plaintiff was its president and a stockholder and held the *locus in quo* for it under an express trust, is properly excluded, the issue of title being only between the plaintiffs and defendants, and there being nothing on record to put the obligors on the defendant's bond upon notice of any liability to the corporation. *Newton v. Brown*, 200.

2. *Vendor and Vendee—Void Judgment—Execution Sale—Restraining Order—Cloud on Title.*—Though it appears from the face of the proceedings that a judgment and levy of attachment on lands is void for the lack of service of summons, the vendee of the judgment debtor may restrain to the final hearing a sale under the execution or levy; for the vendee should be afforded an opportunity to pay off the judgment if it should finally be held valid, and not forced to take chances of losing the land under a forced sale. *Bowman v. Ward*, 602.

INSANE PERSONS. See Deeds and Conveyances.

INSANITY. See Murder.

INSTRUCTIONS.

1. *Substantially Given.*—It is sufficient when the charge of the court substantially gives the instructions requested. *Lumber Co. v. R. R.*, 70.

2. *Instructions—Unsupported.*—Prayers for special instruction, unsupported by evidence, are properly refused. *Ibid.*

3. *Courts—Verdict Directing—Burden of Proof.*—The trial judge can always direct a verdict against the party to an action on whom rests the burden of proof, if there is no evidence or presumption in his favor. *Everett v. Williams*, 117.

4. *Special—When Offered—Appeal and Error.*—It appearing of record that a request for special instructions had been refused because offered too late, after three speeches had been made, an exception thereto cannot be considered on appeal. *Biggs v. Gurganus*, 173.

5. *Request—Substantially Given.*—There is no error in the failure of the trial judge to give correct prayers for instruction requested, when he substantially does so in his charge. *Annuity Co. v. Forrest*, 621.

6. *Instructions—Allusion to Charge—Special—Appeal and Error.*—Upon a trial under a warrant for unlawfully and willfully entering upon the lands of another (Revisal, sec, 3688), it is not reversible error for the trial judge to charge the jury upon the good faith or belief of the defendant as to his ownership, when such had not been requested by special instruction, and the instruction substantially required a finding which excluded the idea of an entry in good faith. *S. v. Yellowday*, 793.

INSTRUCTIONS—*Continued.*

7. *Term "Satisfy"—Words and Phrases.*—Where the principle applies, the terms "must satisfy" and must "satisfy by the preponderance of the evidence" are of equivalent import, and in a charge to the jury, in proper instances, the use of the first-named expression is not reversible error. *S. v. McDonald*, 803.

8. *Requested—Language of Court.*—It is not error for the court to charge the jury in his own language correct special prayers of instruction, when he does not weaken the force of the instruction requested. *S. v. Bowman*, 817.

9. *Murder—Conspiracy—Act Committed by Another.*—When upon trial for a conspiracy to murder deceased there is evidence that a third person did the killing, a charge by the court, that if this person inflicted the wounds which caused the death they should return a verdict of not guilty as to both defendants, and also charging fully and correctly on the doctrine of reasonable doubt, etc., is sufficient and renders immaterial his failure to give defendants' requested instructions upon this phase of the case. *Ibid.*

10. *Secret Assault—Evidence Direct—One Intent—Inapplicable.*—The prisoner having pleaded an *alibi* in defense to an indictment for a secret assault, and the State relying upon direct evidence tending to show opportunity and the admission of prisoner that he followed the assaulted one and his companion, slipping through the woods in the darkness of the night, hiding himself, and that he fired his gun loaded with shot at close range and inflicted the injury upon the one he had not intended to injure, the doctrine as applied in *S. v. Neely*, 74 N. C., 425, "that it is neither charity, nor common sense, nor law, to infer the worst intent which the facts admit of," has no application; for if the jury find the facts to be as contended for by the State, the prisoner is guilty of the offense charged. *S. v. West*, 832.

11. *Murder—Confusing Degrees—Charge—Harmless Error.*—Upon a trial for murder, an incorrect instruction of the trial judge in the first of the charge, confusing murder in the second degree with murder in the first degree, the accused having been convicted of murder in the second degree, is not reversible error, his Honor having thereafter correctly charged thereon in several parts of his charge so as to render it impossible that the jury could have been misled. *S. v. Tweed*, 843.

INSURANCE.

1. *Procurement of Death of Insured—Fund, Right to.*—A beneficiary who has caused or procured the death of the insured under circumstances amounting to a felony cannot recover on the policy; but when the contract of insurance was made with the company by the insured, and the question presented is whether the representative of the insured or of the beneficiary has a right to the proceeds of the policy, it is resolved in favor of the former. *Anderson v. Parker*, 1.

2. *Fire—Sole and Unconditional Owner—Dower Interest.*—One who has married a widow and has constructed a house on her dower interest in the lands of her former husband, and has had it insured in his

INSURANCE—*Continued.*

own name under a standard policy form, may not, upon the loss of the house by fire, recover the proceeds of the policy, as he is not a sole and unconditional owner within the meaning of the terms of the policy contract. *McIntosh v. Insurance Co.*, 50.

3. *Fire—Sole and Unconditional Owner—Equity—Reformation.*—By a bill in equity a written policy of fire insurance may be reformed, after a loss has occurred, upon the ground that it does not express the true contract; that because of mutual mistake, or a mistake of the draftsman, the name of another was substituted for the sole and unconditional owner of the insured premises, and when this is established by the proper degree of proof, the real parties can recover under the contract. *Ibid.*

4 *Policies—Proof of Loss—Denial of Liability—Waiver.*—A denial of liability under its policy by a fire insurance company for a loss occasioned by the burning of the property insured is a waiver of the stipulation in the policy requiring the insured to file with the company, within sixty days, a notice of proof of loss; and the company may not set up a plea that the insured procured the burning of the property, deny liability and avoid payment under its contract, by proving matters relating to this stipulation. *Higson v. Insurance Co.*, 206.

5. *Same—Interpretation—Policies, How Construed.*—To ascertain the meaning of a contract of insurance the courts will construe the language most strongly against the company; and there being no words of forfeiture in a contract of insurance to that effect, the failure of the insured to file proofs within sixty days after the occurrence of the fire does not have the effect of forfeiture when the company has denied all liability under its contract. (*Gerringer v. Insurance Co.*, 133 N. C., 407, cited and approved.) *Ibid.*

6. *Same—Arbitration.*—The failure to perform a promise in the contract as to arbitration which refers to the ascertainment of the amount of loss, does not work a forfeiture of the policy, upon the same principles, when the company denies all liability. *Ibid.*

7. *Ownership—Title—Bill of Sale—Evidence.*—When an insurance company seeks to avoid liability under its policy for a loss, by denying the insured's ownership of the property, it is competent for the insured to put in evidence a bill of sale thereof made to him, in order to show his title. *Ibid.*

8. *Fire—"Iron-safe Clause"—Substantial Compliance.*—The provisions of the "iron-safe clause" of a policy of fire insurance are for the general purpose of furnishing data by which to ascertain the amount of goods on hand at the time of the fire, and etsimating with reasonable correctness the amount of the loss, and a substantial compliance by the insured therewith in keeping a set of books, and also of "locking them securely in a fireproof safe at night, etc," is sufficient. *Arnold v. Insurance Co.*, 232.

9. *Same.*—It is a substantial compliance with the "iron-safe clause" of a policy of fire insurance for the insured to produce after the fire an in-

INSURANCE—*Continued.*

ventory made since the issuance of the policy, with a ledger and day-book, which had been kept in the iron safe, and a bank book kept in a place not exposed to the fire which destroyed the building, which, taken together, afforded data for a plain and concise statement of the business dealings of the insured for the period covered by the policy, and from which the amount of his loss could reasonably be ascertained; and a correct set of books, as stipulated for in this clause of the policy, refers to such as are usually kept by those conducting business of a like character of that of the insured, affording such information, and not necessarily that only which an expert would call exact. *Ibid.*

10. *Same—Inventory Itemized.*—While an item of inventory of a stock of goods, required by the iron-safe clause in a policy of fire insurance, reading, for example, "Harness, robes, collars, horse blankets, $1,-250," is not such a "detailed, itemized statement" as to meet the requirements, the inventory should not be entirely set aside and a forfeiture declared on that account, when the much larger proportion of the amount of the inventory, and the articles of chiefest value, which fixed the general character of the business, were set out, itemized and valued. *Ibid.*

11. *Fire—Inventory—"Iron-safe Clause"—Inadvertence—Substantial Compliance.*—An inventory of a stock of goods inadventently left on insured's desk at his place of business and not put into the iron safe, and which was destroyed by the fire of his store and stock of goods, does not of itself, as a matter of law, affect the insured's substantial compliance with the "iron-safe clause" of his policy, when there is no evidence of willfulness or design, or that its absence was of importance in ascertaining the extent of the damages. *Ibid.*

12. *Fire—"Last Inventory"—Interpretation of Statutes.*—"The last preceding inventory" required by the "iron-safe clause" in a policy of fire insurance, refers and is confined to inventories taken under the contract of insurance and after it was entered into. *Ibid.*

13. *Principal and Agent—Loan to Agent—Principal's Liability—Consideration.*—Checks of an insurance company signed by one agent, payable to another, and by him indorsed to one who knowingly advanced money, at the time, to the latter to enable him to remit to the company and due it by him as such agent, may not be collected by suit of the indorsee against the company, there being a failure of consideration moving to the company. *Underwood v. Insurance Co.*, 274.

14. *Life—Insurable Interest—Uncle.*—The relationship of uncle and nephew does not of itself create an insurable interest of one in the life of the other. *Hardy v. Insurance Co.*, 286.

15. *Life—Insurable Interest—Valid at Inception—Assignment—Va'id.*—A policy of life insurance taken by the insurant on his own life for the benefit of himself, or his estate generally, the policy being in good faith and valid at its inception, may, with the assent of the company, be assigned to one not having an insurable interest in the life of the insured, when the assignment is made in good faith, and not as a mere cloak or cover for a wagering transaction. *Ibid.*

INSURANCE—*Continued.*

16. *Accident—Stipulation—Suit in Year.*—The stipulation in policies of accident insurance, limiting the time in which actions to recover the loss covered by the policies can be begun, is valid and binding, and not in contravention of Revisal, sec. 4809, being construed to give plaintiff one year after his cause of action accrued, or seventeen months, at most, from the time of injury, within which to bring his action. *Heilig v. Insurance Co.*, 358.

17. *Life Policy—False Representations—Material — Inducement — Intent.* In an action by an insurance company to avoid its policy of insurance for false statements made by the insured in his application, the statements being that he had no bowel trouble and had not consulted a physician in five years, two issues, among others, were submitted: 1. Did the assured, in his application, make material representations that were untrue? 2. Did the representations as made induce the policy? *Held*, no error (irrespective of any fraudulent purpose of assured, or lack of honest intent) for the trial court to charge the jury, the evidence being conflicting, that if they found from the evidence these representations were untrue, they should find the first issue "Yes"; and, if untrue, they were material, and they should answer the second issue "Yes." *Annuity Co. v. Forrest*, 621.

18. *Evidence—Policy—Prima Facie Case.*—The insurance company in seeking to declare a policy of life insurance void, which had matured on the death of insured, alleged that it had issued and delivered the policy, received the first premiums, and declined to receive the second premiums; a *prima facie* case for defendant was made by the production of the policy declared on. *Ibid.*

INTENT. See Removal of Causes; Assault; Deeds and Conveyances; Usury; Fraud; Wills; Insurance; Corporations; Concealed Weapons.

INTEREST. See Sales; Usury.

INTERSTATE COMMERCE. See Constitutional Law; Carriers of Freight.

INTOXICATING LIQUORS. See Spirituous Liquors.

ISSUES.

1. *New Trial as to One—Matter of Right.*—A party to an action can never, as a matter of right, have one of the issues found adversely to him by the jury set aside and demand a new trial as to that one, though the court may, in certain instances and in its discretion, order a partial new trial, or a new trial as to one or more of the issues. *Burnett v. Mills Co.*, 35.

2. *Railroads—Contributory Negligence—Last Clear Chance.*—When there is evidence that the plaintiff, a fireman on defendant's engine, with the engineer and others of the train crew, got off the engine at a trestle where it had stopped owing to repairs being made on the latter, and went forward some fifteen or twenty feet on the trestle to watch the workmen, and while doing so plaintiff sat down on the trestle and talked to the workmen making the repairs, and then the engineer passed by him going to the engine, and started the en-

ISSUES—*Continued.*

gine without signals or adequate warnings, colliding with plaintiff, and causing the injury sued on, the only question upon the issue of contributory negligence for the jury is whether the plaintiff was negligent, the proximate cause of the injury, in not getting up from his position when the engineer passed to his engine; and should the verdict on this issue establish contributory negligence, a further issue should be found by the jury involving the question, whether there was a negligent failure on the part of the defendant to avail itself of the last clear chance of avoiding the injury, and if so, was such failure the proximate cause of plaintiff's injury. *Strickland's case*, 150 N. C., 4, cited and distinguished. *Snipes v. Mfg. Co.*, 42.

3. *Contracts—Delivery—Damages—Deductions—New Trial on One.*—The plaintiff having sold to defendant a specified number of piles, which the latter refused to accept, certain creditors of the plaintiff, the owners of the land from which he had cut the piles and the laborers employed to assist therein, sold some of the piles, with plaintiff's knowledge, and applied the proceeds thereof to plaintiff's debt to them: *Held*, (1) the plaintiff is entitled to recover of the defendant the contract price of the piles actually delivered, less the proceeds of the sale of the piles by his creditors, which was applied to his debts to them; for, otherwise, he would, as to the amount of such proceeds, be twice paid; (2) there being error in the charge of the lower court in this respect, the verdict on the issue of damages will be set aside, and a new trial thereon will be had. *Willis v. Construction Co.*, 100.

4. *Feigned Issues — State Bonds — Bank's Surplus — Taxation—Fraud—Corporation Commission—Procedure.*—This cause, submitted on case agreed, was for damages alleged for refusal of defendant bank to fulfill its contract of purchase from the plaintiff of certain State's bonds issued under chapter 150, Laws 1909, the plaintiff having represented, as an inducement for the sale, that the bank could carry the bonds in its surplus without increasing the taxes on its stock in the hands of its shareholders: *Held*, (1) a "feigned issue" only was raised, upon which the courts will not pass, and the proper manner in which to have the question passed upon by the courts is through an assessment made by the Corporation Commission, as only in this manner will the State be represented to protect its own interests in the question of taxation; (2) that the allegation of fraud in inducing the sale rested upon the construction of a statute accessible to all parties, and as the defendant could investigate the matter, no real issue of fraud was presented. *Parker v. Bank*, 253.

5. *Form and Number Submitted—Discretion of Court.*—The number and form of issues is in the discretion of the court, and if every phase of the contention could have been and was presented under the issues submitted they will be sustained on appeal; and when the judge accordingly adds other issues tending to elucidate the case after it has been submitted, in addition to the usual issue, it is not error, but in the line of his duty. Revisal, sec. 614. *In re Herring's Will*, 258.

ISSUES—*Continued.*

6. *No Evidence as to One—Instructions.*—Upon the question of *devisavit vel non*, issues were properly submitted, (1) as to whether the testator signed the will according to law; (2) as to the mental capacity of the testator to make a will. There was a third issue as to fraud and undue influence, upon which there was no sufficient evidence, and a fourth issue as to whether the paper-writing, etc., was the last will and testament: *Held*, no error for the judge to charge that if the first two issues were answered "Yes," to answer the third issue "No," and then to answer the fourth issue "Yes." *Ibid.*

7. *Claim and Delivery—Wrongful Seizure—Damages.*—When the pleadings in an action to declare valid a sale of property under mortgage raise questions as to whether the mortgage had been released, and the sale was unlawful, and the property wrongfully seized under claim and delivery proceedings, the defendant, if successful, is entitled to judgment "for a return of the property, or for the value thereof in case return cannot be had, and damages for taking and withholding the same" (Revisal, sec. 570), and issues were properly submitted to the jury to ascertain the value of the property alleged to have been wrongfully converted. *Penny v. Ludwick*, 377.

8. *Assent—Pleadings—Objection and Exception.*—A party assenting to the submission of an issue not raised by the answer, and upon which there was evidence, will not be heard to complain after verdict rendered therein. *Sharpe v. Sowers*, 379.

9. *Facts Admitted.*—When some of the issues tendered embrace facts admitted by the parties and the others of them are fully covered by the issues submitted to the jury by the judge, it is not error for him to refuse the issues tendered. *Newkirk v. Stevens*, 498.

10. *Unnecessary—Fraud—Issues Found.*—The jury having found in this case that the plaintiff had himself previously contracted to convey his interest in certain lands held in common with defendant, at a certain price, and that the defendant had not agreed to divide the proceeds he had received from the sale of the land at an advanced price and alleged to have been in fraud of plaintiff's rights under an agreement with him, an issue as to the amount defendant had received for his own interest is immaterial, and it was not error for the lower court to refuse to submit it to the jury. *Ibid.*

11. *Immaterial Matters—Narrative—Objections and Exceptions—Evidence Withdrawn—Error Cured.*—The issue in this case being only as to whether the agent of defendant, sent on complaint of plaintiff to remedy defects in a machine purchased by him, had rendered the machine valueless and totally unfit to do satisfactory work, exceptions taken to matters of warranty in the original contract, etc., are irrelevant, for such matters were merely narrative leading up to the cause of action; and admission of improper evidence tending to show a verbal guarantee by the agent at the time of sale was cured by the court's striking it out and withdrawing it from the consideration of the jury. *Huffines v. Machine Co.*, 522.

12. *Insurance—Life Policy—False Representations—Immaterial—Evidence—Harmless Error.*—When the pleadings in an action by an insurance

ISSUES—*Continued.*

company to avoid a life insurance policy raise issues only as to false material statements made by the assured in his application for the policy, and the plaintiff proceeds in the trial upon the theory that there was a scheme to get as much life insurance upon the life of the assured as he could, who was then in ill health, in order to defraud the life insurance companies, it was not reversible error, if error at all, to permit a witness to testify that a certain company had paid up its policy, the plaintiff having shown that several companies had not paid, and gone fully into the evidence that various companies had insured the life of the deceased. *Annuity Co. v. Forrest*, 621.

13. *Submitted—Harmless Error.*—Though the court refused correct issues tendered by defendant, if it appears that the error was harmless, the result will not be disturbed on appeal. *Yeates v. Forrest*, 752.

14. *Objectionable—Harmless Error—Purchasers at Own Sale—Accountability.*—Upon examination of the record on appeal, no substantial error was found, when there was an issue to which there was no exception, being objectionable but clearly understood in connection with the charge, and evidence that plaintiffs' agent purchased a part of the property at their own sale, making them accountable for its true value. *Smith v. French*, 754.

15. *Verdict—Counterclaim—Unanswered—Appeal and Error—Harmless Error.*—In an action involving a claim for damages for plaintiff and a set-off by defendant, an issue being submitted as to each: *Held*, no reversible error arose from the failure of the jury to answer the issue upon the set-off, and judgment accordingly, it appearing in this case that the jury had considered the second issue in answering the first one. *Henderson v. Building Co.*, 754.

JEOPARDY OF ANOTHER. See Murder.

"JIM-CROW CAR." See Penalty Statutes.

JOINT ACTS. See Murder.

JOINT TORTS. See Partnerships.

JOURNALS, CORRECTION OF. See Constitutional Law.

JUDGMENTS. See Liens; Appeal and Error.

1. *Estoppel—Same Cause and Parties.*—A verdict and judgment in a former action is an estoppel in a subsequent one between the same parties for the same cause of action. *Everett v. Williams*, 117.

2. *Justices of the Peace—Docketing, Superior Court—Limitations of Actions.*—The seven-year statute of limitations of actions brought upon judgments of a justice of the peace is not affected by docketing the judgment in the Superior Court. *Matthews v. Peterson*, 168.

3. *Deeds and Conveyances—Voluntary Gift—Executors and Administrators—Estoppels.*—While in an action against the administrator of a deceased voluntary donor of lands to set aside the donor's deed in favor of his creditors and to subject the land to the payment of his

JUDGMENTS—*Continued.*

debts, the donees are not necessary parties, a judgment therein is not an estoppel against their setting up their claim of title in another action brought by them for that purpose, when they were not made parties to the suit against the administrator. Revisal, sec. 73. *Hobbs v. Cashwell*, 183.

4. *Attorney and Client—Fraud—Questions for Jury.*—The plaintiff having been forced to pay a judgment obtained against her as surety on an administrator's bond, had the judgments assigned to her. The administrator was removed for wasting the deceased's assets, and plaintiff obtained judgment against the administrator d. b. n. and the distributees, to be paid out of the recovery had upon the first administrator's bond, as representing the entire assets of the estate. Fraud in obtaining this judgment was alleged on the ground that the plaintiff's attorney had generally represented the first administrator, and there was evidence that this attorney had notified this administrator when plaintiff's interests developed, that she was his daughter, and that he would represent her, and for him to get another attorney. *Held*, no error to defendant's prejudice in submitting the case to the jury upon the question of fraud, and the verdict in plaintiff's favor will not be disturbed. *Kerr v. Mosley*, 223.

5. *Non Obstante—Plaintiff's Motion—Confession and Avoidance.*—Plaintiff's motion for judgment *non obstante veredicto* is applicable only where the defense is in the nature of a plea of confession and avoidance, and the jury find the fact for the defendant, but in law it is an insufficient defense. *Audit Co. v. Taylor*, 272.

6. *Tender—Court Costs—Insufficiency of Tender.*—In a justice's court judgment was rendered against two defendants, from which one only appealed, and, pending the appeal, tendered in cash as a satisfaction of the judgment as to himself a less sum than the amount of the justice's judgment, but more than that ultimately rendered in the Superior Court against him. Assuming that such an offer of compromise of this case under Revisal, sec. 860, can be made, it was not made in behalf of both defendants, not commensurate with plaintiff's right of judgment against both, and insufficient to tax plaintiff with cost in the Superior Court. *Wyatt v. Wilson*, 276.

7. *Judgment Non Obstante—Plaintiff's Motion.*—A plaintiff's motion for judgment *non obstante* cannot be granted unless the answer confesses the cause of action and sets up matters in avoidance which are insufficient, although found true, to constitute either a defense or a bar to the action. *Doster v. English*, 339.

8. *Claim and Delivery—Mortgagor and Mortgagee—Excess—Verdict—Interest—Damages, Unliquidated.*—When the verdict of the jury has only established that plaintiff has wrongfully converted to his own use an excess of property in a certain sum over that required to pay off defendant's mortgage to him, the judgment thereon should not include interest from the time of the alleged conversion, but only from the date of the judgment, the conversion being a tort and the damages unliquidated; and when on appeal the judgment of the court is erroneous in this respect only, it will be ordered to be amended and affirmed. *Penny v. Ludwick*, 376.

JUDGMENTS—*Continued.*

9. *Nonsuit After Verdict—Verdict Sufficient.*—In an action to establish the boundary line between the adjoining lands of the parties, wherein issues were specifically submitted in accordance with the contention of each as to the true line, a judgment of nonsuit should not be granted as to one of them at his request after verdict rendered, which finds only the issue which establishes the line as claimed by his adversary, as a valid judgment may be entered on the finding of the jury on that issue. *Sharpe v. Sowers*, 379.

10. *Water and Watercourses—Stare Decisis—Different Matters.*—The question of the rights of the lower riparian owner, as decided in this case, not being involved in or determined by the case of *Bass v. Navigation Co.*, 111 N. C., 439, the rule of *stare decisis* of the matters in the latter case has no application. *Power Co. v. Navigation Co.*, 472.

11. *Malicious Prosecution—Indictment—Final—Evidence.*—The plaintiff in his action for damages for malicious prosecution may show in evidence the docket and judgment of the justice of the peace having final jurisdiction of the offense, in this case, of obtaining advances and supplies from the landlord with intent to cheat and defraud (Revisal, sec. 3431), but for the purpose only of showing that the prosecution upon which damages are sought in the civil suit had terminated; in such instances the judgment should be restricted to that purpose, and it is error to allow it as evidence upon the question of probable cause. It is competent, however, when a committing magistrate, as such, examines a criminal case and discharges the accused. *Downing v. Stone*, 525.

12. *Vendor and Vendee—Void—Execution Sale—Restraining Order—Cloud on Title.*—Though it appears from the face of the proceedings that a judgment and levy of attachment on lands is void for the lack of service of summons, the vendee of the judgment debtor may restrain to the final hearing a sale under the execution or levy; for the vendee should be afforded an opportunity to pay off the judgment if it should finally be held valid, and not forced to take chances of losing the land under a forced sale. *Bowman v. Ward*, 602.

13. *Contracts—Insane Persons—Equity.*—In this case the plaintiff sued for the specific performance of a contract made with an insane person, and the verdict of the jury established the fact of insanity and plaintiff's knowledge thereof at the time. It likewise appeared that plaintiff had erected a building on the land at a cost, by his own evidence, of $475, found by the verdict to be now worth $1,000, but had been in possession for eight years, collecting an annual rent of $100: *Held*, a judgment should be entered decreeing that defendant recover possession; that the alleged contract be canceled of record; that defendant be not charged with taxes paid by plaintiff on the property, and that the latter be not required to account for the rents and profits by him received. *Godwin v. Parker*, 672.

14. *Other States—Fraud—Pleadings.*—Under our system of procedure it is permissible for a defendant to plead fraud in the procurement of a judgment rendered against him in the courts of a sister State. *Roberts v. Pratt*, 731.

15. *Same—Fraud—Motion.*—While it is very generally recognized that a final judgment can only be impeached for fraud by means of an inde-

JUDGMENTS—*Continued.*

pendent action, this position does not necessarily prevail when a judgment has been procured by fraudulent imposition on the court as to the rendition, or where it has been entered contrary to the course and practice of the court. In such case, relief may ordinarily be obtained by motion in the cause, and this procedure, as a rule, is proper and allowable in all cases where courts of the common law would correct their judgments by writs of error *coram nobis* or *coram vobis;* and this is especially true under our present system combining legal and equitable procedure in one and the same jurisdiction. *Ibid.*

16. *Same—Counterclaim.*—A defendant is not estopped by a final judgment against him of a sister State, from setting up a counterclaim to the judgment sued on there, but not included in the adjudication, though it might have been alleged and included; and it is not sufficient to show that the matters of counterclaim are being litigated in the court of the other State, having jurisdiction of the cause and the parties, as the pendency of another action for the same cause in another State is not, as a matter of law, a bar to judicial proceedings here. *Ibid.*

17. *Reference—Modifications—Corrections.*—When a correction of a boundary line to lands in dispute is made by the judge in passing upon a referee's report, which slightly modifies two or three other lines as found by the referee, which corrections the judgment of the court did not embrace, the final judgment entered must be made to conform to these modifications. *Bailey v. Hopkins,* 748.

JUDICIAL POWERS. See Optometry; Constitutional Law.

JURISDICTION. See Injunction; Removal.

JURORS.

1. *County Commissioners—Proceedings to Lay off Roads—Parties—Disqualifications.*—A petitioner in proceedings to lay off a road is disqualified to act as a juror, being a party to the proceedings; and, when such has been done, it is the duty of the county commissioners to set aside the report and direct the summoning of another jury. *Keaton v. Godfrey,* 16.

2. *Tales Jurors—Two Years—Disqualifications.*—The disqualification of a tales juror to serve on a jury within two years is applicable only when he has "acted" thereon within that time; and when it appears that he was summoned, but was excused before he was sworn or served, an objection on that account is untenable. In this case it appeared that the juror had previously been summoned as a regular juror. *Burnett v. Mills Co.,* 35.

3. *Taking Paper Evidence — Error Corrected — Instructions — Parties—Court Sittings—Notice.*—When it is contended that the divisional line in dispute between the defendant's and the plaintiff's lands should be in accordance with a certain deed, introduced and read by plaintiff, and the jury, without the knowledge of the court, had taken the paper itself into the jury-room, and when called to the judge's attention, after the jury had considered the case for several hours, he instructed them, in the absence of the plaintiff and his attorneys, that they should consider the entire evidence and not the deed alone; that they should not have taken it into the jury-room:

JURORS—*Continued.*

Held, no reversible error, (*a*) if error, it was not attributable to the court; (*b*) he corrected it as soon as discovered; (*c*) the parties must take notice of the sittings of the court, and their absence did not invalidate the proceedings. *Biggs v. Gurganus*, 173.

4. *Appeal and Error—Relationship—Discretion of Court.*—It is within the discretion of the trial judge to allow a new trial on the ground that a juror was related to one of the parties, and his refusal to do so is not appealable. *Boggan v. Somers*, 390.

JURY. See Trespass; Reference.

JUSTICE OF THE PEACE.

1. *Townships — Roads — Board of Supervisors—Majority.*—Revisal, sec. 2681, constituting the justices of the peace in each township "its board of supervisors" refers to those who are qualified and acting; and in proceedings upon petition to lay off a cartway over the lands of another, etc., where the township is entitled to four justices of the peace and only two have qualified or are acting, the award of those two is valid. *Ford v. Manning*, 151.

2. *Judgments—Docketing, Superior Court—Limitations of Actions.*—The seven-year statute of limitations of actions brought upon judgments of a justice of the peace is not affected by docketing the judgment in the Superior Court. *Matthews v. Peterson*, 168.

LACHES. See Appeal and Error.

LANDLORD AND TENANT.

Malicious Prosecution—Malice—Intent to Defraud—Commencement of Work—Completion—Evidence.—Upon the question of malice, in an action for damages for malicious prosecution in arresting and prosecuting the plaintiff under Revisal, sec. 3431, for obtaining advances and supplies from his landlord with intent to cheat and defraud, it was error for the court to charge the jury that, it being admitted that plaintiff (the defendant in the criminal action) commenced the work and labor according to the contract of employment, he was not indictable for failure to complete the work, as by the express language of the statute he is indictable if he unlawfully and willfully fails to complete it. *Downing v. Stone*, 526.

LARCENY.

1. *Evidence, Competent.*—Upon trial under an indictment for burglary in the second degree testimony of a witness that "parties had been in our room" is not objectionable as a mere expression of witness's opinion, he having no knowledge that defendants had been there, when it appears from his evidence that he intended to testify that some one had been there, judging from the appearance of the room. *S. v. Shuford*, 809.

2. *Dwelling—Night-time—Value of Property—Interpretation of Statutes.* Revisal, sec. 3506, providing that "in all cases of larceny where the value of the property stolen does not exceed $20 the punishment shall, for the first offense, not exceed imprisonment . . . for a longer term than one year. If the larceny is from . . . the dwelling-house by breaking and entering in the daytime, this section shall

LARCENY—*Continued.*

have no application," means that a larceny committed by breaking and entering a dwelling-house in the night-time cannot be punished by imprisonment for more than one year when the value of the property stolen does not exceed the amount named; for while a penal statute should be strictly construed, it must be reasonably construed. Revisal, sec. 3500. *Ibid.*

LAST CLEAR CHANCE. See Negligence.

LEGACIES, SPECIFIC. See Wills.

LEGISLATIVE INTENT. See Constitutional Law.

LEGISLATIVE RESTRICTIONS. See Constitutional Law.

LEGISLATURE. See Bond Issues; Constitutional Law.

LICENSE TO OBSTRUCT. See Cities and Towns.

LICENSE, REVOCATION OF. See Pharmacists.

LIENS.

1. *Corporations—Mortgages—Work on Materials.*—A creditor who has furnished a gas-holder to a lighting corporation for its plant is not entitled to a priority of lien over a prior registered mortgage to secure a bond issue, by reason of work necessarily done in shaping the material into the article and fitting it for its erection, under the terms of its purchase. *Cox v. Lighting and Fuel Co.*, 164.

2. *Corporations—Mortgages—Labor Performed—Interpretation of Statutes.*—The preference given by Revisal, 1131, for "labor performed" over prior mortgages of corporations applies only to the laborers employed by the corporation in carrying on its ordinary business, including repairs and up-keep, and does not confer such preference upon contractors who employ labor under a contract to place "betterments" upon the company's property. *Ibid.*

3. *Mechanics' Liens—Preference—Prior Mortgage—Interpretation of Statutes.*—The mechanics' lien, under Revisal, sec. 2016, has no preference over a prior registered mortgage. *Ibid.*

4. *Corporations — Insolvency — Receivers — Fund —Costs—Lowest.*—The effect of taxing court cost and compensation of the receiver of an insolvent corporation against the fund is to tax the whole sum against the holder of the lowest lien, and to pay prior liens in full if the fund be sufficient. *Lumber Co. v. Lumber Co.*, 270.

5. *Corporations — Mortgages—Sales—Subsequent Judgments—Deeds and Conveyances—Priorities.*—A corporation deed of trust executed in good faith to secure the indorsers on its note given for borrowed money, and duly registered prior to the docketing of judgments in favor of the corporation creditors recovered upon causes of action lying in contract, constitutes a lien upon the property described in the deed superior to the liens acquired by the judgments. Revisal, secs. 574, 982. *Clement v. King*, 456.

6. *Material Men—Husband and Wife—Agency—Subcontractor—Notice.*—In an action to enforce a lien for material furnished for the house

LIENS—*Continued.*

of a *feme covert*, being repaired on her land with her assent (Revisal, 2016), it may be shown in defense that she had contracted with her husband for the repairs; and when there is evidence tending to show that plaintiff furnished the husband with the materials, the plaintiff is a subcontractor, and her payment to the husband in full before notice given by the material men (Revisal, 2020) frees her from liability to them. *Payne v. Flack*, 600.

7. *Corporations — Contract—Informalities—Ratification—Receivers—Vendor—Status.*—Among goods taken over by the receiver of an insolvent corporation were those acquired by the corporation under an offer to buy upon condition that title remain in the vendor until the purchase money had been paid: *Held*, any informalities in the corporation's signature, or in the absence of the seal to the contract, were waived by the acceptance of the goods by the corporation; and the receiver, in taking them over, was bound by the conditions creating the vendor's lien. The lower court being overruled in this case, it is suggested that a sale of the corporate property be made by the receiver, and that the proceeds be distributed in accordance with the principles declared. *Mfg. Co. v. Buggy Co.*, 633.

8. *Contracts — Commission Man — Advances — Possession.* — Possession, actual or constructive, is necessary to create a lien on goods in favor of a commission man who, under the terms of his exclusive contract of sale, has advanced money thereon. *Garrison v. Vermont Mills*, 643.

9. *Same—Acquiescence—Silence.*—A commission man claiming a lien under the terms of his contract of exclusive sale by reason of having advanced money on goods manufactured by a corporation and stored at its mills, does not show the possession necessary to his lien by establishing as a fact that after making the advances he went to the mill and asked the superintendent of the mill to take charge of the goods for him, the president of the latter standing by, but not assenting. *Ibid.*

LIMITATIONS. See Deeds and Conveyances.

LIMITATIONS OF ACTIONS. See Corporations.

1. *Suspension—Nonresident Defendants—Property—Agent.*—Revisal, sec. 366, suspending the running of the statute as to nonresident defendants, applies notwithstanding the fact that defendant has property within the State and an agent therein duly appointed, upon whom process could have been served. *Volivar v. Cedar Works*, 34. Reversed on rehearing, 656.

2. *Nonresident Defendant—Suspension—Corporations.*—Revisal, sec. 366, suspending the running of the statute as to nonresident defendants, applies to nonresident corporations. *Ibid.*

3. *Deeds and Conveyances—Privity of Color—Adverse Possession.*—Those who have entered into possession of lands under a deed of their lessor, which is "color" of title, may ripen this color of title into a good title for themselves by their continued adverse possession for seven years, though the deed from him under which they claim may be void for uncertainty of description. *Bond v. Beverly*, 56.

LIMITATIONS OF ACTIONS—*Continued.*

4. *Instructions—Harmless Error.*—When by the exclusion of evidence on appeal the plaintiff cannot recover in his action, it is unnecessary for the Supreme Court to consider the charge of the court on the statute of limitations on a different branch of the case, as such, if erroneous, would be harmless error. *Knight v. Everett*, 118.

5. *Carriers of Freight—Notice—Reasonable Time.*—Under a bill of lading with a provision that a claim of loss or damage must be made to the carrier promptly after the delivery of the property, with a void provision, in addition, that it must be made in thirty days, it is no error in the trial court to instruct the jury that a delay for more than sixty days before demand made would be unreasonable, as such is not in the nature of a statute of limitation, but the construction of what is a reasonable time under the contract of the word "promptly." This action arose prior to the adoption of the standard bill of lading by the Interstate Commerce Commission, allowing four months. *Deans v. R. R.*, 171.

6. *Tenants in Common—Possession of One—Adverse Possession.*—As between tenants in common, occupation and sole appropriation of the proceeds of the property by one or more of the tenants will not ripen title by adverse possession as against others of the cotenants without more, for any period short of twenty years; and there is no evidence in this case of such occupation as against *feme* plaintiff. *Boggan v. Somers*, 390.

7. *Counties—Roads—Construction—Damages—"Established"—Interpretation of Statutes.*—In reference to the assessment of damages, chapter 420, Laws of 1903, provides that "any person aggrieved . . . may, within six months after said change of road, or new road has been opened and completed, apply to the clerk . . . for an order appointing a jury to assess damages, etc." With reference to the time in which the party aggrieved may apply to the clerk, chapter 201, Laws 1907, provides that if he cannot fix the amount of the damages he has sustained, if any, with the superintendent of the roads with the consent of the board of commissioners, "for the changing, locating," etc., or the opening or "establishment" of the road, he may apply to the clerk, etc., who shall appoint a jury to assess the damages: *Held*, the word "established," by correct interpretation, refers to the road in its completed state, and a proceeding instituted within six months from the completion of the road, in accordance with the provisions of the latter statute, is brought in time. *Bost v. Cabarrus*, 531.

8. *Limitations of Actions—Cloud on Title—Assertion of Ownership—Interpretation of Statutes.*—The ten-year statute of limitations as to the time of bringing an action to remove a cloud upon title to lands is not a bar to the action when the party has claimed title within that period. *Bailey v. Hopkins*, 748.

LIVE STOCK. See Carriers of Freight.

LOGGING ROADS. See Railroads.

LOWER PROPRIETOR. See Water and Watercourses.

LOWEST RESPONSIBLE BIDDER. See Courts.

MAGNETIC NEEDLE. See Boundaries.

MAJORITY. See Justices of the Peace.

MAJORITY VOTE. See Bond Issue.

MALICIOUS PROSECUTION.

1. *Malice—Evidence Sufficient—"Personal Malice."*—In an action to recover damages for malicious prosecution, it is not necessary to show personal ill-will or grudge, and it is sufficient if shown that in the plaintiff's arrest and prosecution in the criminal action there was a wrongful act knowingly and intentionally done such plaintiff and without just cause or excuse. *Downing v. Stone*, 525.

2. *Malice—Advice of Counsel—Evidence.*—In defense to an action for malicious prosecution, the fact that the defendant acted in the criminal suit upon advice of counsel learned in the law, on a full statement of the facts, does not of itself and as a matter of law constitute a complete defense; for such advice is only evidence to be submitted to the jury on the issue of malice. *Ibid.*

MANDAMUS.

1. *Optometry—Board of Examiners—Judicial Powers.*—The statute confers upon the Board of Examiners in Optometry authority to pass upon the proof required of one desiring to practice without an examination, and having found from the petition that the applicant was not so entitled under the requirements of the act, a *mandamus* will not lie to compel the board to issue the certificate. *Vineberg v. Day*, 355.

2. *Pharmacists—Sale of Cocaine.*—A *mandamus* will not lie to compel the Board of Pharmacy to renew the license of a pharmacist who has been convicted of the sale of cocaine, contrary to the provisions of the statute, to which license the board, for that reason, found he was not entitled. *Thomas v. Board of Pharmacy*, 373.

3. *County Commissioners — Money Demand — Public Roads — Cherokee County—Highway Commission—Separate Entity.*—Under ch. 210, Laws 1905, the sheriff of Cherokee County shall pay over to the treasurer of the Highway Commission of Valleytown Township all moneys arising from taxes in that township levied for road purposes, to be expended upon the roads of the township; and this exempts that township from the general provisions of Revisal, sec. 2685, making damages assessed on account of laying out a road a county charge, and a *mandamus* will not lie against the county commissioners to compel such payment, though it is for a money demand. *Wells v. Commissioners*, 663.

MANSLAUGHTER. See Murder.

MAP. See Evidence.

MARRIED WOMEN. See Husband and Wife.

MEASUREMENT. See Deeds and Conveyances.

MISJOINDER. See Pleadings.

MISTAKE OF RECORD. See Courts.

MISTRIAL. See Courts.

MITIGATING CIRCUMSTANCES. See Murder.

MORTGAGES. See Liens; Claim and Delivery; Sales.

1. *Mortgagor and Mortgagee—Satisfaction, Entry of—Discharge.*—The entry of satisfaction of a mortgage on the books in the office of the register of deeds by the proper person is conclusive of the fact of its discharge and satisfaction as to third parties. *Smith v. Fuller*, 7.

2. *Same—Purchaser—Notice Implied.*—When executors sell certain lands to make assets to pay debts, the lands are bid in by the widow at a fair price, and one of the executors charges himself therewith in his account, makes deed to the widow and takes a mortgage back for the purchase price, and after the lapse of years buys the lands from the widow at a fair price and at the time cancels the mortgage, the widow and her son remaining in possession as tenants and paying rent therefor, his vendee is not, by the former relationship of mortgagor and mortgagee and the recorded but canceled mortgage deed, impressed with notice of any equities *dehors* the deeds existing between him and the widow. *Ibid.*

3. *Mortgagor and Mortgagee—Deraigning Title—Mortgage Deed—Equities—Notice.*—When, in deraigning title, one deed refers to another, the purchaser is constructively bound by all that the deed referred to would have disclosed, and he buys subject to any infirmity there apparent. So, likewise, where an infirmity appears in a deed constituting a necessary link in his chain of title. *Ibid.*

4. *Mortgagor and Mortgagee—Interpretation of Deeds—"Habendum"—Reference to Deeds—Equities—Implied Notice.*—F. mortgaged certain lands to W., and thereafter W. bought the land from F. by deed at a fair price and canceled the mortgage of record. Thereafter W. sold to S. While some of the words in the granting clause of the deed of W. to S. seemed to be those of a quit-claim deed, the *habendum* and *tenendum* clause were in the usual words of bargain and sale, and the warranty clause referred to the deed of F. to W., which was absolute and unconditional in form. The word "quit-claim" was not used: *Held*, (1) the *habendum* and *tenendum* clause was used to enlarge the estate granted; (2) the language used did not put S. upon implied notice of any equities existing between F. and W. by reason of the mortgage from the one to the other, there being no reference to the mortgage deed. *Ibid.*

5. *Mortgagor and Mortgagee—Default—Foreclosure—Notes in Sets—Maturity.*—In an action to foreclose a mortgage upon a stock of goods securing a number of notes given for the purchase price, the mortgage providing that upon failure to pay any of these notes all of them became due and payable, it appeared that two of the notes had passed maturity and one of a later maturity was given to defendant by mistake upon his payment of the one earlier maturing: *Held*, that this was no sufficient defense, and especially unavailable, as by the verdict the plaintiff was charged with the actual value of the goods when taken. *Gavin v. Matthews*, 195.

MORTGAGES—*Continued.*

6. *Corporations—Liens—Sales—Subsequent Judgments—Deeds and Conveyances—Priorities.*—A corporation deed of trust executed in good faith to secure the indorsers on its note given for borrowed money, and duly registered prior to the docketing of judgments in favor of the corporation creditors recovered upon causes of action lying in contract, constitutes a lien upon the property described in the deed superior to the liens acquired by the judgments. Revisal, secs. 574, 982. *Clement v. King*, 456.

7. *Mortgagor—Vendee—Sale of Mortgaged Property—Trover.*—The plaintiff who had sold a mule and had taken and registered a mortgage to secure the purchase price, may recover of the vendee of the mortgagor, who had disposed of the mule at the time of the suit, the balance of the purchase price the mortgagor owed him thereon; the registered mortgage constituted a valid lien on the mule, and the mortgagor can maintain his action of trover against the defendant, who has wrongfully disposed of the mule and appropriated the proceeds of the sale to his own use. *Smoak v. Sockwell*, 503.

8. *Same—Joint Torts.*—Evidence in this case that the defendant, in buying and reselling the mule, was acting for a firm consisting of the defendant and another, not made a party, does not affect the result; the objection should have been made by demurrer or answer, and this being a case of joint tort, the plaintiff may sue either one or both of the wrong-doers, at his election, though there can be only one satisfaction. *Ibid.*

9. *Contracts of Purchase — Subsequent Notes—Fraud in Treaty—One Transaction—Defenses.*—Notes executed in pursuance of a previous bargain of sale of a certain machine, and secured by mortgage on the machine purchased, are to be regarded as the same transaction as the previous bargain in a suit to cancel the notes and mortgage for fraud in the treaty or negotiation between the parties; and evidence of such fraud in the previous bargain and sale is competent evidence in the suit to cancel the notes and mortgage made in accordance therewith, when the vendor had not previously discovered or had opportunity to discover the defects complained of, and before he was aware or had opportunity to inform himself concerning them. *Machine Co. v. Feezer*, 516.

10. *Same—Presumption—Burden of Proof.*—When the husband makes a mortgage to his wife to secure a debt admittedly *bona fide* and due at the time of the execution of the mortgage, in a suit by other creditors of the husband to set aside the deed as fraudulent for the purpose of delaying or defeating the collection of their debt, there is nothing in the transaction to raise a presumption of fraud, and the burden of proof is on the plaintiff to establish it. *Sanford v. Eubanks*, 697.

11. *Deeds and Conveyances—Husband and Wife—Debt, Bona Fide—Fraud —Evidence—Instructions—Questions for Jury.*—In an action by the creditors to set aside a mortgage given by the husband to his wife to secure a debt admittedly due at the time of its execution, it is for the jury to find, upon the evidence, the actual intent of the husband to defraud his other creditors, and whether the wife knew or had notice thereof, or acted in good faith in the transaction; and it is no error

MORTGAGES—*Continued.*

for the trial court to instruct the jury to answer the issue of fraud in the negative if they found that the wife acted in good faith, without knowledge of the husband's wrongful intent. *Ibid.*

12. *Deeds and Conveyances—Mortgagor and Mortgagee—Registration—Original Parties—Executors and Administrators.*—As between the original parties, the lien of an unregistered mortgage holds, and the personal representative of a deceased mortgagor stands in the shoes of the latter: *Hence*, the plaintiff holding an unregistered second mortgage on the lands of the defendant's intestate is entitled to his lien upon the funds derived from the sale in excess of the first mortgage, in preference to other creditors of deceased. *McBrayer v. Harrill*, 712.

MOTIONS.

1. *Pleadings—Judgment—Facts Admitted—Effect.*—A motion by plaintiff for judgment upon the pleadings is in effect a demurrer to the answer, and admits the truth of the facts therein alleged, except only as to their legal sufficiency. *Helms v. Holton*, 587.

2. *Judgments—Other States—Common Law—Presumptions.*—When relevant, the courts here will presume the existence of the common law in a sister State, in the absence of evidence, statutory or otherwise, bearing on the subject. The principle is not modified or affected by the fact that the sister State was formed from territory acquired from a country where the civil law prevailed (in this case, South Dakota, a part of Louisiana purchase) if, at the time of the acquisition, it was an unoccupied portion of such territory, where no government or civilized community prevailed, and where it was later settled chiefly by emigration from States where the common law prevailed as the basic principle of their jurisprudence. *Roberts v. Pratt*, 731.

3. *Same.*—In this case, where it appears that the plaintiff had recovered a judgment against defendant in the courts of South Dakota, said courts having jurisdiction of the cause and of the parties by personal service of process, and the defendant appeared in said court and moved to set the judgment aside because the same was procured in fraudulent disregard of an agreement between plaintiff and defendant as to the course and conduct of the cause, and the Dakota court on the hearing entered judgment, "Motion of defendant to set aside judgment, denied": *Held*, that in the absence of evidence on the subject, the court here should presume that the courts of South Dakota had jurisdiction to entertain the motion on the ground of fraud, and that its judgment worked an estoppel on defendant here. *Ibid.*

4. *Judgments—Collateral Attack—Fraud—Cause—Unreasonable Delay—Estoppel of Record.*—A deed to lands made in partition proceedings in pursuance of a decree therein, subsequently confirmed, cannot be attacked by strangers in another and independent action involving title, upon the allegation that the affidavit for the publication of the summons therein was defective, wherein there is no averment of fraud. The procedure is by motion in the cause, which should be made in a reasonable time (after twenty years held to be too late), and here the motion is precluded by the recital appearing of record that "service had been made by publication." *Bailey v. Hopkins*, 748.

MURDER.

1. *Verdict—Recommendation for Mercy—Appeal and Error.*—A recommendation for mercy by the jury in their verdict of guilty of murder is not considered on appeal, but is a matter for the Chief Executive, and the lower court having accurately followed in this case the precedents established by this Court upon the questions of deliberation and premeditation, no error is found. *S. v. Stackhouse*, 808.

2. *Capital Felonies—Absence of Prisoner—Mistrial—Order—Discretion—Ends of Justice—Joint Acts.*—After temporary but voluntary absence of a prisoner who is being tried for a capital offense, by the inadvertent permission of the judge, his attorneys stated that they would ask for a new trial on that account. The court thereupon made a mistrial. This does not entitle the prisoner to a discharge upon motion after the entry of the order for a new trial, to which no exception was taken; for while it is not in the discretion of the trial judge to order a mistrial in case of a capital felony, he may do so to attain the ends of justice; and the prisoner not having excepted to a mistrial, he cannot afterwards be heard to object. This principle holds when there are two prisoners being jointly tried for a capital felony for a joint act, and one of them was thus absent. *S. v. Dry*, 813.

3. *Conspiracy—Evidence—Questions for Jury.*—Upon a trial for murder, evidence of unfriendly feeling between the defendants and deceased; that the deceased struck one of them, who said, "I will get you later"; that the two defendants then drove off some distance in a buggy, then returned, quarreled with deceased, and one of them untruthfully said, "He is coming on me with a knife"; the deceased advanced upon him, he drew back, and fell with deceased on top of him, whereupon he cried that he was being cut to pieces, and the other defendant rushed in and killed the deceased with a knife, the first defendant having been but slightly cut, is sufficient to take the case to the jury upon the question of conspiracy. *S. v. Bowman*, 817.

4. *Conspiracy—Jeopardy of Another—Defense Excluded.*—When under a correct charge of the court upon the evidence the jury has rendered a verdict that the two defendants murdered the deceased in accordance with a conspiracy they had previously entered into, the idea is excluded that the one who did the deed was convicted, notwithstanding the jury may have found from the evidence that he had intervened and delivered the fatal blow to prevent the deceased from committing a felony by killing his codefendant and companion without legal excuse, when he had reason to believe that such would otherwise have resulted. *Ibid.*

5. *Conspiracy—Manslaughter—Defense Excluded — Appeal and Error.*—The defense of manslaughter is inconsistent with a conviction of the defendants for murder in the second degree for a conspiracy to murder the deceased, and when the jury have found that the conspiracy resulting in murder had been formed between the defendants, they will not on appeal be permitted to aver that they killed the deceased in the heat of passion, or upon any legal provocation, or for any other reason which would reduce the crime to the degree of manslaughter. *Ibid.*

MURDER—*Continued.*

6. *Malice—Mitigating Circumstances—Manslaughter.*—While malice, in the popular sense of personal hatred or ill-will, is not always required to convict of the crime of murder, and may be said to exist whenever there has been an unlawful and intentional homicide without excuse or mitigating circumstance, its presence is always necessary to that crime, whether in the first or second degree. Revisal, sec. 2631. *S. v. Baldwin*, 822.

7. *Same—Passion.*—Manslaughter is the unlawful killing of another without malice, and under given conditions this crime may be established, though the killing has been both unlawful and intentional, as when the passion, if aroused by provocation which the law deems adequate, displaces malice and is regarded as a mitigating circumstance reducing the degree of the crime. *Ibid.*

8. *Same—Previous Ill-will—Accidental Meeting.*—When previous ill-feeling has existed between the parties and they meet accidentally and a fight ensues in which one of them is killed, malice will not be presumed from the existence of the old grudge unless the circumstances of the case make it appear. *Ibid.*

9. *Same—Evidence.*—While there is evidence in this case tending to show animosity between the deceased and the defendant on trial for his murder, the idea of malice is repelled when it is established that the deceased accidentally met the prisoner, when the prisoner was peaceably going on his way, and hailed him for the purpose of arresting him on an invalid warrant, overtook him and unjustifiably made the arrest with force, turning the prisoner back and shoving him twice before he made any active resistance, and threatened the prisoner with a pistol before he did the fatal firing; and the question on the issue of manslaughter is alone presented. *Ibid.*

10. *Malice—Evidence—Expressions of Prisoner—Provocation.*—The prisoner being tried on the charge of murder was asked by witness, within five minutes after he had fired the fatal shot, "You have about fixed yourself to be hung, haven't you?" to which the prisoner replied, "I have done what I intended to do, and I don't care what in the hell they do with me": *Held*, the question was well calculated to arouse the prisoner, and the conversation at the time and place it occurred, and under the attendant facts, should be regarded as the not unnatural expression of an angered man who had passed through a fatal encounter with his fellow-man, and should be referred to the occurrence itself, and not construed as an expression of a preconceived definite purpose to kill. *Ibid.*

11. *Transitory Insanity—Communications to Prisoner—Evidence.*—The defense in a trial for murder being a plea of transitory insanity caused by the communications of the prisoner's wife to him of deceased's improper conduct towards her, evidence is competent by the wife of what she had told her husband, as it was upon this communication that the prisoner acted in committing the deed and was claimed to have caused the insanity; but evidence of the truth or falsity of the communication was immaterial and incompetent, as also the reason why the wife called the prisoner away from the house of deceased

MURDER—*Continued.*

early in the morning before she had communicated to him the occurrences of the night before upon which the plea of transitory insanity was founded. *S. v. Green*, 835.

12. *Transitory Insanity—Defendant's Character — Drink—Evidence.*—The defense in a trial for murder being a plea of transitory insanity caused by the communication of the prisoner's wife to him of deceased's improper conduct towards her, it was competent for the prisoner, not examined as a witness, to offer testimony of his good character and for the State to offer testimony that prisoner was "two-thirds" drunk on the morning of the homicide, and under such conditions was violent in speech and conduct, being directed to the plea of "transitory insanity." *Ibid.*

13. *Previous Quarrel—"Bad Blood"—Evidence.*—Upon a trial for murder, it is competent to show that the deceased and the prisoner had a quarrel previous to the killing, as evidence of bad blood between the parties. *S. v. Tweed*, 843.

14. *Confusing Degrees—Instructions—Charge—Harmless Error.*—Upon a trial for murder, an incorrect instruction of the trial judge in the first of the charge, confusing murder in the second degree with murder in the first degree, the accused having been convicted of murder in the second degree, is not reversible error, his Honor having thereafter correctly charged thereon in several parts of his charge so as to render it impossible that the jury could have been misled. *Ibid.*

NECESSARIES. See Cities and Towns; Bond Issues; County.

NEGLIGENCE.

1. *Contributory Negligence—Negligence Intervening—Damages.*—While a person cannot take advantage of his own wrong, the court will not furnish a person a remedy for a wrong when he cannot prove a legal claim for damages without showing that his own negligence intervened between the act of the alleged wrongdoer and the result complained of, which was the real and efficient cause of the injury. *County v. Construction Co.*, 23.

2. *Master and Servant — Disobedience of Servant — Consequent Injury—Scope of Employment.*—In disobeying the orders of his superior, in attempting to unchoke a picker machine in defendant's cotton factory, a servant acts independently, and the master is not liable in damages for an injury the servant may have received while so acting. *Burnett v. Mills Co.*, 35.

3. *Master and Servant—Damages—Dangerous Machinery—Safe and Unsafe Methods.*—Damages are not recoverable for an injury received by an employee while improperly attempting to unchoke a picker machine in defendant's cotton factory, by removing the lid from one part of it in an unsafe manner, when the proper and safe method was in removing the lid from another part. *Ibid.*

4. *Same—Instructions of Master.*—When there is a safe way for an employee to do his work, and he attempts, against his employer's instructions, to do it in an unsafe manner, he cannot recover; and when under proper evidence and correct instructions the jury have so found, the verdict will not be disturbed. *Ibid.*

NEGLIGENCE—*Continued.*

5. *Same—Issues — Contributory Negligence — Last Clear Chance.*—When there is evidence that the plaintiff, a fireman on defendant's engine, with the engineer and others of the train crew, got off the engine at a trestle where it had stopped owing to repairs being made on the latter, and went forward some fifteen or twenty feet on the trestle to watch the workmen, and while doing so plaintiff sat down on the trestle and talked to the workmen making the repairs, and then the engineer passed by him going to the engine, and started the engine without signals or adequate warnings, colliding with plaintiff, and causing the injury sued on, the only question upon the issue of contributory negligence for the jury is whether the plaintiff was negligent, the proximate cause of the injury, in not getting up from his position when the negineer passed to his engine; and should the verdict on this issue establish contributory negligence, a further issue should be found by the jury involving the question, whether there was a negligent failure on the part of the defendant to avail itself of the last clear chance of avoiding the injury, and, if so, was such failure the proximate cause of plaintiff's injury. *Strickland's case*, 150 N. C., 4, cited and distinguished. *Snipes v. Mfg. Co.*, 42.

6. *Place to Stop Train.*—The railroad company owed a duty to plaintiff ejected from its train to put her off the train at a suitable and proper place, either at a station or near a house, even though she had not been rightfully a passenger. Revisal, 2629. *Bullock v. R. R.*, 66.

7. *Master and Servant — Instructions of Supervisor — Dangerous Work—Rule of the Prudent Man—Questions for Jury.*—When an employee has been instructed by his superior to direct another, an inexperienced employee, in working at a dangerous machine, the instruction of the former is the instruction of the master, and where there is evidence that a negligent order was given by him, which a reasonably prudent man would not have given, which proximately caused the injury complained of, the case should be submitted to the jury. *Holton v. Lumber Co.*, 68.

8. *Same—Safe Place to Work.*—And the result is the same when there is evidence of a safe, as well as an unsafe place in which to do the work, as more than one inference may be drawn as to defendant's negligence and the proximate cause. *Ibid.*

9. *Master and Servant—Instructions to Servant—Inexperienced Servant—Dangerous Machinery—Warning—Questions for Jury.*—If an employee is instructed by his superior to do a dangerous act, without warning against the danger, he having had no previous experience therein, the question of the employer's negligence is one for the jury. *Ibid.*

10. *Railroads—Evidence—Spark from Engine—Proper Equipment—Rebuttal.*—Where there is competent evidence to show that a fire to plaintiff's lumber dry-kiln originated from a spark from defendant's locomotive, it is sufficient to charge the latter with negligence; and the burden is upon it to show that it had used all the precautions for confining sparks or cinders which are approved and in general use, and that the appliances furnished were used by a competent and skilled engineer in a careful way. *Deppe v. R. R.*, 79.

NEGLIGENCE—*Continued.*

11. *Same—Corroborative Evidence—Discrepancies.*—And when, in corroboration, a witness testifies that he, at or about the time and place of the occurrence, saw the train with a man on it; that he saw the cars of the train slamming and jarring, suddenly stop, and when it again started he did not see the man again, the next morning again identifying the place by blood on the track, the evidence clearly indicates that the death of the intestate resulted from defendant's negligence, notwithstanding there is a slight discrepancy in this witness's testimony as to the number of cars and the position of the intestate thereon; and such evidence is sufficient to sustain a verdict of defendant's negligence. *Leggett v. R. R.*, 110.

12. *Fraud—Pleadings—Evidence.*—The doctrine that a shipper may not recover the actual value of his loss or damage caused by the negligence of the carrier, when he is guilty of positive fraud in representing the character and value of the goods shipped, reasonably relied on by the carrier, does not apply when there is no allegation or suggestion of such fraud; and the mere fact that it received for shipment a valuable horse under its ordinary live-stock contract, restricting a recovery in case of damage, through its negligence, to an arbitrary and predetermined value of such animals, is not evidence thereof. *Stringfield v. R. R.*, 125.

13. *Carriers of Freight—Restricting Liability—Public Policy—Estoppel.*—A shipper is not estopped to recover on the basis of the actual value of a horse injured by the carrier's negligence, and shipped under a carrier's general live-stock contract containing an arbitrary and predetermined restriction on the value, as such restriction, so far as it affects injuries arising from the carrier's negligence, is against public policy and void. *Ibid.*

14. *Master and Servant—Servant's Discretionary Powers—Scope of Agency.* An engineer having full authority to hire or discharge his train crew is presumed as not acting beyond the sphere of his assigned duties in doing the work of a brakeman, when, dissatisfied with the manner in which the brakeman was doing his work, and having ordered him to fire the engine and ordered a competent man to run it, and when killed while acting as brakeman, by the negligence of the defendant in failing to equip its train with an automatic coupler, the relation of master and servant still existed, and the master is liable for the injury received by reason of its negligent act. *Blackburn v. Lumber Co.*, 361.

15. *Master and Servant—Safe Place to Work—Appliances—Duty of Employer—Rule—Proximate Cause.*—The rule requiring the employer of labor to provide for his employees a reasonably safe place to work and appliances reasonably safe and suitable for the work in which they are engaged, obtains in case of machinery more or less complicated, and more especially driven by mechanical power, and does not apply to ordinary conditions requiring no special care, preparation or prevision, the defects readily observable and the injury unlikely to be anticipated; the distinction being that in the latter instances the element of proximate cause is ordinarily lacking. *House v. R. R.*, 397.

16. *Same—Unlikely Results.*—One who is employed to clean out defendant railroad company's passenger coach cannot recover damages caused by

NEGLIGENCE—*Continued.*

her hand slipping through a glass of a window she was instructed to raise, the negligence complained of being that the coach had just been repaired and the windows left so tight she had to exert unusual force, and that the lift on the window, necessary to be used, had been worn smooth and was unfit for the purpose. *Ibid.*

17. *Railroads—Moving Trains—Passengers Alighting—Instructions of Conductor—Contributory Negligence—Questions for Jury.*—The question of contributory negligence of plaintiff in alighting from a moving train should be submitted to the jury upon evidence tending to show that the train had slowed down, so that it was moving very slowly, and that, as plaintiff was alighting, under the instruction of the conductor, it started to go more rapidly and threw plaintiff to the ground and inflicted the injury. *Owens v. R. R.*, 439.

18. *Railroads—Regular Stops—Train Orders—Rights of Passengers—Substantial Damages.*—There was evidence tending to prove that plaintiff was a passenger on defendant's train scheduled to stop at McFarland; that he tendered his fare to conductor, who refused to receive it; that conductor had orders to stop at McFarland; that he willfully disobeyed them; that plaintiff told conductor that he must stop at McFarland to attend his child's funeral, and that then conductor refused to stop: *Held*, that the evidence justified the court in submitting the question of punitive damage to the jury. *Ibid.*

19. *Automobiles—Public Thoroughfares—Reasonable Requirements — Unusual Noises—Frightened Horses.*—The use of an automobile upon a public thoroughfare imposes upon the chauffeur the duty to observe that degree of care in its operation which is commensurate with the risk of danger thereby caused to others; and when the chauffeur commences to crank his machine for the purpose of starting in close proximity to harnessed horses standing quietly in charge of a driver, without giving any previous warning, and thereby causes them to run away and inflict the injury complained of, actionable negligence is established. *Tudor v. Bowen*, 441.

20. *Railroads—Walkways—Duty of Pedestrians—Negligence—Warnings—Evidence.*—When there is evidence that plaintiff was injured while attempting to save his companion from injury, caused by defendant's negligently running its engine and tender backward, in the nighttime, without customary signals and warning, and with only a lantern in front of its tender which threw a light along the track a distance of only 10 or 15 feet, and under circumstances and conditions where the injury would likely result, his evidence, "I saw the light far enough off to have saved my companion and myself, but did not know it was a train, and heard no bell or whistle, the train running very fast with little noise; when I saw the light and heard the whistle, I was standing near the end of the cross-ties; I called my companion; he did not notice me, and I jumped across and pulled him off," is not construed to mean that the light was adequate or at all sufficient to warn him that an engine was approaching, in time to have safely avoided the injury received by him. *Norris v. R. R.*, 505.

21. *Railroads—Negligence—Peril of Another—Contributory Negligence—Nonsuit.*—When a life of a human being is suddenly subjected to imminent peril through another's negligence, either a comrade or a by-

NEGLIGENCE—*Continued.*

stander may attempt to save it, and his conduct is not subjected to the same exacting rules which obtain under ordinary conditions; and when the evidence tends to show that plaintiff and his comrade were suddenly subjected to imminent peril by the defendant's employees negligently running its engine and tender at night, and that plaintiff, without sufficient forewarning of the approach of the engine and tender, attempted to rescue his companion and was injured by defendant's negligence, it is not sufficient evidence of contributory negligence on plaintiff's part to justify a judgment of nonsuit. *Ibid.*

22. *Railroads—Presumed—Head-on Collision.*—A presumption of defendant railroad company's negligence is raised from the fact that the injury complained of was received by an employee as baggageman in a head-on collision. *Duval v. R. R.*, 524.

23. *Bathing Resorts—Duty of Owners—Who are Not Liable—Police Regulations—Officers.*—In an action for damages for negligently permitting the drowning of plaintiff's intestate while swimming in a lake in a park, it appeared that the defendants had no control over the lake or park, except, under the police regulations of the town, to prevent nude persons from bathing therein, and were without control over the bathers and received no toll from them for bathing, though the defendants did rent a limited number of bathing suits to those who came unsupplied: *Held*, under the evidence no actionable negligence was shown and a judgment of nonsuit was properly allowed. The decisions laying down the rule of duty owed by owners and proprietors of public bathing resorts, cited and distinguished. *Phillips v. Orr*, 583.

24. *Evidence—Accident—Nonsuit.*—While plaintiff was working as a lineman for defendant, he and others were engaged in carrying a pole to the point where it was to be erected, two on the right-hand side of the pole and plaintiff and another on the left-hand side, those on the right being taller than plaintiff and his companion, which threw more weight on the latter. The pole "gave a turn," those on the right lowered their side of the pole, and those on the left were instructed to "come up with the pole," which plaintiff's companion did; but plaintiff said, "Let it down, boys; I am hurt": *Held*, the evidence tended to prove that the injury resulted from an accident, was insufficient on the question of negligence, and defendant's motion to nonsuit should have been sustained. *Brookshire v. Electric Co.*, 669.

25. *Explosives—Noises—Injurious Effects—Notice.*—In an action for damages alleged to have been caused to plaintiff's intestate, there was evidence tending to show that the intestate was the wife of plaintiff, in delicate health, and that the blasting necessary in constructing defendant's railroad on the other side of the river from plaintiff's residence was done in such unusual manner as to cause stones to be thrown across the river on plaintiff's premises, and the noise and the falling stones kept the intestate in such fear and anxiety that, being in delicate health, it eventually caused her death, notice of which was repeatedly given defendant and utterly disregarded: *Held*, in this connection, the noise, alone, caused by the necessary blasting would not be negligence. *Hunter v. R. R.*, 682.

26. *Street Railways—Personal Injury—Conductors—Negligence—Improbable Results—Nonsuit.*—The plaintiff was injured while engaged in

NEGLIGENCE—*Continued.*

the service of the defendant company in collecting fares on a summer car run in cold weather. His evidence tended to show that the weather was too cold for a car of this character, and that he had unsuccessfully requested closed cars of his superior for the purposes required; that the curtains of the car ran tight in their grooves, and that the injury occurred while he was necessarily attempting to raise a curtain to collect fares, which had been caught in the grooves, by his hand slipping from the curtain and striking the other one with which he was holding to a stanchion provided for the purpose, which, from the blow, or from being numb by the exposure to the cold, relaxed its hold, causing plaintiff to fall from the moving car to his injury: *Held*, the injury complained of would not ordinarily arise or be likely to ensue from the tightening of the curtain plaintiff was attempting to roll up, and a motion for judgment as of nonsuit upon the evidence should be allowed. *Rich v. Electric Co.*, 689.

27. *Principal and Agent—Evidence.*—The plaintiff was engaged by defendant to work in a gang engaged in moving "economizers," weighing not less than 2,000 pounds, from a higher to a lower level, by pushing them upon skids from a higher platform until the implements were toppled over and allowed to slide to the lower level. This work was done under the order of defendant's vice principal, who alone was in position to have full view of the work as it progressed: *Held*, the defendant is liable in damages for a negligent order of its vice principal, proximately causing an injury to plaintiff's hand, in directing the plaintiff and another to place a skid and ordering those on the upper platform to shove the "economizer" on the skids before plaintiff could step back to a place of safety. *House's case, ante*, 397, and *Brookshire's case, ante*, 669, cited and distinguished. *Hipp v. Fiber Co.*, 746.

NEGOTIABLE INSTRUMENTS. See Notes.

NEW PROMISE. See Contracts.

NEW TRIAL. See Issues.

1. *Evidence, Newly Discovered—Cumulative.*—The newly discovered evidence relied on for a new trial being cumulative, and the majority of the Court being of opinion with the disposition of the case as reported in 150 N. C., 770, this petition to rehear is dismissed. *Bank v. Insurance Co.*, 163.

2. *Newly Discovered Evidence—Diligence.*—A plaintiff is not entitled to a new trial for newly discovered evidence when it appears that an allegation in the answer sets forth the fact upon which the new trial is sought, such being sufficient notice to put plaintiff on guard, requiring him, at the former trial, to make due inquiry. *Matthews v. Peterson*, 158.

NONRESIDENT DEFENDANTS. See Limitations of Actions.

NONSUIT. See Verdict; Evidence.

1. *Motion to Nonsuit—Evidence, How Considered.*—Upon a motion to nonsuit upon the evidence, the evidence must be construed in the view

NONSUIT—*Continued.*

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 regarded as established. *Deppe v. R. R.*, 79.

2. *Same—Formal Defect.*—When issues have been submitted to the jury in accordance with the contentions of the parties in an action to establish the boundary line between their adjoining lands, and the jury has answered only one issue, deeming it to be sufficient, the party claiming the line to be that as called for in the other issue cannot take a nonsuit, for if the failure of the jury to answer this issue made a defective verdict, it was cured by the subsequent logical answer of the jury thereto, having been instructed by the judge to answer it "Yes" or "No." *Sharpe v. Sowers*, 379.

3. *Damages—Release — Evidence.* — When the extension of a release founded upon a valuable consideration has been admitted in an action to recover damages for personal injury, and it appears from the evidence that the plaintiff signed it, in full possession of his faculties, two months after the injury, upon condition that if the consideration should be paid the release would be effective, and about two weeks thereafter signed the final release upon receiving the stipulated payment, a judgment of nonsuit upon the evidence, upon defendant's motion, should be granted, the evidence as to fraud in its procurement not being sufficient to carry the question to the jury. *Aderholt v. R. R.*, 411.

4. *Railroads—Master and Servant—Evidence.*—There was evidence tending to show that since defendant had erected a coal chute at one of its stations, some nine years before the time complained of, it had increased the width of its engines and the liability to injure an employee riding by on the steps of its engine in accordance with an established and known custom; traveling at night under the direction of his superior, plaintiff, an employee, was injured by a post supporting this chute, there being evidence that this particular post had been further moved toward the track, which had been reported to defendant; plaintiff did not know the exact location of the posts, that one had been jerked forward, and the darkness prevented his seeing them; the plaintiff was injured by being struck by one of the posts as the engine was passing: *Held*, (1) it was defendant's duty to move back the posts which increased plaintiff's hazard in riding on the engine's steps, and was liable to plaintiff for damages proximately caused thereby; (2) the rule applying when persons are injured by alighting from moving trains does not in strictness apply in this case, it not appearing that plaintiff was in the act of alighting. *Heilig v. R. R.*, 469.

5. *Railroads—Negligence—Peril of Another — Contributory Negligence—Nonsuit.*—When a life of a human being is suddenly subjected to imminent peril through another's negligence, either a comrade or a bystander may attempt to save it, and his conduct is not subjected to the same exacting rules which obtain under ordinary conditions; and when the evidence tends to show that plaintiff and his comrade were suddenly subjected to imminent peril by the defendant's employees negligently running its engine and tender at night, and that plaintiff, without sufficient forewarning of the approach of the engine and

NONSUIT—*Continued.*

tender, attempted to rescue his companion and was injured by defendant's negligence, it is not sufficient evidence of contributory negligence on plaintiff's part to justify a judgment of nonsuit. *Norris v. R. R.*, 505.

6. *Evidence, How Construed.*—The rule of the construction of evidence on motions to nonsuit, as laid down in *Morton v. Lumber Co.*, *ante*, 54, affirmed. *Phillips v. Orr*, 583.

7. *Deeds and Conveyances—Fraud—Cancellation—Plaintiff's Title—Defendant's Possession—Procedure—Evidence.*—When defendant has entered upon and cut timber from plaintiff's land under plaintiff's deed to the land, which, by the verdict of the jury and judgment entered accordingly, have been set aside for fraud, it is error for the lower court to nonsuit the plaintiff, upon the question of plaintiff's damage, on the ground that he has failed to show title in himself, when the defendant has failed to show a title in itself superior to that acquired by the void deeds; for it would be inequitable to permit the defendant to thus take advantage of its own fraud and wrongful act and assail the plaintiff's title until it had surrendered the possession which it had obtained of plaintiff by fraud. Whether the defendant may show that plaintiff is not the owner of the land in reduction of the damage is not presented in this case. *Foy v. Lumber Co.*, 595.

8. *Railroads—Construction—Personal Injury—Fellow-servant.*—It appearing in this case from the evidence that plaintiff was employed loading rails for the construction of a railroad not in operation, and was injured either by the negligence of a fellow-servant or the result of an unavoidable accident, a motion to nonsuit upon the evidence should have been sustained. *Bailey v. Meadows Co.*, 603.

NOTES.

1. *Equitable Owner—Possession—Defenses.*—When a plaintiff sues upon a note as the equitable owner, and not as a holder in due course, it is sufficient for him to show possession, by producing the note at the trial, whether it is negotiable or not; and he may recover upon it in his own right as a holder thereof, subject to any defenses the maker may have against the original payee. *Bank v. Drug Co.*, 142.

2. *Usury—Payment in Advance—Interest to Maturity.*—When the payee of a note receives payment in full from the maker before maturity, only upon condition that interest shall be paid to maturity, which was accordingly done, the payee not being required by law to do so and the note itself being untainted with usury, the penalty for usury under Revisal, 1951, cannot be recovered, the transaction being the very reverse of a loan or of an extension of credit or a forbearance necessary to sustain the action. *Smithwick v. Whitley*, 366.

3. *Non-negotiable—Indorsee for Value—Defenses, Legal and Equitable—Party in Interest.*—The indorsee for value of a non-negotiable note may maintain his action thereon, as the real party in interest, subject to any defenses existing between the original parties, whether legal or equitable (Revisal, sec. 354), and when such defense is set up in the answer, which, if true, is a valid one, upon conflicting evidence,

NOTES—*Continued.*

an issue of fact is raised for the determination of the jury, notwithstanding the fact that the instrument sued on is not negotiable. *Thompson v. Osborne*, 408.

4. *Contracts of Purchase—Subsequent—Fraud in Treaty—One Transaction —Defenses.*—Notes executed in pursuance of a previous bargain of sale of a certain machine, and secured by mortgage on the machine purchased, are to be regarded as the same transaction as the previous bargain in a suit to cancel the notes and mortgage for fraud in the treaty or negotiation between the parties; and evidence of such fraud in the previous bargain and sale is competent evidence in the suit to cancel the notes and mortgage made in accordance therewith, when the vendor had not previously discovered or had opportunity to discover the defects complained of, and before he was aware or had opportunity to inform himself concerning them. *Machine Co. v. Feezer*, 516.

NOTICE. See Mortgages; Partnerships; Taxation; Courts; Liens; Negligence.

NUISANCE. See Indictment.

OPTOMETRY. See Mandamus.

1. *Without Examination — Residents— Interpretation of Statutes.* — The provisions for one to practice optometry in North Carolina without an examination from the board of examiners, who has engaged in its practice here for two years prior or next preceding the date of the passage of the act, apply only to residents of the State, such being the construction of the language of section 8, "that any recipient of a certificate of registration shall present the same for record to the clerk of the Superior Court of the county in which he resides, etc." *Vineberg v. Day*, 355.

2. *Board of Examiners—Judicial Powers—Mandamus.*—The statute confers upon the Board of Examiners in Optometry authority to pass upon the proof required of one desiring to practice without an examination, and, having found from the petition that the applicant was not so entitled under the requirements of the act, a mandamus will not lie to compel the board to issue the certificate. *Ibid.*

OUSTER. See Tenants in Common.

PARENT AND CHILD.

Employer and Employee—Damages—Loss of Services — Emancipation of Son.—A father cannot recover in his action for the loss of services of his minor son, caused by the negligence of his employer, when it appears that he approved and confirmed the contract of employment whereby the son was to receive the wages earned by him, such being an act of emancipation by the father of his son in respect to the employment. In this case the son had recovered damages for the injury complained of. *Ingram v. R. R.*, 762.

PAROL EVIDENCE. See Contracts.

PARTIES. See Corporations.

1. *County Commissioners—Proceedings to Lay off Roads—Jurors—Disqualifications.*—A petitioner in proceedings to lay off a road is disqualified to act as a juror, being a party to the proceedings; and, when such has been done, it is the duty of the county commissioners to set aside the report and direct the summoning of another jury. *Keaton v. Godfrey*, 16.

2. *Pleadings—Demurrer—Unnecessary—Procedure.*—The joinder of unnecessary parties plaintiff or defendant is not good cause for demurrer, the remedy being by motion to strike out unnecessary parties, or the question may be dealt with in making disposition of the cost; and hence, in an action to annul a contract for the purchase of stock in a corporation by reason of fraud or conspiracy, or the forming of an unlawful combination by the principal defendants against the rights of plaintiff, and to his substantial injury, the joinder of others as parties defendant by reason of an indebtedness to them alleged and levied on, owed by the principal defendants, is an irregularity, and a demurrer on that account is bad. *Worth v. Trust Co.*, 242.

PARTITION. See Tenants in Common.

1. *Judicial Sale—Guardian and Ward—Appointment of Guardian—Ward's Knowledge—Innocent Purchaser.*—The title of a purchaser of lands for value at a sale under partition proceedings is not affected by the fact that one of the parties was a minor residing outside of the State, and who was unaware of the sale or the proceedings, when it appears that the proceedings were instituted in the proper court of the county wherein the land lay, having jurisdiction, and that a guardian has been duly appointed to represent the interest of the minor; that all parties were represented by attorney, and the proceedings were regular in all respects and confirmed according to our laws. *Credle v. Baugham*, 18.

2. *Lands—Sale—Conversion—Deeds and Conveyances—Registration.*—In a sale of lands in proceedings for partition, the conversion from realty to personalty does not take place until the land is sold and the sale confirmed by the court. Therefore, an unregistered deed made by some of the cotenants of their interest in the lands held in common, is not good as against a subsequently made and registered deed by the same grantors of the same interest, to another, after the decree of sale for partition, but before the sale was confirmed. Revisal, sec. 980. *McLean v. Leitch*, 266.

PARTNERSHIPS.

1. *Vendee—Sale of Mortgaged Property—Joint Torts.*—Evidence in this case that the defendant, in buying and reselling the mule, was acting for a firm consisting of the defendant and another, not made a party, does not affect the result; the objection should have been made by demurrer or answer, and this being a case of joint tort, the plaintiff may sue either one or both of the wrongdoers, at his election, though there can be only one satisfaction. *Smoak v. Sockwell*, 503.

2. *Dissolution—Notice.*—It appearing from the record that defendant Monroe had given due notice to plaintiff's mercantile agency that he had dissolved or failed to perfect his contract of partnership with the

PARTNERSHIPS—*Continued.*

other defendant, and that the plaintiff had not, at that time, become a creditor of the firm so as to require direct notice, this appeal is controlled by the former decision. 145 N. C., 286. *Drewry v. McDougald*, 759.

3. *Contracts—Corporations—Judgment, Reformation of.*—In an action of attachment brought by plaintiff as salesman for defendant corporation to recover his salary and expenses under contract, it is immaterial whether the defendant was a corporation or firm, and it appearing that defendant was a firm and not a corporation, the judgment below will be reformed so as to express that it is rendered against the individuals composing the firm. *Davis v. Coffee Co.*, 763.

PART PERFORMANCE. See Contracts.

PARTY AGGRIEVED. See Penalty Statutes.

PARTY IN INTEREST. See Notes.

PARTY TO BE CHARGED. See Vendor and Vendee.

PENALTY STATUTES.

1. *Carriers of Freight—Refusal to Receive—Interstate Commerce—Constitutional Law.*—It is established by the former decisions of this Court that Revisal, 2631, imposing a penalty on the refusal to accept interstate shipments, does not contravene the commerce clause of the Federal Constitution, both because the act is prior to the beginning of transportation and because there is no provision of the act of Congress attempting to regulate it; and further, the State act is in aid of, not an interference with, interstate commerce. *Lumber Co. v. R. R.*, 70.

2. *Carriers of Freight—Consignor and Consignee—Goods on Approval and Return—Party Aggrieved.*—A consignee to whom goods are shipped on approval owes it as a duty to the consignor to return them if they are unsatisfactory, and he must do so to relieve himself of liability to the consignor; and he is the party aggrieved, under Revisal, sec. 2631, and may maintain his action thereunder for the penalty prescribed upon the refusal of the carrier to accept them for shipment. *Ibid.*

3. *Carriers of Freight—Refusal to Receive—Continuous Tender.*—Placing a shipment of goods in the depot of the carrier, prepared for and with request for shipment, and thus leaving them there, makes each day's delay by the carrier "a refusal to ship," under Revisal, sec. 2631, and the carrier, thus refusing, is responsible for the penalty. *Ibid.*

4. *Carriers of Freight—Consignor and Consignee—Open Bill of Lading—Presumption—Party Aggrieved.*—When goods are shipped under an open bill of lading and the consignor has never in any way rescinded or abandoned the contract of sale with the consignee, or resumed possession of the goods, but still holds him responsible, and they are in the railroad warehouse at their destination, the former is not the "party aggrieved," and may not maintain his action for damages to the goods, there being no evidence to rebut the presumption of *prima*

PENALTY STATUTES—*Continued.*

facie ownership by the consignee arising from the consignor's delivery of the goods to the carrier upon a bill of lading of this character. *Buggy Corporation v. R. R.*, 119.

5. *Carriers of Goods—Refusal to Accept—Amount of Claim—Recovery.*—In an action for the statutory penalty for failure of a carrier to pay damages within the time specified on a shipment of goods caused by its negligence, Revisal, sec. 2634, it is for the jury to say whether the amount recoverable is that for which the claim has been filed, when there is conflicting evidence. *Sumrell v. R. R.*, 269.

6. *Carriers of Freight—Refusal to Accept Freight—Interpretation of Statutes.*—Revisal, sec. 2631, imposing a penalty upon the carrier refusing to accept freight for shipment, provides that the tender be made at a regular station and that the articles tendered be of the nature and kind received by the carrier for transportation, and it is necessary in an action for the penalty to show that the character of the shipment and place of tender are such as fall within its provisions. *Olive v. R. R.*, 279.

7. *Pleadings—Demurrer—Some Damages—Interstate Shipments—Refusal to Accept.*—The complaint in an action for damages alleged by failure of carrier to accept a tender of an interstate shipment, and for the penalty under Revisal, sec. 2631, sufficiently alleging a ground for the recovery of nominal damages at least, the question of whether the statutory penalty may be imposed upon an interstate shipment does not arise upon defendant's appeal from an order of the trial judge overruling a demurrer to the complaint defendant had interposed. *Ibid.*

8. *Interpretation—Railroads—"Jim Crow Car"—Separate Accommodations—Direction of Conductor.*—When a railroad company has fully and in good faith complied with the statute requiring it to furnish equal and separate accommodations on its train for the white and colored races, no penalties thereunder may be recovered by reason of the conductor merely directing a few white passengers to take the coach set apart for the colored people, and under evidence establishing these facts defendant's motion for nonsuit should be granted. Revisal, secs. 2619, 2321, 2622. *Merritt v. R. R.*, 281.

9. *Carriers of Goods—Failure to Pay Claim—Amendments—Discretion.*—In an action against the carrier to recover the penalty prescribed by Revisal, sec. 2634, for the failure of the company to settle a claim, it is in the discretionary powers of the trial court to allow plaintiff, during the trial, to amend so as to show that the claim for damages had been agreed upon, though not settled, it being necessary for plaintiff to prove the exact amount of the damage claimed in order to recover the penalty, of which the defendant was put upon notice by the nature of the suit and by the statute. *Stationery Company v. Express Co.*, 342.

10. *Carriers of Goods—Failure to Pay Claim—Subsequent Voluntary Payment.*—In an action to recover the penalty for failure of the carrier to settle a claim for damages under Revisal, sec. 2634, the mere voluntary payment of the damages after the statutory time is neither a forfeiture nor a satisfaction of the penalty. *Ibid.*

PENALTY STATUTES—*Continued.*

11. *Carriers of Freight—Transportation—Private Tracks—Delivery—Accessible for Unloading—Interpretation of Statutes.*—Revisal, sec. 2632, penalizing a railroad company for failure, etc., to transport freight (amended so as to include delivery at destination under ch. 461, Laws 1907), does not apply to a delivery on the private tracks of a consignee; but to avoid the penalty it is required of the carrier to place for delivery a carload shipment on its track at destination at a place reasonably accessible. *Mfg. Co. v. R. R.*, 665.

12. *Carriers of Freight—Transportation—Intermediate Points.*—In this case there was no evidence upon which the trial judge could hold that Durham was an intermediate point at which the carrier should have further time for necessary delay, under the principles announced in *Wall's case*, 147 N. C., 408, and *Davis's case*, 145 N. C., 207. *Ibid.*

PERMANENT DAMAGES. See Damages.

PETITION TO REHEAR. See Rehearing.

PHARMACISTS.

Sale of Cocaine—Revocation of License—Authority of Board.—The provision of chapter 77, Laws 1907, as amended by chapter 713, Laws 1909, that the license of a pharmacist convicted of the unlawful sale of cocaine, etc., shall be revoked, leaves the board without authority to renew the license of a pharmacist so convicted upon the tender of the prescribed fee of $2. *Thomas v. Board of Pharmacy*, 373.

PILOTS.

1. *Local Boards—Cruising Grounds—Legislative Authority.*—The Legislature may confer upon a local board of commissioners of navigation and pilotage authority to mark out cruising grounds for pilot boats. *Morse v. Heide*, 625.

2. *Same—Services—Tender—Regulations.*—Under the legislative authority conferred upon the Board of Commissioners of Navigation and Pilotage of Wilmington (ch. 625, Laws 1907), that they "shall from time to time make and establish such rules and regulations respecting the arrangement and station of pilots for the purpose of compelling them to be on duty at all times," a rule and regulation of the board to the effect that no pilot, except under certain unusual circumstances, shall be entitled to his fee for such services if they be tendered beyond the cruising ground they had laid off for pilots, is valid and reasonable. *Ibid.*

PLEADINGS.

1. *Contracts—Parol Evidence—Admissions.*—In an action upon an oral contract to furnish defendants certain sand to be used by the latter in certain construction work under a written contract they had with a city, the mere reference to the city contract in the complaint, for the purpose of fixing upon the quantity of sand for plaintiff to have delivered, is no admission that the plaintiff had agreed that the sand should be subject to inspection by the city engineer, because of a stipulation in the city contract that the materials used by the defendants in the construction work should be inspected by him, so as to exclude plaintiff's evidence that he had expressly refused to agree to this under his contract with defendants. *Brown v. Alsop*, 114.

PLEADINGS—*Continued.*

2. *Same—Fraud—Evidence.*—The doctrine that a shipper may not recover the actual value of his loss or damage caused by the negligence of the carrier, when he is guilty of positive fraud in representing the character and value of the goods shipped, reasonably relied on by the carrier, does not apply when there is no allegation or suggestion of such fraud; and the mere fact that it received for shipment a valuable horse under its ordinary live-stock contract, restricting a recovery in case of damage, through its negligence, to an arbitrary and predetermined value of such animals, is not evidence thereof. *Stringfield v. R. R.*, 125.

3. *Inconsistent Pleas—Defenses.*—Inconsistent pleas may be made in defense to an action, but the defendant cannot succeed as to both, when one naturally destroys the other. *Higson v. Insurance Co.*, 206.

4. *Motion for Judgment—Facts Admitted—Effect.*—A motion by plaintiff for judgment upon the pleadings is in effect a demurrer to the answer, and admits the truth of the facts therein alleged, except only as to their legal sufficiency. *Helms v. Holton*, 587.

5. *Proof—Variation.*—There is no material variance between the allegations and the proof in an action for damages for personal injuries, the averments of the complaint substantially being that the alleged injury was caused by the negligent, etc., starting the train of defendant railroad company by the engineer, without signal or warning, which violently jerked the slack out of the train, pulled the cars farther apart, causing plaintiff to miss his footing and fall to his injury between the cars; and the evidence objected to being that "the engineer started off at high speed—quick start," etc. *Coore v. R. R.*, 702.

6. *Judgments—Other States—Fraud.*—Under our system of procedure it is permissible for a defendant to plead fraud in the procurement of a judgment rendered against him in the courts of a sister State. *Roberts v. Pratt*, 731.

7. *Counterclaim.*—A defendant is not estopped by a final judgment against him of a sister State, from setting up a counterclaim to the judgment sued on there, but not included in the adjudication, though it might have been alleged and included; and it is not sufficient to show that the matters of counterclaim are being litigated in the court of the other State, having jurisdiction of the cause and the parties, as the pendency of another action for the same cause in another State is not, as a matter of law, a bar to judicial proceedings here. *Ibid.*

POLICE POWERS. See Cities and Towns.

POSSESSION. See Principal and Agent; Notes; Deeds and Conveyances; Indictment.

PRESUMPTIONS. See Deeds and Conveyances; Appeal and Error; Tenants in Common; Penalty Statutes; Carriers of Freight; Fraud; Bastardy; Judgments.

PRIMA FACIE. See Evidence; Bastardy.

PRINCIPAL AND AGENT. See Wills; Master and Servant; Limitations of Actions.

PRISONER, ABSENCE OF. See Murder.

PROCESS. See Corporations; Attachment.

Foreign Corporations — Agents — Statute of Limitations — Judgments— "Full Faith and Credit"—Constitutional Law.—A foreign corporation which had complied with the requirements of Revisal, sec. 1243, in maintaining an agent in this State upon whom process may be served, together with public-service corporations doing business in this State, may plead the statute of limitations. The test of the availability of the plea is whether they were amenable to the process of our State courts. *Volivar v. Cedar Works*, 656.

PROCESSIONING.

1. *Divisional Line—Paper-writing—Evidence—"Incompetency" — Witness.* In an action involving the location of a divisional line between the parties, a paper in the handwriting of one who is not a witness or a party is incompetent evidence either to corroborate or contradict a witness in the case. *Biggs v. Gurganus*, 173 .

2. *Divisional Line—Issues—Nonsuit.*—When the parties to processioning proceedings allege adjoining ownership of lands and bring to issue the question of the location of the dividing line alone, and there is conflicting and competent evidence to sustain either contention, an issue of fact as to the true line is presented upon which a motion of nonsuit upon the evidence cannot be granted. Ordinarily, in such proceedings this issue is the only one to be presented. *Jackson v. Williams*, 203.

3. *Dispute Lines—Survey—Procedure.*—When the petitioner in proceedings for processioning or locating certain lines between his own and adjoining lands, before the clerk, alleges that the lands of a party to the proceedings are adjoining his, which is admitted by that party, but he denies all the allegations of the petition which conflict with his title and the description of the line he sets up as the true one, without further denial of the petitioner's title, the issue so raised is not one of title, but of boundary, and an order of the clerk that the county surveyor survey the boundaries in dispute, etc., and make report, is in accord with the statute. Revisal, sec. 325. *Cole v. Seawell*, 349.

PROXIMATE CAUSE. See Negligence.

PUBLIC POLICY. See Carriers of Freight; Trusts.

PUBLIC SAFETY. See Cities and Towns.

PUBLISHED RATES. See Carriers of Freight.

PURCHASER OF STOCK. See Corporations.

QUANTUM MERUIT. See Contracts.

RAILROADS. See Street Railways.

1. *Negligence—Circumstances of Danger—Persons on Track—Warnings—Duty of Engineer.*—When in the starting and operation of a moving railroad train the engineer, in the proper performance of his duty, saw or should have seen a person in front of the engine in such a position that ordinary effort on his part would not likely avail to save him from injury, and that a collision was not improbable, it was his duty to give a signal or adequate warning before starting the

RAILROADS—*Continued.*

engine, and he is negligent if he fails to use all means at his command, consistent with the safety of the passengers or property in his charge, to prevent the collision or injury; and where there is evidence of such failure of duty, or of negligence, and that it caused the injury complained of, a judgment of nonsuit upon the evidence should not be granted. This doctrine applies to "logging" roads using steam as a motive power under *Sawyer's case*, 145 N. C., 24. *Snikes v. Mfg. Co.*, 42.

2. *Negligence—Sparks from Engine—Evidence—Origin—Primal Cause.*—When, in an action for damages for the destruction of plaintiff's lumber dry-kiln by fire alleged to have been caused in the daytime, by a spark from defendant railroad company's locomotive, the plaintiff has introduced evidence of the condition and surroundings of the kiln, tending to exclude the possibility of the fire originating therein, and there is evidence that a short time before the fire was discovered the locomotive was shifting cars near the kiln, that it had enveloped the kiln in smoke, that the fire was discovered near a ventilator in the top of the kiln, it is sufficient to take the case to the jury upon the question as to whether the primal cause of the fire was a spark from the locomotive entering the kiln through the ventilator; and it was unnecessary to prove directly by eye-witnesses that such was the cause. *Deppe v. R. R.*, 79.

3. *Master and Servant—Dangerous Track—Duty of Master.*—A carrier is conclusively presumed to have knowledge of the fact that its track has become so out of repair as to be dangerous to its own employees and its passengers, for it is its duty to provide a reasonably safe roadbed. *Leggett v. R. R.*, 110.

4. *Master and Servant—Dangerous Track—Negligence—Evidence.*—Evidence that plaintiff's intestate, a brakeman on defendant railroad company's work train, was seen on a car of its moving train by its engineer, and shortly thereafter, when the engineer looked again, he was missing; that the engineer went back looking for him and found him dead from injuries apparently received by the train passing over him; that the track was in such a dangerous, uneven and bad condition as to probably have caused him to fall from the train and receive the injury; that at the place his body was found there was a very rough place and sink in the track, is sufficient to warrant the reasonable inference that the rough condition of the track was the cause of the intestate falling to his death, and take the case to the jury. *Ibid.*

5. *Penalty Statutes—Interpretation—Railroads—"Jim Crow Car"—Separate Accommodations—Direction of Conductor.*—When a railroad company has fully and in good faith complied with the statute requiring it to furnish equal and separate accommodations on its train for the white and colored races, no penalties thereunder may be recovered by reason of the conductor merely directing a few white passengers to take coach set apart for the colored people, and under evidence establishing these facts defendant's motion for nonsuit should be granted. Revisal, secs. 2619, 2321, 2622. *Merritt v. R. R.*, 281.

6. *Relief Department—Release of Damages—Void Stipulation—Waiver.*—An unincorporated relief department of a railroad company for in-

RAILROADS—*Continued.*

suring the lives of the employees and indemnifying them against accident, providing hospitals for them under certain conditions while sick, which is contributed to by the employees and the company in a certain manner and is practically under the control and management of the company, is but a bureau or agency of the company; and a stipulation in the contract with its employee that in the case of accident he must accept the benefit of the contract and release the company from liability, is in effect a contract to relieve the latter of the result of its own negligence, is contrary to public policy and void, and is prohibited by the provisions of Revisal, sec. 2646, as a waiver of the benefits of that section. *Barden v. R. R.*, 318.

7. *Same—Demurrer.*—Upon demurrer to the complaint in this action for damages alleged under the contract of insurance or indemnity of plaintiff as an employee of defendant, and arising under its employee's relief bureau, wherein the complaint sets out with particularity the nature and scope of the bureau, it is necessary to pass upon the validity of stipulations therein appearing to release the defendant from liability for its own negligence, in order to ascertain whether a cause of action is stated. *Ibid.*

8. *Relief Department—Hospitals—Physicians in Charge—Selection—Negligence—Pleadings—Demurrer.*—When by eliminating a stipulation in the provisions of a contract made with a relief department of a railroad company, which is void as releasing the defendant from the result of its own negligence to its own employees, the remainder of the contract with the employee is for beneficent purposes, in an action to recover of the company for injuries alleged by the plaintiff, an employee, to have been received while at a hospital undergoing treatment, in accordance with his contract with the company, by reason of the negligence or malpractice of the surgeon or physician selected and put in charge by the defendant company, a demurrer to a complaint on the ground that it failed to allege that defendant was negligent in their selection, or that it retained them after it knew or had good reason to believe they were incompetent, is good, and should be sustained. *Ibid.*

9. *Automatic Couplers—Negligence—To What Roads Applicable.*—A corporation operating a short standard-gauge railroad with steam motive power, well surveyed and constructed, over which a very large output of sawed lumber from a mill was exclusively hauled to its connecting railroad for further transportation, is responsible for an injury received by its employee in the course of his employment, caused by its negligently failing to furnish and equip its cars with automatic couplers. *Blackburn v. Lumber Co.*, 361.

10. *Continuing Negligence—Contributory Negligence—Question for Jury.*—When the injury complained of was received by reason of the parting of a freight car from the engine, which would not have occurred if the defendant railroad company had equipped its cars with automatic couplers, the plaintiff being an employee acting within the scope of his duties, at the time, the negligent failure of the defendant to so equip its cars continued up to the time of the injury, and bars the defense of contributory negligence, unless the negligence of the defendant amounted to recklessness; and the mere fact that the plaintiff was

RAILROADS—*Continued.*

on the running-board of the engine at the time, and used an iron pin to make the coupling, furnished for the purpose by the defendant, raises a question of fact for the jury, under the circumstances, upon the question of such contributory negligence. *Ibid.*

11. *Rights of Way—Permanent Damages—Generally Increased Values—Evidence.*—In an action to recover damages of defendant for a permanent appropriation of a right of way over plaintiff's lands, it is not competent for this defendant to show the generally increased value of lands after the construction of defendant's overhead electric system, common to the entire community. *Lambeth v. Power Co.*, 371.

12. *Rights of Way—Permanent Damages—Measure.*—The measure of permanent damages against this defendant for appropriating a right of way over plaintiff's lands for the construction of an electrical overhead system is the difference between the fair market value of the land before the right of way was taken and its impaired value, directly, materially and proximately resulting to plaintiff's land by the placing of the power line across the premises in the manner, and to the extent, and in respect to the uses for which the easement was acquired. *Ibid.*

13. *Same—Imaginary Causes.*—The charge to the jury, that they may not allow damages based upon unknown or imaginary contingencies or events, eliminates the objection by defendant, in this case, that the jury might have considered the possible dangers from wires falling from its overhead electrical system on plaintiff's land, in assessing permanent damages. *Ibid.*

14. *Master and Servant—Fellow-servant Act—Uncompleted Railroad.*—One who is injured by the negligent acts of a fellow-servant while working as a blacksmith for a force engaged in building bridges for the construction of a railroad cannot recover of the master, for, to bring his action within the meaning of the fellow-servant act, he must show that he received the injury in performing a required service necessary to or connected with the use and operation of a railroad. *O'Neal v. R. R.*, 404.

15. *Cities and Towns—Railroads—Private Sidings—Streets and Sidewalks—License to Obstruct.*—Without express legislative power, a city may not authorize a contract between a manufacturing company and a railroad company for the building of a side track across its public street, beyond the right of way of the latter, for the benefit of the former and its business. *Griffin v. R. R.*, 150 N. C., 312, cited and distinguished. *Butler v. R. R.*, 416.

16. *Same—Party Injured—Injunction.*—A citizen whose property is injured, and who is deprived of his right of easement to freely pass and repass along a street and sidewalk of a town by reason of an unauthorized license to a railroad company by the town to build a private siding across the street beyond the right of way, for the benefit of another, is entitled to an injunction, although his property is not immediately adjacent. *Ibid.*

17. *Master and Servant—Custom—Knowledge Implied—Duty of Master—Scope of Employment.*—A custom of nine years duration, without objection, of a railroad company's employees riding between stations

on the road some two or three miles apart, on the steps of the engines or elsewhere, so they would not be crowded off by others, going to and from the discharge of their duties as such, charges the company with knowledge of the custom and imposes the duty on it to transport them thus in safety; and while so riding they are engaged in their master's business and within the scope of their employment. *Heilig v. R. R.*, 469.

18. *Walkways—Duty of Pedestrians—Negligence—Warnings.*—A person who travels a highway close to a railroad track and in such a position that the approach of a train should be adverted to in the exercise of reasonable care for his own safety, or who is on the track which travelers are habitually accustomed to use as a walkway, has a right to rely, to some extent and under some conditions, upon signals and warnings usually given by trains at nearby public crossings where they are ordinarily required to be given; and a failure of the agents or employees operating defendant's train to give proper signals at such places is ordinarily evidence of negligence, and under some circumstances actionable negligence may be inferred by the jury. *Norris v. R. R.*, 506.

19. *Same—Questions for Jury.*—When there is evidence tending to show that the employees of defendant company were running an engine and tender backward in the night-time at a very high rate of speed through a thickly settled community where large numbers of people were habitually accustomed to use the track for a walkway, giving no signals or other warnings at public crossings, and with just a lantern on the tender throwing light along the track a distance of only 10 or 15 feet, there is an indication that the conduct of defendant's employees was more than likely to result in a collision by the tender with a pedestrian; and when it is shown that a person sitting on the track has been hurt in consequence and as a result of such conduct of defendant, it is sufficient evidence to take the case to the jury upon the question of defendant's actionable negligence. *Ibid.*

20. *Baggageman—Scope of Employment—Master and Servant.*—The mere fact that plaintiff, a baggageman employed on defendant's train, received the injury complained of caused by a head-on collision, when he had stepped into the express car from the baggage car, does not affect his employment at the time, or the responsibility of the defendant. *Duval v. R. R.*, 524.

21. *Construction—Personal Injury—Fellow-servant—Nonsuit.*—It appearing in this case from the evidence that plaintiff was employed loading rails for the construction of a railroad not in operation, and was injured either by the negligence of a fellow-servant or the result of an unavoidable accident, a motion to nonsuit upon the evidence should have been sustained. *Bailey v. Meadows Co.*, 603.

22. *Orders — Negligence — Evidence—Instructions.*—Upon conflicting evidence an instruction is correct in substance as follows: That if the engineer should not have started his train without a signal from plaintiff, an employee, if they find the conductor had ordered him to thus signal from the top of the train, and if the engineer did start the train with a jerk without plaintiff's signal, or did so at a signal from the conductor, jerking the cars apart so as to throw plaintiff

RAILROADS—*Continued.*

between them to his injury, and this was the proximate cause thereof, the issue as to negligence should be answered for plaintiff. *Coore v. R. R.*, 702.

RATIFICATION. See Principal and Agent; Principal and Surety; Infants.

REBATE. See Carriers of Freight.

RECEIVERS. See Sales; Corporations; Indictments.

RECORD. See Evidence; Courts.

REFERENCE.

1. *Information for Court—Report Set Aside—Objections and Exceptions.*—A referee appointed by the court to look into the demand of a purchaser of land of a receiver of a corporation, that the purchase price paid by him be refunded owing to defective title of the corporation, and to report thereon, does not fall within the provision of the Code of Civil Procedure with reference to hearing and determining issues raised by the pleadings in a civil action, and the court may disaffirm the report of the referee *ex mero motu*, even when no exceptions were regularly filed thereto. *Tate v. Davis*, 177.

2. *Consent—Findings by the Court—Conclusive.*—In passing upon the report of a referee under an order made by consent, directing him to hear and determine all issues and questions of law and fact arising upon the pleadings, the judge may review the findings of fact and law. His rulings upon the facts, when supported by evidence, are conclusive. *Baggett v. Wilson*, 182.

3. *Courts—Inform Court—Equity—Chancellor—Procedure.*—A referee appointed by the court to ascertain and report upon matters arising for the court's determination, is not a reference under the Code of Civil Procedure, and the judge, sitting as a chancellor, may adopt the findings of the referee, hear additional evidence, reject such as he may disapprove, determine the matter upon the facts found by himself and adjudge the result thereupon. *Whitlock v. Lumber Co.*, 192.

4. *Trial by Jury—Consent—Waiver.*—By consenting to and requesting an order of reference a party elects to waive a trial by jury, and will not be permitted to repudiate his voluntary action and demand a jury trial upon the findings of the referee; and in this case the trial by jury was further waived under the rules of practice, as to exceptions, etc. *Driller Co. v. Worth*, 117 N. C., 515; *Ogden v. Land Co.*, 146 N. C., 443, cited and approved. *Simpson v. Scronce*, 594.

5. *Findings by Judge—Conclusiveness.*—The findings of fact by the trial judge upon the report of a referee under The Code are conclusive on appeal when supported by any evidence. *Bailey v. Hopkins*, 748.

REFORMATION. See Insurance.

REFUSAL TO RECEIVE. See Carriers of Freight.

REGISTRATION. See Mortgages; Deeds and Conveyances.

REHEARING.

Petition—Former Opinion—Interpretation.—In this petition to rehear it is held that the former decision declared only that the court had no power to invest the fund, under the facts and circumstances of the case, and that the land must be sold and the heirs reimbursed, subject to any legal charges and liens upon the fund which a court of law or equity would allow in the further disposition of the case. *Smith v. Miller*, 314.

RELEASE. See Contracts; Damages; Sales.

RELIEF DEPARTMENTS. See Railroads.

REMAINDERS. See Estates.

REMAINDERS, CONTINGENT. See Estates.

REMOVAL OF CAUSES.

1. *Facts Found—Residence—Intent.*—Upon motion to remove a cause by a railroad company, upon the ground that it was not brought in the county of plaintiff's residence, etc., the findings of fact of the lower court are conclusive on appeal; and it appearing that plaintiff was injured in defendants' service, under a contract determinable at the will of either, while living in another county, but that he had never intended to change his residence from that of the county in which suit was brought, the motion should be disallowed. *Watson v. R. R.*, 215.

2. *Residence—Intent—Evidence.*—The plaintiff having brought his action for damages against a railroad company for personal injury in the place of his former residence, it is competent for him to testify as to his intent not to change his residence to the county in which he was living in the employment of the defendant at the time of the injury, upon petition by defendant to remove the cause to the county wherein the injury occurred. *Ibid.*

3. *Plaintiff's Residence—Interpretation of Statutes.*—The proviso to Revisal, sec. 424, made by ch. 367, Laws 1905, does not affect the bringing of an action in the county where the plaintiff resides, but only prohibits the selection at will of any county for that purpose, where the defendant had a track, unless the injury occurred, or plaintiff resided, therein. *Ibid.*

4. *Jurisdictional Amount — Damages—Injunction—Further Procedure.*—Upon defendant's sufficient petition and bond, filed in apt time, to remove a cause from the State to the Federal court on the ground of diversity of citizenship, the court having found as a fact that the cause was wholly between citizens of different States and therein wholly determinable, the amount is sufficient when damages are claimed in the sum of $2,000, and an injunction prayed which undoubtedly extends the amount beyond that sum, and alleged by defendant in his petition to be in excess of that specifically demanded; and the case being ordered removed, as prayed, all further proceedings must be had in the Federal court—exceptions to orders made in the lower court, and the like. *Harbison v. Allen*, 720.

REPRESENTATIONS. See Contracts.

REPUGNANCY. See Deeds and Conveyances.

REVISAL.

SEC.

73. Donees of deceased not necessarily parties in action against administrator to set aside deed; but when not made parties, they are not estopped by the judgment. *Hobbs v. Cashwell*, 183.

225. Affidavit of prosecutrix filed in bastardy proceedings raises presumption of fatherhood, and is constitutional as a change in rule of evidence. *S. v. McDonald*, 802.

313. The county commissioners are not liable to sureties on defaulting sheriff's bond. *Hudson v. McArthur*, 445.

325. In processioning lands the clerk should order county surveyor to make the survey of disputed boundaries, when title is denied, only with reference to disputed lines. *Cole v. Seawell*, 349.

354. An indorsee of a nonnegotiable instrument may maintain his action thereon subject to the equities between the original parties. *Thompson v. Osborne*, 408.

363. The statute of limitations will bar a *feme covert* by the adverse possession of her grantee. *Bond v. Beverly*, 57.

366. The application of the statute of limitations to nonresident corporations. (See *s. c.*, 656.) *Volivar v. Cedar Works*, 34.

424. This section does not affect the bringing of an action in the county where plaintiff resides. *Watson v. R. R.*, 215.

469. The trial judge may allow amendment of complaint used in the application for an injunction, to be amended so as to allege damages. *Harper v. Lenoir*, 723.

506. A demurrer to the complaint on the ground that a rebate on lumber was sought to be recovered by the owner of a connecting tramroad is bad, it not appearing that the plaintiff had shipped his own lumber. *Wilcox v. R. R.*, 316.

570. A successful defendant in claim and delivery proceedings is entitled to judgment for return of the property or its value. *Penny v. Ludwick*, 375.

574. A corporation's deed *bona fide* given to secure its indorsers and registered, is void against a subsequent judgment of creditors obtained on contract. *Clement v. King*, 456.

614. It is the duty of the trial judge to submit issues that will elucidate the trial. *In re Herring's Will*, 258.

858. The life tenant forfeits his estate by waste. *Richardson v. Richardson*, 705.

860. A tender of a less amount than finally recovered will not prevent a recovery of costs. *Wyatt v. Wilson*, 276.

946. The word "heirs" in the warranty of a deed will be construed to pass the fee simple of lands. *Real Estate Co. v. Bland*, 225.

962. The burden of proof is on those claiming title to land under a deed of gift, to show donor retained property sufficient. *Hobbs v. Cashwell*, 183.

REVISAL—*Continued.*

SEC.

980. A prior unregistered deed is not good as against a registered deed made to party in partition proceedings. *McLean v. Leitch*, 267.

982. An unregistered mortgage is valid between the original parties. *McBrayer v. Harrill*, 712.

1024. The validating act for acknowledgment of deeds is good in this action, the plaintiff not claiming under the grantor therein. *Powers v. Baker*, 718.

1131. A corporation's prior registered mortgage is invalid as against a judgment obtained for its torts; and when sale has been made antedating it four months, title will not pass to trustee in bankruptcy. In this case the court orders invalid mortgages canceled of record. *Clement v. King*, 456.

1131. Material man's liens have preference over that of mortgage on a corporation's property or its earnings. *Cox v. Lighting and Fuel Co.*, 164.

1131. The priority of lien on corporation property for labor performed does not apply to contractors, but does apply to foreman working as a laborer. *Cox v. Fuel and Lighting Co.*, 164.

1185. Under a power in the will the executors and trustees may vote deceased's shares of stock in a corporation. *Haywood v. Wright*, 421.

1186. Under a power in the will the executors and trustees may vote deceased's shares of stock in a corporation. *Haywood v. Wright*, 421.

1243. A foreign corporation maintaining process agent here may plead statute of limitations. *Volivar v. Cedar Works*, 656.

1245 (4). A mere clerical error for "vice" in the word "vice consul" does not necessarily vitiate the probate of a deed. *Powers v. Baker*, 718.

1267 (7). Taxing of costs in partition is discretionary. *Fortune v. Hunt*, 715.

1467. A consignee under an open bill of lading is *prima facie* the "party aggrieved." *Buggy Co. v. R. R.*, 119.

1467. The Supreme Court may order an amendment made to the warrant of a justice of the peace. *S. v. Yellowday*, 793.

1581. In this case an estate to D. and the heirs of his body, and in case of death, with certain limitations, did not pass to D. a fee simple, but a base and qualified fee. *Perrett v. Bird*, 220.

1588. The spendthrift trust is inapplicable to a fee-simple devise of property to be managed by a trustee to pay over the income exempting the property from the debts. *Vaughan v. Wise*, 31.

1631. Testimony of a physician of matters of an account had by him against deceased is incompetent. *Knight v. Everett*, 118.

1910. It is a question for the jury in this case whether the deed made was *bona fide*, or a device to avoid the usury law. *Doster v. English*, 339.

1951. By canceling a note before maturity upon consideration that full interest be paid to that time, the payee is not subject to usury law. *Smithwick v. Whitley*, 366.

REVISAL—*Continued.*

SEC.

2016. One who furnishes the husband, under contract to repair the wife's house, with materials, is a subcontractor. *Payne v. Flack*, 600.

2020. One who furnishes the husband, under contract to repair the wife's house, with materials, is a subcontractor, and, having given apt notice, acquires his lien. *Ibid.*

2107. The formalities of this section do not apply to the appointment by the wife of the husband as her agent. *Stout v. Perry*, 312.

2118. This section declaring a *feme covert* a free-trader unless required sign is displayed is constitutional; she is liable for goods sold, though vendor knew husband did not run the business for a brief interval; the action is cognizable in justice's court. *Scott v. Ferguson*, 346.

2321. The act of the conductor in directing a few white men to take a "jim-crow" car does not violate the statute. *Merritt v. R. R.*, 281.

2619. The act of the conductor in directing a few white men to take a "jim-crow" car does not violate the statute. *Ibid.*

2622. The act of the conductor in directing a few white men to take the "jim-crow" car does not violate the statute. *Ibid.*

2629. One who is not rightfully a passenger should be put off the train at a proper place. *Bullock v. R. R.*, 66.

2631. The presence of malice is necessary to the crime of murder. *S. v. Baldwin*, 822.

2631. A demurrer to a complaint sufficiently alleging the grounds for a recovery of a penalty under this section does not raise the question of interstate commerce, though the shipment is interstate. *Olive v. R. R.*, 279.

2631. A tender of freight must be of the kind and at the place proper for acceptance in order to recover penalty. *Ibid.*

2631. A consignee of goods sent on approval is the party aggrieved, and may sue for the penalty for "a refusal to ship." *Lumber Co. v. R. R.*, 70.

2632. The penalty of this section, as amended, is inapplicable to delivery on private sidings, but at a place accessible. *Mfg. Co. v. R. R.*, 665.

2634. The trial court may allow amendment to complaint to show an agreed valuation of the claim demanded. *Stationery Co. v. Express Co.*, 342.

2634. Whether the amount recoverable is the same as for which claim was filed, is a question for the jury in an action for the penalty against the carrier. *Sumrell v. R. R.*, 269.

2646. The fellow-servant act applies to street railways. *Brookshire v. Electric Co.*, 669.

2646. A release of a railroad company from liability for personal injuries in consideration of the privileges of an unincorporated relief department, is a waiver prohibited by law. *Barden v. R. R.*, 318.

2646. The fellow-servant act applies to logging roads. *Bissell v. R. R.*, 123.

2685. This section does not now apply to Cherokee County. Ch. 210, Laws 1905. *Wells v. Commissioners*, 663.

REVISAL—*Continued.*

SEC.

2712. Township board of supervisors may determine the matter of laying out road over another's land at a call meeting, with notice. *Ford v. Manning*, 151.

2715. Township board of supervisors may determine the matter of laying out road over another's land at call meeting with notice. *Ibid.*

2785. A member of the board of county commissioners cannot recover pay for extra services. The same applies to highway commissioners in this case. *Davidson v. Guilford*, 436.

2812. The county commissioners are not liable to the sureties on defaulting sheriff's bond. *Hudson v. McArthur*, 445.

2813. The county commissioners are not liable to the sureties on defaulting sheriff's bond. *Ibid.*

2814. The county commissioners are not liable to the sureties on defaulting sheriff's bond. *Ibid.*

2974. The limitations of this section do not apply to necessary municipal water and sewerage systems. *Underwood v. Asheboro*, 641.

2977. The limitations of this section do not apply to necessary municipal water and sewerage systems. *Ibid.*

2994. The limitations of this section do not apply to necessary municipal water and sewerage systems. *Ibid.*

3365. To constitute the offense prescribed by this section, it must be shown that the servant of another was induced or enticed to leave his service. *S. v. Holly*, 839.

3500. While section 3506 should be strictly construed, it must be reasonably construed. *S. v. Shuford*, 809.

3506. The punishment for breaking and entering in the daytime, a dwelling-house, for a larceny of not exceeding $20, cannot exceed an imprisonment for one year. *Ibid.*

3572. A member of the board of county commissioners is indictable for receiving pay for extra services. The same applies to highway commissioners in this case. *Davidson v. Guilford*, 436.

4809. The stipulation in an accident policy requiring that suit be brought in one year, etc., is valid. *Heilig v. Insurance Co.*, 358.

5110. The limitations of this section do not apply to necessary municipal water and sewerage systems. *Underwood v. Asheboro*, 641.

5241. The county commissioners are not liable to the sureties on defaulting sheriff's bond. *Hudson v. McArthur*, 445.

5250. The county commissioners are not liable to the sureties on defaulting sheriff's bond. *Ibid.*

RESTRAINT. See Wills.

RESTRICTING LIABILITY. See Carriers of Freight.

RIGHTS OF WAY. See Railroads.

ROADS. See Highways; County.

SAFE APPLIANCES. See Master and Servant.

SALES. See Contracts; Spirituous Liquors.

SEAL. See Principal and Agent.

SERVICE. See Process; Appeal and Error.

SPIRITUOUS LIQUORS.

Procuring Sale—Police Officers—Evidence—"Connivance."—A conviction for retailing whiskey, contrary to statute, is not affected by the fact that it was obtained upon evidence obtained by police officers furnishing money and employing one to buy it from defendant, without suggestion that any inducement to the sale had been held out to him. There is a distinction from those cases holding that a "connivance" of the parties will bar a cause of action. *S. v. Smith*, 798.

STATE BONDS. See Taxation.

STATE'S LANDS.

1. *Grants—Maps Attached—Evidence.*—The statutes require that the surveyor make two plats of the land granted by the State, and record thereon the courses, distances, etc., one of which shall be attached to the grant and the other filed in the office of the Secretary of State (Revisal, secs. 1716, 1734). Such plats are evidence of description, boundaries, etc., in an action involving those questions. *Lumber Co. v. Hutton*, 537.

2. *Same—Acreage.*—The number of acres of land which the grant purports to convey is evidence in aid of courses and distances, when the courses and distances given in the grant of a tract of land, not actually surveyed at the time, exactly agree with the quantity of land described as conveyed and with the plat attached to the grant, and to discard them would increase the quantity of land to fourteen times that for which the State was paid. *Ibid.*

3. *Grants—Acreage—Tax Books—Corroborative Evidence.*—The tax list is competent evidence to show that the grantee of State's land gave in the tract granted as 50 acres, in corroboration of his testimony that he entered only that quantity of land, in an action wherein the number of acres given in the grant is allowed as evidence to establish the courses and distances therein given. *Ibid.*

4. *Right of Protest—Interest or Title—Description—Locus in Quo—Grant to a Stranger—Evidence.*—The right of one to protest an entry of State's land depends upon a claim by the protestant of title to, or an interest in, the land covered by the entry; and when he sets up his title and confines it to the lands described in the grant under which he claims, which the protestee admits, but contends that it does not cover the *locus in quo*, the protestant may not put in evidence a grant to another covering the lands outside of his grant, under which he claims no interest or title, for the purpose of disproving the protestee's right to enter the land not claimed by protestant. *Lumber Co. v. Clark*, 544.

5. *Entry—New County—Grant—Location—Description Sufficient—Interpretation of Deeds.*—It appearing that an entry of State's lands was made and definitely located and described as being in a certain county, wherein it was situated at the time, the validity of the grant is not

STATE'S LANDS—*Continued.*

affected by reason of the subsequent creation of a new county by the Legislature, including the *locus in quo*, and the description of the grant following the entry which called for the land in the original county; or by a clerical error in giving the number of the district as No. 6, when from a sufficient description it appears that District No. 9 was clearly intended. *Powers v. Baker*, 718.

STATUTE OF FRAUDS. See Deeds and Conveyances; Contracts.

STATUTORY REQUIREMENTS. See Negligence.

STOCK DIVIDEND. See Corporations.

STREET RAILWAYS. See Negligence.

1. *Fellow-servant Act—Interpretation of Statutes.*—The Fellow-servant Act, Revisal, sec. 2646, applies to street railways, and *Hemphill v. Lumber Co.*, 141 N. C., 487, is cited and approved. *Brookshire v. Electric Co.*, 669.

2. *Personal Injury—Conductors—Negligence—Vestibules—Statutory Requirements—Causal Connection.*—The plaintiff's evidence tended to show that the injury complained of was received by his falling from the running-board of a summer street car while collecting fares from passengers, under circumstances insufficient to establish the defendant's negligence. In order to avoid a nonsuit under the provisions of Revisal, secs. 2615 and 3800, requiring street passenger railways to use vestibule fronts at certain prescribed times, the plaintiff must show a causal connection between the violation by defendant of the statute and the injury sustained, or a judgment as of nonsuit upon the evidence will be sustained. *Rich v. Electric Co.*, 690.

STREETS AND SIDEWALKS. See Cities and Towns.

SUBCONTRACTOR. See Liens.

SUPPORT, LATERAL. See Cities and Towns.

SURVEYS. See Boundaries.

TAXATION. See Cities and Towns.

1. *Solvent Credits—County Commissioners—Revision—Interpretation of Statutes—Constitutional Law.*—Under sec. 68, ch. 440, Public Laws of 1909, the board of county commissioners are given full power and authority, and provided with ample machinery to revise the taxable value of property, and a resolution simply requesting a taxpayer to properly list his solvent credits, upon advice received by the board that he has not done so, is not a revision of an assessment for taxes in accordance with the requirements of the statute, passed to make effective the mandates of sec. 3, Art. V, of the Constitution. *Wolfenden v. Commissioners*, 83.

2. *Banks—Real and Personal Property—Nontaxable State Bonds.*—All bank stock is taxable at its value, less the assessed value of the bank's real and personal property, although the capital is invested in North Carolina State bonds. *Pullen v. Corporation Commission*, 548.

TAXATION—*Continued.*

3. *Banks—Surplus—Nontaxable State Bonds—Assessments.*—So much of the surplus of the bank as is not invested in the nontaxable bonds of the State of North Carolina issued in pursuance of the act of the General Assembly of 1909 is to be considered in assessing the value of shares of stock for taxation. *Ibid.*

4. *Same—Exemption.*—Under the provision of said act so much of the surplus, over and above capital, as is invested in such nontaxable bonds is exempt and must be deducted from the surplus in assessing the value of the stock for taxation. *Ibid.*

5. *Assessment—Reciprocal Advantages—Vote of People.*—While drainage districts created by legislative act are regarded as public *quasi*-corporations, partaking to some extent of the character of a governmental agency, the restrictive provisions established by the Constitution upon municipal corporations in reference to the imposition of taxes, both as to the amount and method, do not apply to the case of local assessments made and collected by a recognized method of apportioning the burdens according to the benefits received by the property affected, as, in this case, from the drainage of the lands in accordance with the provisions of chapter 442, Laws 1909, and no vote of the people on the proposition is required. Constitution, Art. VII, sec. 7. *Sanderlin v. Luken*, 739.

TAX BOOKS. See Evidence.

TAX VALUE. See Evidence.

TELEGRAPHS.

1. *Messages—Actual Damages—Contemplation of Parties.*—Any damages recoverable beyond the toll paid, for the negligent delay of a telegraph company in the transmission and delivery of a message, must be limited to those fairly considered as necessarily arising, according to the usual course of things, from the breach of the very contract sued upon, or which both parties must have reasonably understood and contemplated, when making the contract, as likely to result from the breach. *Mfg. Co. v. Telegraph Co.*, 157.

2. *Same—Payment of Toll—No Record Evidence—Procedure.*—And there being no evidence that plaintiff paid the toll for the message sued on, the case is remanded to the Superior Court to the end that, if the toll was paid, the plaintiff may recover it. *Ibid.*

3. *Reasonable Stipulations—Written Claim—Form Sufficient.*—The stipulation printed upon a telegram requiring that claim for damages be presented within sixty days in writing, etc., is not a statute of limitation, and is upheld only as a requirement to afford the company reasonable opportunity to ascertain the facts and circumstances connected with the transaction, from its employees who handled the message, and whether they had been negligent in forwarding or delivering it; and the written claim is in form sufficient when it sets out the telegram showing its nature, its date of filing, the party claiming to have been damaged, with the amount claimed. *Forney v. Telegraph Co.*, 494.

TELEGRAPHS—*Continued.*

4. *Written Claim—Rights of Third Persons.*—A written claim filed with a telegraph company in behalf of the sendee of a message only, is not sufficient in an action brougth in behalf of Sye, the message reading, "J is dead. Tell Sye. Can you come at once? Answer." Nor is this affected by an agreement between the sendee and Sye that the former would communicate the information to the latter, which was unknown to the company. *Forney v. Telegraph Co.*, 496.

TENANTS IN COMMON.

1. *Adverse Possession—Ouster—Evidence.*—Tenants in common hold their estate by unity of possession, and the possession of one inures to the benefit of his cotenants, not only as concerns themselves, but also as to strangers; and while a tenant in common in possession may so act as to amount to an actual ouster of his cotenants and put them to their act of ejectment, it must be clear, positive, and equivalent to an open denial of the cotenants' rights, and to putting them out of seizin. *Clary v. Hatton*, 107.

2. *Same—Presumptions—Rebuttal.*—When the sole adverse possession of one as tenant in common is relied on to establish title by his heir at law, his declarations while in possession are competent evidence as against himself or those claiming under him to explain and qualify his possession and to show its true character; and when there is evidence that he had thus said eight years before his death that he only claimed certain interest in the *locus in quo* as tenant in common, and that his sisters owned the other interests, it would tend to rebut any presumption of an ouster at any time prior to such declarations. *Ibid.*

3. *Partition—Quantity of Interest—Estoppel—Deeds and Conveyances—Correction.*—The quantity of the estate held by the tenants in common can be litigated and determined in proceedings for partition; and a judgment therein is a complete estoppel in a suit by one of them to establish that his cotenant held a less interest in the land in common, by reason of the mistake of the draftsman in writing the deed under which he claimed. *Buchanan v. Harrington*, 333.

4. *Deeds and Conveyances—Life Estates—Adverse Possession—Title.*—H. conveyed by deed certain lands to his daughter M. for life, then to her daughters for life, with limitation over. M. having reconveyed her interest, died leaving her daughters in possession, all of whom have since died, except one, who is a lunatic, in the asylum, and whose son lived on the lands with his grandmother and aunts until their death, and now lives there representing his mother: *Held*, that upon the death of each of the daughters her interest reverted to the grantor, or to *feme* plaintiff, the devisee of the property under the grantor's will, constituting them tenants in common as to such interest with the others. *Boggan v. Somers*, 390.

TENDER, CONTINUOUS. See Penalty Statutes.

TIMBER. See Deeds and Conveyances.

TITLE. See Deeds and Conveyances; Injunctions; Insurance; Mortgages; Sales; Liens; Trusts; State's Lands; Principal and Agent.

TORTS. See Corporations; Highways.

TRESPASS.

1. *Dividing Line—Variation of Magnetic Needle—Questions for Jury—Line Trees—Evidence.*—In an action of trespass to determine the dividing line between the adjoining lands of the parties, there was evidence of a variation of the magnetic needle since the time of the original survey, and that to fix the line as given by the deed, by running from an admitted corner, without allowing for this variation, would establish the line contended for by defendant; there were other surveys made from this admitted corner to locate this line, allowing for the variation of the needle, and there was testimony that on one of them there were certain marked stumps, regarded as line trees. There was evidence on plaintiff's part that he had been cultivating the land for fifty years in accordance with this last-named line, and that it was the true dividing line: *Held*, (1) a question of fact for the jury; (2) it was not error to refuse defendant's prayer for instruction that the line which was run without allowing for the variation of the magnetic needle should be established as the true line; (3) the line stumps should be regarded as evidence tending to show the location of the true line. *Whitfield v. Roberson*, 97 .

2. *Trespass—Dower—Report of Jury—Omitted Line—Correction by Court.* An action of trespass by the heirs at law upon the widow's dower interest in lands may not be successfully resisted upon the ground that the jury of view awarding the dower inadvertently omitted to copy in their report an outside line required to make the lines close and include the dwelling-house embraced within the dower, the court docket containing data to enable the court on inspection to correct and supply with certainty the omitted line; and in such case no proceedings to correct the docket is required. *Wells v. Harrell*, 218.

3. *Same—Mistake of Record—Secondary Evidence.*—And it further appearing that the report fully described the dower, but had been lost, and the omission of the line was made in copying it upon the docket, the report is a part of the record, and secondary evidence of its contents is admissible. *Ibid.*

4. *Issues—Evidence.*—This action of trespass was correctly made to turn upon the location of a certain line, and as there was plenary evidence of trespass by defendant, there was no error in rendering judgment against him upon the issues, which were clearly and fairly submitted to the jury. *Yeats v. Forrest*, 752.

TRIAL BY JURY. See Reference.

TRUSTS. See Corporations.

1. *Trustees—Deeds and Conveyances—Fee—Limitations—Creditors—Repugnancy.*—In a fee-simple devise with a subsequent provision that during the life of the devisee the property is to be "managed" by the trustees, paying to him the income and exempting the property from liability for his debts, the provision is repugnant to the fee, and the limitations imposed are void; and at the suit of a purchaser for value under a deed from the devisee and the trustee, judgment against the latter and in favor of the plaintiff for possession should be granted. The "Spendthrift Trust," Revisal, 1588, is inapplicable. *Vaughan v. Wise*, 31.

TRUSTS—*Continued.*

2. *Corporations—"National Banks"—Trustees—Officers—Proxies—Void.*—A "voting trust" of a majority stock vote in the shares of a National banking corporation, naming the president, vice president, and cashier as trustees, is directly violative of the provisions of the United States Revised Statutes, sec. 5144, prohibiting these officers to vote as proxies; and, also, of Revisal, sec. 1184, relating to the election of officers by the stockholders present in person or by proxy, and that no proxy may be voted more than three years from its date. *Bridgers v. Bank*, 293.

UNLAWFUL ENTRY. See Indictment.

UPPER PROPRIETOR. See Water and Watercourses.

USURY.

1. *Element of Oppression.*—Involved in the charge of usury is the idea of illegal advantage or oppression, and it is competent to offer testimony of dealings or communications between the parties which tend to strengthen this element in the charge. *Cuthbertson v. Austin*, 336.

2. *Intent—Deeds and Conveyances—Evidence—Instructions.*—The defendant having bought plaintiff's land and obtained a deed from a commissioner appointed by the court in a suit to foreclose a mortgage, conveyed the lands to plaintiff at an advanced price. There was conflicting evidence as to whether the defendant's purchase and resale was under an agreement with plaintiff to buy the lands for them and loan the purchase money, or a *bona fide* purchase by him and a resale to plaintiffs at a profit. In an action for usury under Revisal, sec. 1910: *Held*, no error to instruct the jury, that if the transaction was a loan of money with the intent of defendant to exact an unlawful profit for the use of the money, it was usurious; otherwise, if it was a *bona fide* purchase and resale of the land; and defendant's testimony as to his intent in making the transaction was competent. *Doster v. English*, 339.

3. *Same—Evidence — Attorney and Client — Agency.*—The testimony of agents and attorneys who negotiated and managed the whole transaction for the parties is competent to show its purpose and character. *Ibid.*

4. *Usurious Contracts—Voluntary Payment.*—An action to recover money alleged to be paid under duress, will not lie, when it appears that plaintiff in possession of the land under a contract to purchase at a certain price had given his various notes to defendant, who withheld the deed; that defendant, who denies the validity of the contract, forced him, after he had remained on the lands and improved them, to pay a higher price in order to obtain his deed. The payment of the difference by plaintiff was voluntary in order to get an adjustment of the dispute without litigation. *Smithwick v. Whitley*, 369.

VALUATION. See Carriers of Freight.

VARIATIONS. See Pleadings.

VENDOR AND VENDEE.

1. *Contracts—Territorial Rights—Fraud—Third Persons.*—The facts of this case being substantially the same as those in *Bank v. Hatcher*,

VENDOR AND VENDEE—*Continued.*

151 N. C., 359, excepting that the note for territorial rights for the sale of the commodity was made direct to the bank and not to the vendor, without sufficient evidence that the bank was interested in the sale, or was a copartner with the vendor, the decision in that case controls this appeal. *Sampson v. Barbrey*, 278.

2. *Mortgagor and Mortgagee—Sale of Mortgaged Property—Trover.*—The plaintiff who had sold a mule and had taken and registered a mortgage to secure the purchase price, may recover of the vendee of the mortgagor, who had disposed of the mule at the time of the suit, the balance of the purchase price the mortgagor owed him thereon; the registered mortgage constituted a valid lien on the mule and the mortgagor can maintain his action of trover against the defendant, who has wrongfully disposed of the mule and appropriated the proceeds of the sale to his own use. *Smoak v. Sockwell*, 503.

3. *Deeds and Conveyances—Statute of Frauds—Party to Be Charged.*—A suit against the vendee to recover the purchase money agreed to be paid for land, or any interest therein, is one against the party to be charged within the meaning of the statute of frauds, and the defendant can plead the statute in order to defeat a recovery. *Miller v. Monazite Co.*, 608.

4. *Deeds and Conveyances—Standing Timber—Contract to Convey—Outstanding Title—Purchase Price—Notes—Abatement.*—In defense to an action upon a note, between the original parties, given for the purchase price of standing timber upon lands under a contract to convey the same, the defendant, the vendee, may show in abatement of the agreed purchase price that, under an outstanding title superior to that of his vendor, he had been prevented from receiving the number of trees embraced by the description in his conveyance, thus proving a partial failure of title and a shortage or deficiency in the number of trees conveyed. *Woodbury v. King*, 676.

VERDICT.

1. *Master and Servant—Conflicting Evidence—Dangerous Machinery.—Conclusive.*—In this case there was conflicting evidence as to whether the employer had sufficiently instructed the employee over fourteen years of age as to the dangerous character of a picker machine in a cotton factory at which the latter was employed to work, and there being no error in the trial, the findings of the jury are conclusive. *Burnett v. Mills Co.*, 35.

2. *Courts — Instructions — Directing — Nonsuit — Estoppel — Appeal and Error—Procedure.*—A party is estopped by a verdict by not immediately taking a nonsuit and appeal before verdict entered under an instruction by the trial judge to the jury, or upon his intimation that he would so instruct or render judgment for the other party to the action. *Everett v. Williams*, 117.

3. *Carriers of Goods—Value at Destination—Freight.*—It appearing that, under the instructions of the court, the jury awarded the amount of freight charges in a certain ascertained sum in addition to the valuation of the horse at its destination of shipment, the verdict is modified by deducting the amount of freight charges, as the valuation there necessarily included them. *Stringfield v. R. R.*, 125.

VERDICT—*Continued.*

4. *Claim and Delivery—Mortgagor and Mortgagee—Excess—Judgment—Interest—Damages, Unliquidated.*—When the verdict of the jury has only established that plaintiff has wrongfully converted to his own use an excess of property in a certain sum over that required to pay off defendant's mortgage to him, the judgment thereon should not include interest from the time of the alleged conversion, but only from the date of the judgment, the conversion being a tort and the damages unliquidated; and when on appeal the judgment of the court is erroneous in this respect only, it will be ordered to be amended and affirmed. *Penny v. Ludwick*, 376.

5. *Same—Formal Defect.*—When issues have been submitted to the jury in accordance with the contentions of the parties in an action to establish the boundary line between their adjoining lands, and the jury has answered only one issue, deeming it to be sufficient, the party claiming the line to be that as called for in the other issue cannot take a nonsuit, for if the failure of the jury to answer this issue made a defective verdict, it was cured by the subsequent logical answer of the jury thereto, having been instructed by the judge to answer it "Yes" or "No." *Sharpe v. Sowers*, 379.

6. *Principal and Agent—Contracts of Sale—Quantum Meruit—Harmless Error.*—In an action to recover for services rendered in the sale of defendants' timber lands, the plaintiff relied upon an offer made and accepted by letter as a complete written agreement that he should receive all moneys obtained above a fixed price; and, also, upon a *quantum meruit* for services rendered in eventually effecting the sale, which was accordingly accepted by the defendant: *Held*, the correspondence was insufficient upon its face to entitle the plaintiff to recover upon it, as on contract, but as he was entitled to recover upon a *quantum meruit* for services rendered, and the verdict of the jury upon its face necessarily established that it was rendered as on a *quantum meruit*, no reversible error is found. *Bryan v. Cowles*, 767.

7. *Carrying Concealed Weapon — Unresponsive — Intent.*—A verdict of "guilty of carrying a concealed weapon in a suitcase" is not responsive to the charge in a bill of indictment for carrying a concealed weapon, contrary to the statute, and on motion made, it should be set aside as failing to find the fact of concealment and the intent. *S. v. Parker*, 790.

"VOTING TRUSTS." See Trusts.

WAIVER. See Reference.

WALKWAYS. See Railroads.

WARNINGS. See Negligence; Railroads.

WATER AND WATERCOURSES. See Constitutional Law.

1. *Upper and Lower Owner—Navigation Purposes—Obstruction of Stream—Damages—Injunction—Interpretation of Statutes.*—The charter of the defendant Roanoke Navigation Company by Laws 1812, ch. 848, provides only for improving the navigation of Roanoke River. In relation to this the Legislature passed an act in 1817 which provides

WATER AND WATERCOURSES—*Continued.*

that, "Whereas some of the places through which it may be necessary to conduct (said) canals may be convenient for erecting mills, forges, etc.," the corporation may, with the consent of the adjoining proprietors of the land and not otherwise, when it may conveniently be done, "to answer the purposes of navigation and the waterworks aforesaid . . . enter into reasonable agreements with the proprietors of such situations . . . for making large canals or cuts capable of carrying such volume or volumes of water as may be sufficient for the purpose of navigation, and also for such waterworks as aforesaid; but in no case whatever shall the owner or proprietor of such land . . . withdraw from any canal cut by the aforesaid company, the water for the purpose of working any mill, etc." Under the provisions of these two acts said corporation built a "wing dam" extending about 100 feet into the river for the purposes of supplying the water of a canal cut by it in 1824, but abandoned since 1854. In an action by the plaintiff to recover damages for a nuisance and to enjoin the continued obstruction of the waters of Roanoke River by defendants extending the "wing dam" across the river for supplying water power to mills with which the defendant had contracted: *Held*, (1) it was not the intent of the act of 1817 to enlarge the powers granted defendant under the act of 1812, so as to permit them to obstruct the river by extending the "wing dam" across it for the sole purpose of the use of its waters for manufacturing purposes, to plaintiff's damage as a lower riparian proprietor, by diminishing the volume of water which would otherwise flow by and through plaintiff's land; (2) and that the injunction to the extent of the waters thus diverted should be granted. *Power Co. v. Navigation Co.*, 472.

2. *Obstruction of Stream—Damages—Lower Proprietor—Plaintiff's Rights —Matters Involved.*—It being decided in this case that defendant had no authority to divert the flow of the waters of Roanoke River for manufacturing purposes to plaintiff's damage as a lower riparian owner, the question as to plaintiff's rights to the use of the waters as such owner for manufacturing purposes does not arise, this use by the plaintiff not interfering with the defendant's rights or interests. *Ibid.*

3. *Obstruction—Cause of Action—Interpretation of Statutes.*—The plaintiff is expressly given the right to use the waters of Roanoke River for manufacturing purposes by the act of 1891, and this right is not restricted by the various acts of the Legislature conferring certain powers upon defendant; and as the acts complained of are to plaintiff's damage, and unauthorized, the plaintiff's cause of action is established. *Ibid.*

4. *Obstruction—Damages—Lower Proprietor—Temporary Agreement—Effect.*—An agreement formerly made between the parties litigant in this action, to provide for a temporary adjustment of the matters in dispute until the courts should finally decide between them, does not change or affect the rights of either one in the course of the procedure or in its results. *Ibid.*

5. *Same—Assessment—Reciprocal Advantages—Taxation—Vote of People.* While drainage districts created by legislative act are regarded as public *quasi*-corporations, partaking to some extent of the character

WATER AND WATERCOURSES—*Continued.*

of a governmental agency, the restrictive provisions established by the Constitution upon municipal corporations in reference to the imposition of taxes, both as to the amount and method, do not apply to the case of local assessments made and collected by a recognized method of apportioning the burdens according to the benefits received by the property affected, as, in this case, from the drainage of the lands in accordance with the provisions of chapter 442, Laws 1909, and no vote of the people on the proposition is required. Constitution, Art VII, sec. 7. *Sanderlin v. Luken*, 738.

WATERWORKS. See Cities and Towns.

WEAPONS. See Concealed Weapons.

WILLS.

1. *Fee—Restraint Upon Alienation.*—A limitation by will restricting for any period of time the sale of land by one to whom the fee is previously devised is repugnant to the fee, and void. *Christmas v. Winston*, 48.

2. *Construction.*—In construing a will, the intent of the testator is to be gathered from the will itself, uninfluenced by the condition of his estate at the time of his death. *Pigford v. Grady*, 179.

3. *Specific Legacies—"In Cash."*—A designation of the payment of certain sums of money "in cash" to named devisees indicates that the legacies are to be paid in cash generally, and not that they must be paid out of a particular fund. *Ibid.*

4. *Same—Residuary Clause.*—When the testator's estate at the time of his death was insufficient to pay the debts and specific legacies, and consisted chiefly of personal property, the mere fact that these legacies were to be paid "in cash" does not change the character of a residuary clause devising to certain named persons "any and all property, of any and all description, that I may have at my death." *Ibid.*

5. *Witnesses—Signed—Presence of Testator.*—It is not necessary to the validity of a will that the maker should sign his name thereto in the presence of the witnesses, and thus acknowledge his signature. This latter may be done by the testator's acts and conduct as well as by his words. *In re Herring's Will*, 258.

6. *Same—Questions for Jury.*—When there is evidence that the testator's attorney wrote the paper, probated as the last will and testament, submitted it to the testator, who approved it and sent the attorney to procure the witnesses, who soon after came and signed same as witnesses near the name of the testator appearing thereon, while it was upon a table near which the testator sat looking on, the attorney remarking at the time to the witnesses and to the testator, "I have brought the witnesses to the will," it is sufficient upon the question of acknowledgment to take the case to the jury. *Ibid.*

7. *Witnesses—Request—Attorney and Client—Agency.*—When an attorney is sent out by the testator to procure witnesses to his will, who appear before the testator and sign it, it is not necessary to the validity of

WILLS—*Continued.*

the will that the testator personally request the witnesses to sign, if the attorney, acting under the instruction of the testator, had so requested them previously to their appearing for the purpose. *Ibid.*

8. *Acknowledgment—In Hearing of Witness.*—A prayer for instruction, in proceedings to *caveat* a will, that it was necessary to a valid acknowledgment of a will that each of the witnesses should hear it, is properly refused. Revisal, sec. 3113. *Ibid.*

9. *Interpretation—Power of Appointment—Its Exercise.*—When under the will of a donee of a power the devise of lands is effective without the execution of the power, the intent of the testator to execute it must be so clearly expressed that no other reasonable one can be imputed. *Carraway v. Moseley*, 351.

10. *Same—Lands Adjoining—Description.*—L. devised a life estate in his lands, with a limitation over to W., a grandson, in default of the exercise by S., the son of the former and father of the latter, of a power of designation or appointment under the will of L. In the will of S., devising to W. certain of his own lands, the *locus in quo* is given as adjoining lands, which were referred to as those given to W. by the last will and testament of L.: *Held*, (1) that by the will of S. it was intended by S. that only his own lands were to be conveyed to his son, and the devise was not an execution of the power of appointment he held under the will of L., his father, the reference in his will to the *locus in quo* being for the purpose of description. *Ibid.*

11. *Probate Defective—Second Probate.*—A second probate to a holograph will may be made correcting a defect in the first probate, which failed to state that the "will, and every part thereof, was in the handwriting of the testator." *Boggan v. Somers*, 390.

12. *Bequests for Life—Trusts and Trustees—Shares of Stock—Management and Control—Interest to Life Tenant—Executors and Administrators.*—While the executors under a will bequeathing specific personal property for life, remainder over, may assent to the legacy and deliver the property to the life tenant, unless the exigencies and proper administration of the estate otherwise require, without ordinarily being charged with the duty of looking further after the property and of insuring its delivery intact to the remainderman, a different principle prevails when a mixed fund, under a general residuary clause, *eo nomine*, is given to one for life, remainder over. In this latter case the executor is ordinarily required to sell the property, pay the interest on the proceeds to the life tenant, and hold the fund for the remainderman under the will. *Haywood v. Wright*, 421.

13. *Same Interpretation—Different Intent.*—Both of these principles, however, are only rules of interpretation established because they are ordinarily supposed the better to effect the testator's intent, and both yield when it is apparent that a different intent is required by the terms of the will. *Ibid.*

14. *Same.*—Where a testator in the 4th clause of his will bequeaths the certain shares of stock in a corporation to his five children, two sons and three daughters, the portion of the sons absolutely, and that of the daughters to them for life, remainder over, and affects the re-

WILLS—*Continued.*

mainder with a contingent limitation, and styles the provision for these daughters as a limitation and trust; and another clause, to wit, clause 5, provides for a sale and reinvestment of the stock, and directs that on such sale the executors shall retain and invest the proceeds, paying the interest to the daughters for life, and the remainder over under the same limitations and trusts as contained in clause 4; and in various other clauses of the will refers to the limitations and trusts provided for his daughters in sections 4 and 5, and finally appoints certain persons executors and trustees to carry out and perform the "trusts hereinbefore declared": it sufficiently appears that the testator desired and intended to impress the fund with a trust, and it became the duty of the executors and trustees named to take charge of the stock to be held by them as executors, while the exigencies and well ordering of the estate so required, and then to turn the same over to themselves as trustees to be dealt with and disposed of as the proper management of the trust would suggest, and as directed by the provisions of the will. *Ibid.*

WITNESSES. See Evidence; Wills; Processioning.

WORDS AND PHRASES.

1. *Indictment — Unlawful Entry — Premises — Land Synonymous.* — The word "premises" is synonymous with the word "land," and an indictment for the unlawful and willful entering upon the "premises," etc. (Revisal, 3688), is not defective for the failure of the use of the word "land." *S. v. Yellowday*, 793.

2. *Cities and Towns—Ordinances—Police Powers—Killing of Dogs "Willfully."*—A police officer of a town, acting within his duties imposed by an ordinance, in killing a dog running at large within the town limits without a muzzle, when not on the owner's premises, cannot be convicted under the statute, of "unlawfully, willfully and wantonly," etc., killing a certain useful animal, etc., the word willful meaning not only designedly, but with a bad purpose. *S. v. Clifton*, 800.

3. *Instructions—Term "Satisfy."*—Where the principle applies, the terms "must satisfy" and must "satisfy by the preponderance of the evidence" are of equivalent import, and in a charge to the jury, in proper instances, the use of the first-named expression is not reversible error. *S. v. McDonald*, 802.

WRITINGS. See Evidence.

WRITINGS IN JURY-ROOM. See Instructions.

WRONG INFORMATION. See Carriers of Passengers.

WRONG TRAIN. See Carriers of Passengers.

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