ANNOTATIONS INCLUDE 174 N. C.

NORTH CAROLINA REPORTS

VOL. 153

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1910

BY

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

FALL TERM, 1910

SAMUEL ROBERTSON v. E. J. CONKLIN AND PLYMOUTH LUMBER COMPANY.

(Filed 14 September, 1910.)

Malicious Prosecution—Damages—Plaintiff's Poverty—Evidence.

Evidence of plaintiff's poverty is inadmissible in an action for malicious prosecution, in the absence of evidence tending to show that his actual damage occasioned by the defendant's tortious act was thereby increased.

APPEAL by defendant from *Ferguson, J.*, at January Special Term, 1910, of WASHINGTON.

Action to recover damages for an alleged malicious injury to the person and character of the plaintiff.

There are three distinct counts or causes of action set out in the complaint; malicious prosecution, abuse of process with false arrest, and slander. The following issues were submitted:

1. Did the defendant wrongfully and without probable cause, cause the warrant for searching the plaintiff to be issued? A. Yes.

2. If so, was the defendant actuated by malice in causing such warrant to issue. A. Yes.

3. Did the defendant wrongfully and without probable cause, (2) cause the plaintiff to be arrested? A. Yes.

4. If so, was the defendant actuated by malice in causing such arrest? A. Yes.

5. Did the defendant wrongfully and maliciously charge the plaintiff with the larceny of the money? A. Yes.

6. What actual damage, if any, is the plaintiff entitled to recover? A. $1,000.

7. What punitive damage, if any, is the plaintiff entitled to recover? A. None.

By consent of plaintiff the court reduced the verdict to $500 and gave judgment for plaintiff. The defendant appealed.

Wm. M. Bond and Wm. M. Bond, Jr., for plaintiff.
Asa O. Gaylord for defendant.

BROWN, J. The evidence tended to show that the plaintiff was employed by the Plymouth Lumber Company as night watchman at the time of the alleged wrongs committed against him, and that E. J. Conklin was secretary and treasurer of the lumber company; that on a Saturday night $40.80 was left in a desk drawer in the office of the lumber company, in the mill grounds which the plaintiff was employed to watch; that the money was taken and defendant charged plaintiff with the larceny and also had him arrested under a search warrant, or without warrant, and had his home searched by an officer.

Over the objection of the defendant, plaintiff was permitted to testify that he had no property at the time and was entirely dependent on "his two hands" for a living.

The rule that in cases of malicious torts, where punitive damages are claimed and may be awarded, evidence of the defendant's pecuniary condition is admissible, is very generally recognized by the authorities, but evidence of the pecuniary condition of the plaintiff as a general rule is inadmissible. It is admitted only on the ground that the pecuniary circumstances of the plaintiff are directly involved in estimating the actual damages caused by the tortious act, the poverty of the plaintiff making the injury the greater. Such evidence is never admitted for the purpose of securing vindictive damages.

(3) *Rowe v. Moss,* 67 Am. Dec., 566, and cases cited. It is generally allowed in actions for the wrongful infliction of personal injuries by an assault, upon the theory that the consequences of a severe personal injury are more disastrous to a person destitute of pecuniary resources and dependent wholly upon his manual exertions for the support of himself and family than to one of ample means.

We think this is the rule recognized by this Court in *Reeves v. Winn,* 97 N. C., 248.

There is nothing in this case which justifies a consideration of the plaintiff's pecuniary condition in assessing the damages. There is no foundation for the claim that whatever actual damage he suffered was increased by plaintiff's poverty.

The evidence shows that he did not suffer the pangs of hunger or listen to the cry of his children for bread by reason of defendant's con-

duct. In fact, he was not even discharged from defendant's service, but transferred to the day force at no decrease in pay so far as the record discloses, and continued in defendant's service for some time after the occurrence and only discharged after the commencement of this action.

It is evident, from reading the evidence as to actual damage, that the jury undertook to allow punitive damages under the sixth issue, which probably induced his Honor to reduce the verdict and plaintiff to accept it.

Upon the next trial we think it better to follow the usual practice and submit only one issue as to damage and under it the judge should carefully instruct the jury as to actual damage and also upon punitive damage, and when the latter may or may not be allowed.

New trial.

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(4)

W. S. BERRY v. A. B. MCPHERSON.

(Filed 14 September, 1910.)

1. **Deeds and Conveyances—Color of Title—Adverse Possession—State—Evidence.**

The testimony of the plaintiff, unexplained and uncontradicted upon cross-examination, that he and his father had been in possession of the *locus in quo* for thirty years, in order to show color of title as against the State under deeds he had introduced in evidence, is sufficient to go to the jury.

2. **Same—Continuity.**

While the evidence of title by adverse possession must tend to prove the continuity of possession for the statutory period in plain terms or by "necessary implication," it is sufficient to go to the jury if it was as decided and notorious as the nature of the land would permit.

3. **Same.**

In this case the *locus in quo* is swamp land, uninclosed and without inhabitants, and evidence was held sufficient to go to the jury, which tended to show that plaintiff, and his father, under whom he claimed, had cut wood therefrom, built roads on the land and had permitted others to cut wood therefrom from time to time, at different places, for a length of time more than covering the statutory period, and that, at one time, the defendants had acknowledged plaintiff's possession by admitting in his presence, a certain corner claimed by him, and that defendant had himself cut wood on the land in dispute and paid plaintiff for it.

APPEAL from *Ferguson, J.*, at Fall Term, 1910, of CAMDEN.

At the conclusion of plaintiff's evidence the defendant moved to nonsuit, which motion was allowed. Defendant excepted and appealed.

E. R. Aydlett and J. C. B. Ehringhaus for plaintiff.
H. S. Ward and W. A. Worth for defendant.

BROWN, J. The plaintiff introduced deeds—

1. O. G. Pritchard, administrator of T. S. Berry, to the plaintiff, W. S. Berry, December, 1897.

2. Deed of trust of W. S. Berry and wife, who are the parents of the plaintiff, to T. S. Berry, dated December, 1890.

(5) 3. W. M. Lindsey to W. S. Berry, 12 August, 1859.

These deeds cover the lands in controversy, according to plaintiff's testimony.

Failing to show title out of the State by grant, plaintiff relied upon possession under color, and testified that his father, W. S. Berry, was in possession of the lands covered by the deeds and claiming them for twenty-five years prior to 1897, and that he had been in possession of them ever since, constituting a possession of over thirty years.

This language of the witness, unexplained and uncontradicted by cross-examination, must be taken in the ordinary sense, as understood by laymen, to mean an actual and not a mere constructive possession. It is to be treated as the statement of a fact, which, however, upon cross-examination, may be shown to be without substantial basis, in which event it will be disregarded.

"A witness may testify directly in the first instance to the fact of possession, if he can do so positively, subject of course to cross-examination." Abbott Trial Ev., 622, 590; *Rand v. Freeman,* 1 Allen, 517; *Bryan v. Spivey,* 109 N. C., 68, where this question is learnedly discussed by *Mr. Justice Shepherd.*

The further examination of the witness does not in our opinion weaken or destroy the effect and significance of his first statement.

He testifies that there is an island about midway of his possession and a road leading across the swamp to the island, that he and his father kept up this road; that there was a road leading across the woods to the island for a third of the way from which he and his father regularly got firewood; that his father sold timber off the land in controversy, and that six years ago defendant cut timber on this land and promised to pay plaintiff for it; that on one occasion defendant, in presence of plaintiff and his brother, recognized plaintiff's possession by admitting the cedar corner claimed by plaintiff to be the true division corner. Plaintiff further testifies that tenants on his farm cut wood on this land whenever they needed it, and that he had cut and sold shingles off it frequently, and his father had cut

(6) and sold railroad ties. Plaintiff further stated that he sold pine timber off the land and allowed the neighbors to get wood off it when they desired.

The land in controversy appears to be swamp land, unenclosed and with no habitation upon it.

The evidence indicates that plaintiff and his father for more than thirty years exercised acts of dominion over the land, and made from it the only profits and use of which it is susceptible. From the evidence of the witness the jury may well infer that these acts were those of ownership and not those of an occasional trespasser, and that they were repeated and continuous for a considerable period of time.

The possession was as decided and notorious as the nature of the land would permit, and offered unequivocal indication that plaintiff and his father were exercising the dominion of owners and were not pillaging as trespassers. *Williams v. Buchanan,* 23 N. C., 535; *Tredwell v. Reddick,* 23 N. C., 56; *Hamilton v. Icard,* 114 N. C., 538; *Simpson v. Blount,* 14 N. C., 34; *Baum v. Shooting Club,* 96 N. C., 310.

It is true that in proving continuous adverse possession under color of title nothing must be left to mere conjecture. The testimony must tend to prove the continuity of possession for the statutory period either in plain terms or by *"necessary implication." Ruffin v. Overby,* 105 N. C., 83.

This possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has from time to time continuously subjected some portion of the disputed land to the only use of which it was susceptible. *Ruffin v. Overby, supra; McLean v. Smith,* 106 N. C., 172; *Hamilton v. Icard, supra.*

While the evidence offered is not necessarily conclusive, if taken to be true, as to the fact of possession, we think it sufficient to be submitted to the jury, under appropriate instructions, that they may draw such inference as they see proper, bearing in mind that the burden of proof is on the plaintiff to establish the fact of possession for the statutory period by a preponderance in the proof. The nonsuit is set aside.

New trial.

Cited: Coxe v. Carpenter, 157 N. C., 559; *Christman v. Hilliard,* 167 N. C., 7; *Reynolds v. Palmer, ibid.,* 455; *Cross v. R. R.,* 172 N. C., 120, 124, 125.

(7)

J. T. WILLIAMS ET AL. v. THE BRANNING MANUFACTURING COMPANY.

(Filed 14 September, 1910.)

1. Arbitration and Award—*Conclusiveness of* Award.

A valid award operates as a final and conclusive judgment between the parties within the jurisdiction of the arbitrators, respecting all matters coming within the terms of the agreement to arbitrate, which are therein determined and disposed of.

2. Arbitration and Award—Revocation—Notice—Summons.

While a party to an agreement may, at any time before the rendering of an award of matters submitted to arbitration, revoke the submission, it is necessary that notice be given to the arbitrators; and the mere issuance of a summons in an action alleged to involve the determination of the matters submitted, will not invalidate an award made before the filing of the complaint or the giving of a bill of particulars.

APPEAL from *Ward, J.*, at Spring Term, 1910, of HERTFORD.

Action for damages for breach of contract in writing in which plaintiffs obligated for certain consideration to operate defendant's lumber plant at Ahoskie, in Hertford County, and to cut into logs the standing timber of defendant and manufacture them into lumber at said plant.

In October, 1904, these parties entered into another contract, modifying and changing some of the provisions of the contract of 1901. In the contract of 1904 the following provision is incorporated:

"Section 9. It is further understood and agreed, in the event of any future misunderstanding or disagreement between the parties hereto as to the contract of 1 March, 1901, or as to any modifications of the same herein contained, that the matter shall be settled by arbitrators, to be selected, one by the Branning Manufacturing Company and one by the said J. T. Williams & Bro., and the third by the two, who shall hear and determine the same, and whose award shall be accepted as final between the parties and faithfully performed by each."

Disagreements having arisen, the matters in controversy were
(8) submitted to arbitrators on 20 February, 1906, in accordance with the agreements.

After the controversy had been heard by the arbitrators, but before they rendered their award, to-wit 1 January, 1907, this action was commenced to recover the damages for the breach of the aforesaid contract. It is admitted in the "facts agreed" that several matters of difference submitted to arbitration are those set out in the complaint in this action, which complaint was not filed until 18 January, 1908. It is admitted in the case agreed, "5th. That said arbitrators, thereafter, on 25 January, 1907, rendered their award, passing on the matters

submitted to them, and shortly thereafter the same was sent to plaintiffs and defendant, and which the plaintiffs ignored."

The cause was submitted at Spring Term, 1910, Superior Court of Hertford County, to his Honor, Judge Ward, who rendered judgment for plaintiff.

Judgment was rendered as follows:

This cause coming on for hearing before his Honor, George W. Ward, judge presiding, and a jury being impaneled, the following facts were admitted in open court by the parties, plaintiffs and defendant:

1. That the copies of the contracts between the plaintiffs and defendant are true copies of said contracts.

2. That on 20 February, 1906, the plaintiffs and defendant entered into a written agreement, submitting several matters of difference between them, growing out of their old contract, to arbitrators, selected as provided in the contract of 1 October, 1904, and said several matters of difference are included in the matters complained of by the plaintiffs in this action.

3. That a copy of agreement of submission is annexed to the answer in this cause.

4. That this suit was commenced on 1 January, 1907, as shown by the summons.

5. That said arbitrators, thereafter, on 25 January, 1907, rendered their award, passing on the matters submitted to them, and shortly thereafter the same was sent to plaintiffs and defendant, and which the plaintiffs ignored.

6. It was then agreed by counsel for plaintiffs and defendant, (9) in open court, that a jury trial would be waived, and that his Honor might, upon the above facts and upon the record and pleadings in this action, pass upon the pleas in bar set up in the answer to an accounting and the question of jurisdiction of the Court in this action, and render such judgment as in law he thought proper.

Now, after hearing the arguments on both sides, and after giving the matters full consideration, his Honor being of the opinion that the provision in said contracts of 1901 and 1 October, 1904, aforesaid, providing for the submission to arbitration the matters of difference between the parties thereto was no bar to the right of the plaintiffs to enter and prosecute this suit, and that said agreement of submission of 20 February, 1906, of the matters therein set forth was no bar to the prosecution of this suit, which was begun before any award was rendered by said arbitrators, and that the Court has full jurisdiction of this action.

Wherefore, on motion of Winborne & Winborne, attorneys for plaintiffs, it is adjudged and decreed that the defendant's pleas in bar are

overruled and are no bar to a reference to state an account between the parties under said contract of 1 October, 1904.

It is further adjudged that the contract of 1 October, 1904, is a bar to all matters of difference between the parties prior to that date.

Defendant does not object to refusing the statute of limitations by the Court, but reserves the right to object to his findings of fact and conclusions of law thereon.

It is further ordered, upon plaintiffs' motion, defendant objecting thereto, that the action be and it is referred to_____ as referee, to state all matters of difference growing out of the contract of 1 October, 1904, not barred by the statute of limitations, the question of the statute of limitations being likewise referred to him. He shall hear the said matters, after due notice to the parties, and make his report to Court.

Defendant has the right to except to the referee's findings of fact and conclusions of law, and to raise such issues of fact, to be heard
(10) by a jury, as he may be advised are necessary and proper.

G. W. WARD, *Judge.*

The defendant appealed.

Winborne & Winborne for plaintiffs.
Pruden & Pruden, Wm. M. Bond, and S. B. Shepherd for defendant.

BROWN, J. It is unnecessary to review the conclusions of the Superior Court that the provision in the contract agreeing to submit all matters of difference to arbitration is no bar to this action, for the reason that the plaintiffs and defendant did voluntarily submit such matters to arbitration in manner and form as provided in the contract and the arbitrators in due time rendered their award. It is common learning that a valid award operates as a final and conclusive judgment, as between the parties to the submission, or within the jurisdiction of the arbitrators, respecting all matters determined and disposed of by it.

But it is contended that the fact that a summons in this action was issued some days before the rendering of the award revoked the submission, and deprived the arbitrators of the right to make an award.

No other form of revocation is contended for.

At common law a submission might be revoked by any party thereto at any time before the award was rendered. Bacon Abridgment, Arb. B., Comyns Dig., Arb. D., 5; *Vinyor's case,* 8 Coke, 82.

Some courts of this country have held to the contrary (*Berry v. Carter,* 19 Kan., 135, and cases cited), but this Court has followed the doctrine of the common law. *Tyson v. Robinson,* 25 N. C., 333; *Carpenter v. Tucker,* 98 N. C., 316.

The revocation to be effective must be express unless there is a revocation by implication of law, and in case of express revocation, in order to make it complete, notice must be given to the arbitrators. It is ineffective until this has been done. *Allen v. Watson,* 10 John., 205; *Brown v. Leavitt,* 26 Maine, 251; Morse on Arb. and Award, p. 231; Vin. Ab., Authority E., 3, 4; *Vinyor's case, supra,* 2 A. & E., 600.

It is contended that commencing an action is a revocation by (11) legal implication. Such revocations arise from the legal effect of some intervening happening after submission, either by act of God or caused by the party, and which necessarily puts an end to the business.

The death of a party, or arbitrator, marriage of a *feme sole,* lunacy of a party, or the utter destruction and final end of the subject matter, are of this description. But whether the bringing of an action for the subject matter of an arbitration after submission and before award is an implied revocation, is a matter about which the courts differ.

In New York it is held that it is no revocation in law (*Lumber Co. v. Schneider,* 1 N. Y., Supp., 441; *Smith v. Bard,* 20 Barb., 262). To same effect are the decisions in New Jersey and Vermont (*Knores v. Jenkins,* 40 N. J. L., 288; *Sutton v. Tyrrell,* 10 Vt., 91). The courts of Kentucky, Illinois, Georgia and New Hampshire hold the contrary. (*Peters v. Craig,* 6 Dana, 307; *Paulser v. Manske,* 24 Ill. App., 95; *Leonard v. House,* 15 Ga., 473; *Kimball v. Gilman,* 60 N. H., 54). The conclusion of *Judge Collamer* in the Vermont case is that "The entry and continuance of an action was, obviously, not an express revocation, nor was it such an act as put an end to the subject matter of the submission nor did it prevent the arbitration from proceeding with effect. It occasioned the defendant no cost, and, indeed, it was no more than an ordinary act of caution to keep the action in existence should the opposite party revoke or decline to attend. This, then, was not a revocation in law." Nevertheless it is plainly deducible from all the cases that the action when commenced must cover the subject matter submitted to arbitration; otherwise, it can not be construed as a revocation or notice to the party or to the arbitrators.

In the case at bar the summons was issued some days before the award was made, but the complaint was not filed until a year after. The summons gave no indication as to the character of the action except that it was a civil action.

Until a complaint is filed the defendant has no legal notice of the cause of action and the arbitrators had a right to proceed with the pending arbitation and to render their award. Assuming that the bill of particulars furnished upon defendant's demand is notice (12) of the character of the action, that was not furnished until after 1 August, 1908, several months after the award had been rendered.

It is further contended that the award is not warranted by the terms of submission. According to the written contract and the terms of the submission the purpose of the award was to ascertain the damages accruing by reason of—"1. The percentage of miscuts and stained lumber. 2. As to excess cost of railroading. 3. As to excess cost of handling lumber on the yard. 4. Are J. T. Williams & Bro. responsible for fire which occurred last fall, supposedly originating from sparks from Locomotive No. 7? The above items cover all disputes and contentions under said contract to date."

In their written award the arbitrators appear to have carefully confined themselves to the questions submitted and to have confined their findings to the four matters in dispute. But it is unnecessary to discuss that contention further, as it is expressly admitted in the case agreed that the arbitrators, on 25 January, 1907, rendered their award, "passing on the matters submitted to them."

In view of this admission in the record it is not now open to plaintiff to attack the award.

The judgment of the Superior Court upon the "case agreed" is Reversed.

Cited: *S. c.*, 154 N. C., 205.

J. S. H. CHAUNCEY v. W. W. CHAUNCEY.

(Filed 14 September, 1910.)

1. **Appeal and Error—Settling Case—Request to Judge—Time Allowed.**
Upon receipt of appellee's exceptions or countercase, the appellant now has fifteen days in which to request the judge to fix a time and place to settle the case on appeal. Chapter 312, Laws 1907.

2. **Same—Certiorari—Procedure.**
The appellant having requested the judge, in ample time, to settle the case on appeal, he is entitled to a *certiorari*, to the end that the judge now settle the case.

(13) MOTION in Supreme Court for *certiorari* to the end that the trial judge may settle case on appeal. Defendant appealed.

W. M. Bond for plaintiff.
W. C. Rodman for defendant.

CLARK, C. J. Under the original Code of Civil Procedure the appellant was allowed five days after entry of appeal to serve his case on ap-

peal, and the appellee was allowed three days after such service to serve his exceptions or countercase. By successive amendments this was changed to fifteen days for appellant and ten days for appellee (Rev., 591).

The further provision that the appellant, upon receipt of appellee's exceptions or countercase, should "immediately" request the judge to fix a time and place for settling the case on appeal remained unaltered in Revisal, sec. 591. But chapter 312, Laws 1907, have since provided that "if the appellant shall delay longer than fifteen days after the appellee serves his countercase or exceptions to request the judge to settle the case," the appellee's countercase or exceptions shall be taken as correct. The effect of this is to substitute "fifteen days" in lieu of "immediately" as the time in which the appellant, after receipt of appellee's exceptions, can make his request to the judge, though it is not expressly so stated.

The appellant in this case having made such request to the judge within eleven days after receipt of the appellee's exceptions, was entitled to have his request granted. This not having been done he is entitled to his *certiorari* to the end that the judge may now "settle the case."

Motion allowed.

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(14)

E. B. WHITE v. W. H. LANE ET AL.

(Filed 14 September, 1910.)

1. Drainage Commission—Bond Issue—Validity—Interest of Clerk.

An issue of bonds by a drainage commission formed under chapter 442, Laws 1909, is not void by reason that the clerk of the court who appointed the commissioners owned an interest in a tract of land within the drainage district, as such an interest is too minute, and not directly the subject-matter of the litigation.

2. Drainage Commission—Bond Issue—Interest of Clerk—Judgment—Collateral Attack.

A bond issue by a drainage commission formed under chapter 442, Laws 1909, may not be restrained on the ground that the clerk appointing the commissioners owned land within the district, as such action would be a collateral attack upon the order or judgment of the clerk. It is also prohibited by sections 33 and 37 of the act.

3. Appeal and Error—Objections and Exceptions—Brief.

Exceptions not noted by the brief are deemed abandoned on appeal under Supreme Court Rule 34.

APPEAL by plaintiff from *Ward, J.*, at chambers in Elizabeth City, 6 August, 1910, of CHOWAN.

This is an action for the purpose of enjoining the issuance of bonds in the sum of twenty-five thousand ($25,000) dollars by the defendants as the Board of Drainage Commissioners of the "Bear Swamp Drainage District," which had been formed under authority of chapter 442, Laws 1909. The plaintiff is a landowner in the said district, and on his own behalf, and behalf of others in like manner interested, brought the suit to enjoin said bond issue, contending that the proceeding in which the said commissioners were appointed was void because the clerk of the court before whom the same was instituted was a landowner in the district, and therefore directly interested in the result of the matter he was to hear and determine. A restraining order which had been granted was vacated and the plaintiff appealed.

Small, McLean & McMullan for plaintiff.
W. S. Privott for defendant.

(15) CLARK, C. J. The sole exception presented by appellant's brief is whether the issuance of the bonds by the drainage commissioners is invalid because the clerk of the Superior Court who appointed them had an interest in a tract of land within the drainage district.

We think his Honor correctly held that the interest which disqualifies one to act as judge must be a direct interest in the subject matter of the litigation. In this case, the judgment of the clerk in no wise affected his title or interest in the said tract, but the proceeding was simply to create a drainage district and for the assessment of the lands therein for the purpose of paying for such drainage, either in cash or by issuance of bonds.

If in such proceeding the clerk should have committed any error (and none is alleged) the remedy was by an appeal in that cause. If any exception had been taken to the report of the board of viewers as to the proper classification and assessment of the tract in which the clerk had an interest, the question might arise whether the clerk could pass upon such exception, or should certify it to the judge for decision. But as the owners of land within the district are not incompetent to sit on the board of viewers to pass upon the classification and assessment of the several tracts in the first instance, it would not seem that the clerk would be disqualified to pass on their report, seeing that the judge can review his action upon appeal. But however that may be, such question is not here presented.

Here, all the landowners in the district having been petitioners or been served with summons as defendants and final judgment rendered,

the drainage commissioners issued bonds for the drainage district and it is sought to restrain such issuance of bonds by them. The drainage commissioners were elected by the new corporation, the "drainage district" (section 19, ch. 442, Laws 1909), and the clerk appointed them by virtue of such election.

This is a collateral attack upon the judgment of the clerk who appointed the commissioners after their election by the corporation on the ground that the clerk had an interest in one of the tracts subject to assessment. The bond issue here called in question is not authorized by any judgment of the clerk, but the bonds are issued by the board of drainage commissioners by virtue of section 34 of said chapter 442, Laws 1909, and section 33 provides that any one who (16) has failed to appeal from his assessment or failed to pay it is "deemed as consenting to the issuing of said drainage bonds." Section 37 further reiterates that all parties, like the plaintiff for instance, who have had their day in court, are deemed and held to have waived all objections if there was no exception and appeal taken in the cause, "and the remedies provided for in this act shall exclude all other remedies."

The object of the act is to encourage drainage, and to cut off all vexatious, technical and dilatory litigation where a party has had his day in court and has failed to appeal. "Not having spoken when he could have been heard the plaintiff can not now be heard when he should be silent."

Irrespective of the express provisions of this statute, and that the bonds are voted and to be issued by the drainage commissioners, a corporation, under their corporate seal, and not by virtue of any decree of the clerk, the interest of the latter in a tract of land in the drainage district "would not be such interest (even if it had been excepted to) which would have disqualified him to appoint drainage commissioners." *In re Ryers,* 72 N. Y., 1; 28 Am. Rep., 88. Also 23 Cyc., 579, which recites sundry instances of remote or contingent interests which will not disqualify a judge.

The interest of the judge which renders a judgment void must be a direct interest in the subject matter and not a remote or minute one, or which he has in common with many others in a public matter. Otherwise no citizen of a town or county or of the State would be competent either as judge or juror in actions for or against the town, county or State or in cases involving the validity of bonds issued by them. *Eastman v. Comrs.,* 119 N. C., 505; *Johnson v. Rankin,* 70 N. C., 550. Cases in which the clerk would be disqualified to act are cited in *Land Co. v. Jennett,* 128 N. C., 4.

The plaintiff also excepted below that the statute was unconstitutional. But this is abandoned by not being in his brief here, Rule 34 of this

Court, 140 N. C., 666. This, we presume, was the real ground of appeal originally, and was abandoned because the statute has been held
(17) constitutional, in a well considered opinion by *Hoke, J.*, in *Sanderlin v. Luken,* 152 N. C., 738.

The judgment dissolving the restraining order is
Affirmed.

Cited: Forehand v. Taylor, 155 N. C., 355; *In re Drainage District,* 162 N. C., 128; *Newby v. Drainage District,* 163 N. C., 27; *Shelton v. White, ibid.,* 93; *Griffin v. Comrs.,* 169 N. C., 645, 647; *Lang v. Development Co., ibid.,* 664.

J. N. YEATES v. R. F. FORREST.

(Filed 14 September, 1910.)

Trespass—Injunction—Supreme Court Opinion—Surveys—Orders—Procedure.

In an action of trespass involving a dividing line between plaintiff's and defendant's land, and asking for a restraining order, the Supreme Court having rendered and certified down its opinion in plaintiff's favor, it is not error for the subsequent trial judge to order the dividing line to be marked, and enjoining against trespass upon plaintiff's land; but the cause should be retained until the court has received the surveyor's report, to afford opportunity for exceptions to be made to the line as actually marked.

APPEAL from *O. H. Allen, J.,* at May Term, 1910, of BEAUFORT. From the judgment rendered by his Honor the defendant appealed.

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

MANNING, J. This case is reported in 152 N. C., 752. The judgment of this Court having been certified to the Superior Court of Beaufort County, *Judge Allen,* at May Term, 1910, rendered, on motion of plaintiff's attorney, the following judgment: "This cause coming on for hearing upon the return of the certificate of the Supreme Court, affirming the former judgment in said cause, it is ordered and adjudged that the former judgment of this court be declared the final judgment in this cause, and that the surveyor of the court run and mark a line on the land in accordance with the judgment heretofore rendered, and the defendant be and he is hereby enjoined from trespassing across said line, and that this cause go off the docket, at the cost of the defendant." The

judgment from which the former appeal in this case was taken (18) by the defendant clearly and distinctly defined the dividing line between plaintiff's and defendant's lands as fixed by the verdict of the jury. This judgment was affirmed by the Court. We can, therefore, see no objection to that part of his Honor's judgment directing the surveyor appointed by the court to run and mark a line on the land in accordance with the former judgment. This line had been defined on a plat and in the judgment, and we do not see that any right of the defendant could be invaded by having it marked on the land itself by either artificial or natural objects. The verdict and judgment conclusively determined not only plaintiff's title, but his right of possession. The plaintiff, as a part of the relief prayed by him in his original complaint, had asked for a restraining order, and the judgment having conclusively determined that defendant was trespassing upon land belonging to plaintiff, we can see no objection to that part of his Honor's judgment enjoining the defendant from a continuance or resumption of his acts of trespass. The power to protect its judgment from violation by the defendant was within the power of the court. No right of the defendant was invaded and this was in aid of plaintiff's rights.

But that part of the judgment which directed the case to be discontinued from the docket before the surveyor had made his report that he had run and marked the exact line of division, we think is properly subject to defendant's objection. The reason is clear to us—the surveyor might not run and mark the proper line, and the action should have been retained to receive the surveyor's report and for an opportunity to either party to file exceptions to the running and marking the line as not the exact and actual line of division. In view of this possible disagreement, the case should not have been finally disposed of, but should have been retained. We do not think any action should be ordered discontinued from the docket of the court until every act commanded to be done has been performed and its performance passed upon by the court. In directing this action to be discontinued from the docket before the report of the surveyor was received and passed upon, there is error. The defendant appellant is entitled to recover the costs of (19) the appeal. We notice the appellant has had printed the entire record in the former appeal. We think this clearly unnecessary and the costs of this part of the transcript and of its printing must be taxed against the appellant.

Error.

W. J. HOLLOWELL v. NORFOLK AND SOUTHERN RAILWAY COMPANY.

(Filed 14 September, 1910.)

1. Corporations—Federal Receivers—Permission to Sue—Submission to State's Jurisdiction.

In an action for damages against a railroad in the hands of Federal receivers, an objection to the introduction in evidence of an order of the Federal judge permitting the plaintiff to sue, because the order was not properly certified or sealed by the clerk of that court, becomes immaterial when it appears from the complaint and answer that both the railroad and its receivers had submitted to the jurisdiction of the court respecting the matters involved by filing a joint answer to the merits of the action.

2. Corporations—Receivers—Joinder—Parties.

It is proper to unite a corporation and its receivers as parties defendant in an action in tort to recover damages against the former in the receivers' hands, though the tort complained of arose before the appointment of the receivers. The effect of priority that a judgment thus obtained will be given in the Federal court, not passed upon.

3. Appeal and Error—Appellant—Burden of Proof—Trial Courts—Rulings.

The appellant must show error on appeal in respect to the rulings of the trial judge upon the evidence, and in the failure of the record to disclose the evidence relied on, the ruling of the lower court will be affirmed.

APPEAL from *Ferguson, J.*, at Spring Term, 1910, of CHOWAN.

The plaintiff complained that his horse was injured by a defective crossing of the defendant railway's roadbed, negligently con-
(20) structed and maintained by the defendant. The jury so found and assessed plaintiff's damages at $102. The defendant appealed.

Ward & Grimes for plaintiff.
Pruden & Pruden and Brown Shepherd for defendant.

MANNING, J. The defendants are the railway company and its receivers. It was admitted that plaintiff's cause of action arose prior to the appointment of the receivers by the Federal court. The plaintiff filed a single complaint against the railway company and its receivers, and a joint answer was filed by the defendant, admitting the appointment of the receivers, but denying the alleged acts of negligence and the damages sustained thereby. There was no plea that the defendant receivers were not liable because the injury complained of was not received while the receivers were operating the railroad under appointment of the Federal court, and that the corporation was not suable in the State courts, because such actions against the corporation had been enjoined by the Federal court. After offering evidence tending to show the negligence

complained of and the date of the injury, and the damages sustained by plaintiff, the plaintiff offered in evidence an order of Judge Purnell, judge of the Federal court, permitting the plaintiff, upon his petition therefor, to sue the railway company. The defendant objected to the introduction of this order, upon the ground that the order was not certified by the clerk of the Federal court, nor was the seal of the court attached thereto. We do not think the evidence material and that its reception by the court constituted reversible error. The complaint alleged that the defendant corporation was operating a railroad in the State, and that its business and property had been placed under the management and control of the other defendants as receivers appointed by the Federal court. The answer, filed jointly by all the defendants, admitted the truth of these allegations. It became, therefore, unnecessary to offer evidence of a preliminary jurisdictional fact admitted in the pleadings. The defendant railway company had, by its answer to the merits, without raising any jurisdictional question, submitted itself and its defense on the merits to the jurisdiction of the (21) court. The court having jurisdiction of the parties and the cause of action, it remained only to hear and determine the cause upon the merits.

This court held in *Kissinger v. Fitzgerald,* 152 N. C., 247, that under the provisions of section 1224, Revisal, the receivers were properly named as defendants to an action instituted upon a cause of action arising prior to their appointment, because the action against the receivers was, in effect, an action against the insolvent corporation. *Grady v. R. R.,* 116 N. C., 952; *Farris v. R. R.,* 115 N. C., 600. In the *Kissinger case, supra,* this Court said: "We think the failure to formally name the company in the summons is not of the substance, and should be cured now by amendment, even if required." In the present action, however, the corporation was formally named as a defendant, as well as the receivers. It follows from these authorities that it was proper to sue the receivers alone or to join as defendants the corporation and the receivers, though the cause of action arose prior to the appointment of the receivers. What effect or what priority of payment the Federal Court will give to the judgment in plaintiff's favor, in administering the assets of the insolvent corporation, is not before us, and we refrain from expressing or intimating any opinion thereon. The defendants object to his Honor's charge to the jury "that if they believed the evidence in this cause, they should answer the first issue, Yes." The evidence offered by the plaintiff upon the first issue is not sent up. In the statement of the case it is stated that on the trial there was evidence tending to show the facts necessary to support a finding for the plaintiff and that the defendants offered no evidence. In *S. v. R. R.,* 149

N. C., 508, this Court has so recently considered the question presented by this exception, that we deem it now only necessary to refer to that decision and to say that the defendants, being appellants, the burden is upon them to convince us that there was error in the ruling of his Honor excepted to. Upon the facts appearing in the record, we can not hold that the charge of his Honor constitutes reversible error. We can not see that a contrary inference was permissible from the (22) evidence.

We have examined the other exceptions taken by the defendants, and we do not think they can be sustained.

No error.

G. L. SWINDELL v. EUREKA SWINDELL.

(Filed 14 September, 1910.)

Evidence—Personal Property—Gift—Executors and Administrators.

In an action for possession of a horse brought by the administrator of a deceased husband against the wife, the latter claiming her husband had given her the horse, it is only necessary to show by the greater weight of the evidence, the actual delivery and transfer of possession, and an instruction requiring her to prove further that she "thereafter alone had the control and possession of the horse," is erroneous.

APPEAL by defendant from *O. H. Allen, J.*, at May Term, 1910, of BEAUFORT.

W. C. Rodman for plaintiff.
Small, McLean & McMullen for defendant.

WALKER, J. This action was brought to recover the possession of a horse alleged to be unlawfully detained by the defendant. The plaintiff is the administrator of F. R. Swindell and the defendant is his widow. There was evidence tending to show that F. R. Swindell had given the horse to his wife. The plaintiff contended that there had been no actual or symbolical delivery of the horse to the defendant, which was necessary to complete the gift. *Gross v. Smith,* 132 N. C., 604. The evidence tended to show that there had been an actual delivery of the horse to the defendant and an admission by the husband afterwards that it belonged to his wife. With reference to this dispute between the parties, the court charged the jury as follows: "In order to constitute a gift by F. R. Swindell to his wife of the horse in question, she must satisfy you by the greater weight of the evidence that there was an

actual delivery and transfer of possession by him to her at the time, and that she thereafter alone had the control and posses- (23) sion of the horse." To this instruction defendant excepted. If there had been a delivery of the horse to the defendant by her husband, the gift was complete and the property in the horse vested in her. It was not required, in order to complete the gift, that she should continue in the sole possession of the horse. If it was her property, the mere possession and use of the horse afterward by her husband did not divest or even impair her title, no more than such a possession and use of property, which she had acquired by purchase or which she owned at the time of the marriage, would affect her title to such property. In *Holliday v. McMillan,* 83 N. C., at p. 271, the Court, when considering the competency of a declaration of the wife, while in possession of a buggy, that it belonged to her, and deciding in favor of its competency, said that the "case stands on peculiar grounds. With separate estates held by married persons, and the husband's use of that belonging to the wife, the actual possession can seldom be ascertained except under the rule of law that it follows and attaches to the title. It would, therefore, seem almost unavoidable to admit such declarations made *ante litem* to explain the quality and nature of the possession. They are received, not as proof of ownership, but as an assertion and claim of ownership, and to repel the inference of holding for another, or of a recognition of property in any one else than the declarant." The instruction of the court was erroneous.

New trial.

M. E. HUGHES, SR., v. D. T. PRITCHARD.

(Filed 14 September, 1910.)

1. **Homestead—Appraiser's Report—Lost Records—Oral Evidence.**

A purchaser of lands at an execution sale from which defendant's homestead had been exempted and laid off, may show, after proving the loss of the original report of the appraisers, by oral evidence and by copy made thereof, the contents of the original report of the appraisers, which had been filed in the judgment roll, for the purpose of establishing the boundaries of the homestead and the proper location of a disputed line.

2. **Lost Deeds—Records—Oral Evidence—Interpretation of Statutes.**

Revisal, ch. 11, is an enabling act, and does not exercise oral evidence, admissible at common law, to prove the contents of a lost deed or record.

3. **Homestead—Appraiser's Reports—Independent Action—Collateral Attack—Procedure—Motion.**

The report of the appraisers in laying off a homestead can not be collaterally attacked in an independent action to ascertain the boundaries, upon

the ground that they did not sign the report in the presence of the sheriff. This is an irregularity which at most can only render the report voidable, and the remedy is by motion in the original proceedings to set it aside, after it has been filed in the Superior Court clerk's office.

(24) APPEAL by defendant from *Ferguson, J.*, at March Term, 1910, of CAMDEN.

E. F. Aydlett, J. C. B. Ehringhaus, and Pruden & Pruden for plaintiff.

W. A. Worth and H. S. Ward for defendant.

WALKER, J. This is a proceeding which was instituted for the purpose of establishing the dividing line between a tract of land, alleged by the plaintiff to be the homestead of the defendant, and an adjoining tract, which was purchased by the plaintiff at a sale under an execution issued against the defendant. In his deed the sheriff conveyed to the plaintiff the tract of land upon which he had levied under the execution, but excepted therefrom the homstead of the defendant.

It appeared that the report of the appraisers, who set apart the homestead to the defendant, could not, after diligent search, be found in the clerk's office. There was evidence tending to show that an allotment of the homestead had been made by three appraisers, at the request of the sheriff, and that their report was prepared and signed by them. This report was seen in the clerk's office among the papers in the judgment roll of the case in which the execution had been issued. A copy of the report was made and, after proving the loss of the original report, the plaintiff proposed to prove, by oral evidence and by the copy, the contents of the original report, for the purpose of showing the boundaries of the homestead and the proper location of the disputed line.

(25) This testimony was objected to by the defendant, but admitted by the court. It was clearly competent. The defendant's objection was based upon the ground that oral evidence can not be received to prove the contents of a judicial record, unless in a proceeding brought to establish the lost or destroyed record, under Revisal, ch. 11, and that the record thus restored by proof and the judgment of the court, is the only evidence admissible to show the contents of the lost record. This is a misapprehension of the meaning and scope of that enactment. It is an enabling act and it was not intended to exclude oral evidence, which was admissible at common law to prove the contents of a lost instrument, whether a deed or the record of a court. This has been well settled by the decisions of this Court. *Mobley v. Watts,* 98 N. C., 284, and cases cited in the annotated edition; *Cox v. Lumber Co.,* 124 N. C., 80; *Aiken v. Lyon,* 127 N. C., 175; *Jones v. Ballou,* 139

N. C., 526; *Wells v. Harrel,* 152 N. C., 218. In this case the plaintiff did not depend altogether upon the memory of a witness, as to the contents of the report, but introduced an examined copy, or one which had been compared with the original and found to be correct. This is the principal exception of the defendant, and in passing upon it, we must sustain the ruling of the court below.

The failure of the appraisers to sign the report in the presence of the sheriff did not render it void, so that the defendant could impeach it in this collateral proceeding. It was, at most, an irregularity, and if compliance with the statute in this respect is so essential to the sufficiency of the report and the allotment of the homestead, as to constitute the omission to sign the report in the presence of the sheriff a valid objection to it, the remedy of the defendant was by a motion to set aside the report, after it had been filed in the office of the clerk of the Superior Court. *Oates v. Munday,* 127 N. C., 439; *Formeyduval v. Rockwell,* 117 N. C., 320; *Burton v. Spiers,* 87 N. C., 91. The other exceptions of the defendant are without merit, if they are not sufficiently considered and disposed of by what we have already said.

No error.

(26)

FENNER PAUL ET AL. v. S. LLOYD CARTER.

(Filed 14 September, 1910.)

Heirs at Law—Collateral Relations—Blood of Ancestors.

Rules 4 and 6 of the Canons of Descent, Revisal, sec. 1556, are *in pari materia,* and should be construed together and harmonized; and thus construed, the collateral relations of the half blood inherit equally with those of the whole blood, under the provisions of canon 6, when, under the requirements of canon 4, they are of the blood of the ancestor from whom the estate was derived.

APPEAL by plaintiffs from *Ferguson, J.,* at May Term, 1910, of BEAUFORT.

The plaintiffs brought this action to recover the possession of a tract of land. They claim title to the land as the children of J. B. Paul by his first marriage. J. B. Paul, after the death of his first wife, married Bettie Carter, who inherited a one-third interest in the land from her father, Stephen Carter, the other heirs of Stephen Carter being his two sons, Lawrence Carter and the defendant. The latter has purchased the interest of Lawrence Carter and is the owner of the entire interest in the land, if the disputed question is decided in his favor. J. B. Paul had one child by his second marriage. He died and then his wife, Bettie

Paul, formerly Bettie Carter, died intestate, their child surviving them. The child died in infancy, and the plaintiffs now assert title to a one-third interest in the land as the heirs of the deceased child of J. B. and Bettie Paul, while the defendant claims that he and his brothers are the heirs of the child, and that he, by purchase from them of two-thirds of that interest and inheritance in his own right of the other third, is the sole owner of the land. The court so decided, and the plaintiffs appealed.

Ward & Grimes for plaintiffs.
W. M. Bond and N. L. Simmons for defendant.

WALKER, J., after stating the facts: The solution of the question in this case depends upon the construction of Rules 4 and 6 of the Canons of Descent, Revisal, ch. 30, sec. 1556. Rule 4 provides that on
(27) failure of lineal descendants where land has been transmitted by descent from an ancestor, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, *who are of the blood* of such ancestor. Rule 6 provides that collateral relations of the half blood shall inherit equally with those of the whole blood, the degrees of relationship to be computed according to the rules of common law, but this rule is subject to the proviso that if "the person last seized shall have left no issue capable of inheriting, nor brother, nor sister, nor issue of such, the inheritance shall vest in the father, if living, and if not, then in the mother, if living." These two rules were adopted at the same time (Laws 1808, ch. 739), and, as they relate to the same subject, or are *in pari materia,* should be construed together, and it was clearly intended that they should be. There is no conflict between them, as suggested by counsel of plaintiffs. They can easily be harmonized and each be allowed its full scope and effect. Collateral relations of the half blood derive their right of descent from the provisions of Rule 6. It surely was not the intention to confer upon them a greater right than upon collateral relations of the whole blood. Rule 6 was adopted, therefore, to prevent the term "collateral relations," as used in Rule 4, from being confined to those of the whole blood. That term, therefore, embraces all collateral relations, that is, of the whole or of the half blood, who are capable of inheriting, and those of the half blood are as much subject to the restrictions of Rule 4 as those of the whole blood, which require not only that they should be capable of inheriting, but that they should be of the blood of the ancestor from whom came the descent or inheritance. But it is useless to further consider or discuss the rules for the purpose of ascertaining their meaning, as this Court has already construed them adversely to the plaintiffs' contention in several cases. The plaintiffs are not of the blood of Bettie

Paul (or Bettie Carter) the ancestor of the person last seized, nor have they any of the blood of Stephen Carter in their veins, if we are permitted to go back to him. In *McMichal v. Moore,* 56 N. C., 471, the very question presented by this appeal was considered and decided by the Court, the position of the parties being reversed, but the point and the principle involved being common to both cases. In (28) that case it was said by *Judge Pearson,* for the court, that "the petitioners are of the blood of the ancestor from whom the land descended; the defendants, who are the children of the defendant Harvey Moore, and the half brothers and sisters of the person last seized, are nearer in degree than the petitioners; but they are not of the blood of the ancestor; consequently, as against them, the petitioners would be entitled to the land." See also *Bell v. Dozier,* 12 N. C., 333; *Dozier v. Grandy,* 66 N. C., 484. *Little v. Buie,* 58 N. C., 10, fully answers the plaintiffs' contention and shows conclusively that Rule 6 excludes from the inheritance collateral relations of the half blood, who are not of the blood of the transmitting ancestor. *Judge Manly* said, in *Little v. Buie:* "It is clear that the father, upon the death of his son, took the entire interest in the land in question, and half sisters, not being of the blood of the transmitting ancestor, took nothing."

There was no error in the ruling and judgment of the court upon the case agreed.

Affirmed.

Cited: Watson v. Sullivan, post, 248.

PRUDEN AND WINBORNE, TRUSTEES, v. T. J. WHITE ET AL.

(Filed 14 September, 1910.)

APPEAL from *Ward, J.,* at the Spring Term, 1910, of HERTFORD.

Defendants White and Tayloe appealed.

Stanley Winborne for plaintiffs.
L. L. Smith for defendant White.
George Cowper for defendant Tayloe.

PER CURIAM. We have carefully examined and considered the records in both of these appeals and are of the opinion that substantial justice has been done and that no reversible error appears. The (29) judgment of the court is therefore affirmed.

Affirmed in both appeals.

J. T. WHITE v. M. L. TAYLOE ET AL.

(Filed 14 September, 1910.)

Judgments—Estoppel—Conclusiveness—Consistent Judgments.

Plaintiff alleged in a former action that he was the owner of certain lands as assignee by mesne conveyances of the dower of E., and an issue being submitted to the jury to establish the boundary line between plaintiff's and defendant's land, it was found that a certain line from A to B, as indicated on a plat in evidence, was the true line, which would exclude the *locus in quo* from the boundaries of plaintiff's land, and include it in those of defendant, and it was adjudged, according to the verdict, that the plaintiff owned the lands lying to the west, and the defendant those to the east of said line, from which judgment there was no appeal. In the present action between the same parties involving the title to the same land, the defendant pleads plaintiff's estoppel by the former judgment, and in response to an appropriate issue the jury found that therein the *locus in quo* had been adjudged as defendant's land. *Held:* 1. The plaintiff is bound by the former judgment and verdict; 2. The judgment defining the dower relied upon as an estoppel is not inconsistent with a judgment theretofore rendered in the same action, which merely declared that the widow was entitled to dower without locating it.

APPEAL by plaintiff from *Ward, J.*, at April Term, 1910, of HERTFORD.

This action was brought to recover possession of a tract of land, known as the Britton Moore place, which plaintiff claims is a part of the dower of Ann E. Tayloe, widow of James E. Tayloe. In his complaint the plaintiff alleges that Ann E. Tayloe conveyed her dower to M. L. Tayloe, and the latter conveyed the tract of land which was allotted to him in the division of the lands of James E. Tayloe, together with the said dower, to W. D. Pruden and D. B. Winborne, as trustees,
(30) and that, in accordance with the terms of the deed to them, the trustees sold and conveyed the said land to him. He further alleges that the plaintiffs are in possession of the land, claiming the Britton Moore tract under a deed from Ada F. Parker, the daughter of James E. Tayloe, to the *feme* defendant, Carrie W. Tayloe. The defendants, in their answer, deny that the dower of Ann E. Tayloe was ever allotted to her and, therefore, that no particular tract of land was conveyed to M. L. Tayloe by the deed to Ann E. Tayloe, but only her right of dower. They aver in their answer, as a special defense to the action of the plaintiff, that on the 5th day of January, 1908, the plaintiff commenced an action in the Superior Court of Hertford County against these defendants, to recover the land conveyed to him by the said trustees, and that at Spring Term, 1908, he recovered judgment for that part of the land which was allotted to M. L. Tayloe in the division of the

James Tayloe lands and for such rights as were acquired by M. L. Tayloe in said land under the deed to him by Ann E. Tayloe. It was adjudged in the former suit that the plaintiff is the owner of the dower right and interest of Ann E. Tayloe in the land of her husband, James Tayloe, which was conveyed by her to M. L. Tayloe, and that if the said dower had been allotted by metes and bounds the plaintiff is entitled to the possession thereof, but that if the said dower had not been so allotted, then the plaintiff should proceed to ascertain the same in the manner provided by law. The foregoing judgment was rendered at April Term, 1908, of the Superior Court, when *Judge O. H. Allen* presided. At April Term, 1909, when *Judge O. H. Guion* presided, an issue was submitted to the jury in the same action, for the purpose of ascertaining the dividing line between the lands claimed by the plaintiff and those claimed by the defendant, the plaintiff having alleged that he is the owner of the Britton Moore tract, as a part of the dower of Ann E. Tayloe, and the defendant denying the allegation. The issues and answers thereto were as follows: 1. Is the line (of division) the one indicated on the plat by the letters A and B? Answer, Yes. 2. If not, is the line the one indicated on the plat by the letters C, D and E? This issue was (31) not answered.

If the true line of division is the one indicated by the letters A and B, the Britton Moore tract would not be included within the boundaries of the lands owned by the plaintiff. If the true line is the one indicated by the letters C, D and E, then a large part of the Britton Moore tract would be so included. Upon the verdict in that case, it was adjudged that the plaintiff owned the land lying west of the line indicated by the letters A-B and the defendant, Carrie W. Tayloe, owned all of the land lying east of said line, the issue made by the pleadings being as to the ownership of the respective parties. In September, 1910, the plaintiff brought another action against the defendants, to recover damages for a trespass on the Britton Moore tract, which he claimed was a part of the dower of Ann E. Tayloe, the title to which he alleged had been acquired by him under the deed from the trustees. In that action, he prayed for a receiver, and the receiver was appointed to take charge of the lands and to collect rents and profits. The defendants moved to vacate the order appointing the receiver and to dismiss the action, which motion, upon consideration of the same, was granted by the court and a judgment in the case entered accordingly.

The defendants, in their answer to the plaintiff's complaint in this action, set up as a defense in bar thereto, the judgments in the former suits between the same parties. Issues were submitted to the jury which, with the answers thereto, are as follows: 1. Was dower allotted to Ann E. Tayloe in the lands of her husband, James Tayloe, as alleged?

Answer, Yes. 2. If so, did said dower cover the lands known as the Britton Moore land? Answer, Yes. 3. Is said Britton Moore land and the land on the west side of A-B in plat referred to in the judgment which was rendered at April Term, 1909, the same land? Answer, Yes. 4. Has the Britton Moore land been heretofore adjudged to be the land of defendant Carrie Tayloe in a suit between the same parties? Answer, Yes. Upon this verdict the court adjudged that the plaintiff take nothing by his action and that the defendants recover their costs of
(32) him. The plaintiff excepted and appealed.

L. L. Smith for plaintiff.
Winborne & Winborne for defendants.

WALKER, J., after stating the case: The plaintiff alleged, in his complaint filed in this action, that the dower of Ann E. Tayloe had been allotted many years ago and that the record of the said allotment had been lost. He sought to restore the record and to recover the Britton Moore tract of land as a part of the dower. In the action tried at April Term, 1909, of the Superior Court, when *Judge Guion* presided, the defendants denied that they were in possession of any land owned by the plaintiff or that the plaintiff acquired, by the deed from the trustees an interest in any such land. A survey was made to establish the dividing line between the land owned by the plaintiff and that owned by the defendant Carrie W. Tayloe. The jury, by their verdict, found that the line indicated by the letters A-B is the dividing line, and the court so adjudged. The effect of the verdict and judgment in that case is to estop the plaintiff from now asserting any title to the land lying on the east side of the line, or to any interest therein, as the court adjudged the *feme* defendant to be the owner of all the land on that side. There was no exception to the judgment or appeal therefrom. If the Britton Moore tract or any part of the dower land is, in fact, on the east side of that line, the plaintiff should have made it appear, so that the verdict would have been according to the truth of the matter. If he failed to do so by reason of any error of the court at the trial of the case, he should have excepted and appealed. If the verdict was contrary to the weight of the evidence, he should have moved to set it aside. Having failed to impeach the verdict and judgment in any proper way, the plaintiff is bound by them and will not be heard in this action to contradict anything which was decided in the former suit upon the issues joined between the parties. The jury have found in this case, it is true, that the Britton Moore tract was a part of the dower land as allotted
(33) to the widow, but they also find that it is on the west side of the line. If "west" should be "east," as suggested on the argument,

the plaintiff is still estopped by the former verdict and judgment from claiming the land, as the jury further find that the *feme* defendant had theretofore been adjudged to be the owner of the Britton Moore tract of land. The issues were raised by the pleadings and the verdict was in accordance with instructions given by the court, as to the legal effect of the records in the prior suits. We find no error in the charge of the court. We have shown that the identical question involved in this action has heretofore been decided against the plaintiff in a suit between the same parties. If we accept and consider the verdict as it appears in the record, and we must do so in the absence of any correction or amendment, it is perfectly consistent with the verdict and judgment as rendered at April Term, 1909, before *Judge Guion.* The reference in that judgment to the judgment rendered at April Term, 1908, when *Judge Allen* presided, does not change its legal effect, for the latter judgment merely declared that the plaintiff is the owner of the dower land, without locating it, while the other judgment clearly ascertains that it is no part of the land on the east side of the line, as the *feme* defendant owns all the land on that side. The plaintiff may have lost a part of his land in the litigation, though it does not so appear, but if he has, we can not restore it to him without disregarding a well-settled rule of law which protects the *feme* defendant in the ownership of the land once adjudged to be hers. We need not enter upon any lengthy discussion of the principle underlying the doctrine of estoppel by record or *res judicata.* We simply refer to what is said by the court in *Bunker v. Bunker,* 140 N. C., 18, when considering a question similar to the one presented by this appeal: "It being a final judgment, the plaintiffs can not be heard upon any matter which was litigated in the action and which was necessarily determined by it. In such a case, the matter in dispute having passed *in rem judicatam,* the former decision is conclusive between the parties, if either attempts, by commencing another action or proceeding, to reopen the question. This doctrine is but an outgrowth of the familiar maxim, that a man shall not be twice vexed for the same cause,
and the other wholesome rule of the law that it is the interest (34)
of the State that there be an end of litigation, and consequently
a matter of public concern that solemn adjudications of the courts should not be disturbed. Broom's Legal Maxims (8 Ed.), 330, 331. 'If,' says *Lord Kenyon,* 'an action be brought and the merits of the question be discussed between the parties and a final judgment obtained by either, the parties are concluded and can not canvass the same question in another action, although, perhaps, some objection or argument might have been urged upon the first trial, which would have led to a different judgment.' *Greathead v. Bromley,* 7 Durnf. & East (7 T. R.), 546. And again in another case, he says: 'After a recovery by process of law,

there must be an end of litigation; if it were otherwise there would be no security for any person, and great oppression might be done under the color and pretense of law.' *Marriott v. Hampton,* 7 Durnf. & East 269. 'Good matter must be pleaded (or brought forward) in good form, in apt time, and in due order, otherwise great advantage may be lost.' Coke, 303-*b*. If there be any one principle of law settled beyond all dispute, it is this, that whensoever a cause of action, in the language of the law, *transit in rem judicatam,* and the judgment thereupon remains in full force and unreversed, the original cause of action is merged and gone forever, and so it is, also, that if the plaintiff had an opportunity of recovering something in litigation formerly between him and his adversary, and but for the failure to bring it forward or to press it to a conclusion before the court, he might have recovered it in the original suit; whatever does not for that reason pass into and become a part of the adjudication of the court is forever lost to him. *U. S. v. Leffler,* 11 Peters, 101. *Judge Willes* thus states the rule: 'Where the cause of action is the same and the plaintiff has had opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action.' *Nelson v. Couch,* 15 C. B. (N. S.), 108; (*S. c.,* 109 E. C. L., 108). These principles have been fully adopted by us, as will appear in the case of *Tyler v. Capeheart,* 125 N. C., 64, where the doctrine as to the plea of former
(35) judgment is concisely and accurately stated." In *Tyler v. Capeheart* it was held that "the judgment is decisive of the point raised by the pleadings, or which might properly be predicated upon them." See also *Turnage v. Joyner,* 145 N. C., 81. The plaintiff is estopped by the judgment rendered at April Term, 1909, to allege that he is the owner of any land on the east side of the line A-B, or of any interest therein. Being concluded by the former judgment he can not recover upon the cause of action stated in his complaint.

The fourth issue was properly submitted to the jury, as it involved a question of law and fact.

No error.

W. B. HIGSON AND WIFE v. NORTH RIVER INSURANCE COMPANY.

(Filed 21 September, 1910.)

1. Removal of Causes—Diverse Citizenship—Jurisdiction—Procedure.

The petition and bond to remove a cause from the State to the Federal court on the ground of diversity of citizenship must be presented in the

former court before the judge in term, when the answer is due, and failure of plaintiff to move for judgment by default does not extend the time therefor.

2. Same—Order of Federal Court.

A copy of a petition and bond for removal of a cause from the State to the Federal court on the ground of diversity of citizenship, addressed to the Federal judge, and originally filed in the Circuit Court of the United States, together with a copy of his order for the removal of the cause, which was filed with the clerk of the State Superior Court, is not a compliance with the Removal Act and does not operate to remove the cause from the State court.

3. Same—Record.

The right of removal of a cause from the State to the Federal court for diverse citizenship is purely statutory, and before the jurisdiction of the State court can be disturbed, it must appear affirmatively that a proper petition and bond has been in due form and time presented to the State court; and an order of the Federal judge merely filed with the clerk of the State court removing the cause upon petition and bond filed in the Federal court is ineffectual.

4. Removal of Causes—Jurisdiction—Acquiescence.

Appearing in the Circuit Court of the United States before the judge and moving to remand a cause ordered removed by him on the ground of diverse citizenship is not a recognition of the jurisdiction and power of that court to make the order.

5. Removal of Causes—State Court—Pleadings—Judgments—Default and Inquiry.

A judgment by default and inquiry for the want of an answer will not be disturbed on appeal, for the reason that defendant had not filed his answer relying upon an ineffectual order of the Federal court that the cause be removed for diverse citizenship.

6. Process—Original Destroyed—Copy—Removal of Causes—Admissions.

The defense to a judgment by default and inquiry that the original summons had been destroyed by fire and no copy substituted, is not available when the defendant admitted in his petition to remove the cause for diverse citizenship, filed and moved on too late in the State court, that it had been made a party defendant to the action.

APPEAL by defendant from *Peebles, J.*, at May Term, 1910, (36) of PITT.

Civil action pending in the Superior Court of Pitt County and heard upon motion for judgment by default and inquiry. No answer has been filed, but on 23 April, 1910, defendant filed a petition and bond for removal to the Circuit Court of the United States, which at the hearing before *Judge Peebles* was urged in bar of the judgment by default. Upon the hearing his Honor rendered the following judgment:

This cause coming on to be heard before Honorable *R. B. Peebles,*

Judge presiding at the May Term of Pitt County Superior Court, 1910, upon the motion of attorneys for plaintiffs for judgment by default and inquiry for want of an answer on the part of defendant, and the same having been argued fully by Messrs. Skinner & Whedbee, attorneys for plaintiff, and it appearing to the court that summons in this action issued 11 September, 1909, and served 14 September, 1909, and that thereafter complaint was filed 9 December, 1909, and that since the issuance of the summons in this cause there have been civil terms
(37) of Pitt County Superior Court as follows, to wit, 13 December, 1909; 24 January, 1910; 21 March, 1910, and 2 May 1910, and that no answer has been filed to the complaint filed in this cause, and at none of the terms of said court, nor at any other time has the defendant in the above entitled cause made any motion or obtained any leave of record to file answer, and that the defendant, up to the 23d day of April, 1910, never filed any bond or made any motion for the removal of this cause from this court. The 2 May term only held for one day, and the petition was not called to the attention of the court, and the judge announced that he would remain as long as there was anything he could do: It is therefore ordered, adjudged and decreed by the court that the plaintiff W. B. Higson is entitled to recover of the defendant in this action on account of the matters and things alleged in the complaint; and it is further ordered that a jury come at a subsequent term of this court to assess the amount of the damages that the plaintiff is entitled to recover of the defendant company by reason of the matters and things alleged in the complaint.

And this cause is retained for further orders.

R. B. PEEBLES, *Judge Presiding.*

From the judgment rendered the defendant appealed.

Harry Skinner for plaintiff.
Moore & Long, Tillett & Guthrie for defendant.

BROWN, J., after stating the case. It appears to be settled by both the Federal and State courts in numerous decisions based upon petitions to remove causes pending in State courts upon the ground of diverse citizenship, that the jurisdiction of a State court over a removable case terminates upon the timely filing therein of a proper petition and bond for its removal to the U. S. Circuit Court. *S. S. Co. v. Tugman,* 106 U. S., 118; *Stone v. South Carolina,* 117 U. S., 430; *Winslow v. Collins,* 110 N. C., 121.

It is equally well settled that the State court is not bound to surrender its jurisdiction unless the petition shows upon its face a removable cause founded upon diverse citizenship, and unless such petition

and an accompanying bond are filed in the State court within (38) the time required by the acts of Congress of 1887-1888. *R. R. v. Daughtry,* 138 U. S., 298; *Stone v. South Carolina,* 117 U. S., 430; *Howard v. R. R.,* 122 N. C., 944; *Corp. Commission v. R. R.,* 151 N. C., 447; Moon on Rem., sec. 156.

The statute is imperative that the application to remove must be made to the State court when the answer is due, and although the plaintiff does not then move for judgment by default it can not be held that he thereby extends the time for removal. *R. R. v. Daughtry, supra;* Moon, sec. 156. Mr. Moon says: "A plaintiff may even stipulate that defendant shall have further time to answer without plaintiff thereby consenting that a petition for removal may be filed after the time limited therefor has expired." Again the same author says: "The better reason, if not the weight of authority, sustains the theory that the State court in which a suit is pending can not by order extending the time for the defendant to answer, or otherwise, enlarge the time within which a petition for removal may be filed." In support of the text the author cites a great array of decided cases from the Federal courts, p. 446.

Referring to this construction of the act, *Judge Sanborn* says: "It secures uniformity in the practice, prevents delays and I think is in accord with the evident intention of Congress. It was not within any time that a defendant might procure to be given him by the court or his opponent, but within the time fixed by the statute, that Congress intended the petition should be filed." *Gold Mining Co. v. Hunter,* 60 Fed., 305; *Howard v. R. R.,* 122 N. C., 944, and cases cited.

The fact that the courthouse of Pitt was burned on 24 February, 1910, when the original summons and complaint in this cause were destroyed, can not help the defendant.

The complaint was filed 9 December, 1909. Civil terms of the Superior Court convened on 13 December, 1909, and 24 January, 1910. At neither of those terms did the defendant offer to file the petition and bond for removal, but waited until long after the time for answering had expired.

It is true the defendant filed with the clerk of the Superior Court of Pitt on 24 January, 1910, a copy of a petition and bond for removal of this cause, but it was a copy of a petition addressed (39) to the judge of the United States Circuit Court for the Eastern District of North Carolina and filed in that court praying the Federal judge to order a removal of this cause to that court. This copy was attached to a copy of an order of said judge directing the clerk of the Circuit Court to cause a copy of such petition and his order to be

forwarded to the Superior Court of Pitt to the end that said record may be certified to the Circuit Court of the United States.

It was not an original petition for removal addressed, as it should be, to the judge of the Superior Court of Pitt (as the petition filed 23 April was addressed), but only a copy of a proceeding commenced originally in the Circuit Court of the United States and delivered to the clerk of the Superior Court of Pitt County. Nevertheless, treating it as an original petition for the sake of argument, it was not filed within the time required by law nor presented to the Superior Court in term.

The time for answering according to our statute expired with the term convening 13 December, 1909, and a filing with the clerk of a petition and bond for removal is not a presentation to the judge in term as is required. *R. R. v. Roberts,* 141 U. S., 690; *Howard v. R. R., supra; Shedd v. Fuller,* 36 Fed., 609; *Roberts v. R. R.,* 45 Fed., 433. It is further contended that the order of the district judge had the effect to remove the cause into the Circuit Court of the United States and to oust the jurisdiction of the State court.

We can not concede this, and with entire respect for the learned judge, must hold that his order can not have the effect to terminate the jurisdiction of the State court.

If the removal proceeding were founded in the local prejudice act of Congress we should willingly concede that his order lawfully transferred the cause to the Circuit Court.

But where the ground of removal is solely that of diverse citizenship, as we understand the law, the Circuit Court has no authority to order a transfer of the cause, especially when at the time no petition
(40) and bond has been presented to the State court, as was the case here.

The right of removal for diverse citizenship is purely statutory, and before the jurisdiction of the State court can be disturbed it must appear affirmatively that a proper petition and bond has been in due time presented to the State court, when, as said by *Chief Justice Waite,* in *Stone v. South Carolina,* 117 U. S., 430: "The State court is at liberty to determine for itself whether on the face of the record a removal had been effected." The learned *Chief Justice* then proceeds to say: "If it decides against removal and proceeds with the cause, notwithstanding the petition, its ruling on that question will be reviewable here after final judgment under section 709 of the Revised Statutes (citing several cases). If the State court proceeds after a petition for removal it does so at the risk of having its final judgment reversed, if the record on its face shows that when the petition was filed that court ought to have given up its jurisdiction."

The act of Congress does not confer upon the lower Federal courts

the power to order removal of causes on account of diverse citizenship, as it does in the local prejudice act, but the removal proceeding must commence in the State court by filing the petition and bond there.

At the time *Judge Connor's* order was made, 10 January, 1910, no petition or bond had ever been filed in the Superior Court of Pitt County, either presented to the judge or filed with the clerk, and that court had not been asked to surrender its jurisdiction.

We fail to find any authority, State or Federal, which sustains the action of the Circuit Court under such circumstances, and its order can not have the effect to oust the jurisdiction of the Superior Court of Pitt County. "A State court is not ousted of its jurisdiction of a case by unauthorized proceedings taken for removal of the same case to a Federal Court." *Johnson v. Wells Fargo Co.,* 91 Fed., 1; *Tevis v. Pallentine Insurance Co.,* 149 Fed., 560.

It is contended that the plaintiff's counsel appeared in the Circuit Court and moved to remand to the State court, and that such action is a recognition of the Circuit Court's jurisdiction and (41) power to make the original order.

We are unable to see how any action of plaintiff's counsel can confer on a court a jurisdiction not conferred by law, but we would regard a motion to remand as rather in the nature of a challenge to the jurisdiction of the Circuit Court to make the order of removal rather than submission to or recognition of it. The motion was doubtless made to prevent an unseemly conflict between the State and Federal courts.

Had the defendant pursued the usual and orderly procedure, the petition and bond would have been presented to the Superior Court in term, and if the judge determined that on the face of the record a removal had not been effected, the defendant could have appealed to this court, and if necessary had its judgment reviewed by the Supreme Court of the United States, and thus preserved its right to answer until the right of removal had been finally adjudicated. On the contrary, the defendant chose to commence its removal proceedings originally in the Circuit Court and declined to file its answer to the complaint in the State court.

There was nothing left for the State court to do but grant the plaintiff's motion for judgment by default and inquiry.

The point is made that a judgment by default can not be lawfully rendered in the absence of a summons substituted in place of the original served on defendant 14 September, 1909, and destroyed by fire. This is not necessary, as the defendant admits, when it filed its petition for removal on 23 April, that it had been made a party defendant to this action. This is not only admitted by the act of filing itself, but it is

expressly stated in the petition that the summons has been duly served on defendant.

Nevertheless the substituted summons has been filed in the record by leave of this Court since the argument.

The cause is remanded to the Superior Court of Pitt with instructions to execute the inquiry, and otherwise proceed as the law directs.

Affirmed.

(42) CLARK, C. J., concurring: The great bulk of court business under our system of government is necessarily in the State courts. The Federal courts have a restricted jurisdiction which is limited to matters marked out by the United States Constitution. So true is this that in all actions in a Federal court it is presumed that the court is without jurisdiction until the contrary affirmatively appears. *Robertson v. Cease,* 97 U. S., 646; 11 Cyc., 855. In those instances of concurring jurisdiction in which, notwithstanding a State court has first taken jurisdiction in the Federal Judiciary Act permits a removal into the Federal, such removal is permissible only when the motion is made in apt time, and in all respects complies with the requirements of the act of Congress. Whether it does so comply is a matter which the State court is competent to judge, as well as the United States Court, the Federal Supreme Court being the final arbiter. *Stone v. South Carolina,* 117 U. S., 430; *Lawson v. R. R.,* 112 N. C., 397; *Baird v. R. R.,* 113 N. C., 608; *Howard v. R. R.,* 122 N. C., 954; *Beach v. R. R.,* 131 N. C., 399.

A writ of error lies from a State Supreme Court to the United States Supreme Court, though even this was strenuously denied in the early history of the Court. But there is no superiority or inferiority between the State Superior Court and the Federal District and Circuit Courts. They are coördinate courts, just as the State Superior Courts are between themselves. The right to remove cases from the State court to the Federal court argues no superiority in the latter over the former, but only indicates that in the purview of the Federal Constitution and laws, the nature of the case is such that the defendant is entitled to have it tried in the Federal court, but only when the defendant has made his motion within the time and in the manner prescribed by the statute.

It is not inappropriate to say this much, as the learned counsel for defendant, in his argument here, spoke of the writ going "down" from the Federal Circuit Court to the State Superior Court. "Words," said the great orator *Mirabeau,* "are things," and in matter touching the jurisdiction of courts there should be entire accuracy of thought and speech. The jurisdiction of the Federal courts below the Supreme

Court, as well as their existence, is entirely statutory, created originally by the Judiciary Act of 1789 and modified by statutes since, and subject to further modifications, but not to exceed the limits (43) marked out by the United States Constitution. *U. S. v. R. R.*, 98 U. S., 569.

The United States Supreme Court alone is not a legislative creation, and, therefore, it can not be abolished by act of Congress (as has been the case with Circuit and District Courts), but even that high court is dependent upon Congress for the exercise of its jurisdiction, which as prescribed by U. S. Cons., Art. III, sec. 2, cl. 2, is "with such exceptions, and under such regulations, as the Congress shall make." The Federal courts, therefore, have no inherent jurisdiction, and their limited jurisdiction extends only to the cases, and can be exercised only in the instances, marked out by the statute.

Cited: *Pruitt v. Power Co.*, 165 N. C., 420, 421; *Cox v. R. R.*, 166 N. C., 659.

K. R. WOOTEN v. R. E. HARRIS.

(Filed 21 September, 1910.)

1. Contracts—Consideration—"Good Will"—Sale of Business—Restraint—Writing.

An agreement as part of the consideration of purchase of a business that the vendor will not engage in such business in the town, etc., need not be in writing to be valid.

2. Contracts—Interpretation—"Good Will"—Restraint—Sale of Business—Territory.

An agreement made with the purchaser of a business that the vendor will not engage in such business in that town "or near enough thereto to interfere with the vendee's business," is not too indefinite a contract to be enforceable, especially when the vendor again commences the business near the place of the vendee in the same town.

3. Contracts—Interpretation—"Good Will"—Restraint—Sale of Business—Duration.

An agreement with the purchaser of a business that the vendor will not again engage in the business in the same town, etc., or "near enough thereto to interfere with plaintiff's business" is limited in duration to the life of the plaintiff, and thus being definite is enforceable in regard to duration of time.

4. Contracts—Restraint—Reasonable Monopolies and Trusts—Interpretation of Statutes.

An agreement of one selling a local mercantile business, not to engage therein in competition with the vendee in that vicinity, does not contravene chapter 218, section 1, subsection 2, Laws 1907, being reasonable in its scope, duration and territory, and for the protection of the "good will" sold, the statute being directed against monopolies and combinations having the purpose and effect of "preventing competition in selling, or fixing the price or preventing competition in buying," etc., and for that reason against public policy.

(44) APPEAL by plaintiff from *Peebles, J.*, at January Term, 1910, of PITT.

The facts are stated in the opinion of the Court.

Moore & Long for plaintiff.
Harry Skinner for defendant.

CLARK, C. J. The complaint alleges that the plaintiff bought out the defendant, who was his partner in general mercantile business in the town of Falkland, including the defendant's interest in the "good will" of the business, and to secure the latter whose purchase was an inducement to the contract, the defendant contracted verbally with plaintiff that he would not again engage in the mercantile business in the town of Falkland, or near enough thereto to interfere with plaintiff's business. The defendant denied the agreement, but before the jury had decided the issue, his Honor announced that he would nonsuit the plaintiff.

The nonsuit the defendant contends should be sustained—

(1) Because the alleged agreement was not in writing. We know of no authority requiring this.

(2) Because the territory "in town of Falkland or near enough thereto to interfere with plaintiff's business" is too indefinite. If this were true as to any place outside of the town, the expression "in the town of Falkland" is definite enough, and the averment is that the defendant had started his new business within the town and in a few feet of the store in whose business he had sold his interest and his share in the "good will." In *Kramer v. Old,* 119 N. C., 1, the expression "in the vicinity of Elizabeth City," was held good, at least as to Elizabeth city. In *Hauser v. Harding,* 126 N. C., 295, the territory was
(45) "the town of Yadkinville and the territory surrounding." This was held an agreement valid within the town limits of Yadkinville.

(3) The defendant further contends that the agreement is invalid because not limited in duration. But by its very terms, "not to interfere

with the plaintiff's business," it is limited to the plaintiff's lifetime and even to such time as he may be engaged in the same business at that place. In *Hauser v. Harding, supra,* it was held that if no time was named or indicated, the limitation would be held valid for the grantor's lifetime.

And for the last ground of defense the defendant relies upon Laws 1907, ch. 218, sec. 1, subsec. E, which makes it unlawful "for any person, firm, corporation or association engaged in buying or selling anything of value in North Carolina to make or have an agreement or understanding, express or implied, with any other person, firm, corporation or association not to buy or sell said things of value within certain territorial limits within the State, with the intention of preventing competition in selling or to fix the price or prevent competition in buying of said things of value within said limits."

This last in the real point in the case. But in construing such statute we must consider its object and the evil to be remedied. The history of this legislation is known to all. It is an attempt to make unlawful the formation and operation of great trusts and monopolies which may buy out or crush out all competition in certain articles or business with a view to exercise the power of fixing the prices of the raw material and of the manufactured article, that enormous profits may be extorted thereby at the expense of the public. Neither the language, the known purpose of this enactment, nor the history of this legislation will justify its application to the purchase, as here, by one partner of the other's interest in a general store in a village or town; nor to a similar purchase between other individuals. Such contract, when reasonable in its scope and as to duration and territory, can not possibly lend itself to the formation of trusts or monopolies, unless shown to be one of many similar contracts, tending to engross that particular business in a given territory. There is here not shown in evi-
dence any "intention of preventing competition in selling, or to (46)
fix the price or prevent competition in buying, of said things
of value within said limits." This contract is, therefore, not within the terms of the statute. It might be different, if it were shown that this was one of many similar contracts tending to engross or monopolize any given business, or the sale of any article, within the territory named.

Such contracts as herein have been held not to be "illegal restraint of trade" in many cases in this Court from *Baker v. Gordon,* 86 N. C., 116, down to *Anders v. Gardner,* 151 N. C., 604. To hold such contracts invalid would have no possible effect toward preventing trusts and monopolies, but would merely destroy the "good will" which one has built up in his business, for it would become valueless and unsalable,

if the seller can not guarantee its possession to the vendee by an agreement not to again engage in the same business at the same place in competition with his vendee.

The judgment of nonsuit is

Reversed.

Cited: *Sea Food Co. v. Way,* 169 N. C., 688.

J. L. SPRUILL ET AL. v. TOWN OF COLUMBIA ET AL.

(Filed 21 September, 1910.)

1. Cities and Towns—Contracts—Paving Streets—Fraud—Evidence.

In an action to declare void for fraud a contract made by the town for paving sidewalks, and enjoin the issuance of bonds to the contractor in payment therefor, the work not having been commenced, it is competent to show (1) that an ordinance of the town provided that no appropriation of money should be made, except at regular meeting, and that the contract was made at a called meeting of the board; (2) that through the efforts of the contractor the number constituting a quorum of the board was changed from four to three to enable him to obtain the contract. The admission of immaterial evidence that the current expenses of the town took all the money raised by the tax levy, would not constitute reversible error.

2. Same.

In an action to declare void a contract made by a town for paving its sidewalks upon the ground that the contractor by fraud and collusion with the aldermen procured it to be made, it is sufficient to go to the jury upon evidence tending to show that the defendant contractor procured the changing of the quorum of the board from four to three, in order to obtain the contract at an exorbitant price without the consideration of competitive bids; that one of the board was related to him and declared he would give the contract to defendant at an advanced price, and pecuniary inducements were held out to the others who voted for him; and that the nature of the contract was such as to largely give the selection of the material to the defendant, without any investigation by the board as to the quality of the materials to be used; and that the contract called for an investment largely in excess of the ability of the town to pay.

(47) APPEAL by plaintiff from *Ferguson, J.,* at Spring Term, 1910, of TYRRELL.

The facts are sufficiently stated in the opinion.

E. F. Aydlett, H. S. Ward, and J. C. B. Ehringhaus for plaintiffs. Gaylord & Gaylord and W. M. Bond for defendants.

CLARK, C. J. This was an action to declare void a contract for paving the sidewalks of the town of Columbia, upon the ground that it was obtained by fraud, and to enjoin the defendants, commissioners, from issuing bonds to the defendant, Newberry, for the same. The work has not been performed.

The first exception was to the introduction of an ordinance of the town which provided that no appropriation of money should be made except at a regular meeting of the board of commissioners. This was competent because the contract of the defendant, Newberry, was made at a called meeting.

The evidence that the ordinance required four to constitute a quorum, and that through the efforts of Newberry this was changed to three, who constituted the meeting, when this contract was made, was also competent. The defendants also excepted to the testimony that the current expenses of the town took all the money raised by the tax levy because it was immaterial. If so, it is not reversible error, (48) *Collins v. Collins,* 125 N. C., 98.

The chief exception is to the refusal of the motion to nonsuit. There was evidence tending to show that the defendant, Newberry, through his personal influence with the board, had obtained the contract for paving the sidewalk, at a price between $5,000 and $8,000, without competitive bidding; that he was instrumental in causing the board to change the town ordinance which required that four should constitute a quorum, so that three members gave him the contract, at an exorbitant price; and one of the three who voted the contract was related to Newberry, and declared himself in favor of paying 25 cents per square yard more to Newberry for the work than to any other person; that at the meeting, though there was another bid in, the majority of the board declined to receive bids and returned them unopened; that afterwards the defendant, Newberry, carried the proposition to the board, already written, and procured the three members to pass it; that the contract was excessive in price, and was made without any investigation as to price, or as to the best material; that it was indefinite and uncertain so that the contractor might put down a first-class pavement, or an inferior one, and still comply with the contract; that it called for a bonded indebtedness, largely in excess of what the town was able to meet; that the defendant, Newberry, helped to elect the board in order to get the contract; that he had suggested to some members of the board that certain personal advantages and profit would come to them by giving him the contract; that he also requested one member of the board, who opposed his having the contract, to resign and take part in the paving, and intimated that he (Newberry) would make it profitable to him.

There was other evidence tending to show that the contract was fraudulent, and obtained by Newberry through collusion with the board. His Honor properly overruled the motion to nonsuit. It was a question for the jury. *Jones v. Ins. Co.,* 151 N. C., 54, and cases cited; *Tuttle v. Tuttle,* 146 N. C., 484.

The jury found that the defendants, commissioners, acted (49) fraudulently in making the contract with their co-defendant, Newberry, and that he colluded with the commissioners in obtaining the contract. The other exceptions require no discussion.

No error.

Cited: *Moore v. Horne, post,* 416.

GOLDSBORO LUMBER COMPANY v. HINES BROTHERS LUMBER COMPANY.

(Filed 21 September, 1910.)

Wills, Interpretation of—Life Estates—Devise to Widow—Dower, Lieu of—Sale of Timber—Consent.

A devise of lands to two minor granddaughters, and to testator's "present wife"; her life right to and in said premises and lands for her support and for the support of said minor heirs, *Held,* (1) the words "for her support and the support of the minor heirs" do not constitute a condition precedent to the vesting of the life right or estate of the widow, or a condition subsequent by which the estate could be defeated; (2) the devise to the widow was in lieu of dower; (3) the granddaughters, now being of age, could not sell the standing timber on the lands without the consent of the widow, the life tenant.

APPEAL by defendant from *Guion, J.,* at Spring Term, 1909, of JONES.

The facts are sufficiently stated in the opinion.

Warren & Warren and Simmons, Ward & Allen for plaintiff.
Loftin, Varser & Dawson and Rouse & Land for defendant.

CLARK, C. J. The item of the will of Felix E. King (who died in 1885) to be construed is as follows: "I give and bequeath to my granddaughters, Effie A. King and Katie E. King, all of my home tract of land known as the Moses Saunders tract of land, containing 450 acres, more or less, to have and to hold in fee simple forever. And if my

present wife should survive me she shall have her life right to and in said premises and lands for her support and for the support of said minor heirs."

The defendant has acquired the interest of Effie E. King in the timber on said tract. The plaintiff has acquired the interest of Katie E. King in said timber, and also the interest, if any, of Mary King, the widow of the testator. (50)

The defendant contends that the widow, Mary King, did not acquire any estate or interest in the land but merely the right to her support out of the said land, and that this is only a charge upon the rents and profits from the land, and that no interest whatever in the timber was conveyed to the plaintiff by her deed. That, therefore, the defendant is entitled to one-half interest in the timber rights on said land under its deed from Effie A. Taylor.

In *Wellons v. Jordan,* 83 N. C., 371, the testator devised certain lands to his grandson, he to take care of his father and mother during their lives, and to hold the aforesaid property his lifetime, and if he should take care of his parents, etc., and have issue, said property to be theirs in fee at his death; but if he should die without issue, then it was to descend to the testator's daughters in fee. *Held,* (1) that a due support of the parents of the devisee was not a condition precedent to the vesting of the remainder in fee in his issue; (2) that even if such were a proper construction of the will, only the heirs of the testator could take advantage of the breach of the condition. The Court said (p. 375): "At most it would be a charge on the estate, a personal obligation on the devisee, as was held in *Taylor v. Lanier,* 7 N. C., 98."

In *McNeely v. McNeely,* 82 N. C., 183, there was a devise to a son "by him seeing to her," his mother, and it was contended that these words fettered and controlled the estate devised. The court says: "In the will now under consideration the words which give rise to the controversy, 'by him seeing to her,' are in themselves vague and indeterminate, and if an essential and defeating condition of the gift, would be very difficult of application. What is meant by seeing to the widow, and what neglect falls short of that duty? How much of personal care and attention in the son to the mother is requisite, and how is the dividing line to be run between such omissions as are and such as are not fatal to the devise?"

In the case at bar, the above reasoning applies with greater force. Here the widow, Mary E. King, takes a life right or estate in the land in controversy "for her support and the support of said minor heirs," presumably referring to the devisees, Effie A. King and (51) Katie E. King, both of whom attained their majority years ago. The widow took a life estate, and during the minority of the minor

heirs there was "at most a personal obligation" on the devisee, Mary E. King, "present wife," referred to in the will under consideration. The words "for her support and the support of the minor heirs" do not constitute a condition precedent to the vesting of the life right or estate in Mary E. King, or a condition subsequent by which the estate could be defeated, but were intended by the testator as his reason for the devise, and, as said before, could at the most impose a personal obligation upon the devisee Mary E. King to support the devisees, Effie A. King and Katie E. King, during their minority. The devisees, Effie A. King and Katie E. King, have the remainder of the estate after the determination of the life estate.

The life right is synonymous with life estate. Dower of use, benefit and profits passes a life estate. *Perry v. Hackney,* 142 N. C., 368. The devise to the widow was in lieu of dower, and might be styled "testamentary dower." Her interest in the land is an estate for life. This case is clearly distinguishable from *Whitaker v. Jenkins,* 138 N. C., 480, where *Walker, J.,* says: "The provision is that the lands shall belong to her during her life, or until the sons shall be of full age, at which time it shall belong to them, his wife to have her maintenance out of the land if she survived that event. The intention of the devisor is most clearly expressed. We can not infer that he intended his wife to have an estate, or even an interest in the land, when he had expressly said that it should belong to his sons and that she should only have a maintenance."

The widow, a life tenant, had no power to cut the timber for sale or to sell any right to do so, but neither could the tenants in reversion or remainder do so. As, however, they wish to receive the value of their interest in the timber at this time, in anticipation, this could only be done by the concurrence of the life tenant. It is set out in the case agreed that the value of the life estate, if the widow is entitled to anything, is $1,361.40.

The judgment of the court below is in accordance with these views and is

Affirmed.

Cited: Bailey v. Bailey, 172 N. C., 674.

(52)

POWELL BROTHERS v. McMULLAN LUMBER COMPANY.

(Filed 21 September, 1910.)

1. Corporations—Acceptance—Certificates—By-laws.

By signing and recording the articles of incorporation three or more persons become a body corporate under the Code, secs. 677-8, and it is not necessary for the exercise of such powers as are conferred by statute on corporations, that the one so formed shall issue certificates of stock or adopt by-laws. Revisal, secs. 1137-1146.

2. Corporations—Officers and Directors, Loans from—Solvency.

The officers and directors of a solvent going corporation may loan the company money secured by mortgage on its property.

3. Same—Present Consideration.

The officers and stockholders of a corporation may duly authorize the execution of a mortgage on its property to two of their own number to secure a loan of $6,000 made by them to the incorporation, the stockholders and directors therein being only three persons, it appearing from plaintiff's own evidence that the value of the property was approximately $12,000, that all the existing debts at that date, except a small debt of $40, had been paid, and nearly half the amount of the notes secured were for a present consideration.

4. Corporations—Conveyances—Total Property—Solvency—Assignments—Filing of Schedules, etc.

It is not necessary to the validity of a corporation's mortgage made to two of its creditors of its entire property that the schedules of preferred debts be filed under oath, and inventory filed, under Revisal, secs. 967-968, when it appears that the corporation was not insolvent, and that the consideration for the notes secured was a present one.

5. Same.

It appearing in this case that the value of the corporate property was approximately $12,000; the amount of the notes secured by the mortgage on the entire property, $6,000, half given for a preëxistent and half for a present consideration; all debts then paid except $40, owed to an unconcerned creditor, the requirements of Revisal, secs. 967-968, were held inapplicable, and upon such facts there is no *prima facie* case made out, or presumption of insolvency. *Clements v. Cozart* cited and distinguished.

6. Deeds and Conveyances—Assignments—Fraud—Invalidity—Inter Partes.

A voluntary conveyance declared invalid for not complying with the provisions of Revisal, secs. 967-968, is not only void as to *bona fide* unsecured creditors, but *inter partes;* and hence it would be unnecessary for such creditors to show fraud in its procurement in order to set it aside.

APPEAL by plaintiffs from *Ferguson, J.*, at Spring Term, 1910, (53) of CHOWAN.

The plaintiffs, as partners, sued the McMullan Lumber Company,

a corporation, M. H. White, E. V. Perry and White & White Company, corporation. The facts alleged are substantially as follows: In August, 1905, the McMullan Lumber Company was chartered under the general corporation law of the State, with three stockholders, S. W. McMullan, subscribed for 97 shares of the capital stock, E. V. Perry for two shares and M. H. White for one share. There were no other stockholders. On 16 September, 1905, the stockholders met and elected three directors, White, Perry and McMullan. McMullan was elected president, and he was also elected general manager. Perry was elected secretary and treasurer. In November, 1905, the directors met, being also all the stockholders, to consider the affairs of the corporation. It was then indebted, for cash advanced, to White and Perry in sums aggregating $3,475. The corporation bought and took deed from Perry for real estate necessary for its business to the value of $2,500; and White and Perry advanced then the further sum of $125, making a total indebtedness to them of $6,000—$3,000 to each. The corporation duly authorized the execution of two notes to be executed of $6,000—$3,000 to each—and to secure their payment authorized a mortgage to be executed on substantially all its property—real estate, buildings and machinery. The approximate value of this property was $12,500. The corporation owed other debts than to White and Perry, but all of these have been paid except a debt of $40 and were paid before this suit was brought. The holder of this small debt seems, according to the record, to manifest no concern about it. A deed of trust, instead of a mortgage, securing the two was duly executed and promptly recorded. Some six months thereafter the plaintiffs, being lumbermen, began to deal with the
(54) corporation, selling it lumber and taking its notes and acceptances, to the aggregate amount, as established by the verdict, of $1,510. After the meeting in November, 1905, there was no other meeting of the directors or stockholders, the business having been left to the sole management of McMullan, the president and general manager, who was regarded as a competent and reliable business man. No certificates of stock were issued and no by-laws were adopted. In December, 1906, there was a sale by the trustee, named in the deed of trust, pursuant to its terms, to satisfy the two notes secured therein, both of them at that time being owned by White. White purchased for the amount of the two notes, $6,000 and subject to taxes, $126, and a prior lien in favor of the American Woodworking Company, for the sum of $1,336; White subsequently sold to the White & White Company for $7,500. Upon the foregoing facts and the further fact that White said to McMullan before the sale by the trustee, that he, White, would buy the property at the sale if it did not bring more than his debt, and that he and McMullan would then run the business, the plaintiffs

contended that the mortgage or deed of trust to secure the notes to White and Perry was void because (1) made to secure largely pre-existing debts and covering substantially all the property of the corporation, and the requirements of section 967, Revisal, were not observed by the assignor, (2) made by the corporation to two directors, necessarily by their own votes, and that the deed was fraudulent, as the evidence sustaining the above facts tended to prove. At the conclusion of the evidence of the plaintiff, the defendants, White, Perry, and White & White Company, moved for judgment as of nonsuit. The motion was allowed and plaintiff appealed. Judgment was rendered against the McMullan Lumber Company for the debt and interest and costs, and of nonsuit against the plaintiffs in favor of the other defendants.

W. M. Bond and W. M. Bond, Jr., for plaintiffs.

Pruden & Pruden, Chas. Whedbee, J. C. B. Ehringhaus, and E. F. Aydlett for defendants.

MANNING, J., after stating the case: The contention that the (55) McMullan Lumber Company was not a corporation is settled by the decision of this Court in *Benbow v. Cook,* 115 N. C., 324, where it is said: "Having complied with the requirements as to the form of the articles of agreement and caused the proper record to be made, the three persons named as sole corporators become a body politic for the purposes set forth in the agreement. Code, secs. 678, 679. When corporate powers are granted by a special, instead of a general act of the Legislature, there must be evidence of acceptance by the corporators and compliance with all the conditions precedent prescribed by law, in order to show affirmatively that the corporation is lawfully organized. But in our case every corporator affixed his hand and seal to the articles of agreement recorded, and by such signature and the recording of the instrument, became invested with all the powers which it was contemplated by law to confer in such cases. Code, sec. 679. Private corporations are formed when the necessary contractual relations are created between the persons clothed by law with the powers of a body politic. 1 Morawetz, 24." In addition to the conclusive effect of this authority, the plaintiffs allege in the first paragraph of their complaint, "that the McMullan Lumber Company is a corporation, having become such on or about 25 August, 1905," and that plaintiffs, beginning in June, 1906, had many dealings with the corporation. The fact that the McMullan Lumber Company was a corporation, and its continued existence as such would seem to be placed beyond controversy in this action; the fact that the corporation did not issue certificates of stock did not affect its creation or existence as a corporation. "It is

the act of subscribing, or the registry of the stockholder's name upon the stock book of the company, opposite the number of shares for which he has subscribed, which gives him his title thereto, and that the certificate neither constitutes his title nor is necessary to it, but only a memorial of it." 10 Cyc., 390; Womack Private Corporations, sec. 267. If certificates are not necessary to membership in a corporation, it would seem certainly clear that they would not be necessary for the existence of the corporation itself, nor does section 1137, Revisal, prescribing the requirements for the formation of a corporation, prescribe that certificates of stock shall be issued. Nor did the failure
(56) of the corporation to adopt by-laws destroy or impair its existence as a corporation. In 10 Cyc., 353, *Judge Thompson* says: "Where the governing statute, in express terms, confers upon the corporation the power to adopt by-laws, the failure to exercise the power will be ascribed to mere non-action, which will not render void any acts of the corporation which would otherwise be valid."

What the by-laws of a corporation may determine and contain are set forth in section 1146 of the Revisal.

The question most stressed in the brief and oral argument before us is the invalidity of the deed of trust to secure the notes of White and Perry, growing out of their relationship to the corporation; that the larger part of the amount secured was a preëxisting debt; that there were other creditors at that time; that the corporation conveyed in the deed of trust substantially all of its property, and the assignor failed to file the schedule required by Revisal, 967, and the trustee failed to file the inventory required by Revisal, 968. The plaintiff's evidence showed that the corporation was not insolvent at the time the deed of trust was executed; that at that date the property of the corporation was worth approximately $12,000; that all its other debts existent at that date, except a small debt of $40, had been paid; and nearly half the amount of the notes secured was not a preëxisting debt, but a present consideration of equal value; that the stockholders and directors authorized both the note and the security to be given. These facts clearly distinguished this case from *Edwards v. Supply Co.*, 150 N. C., 171; *Hill v. Lumber Co.*, 113 N. C., 173; *Electric Light Co. v. Electric Light Co.*, 116 N. C., 112; *Graham v. Carr*, 130 N. C., 274; *Holshauser v. Copper Co.*, 138 N. C., 251; *Bank v. Cotton Mills*, 115 N. C., 507. That these facts are determinative of the validity of the mortgage or deed of trust is stated with great clearness by *Chief Justice Clark* in *Edwards v. Supply Co., supra*: "It would have been otherwise if, at the time the money was authorized to be borrowed, the company had authorized the mortgage to be executed to secure its officers, who agreed to sign the note as endorsers. In such case the money received

would have balanced the debt secured, and would have paid off that amount of prior debts to others, or would otherwise have (57) aided the business of the company. Such arrangements are often necessary, and when *bona fide* are valid. *Banking Co. v. Lumber Co.*, 91 Ga., 624, cited and approved; *Hill v. Lumber Co.*, 113 N. C., 179." The wholesome and just doctrine which the above cases clearly settle, is that the director of an *insolvent corporation* who is also a creditor, can not take advantage of the information which he has obtained of the affairs of the corporation to protect himself to the injury of the other creditors, or secure an advantage over them; but it has not been decided that the officers of a going, solvent corporation can not aid it with loans of money and take security therefor. Such a doctrine would destroy corporate growth and seriously impair business activity.

It is also insisted by plaintiff that the deed of trust is invalid because, conveying substantially all the property of the corporation and securing only two of its creditors, no schedule of the preferred debts was filed under oath by the corporation, and no inventory filed by the trustee, as required by secs. 967 and 968, Revisal. These statutes have been considered by this Court in the cases of *Bank v. Gilmer*, 116 N. C., 684; *ibid.* (on rehearing), 117 N. C., 416; *Glanton v. Jacobs*, 117 N. C., 427; *Cooper v. McKinnon*, 122 N. C., 447; *Pearee v. Folb*, 123 N. C., 239; *Brown v. Nimocks*, 124 N. C., 417; *Taylor v. Laws*, 127 N. C., 157; *Odom v. Clark*, 146 N. C., 544; and it has been held "that where an insolvent man makes a mortgage of practically all of his property to secure one or more preëxisting debts, such an instrument will be considered an assignment, subject to the regulations of the statutes addressed to that question, and the result will not be changed because some small portion of his property shall have been omitted or because the instrument may have been drawn in the form of a mortgage having a defeasance clause. In the first of these cases (*Bank v. Gilmer, supra*), it is held: 'While the act of 1893 (chapter 453) does not prohibit *bona fide* mortgages to secure one or more preëxisting debts, yet, where a mortgage is made of the entirety of a large estate for a preëxisting debt (omitting only an insignificant remnant of property), the mortgage is, in effect, an assignment for the benefit of creditors secured therein, and is subject to the regulations prescribed in said act of (58) 1893.'" It seems necessary from these decisions, and essential for the application of the act of 1893, sections 967 and 968 of the Revisal, that the grantor should be insolvent, and the debts secured should be preëxistent to the mortgage or assignment, and that there should be other existing creditors. If these essential conditions do not concur, then the mortgage or deed of trust could not be regarded as subject to the requirements of the sections of the Revisal above referred

to, though the property conveyed may constitute substantially all of the grantor's estate. In the present case the plaintiff's evidence showed, and there was no evidence offered for the defendants, that the corporation was not insolvent; that the debts secured were partly preëxistent and partly for a present consideration of nearly equal amount, and that while there were other creditors existing at the time, they were all paid except one whose debt amounted to $40, and this creditor seems to manifest no interest in that small amount. He is wholly inactive. The plaintiffs, however, contend that the fact of the existence, at the date of the deed of trust of other debts than the secured debts, though they may have been subsequently paid, and especially the existence of the unpaid $40 debt, enables them to have the deed of trust declared void and to bring the property therein conveyed within their reach under the doctrine declared by this Court in *Clements v. Cozart,* 112 N. C., 412. The doctrine of that case is thus stated at page 422: "The law is that a voluntary conveyance, where the grantor did not, at the time of the grant, retain property fully sufficient and available for the satisfaction of his then creditors, is fraudulent in law as to existing creditors. And if such conveyance shall be declared void at the suit of an existing creditor, all creditors, those existing at the execution of the conveyance, and also subsequent creditors, will be entitled to come in and participate in the fund arising from a sale of the property, subject to priorities and to the maxim *vigilantibus non dormientibus leges subveniunt.*" In that case the conveyances were impeached, not only because they were voluntary, the grantor not retaining property fully sufficient and available for the satisfaction of his then creditors, but also because the
(59) grantor had the actual fraudulent intent to hinder and delay his creditors. The deed of trust in the present case was not a voluntary deed, nor is there any evidence of any actual fraudulent intent and purpose. But if the conveyance under consideration fell under the condemnation of section 967, Revisal, or section 968, Revisal, as construed by this Court in the cases above cited, no more would be needed, for, as expressly determined in *Cooper v. McKinnon, supra,* such a deed would be void and invalid, not only as to creditors, but also *inter partes.* In that case the Court said: "The distinction suggested by the plaintiffs, that the assignment may be valid between the parties—that is, the assignor and assignee—and yet void as to creditors, can not be maintained. This doctrine applies only to cases where the grantee takes the property for his own benefit exclusively, as a mortgage, or grantee in absolute conveyance. . . . If such a conveyance is in fraud of creditors, either actually or by construction of law, it may be set aside as to them; but until so set aside, it is valid between the parties. But a deed of assignment for the benefit of creditors is essentially different, and if

such a deed becomes void as to creditors, its primary and essential purpose is defeated, and it is totally invalid. . . . In the case at bar, the first deed of assignment being void, the title of the property was still in the assignor, and was by him conveyed to his codefendant, Patterson, by the second deed of assignment, which is admittedly valid if not affected by the prior deed." In the case at bar, the plaintiff's evidence negatives the insolvency of the lumber company—a fact essential to the application of sections 967 and 968 of the Revisal, unless we hold that the mere giving of a mortgage upon substantially all the mortgagor's property, to secure a past and present indebtedness nearly equal in amount raised, under the evidence in this case, a presumption of insolvency in fact at the date of the deed of trust, or made out such a *prima facie* case as required it to be submitted to the jury. Upon the evidence presented in this case, we can not so hold. A different conclusion might be reached upon evidence presenting additional facts. The hardship upon the plaintiffs of losing their debt may be somewhat obviated by an inquiry, in a proper proceeding, as to the payment of the subscribed capital stock of the corporation. If the sub- (60) scribers have not paid in full their subscriptions, the unpaid subscriptions constitute assets for the payment of the debts of the corporation. After a careful examination of the authorities cited by the learned counsel of the plaintiffs, and the exceptions to the rulings of his Honor, we find no error and the judgment is

Affirmed.

Cited: Aman v. Walker, 165 N. C., 228; *Bernard v. Carr,* 167 N. C., 482; *Wall v. Rothrock,* 171 N. C., 391.

M. D. FRAZELL v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 21 September, 1910.)

Life Insurance—Policy Contracts—Misrepresentations—Belief—Inducements.

One who can read and does not read his policy of insurance, can not maintain an action to recover premiums paid thereon upon the ground that he was induced to pay them by false and fraudulent representations of the agent of the insurance company as to the plain terms and conditions of the written policy, when he admits he did not believe the agent at the time, for he could not therefore have been induced by the alleged misrepresentations to take the policy or pay the premiums, and especially as he was acting under the advice of his attorney when he paid the premiums.

APPEAL by plaintiff from *Lyon, J.,* at May Term, 1910, of CRAVEN.

The facts are stated in the opinion of the Court.

Simmons, Ward & Allen for plaintiff.
Guion & Guion for defendant.

WALKER, J. This action was brought by the plaintiff to recover $192, the amounts of premiums paid by him on an insurance policy for $500, which it is alleged he was induced to pay to defendant by false and fraudulent representations of its agent, as to the terms and conditions of the policy. The plaintiff testified substantially that the agent of the company stated to him, before he agreed to take the policy, that it would contain provisions by which the full amount, or $500,
(61) would be paid at his death, and if he continued the policy for ten years, the company would pay to him the amount of all premiums it had received to that time, with interest, upon the surrender of the policy, and if he paid the premium regularly for twenty years, it would become a paid-up policy. There were no such provisions, except the first one, in the policy. Plaintiff paid the premiums for nearly ten years, when he discovered, or was told by the agent of another company, that the policy did not contain the provisions as represented to him. He further testified that he did not believe what the defendant's agent told him, but sought the advice of his attorney as to the meaning of the contract and believed him and acted on his advice.

At the close of the testimony, the court sustained a motion to nonsuit, and the plaintiff appealed.

If the testimony of the plaintiff is sufficient to sustain the allegation of false and fraudulent representations, within the principles stated by this Court in *Caldwell v. Insurance Co.*, 140 N. C., 100; *Sykes v. Insurance Co.*, 148 N. C., 18; *Stroud v. Insurance Co.*, 148 N. C., 54, and *Whitehurst v. Insurance Co.*, 149 N. C., 273, he admitted that he did not believe the agent who made them, and, therefore, he neither relied upon them nor was induced by them to accept the policy and pay the premiums. While he can read and write, and we must assume is a person of ordinary intelligence, he did not read his policy when it was sent to him (*Floars v. Insurance Co.*, 144 N. C., 242) nor was its language, as well as we can gather from the record what it is, calculated to mislead him. He has not presented a case for reformation of the policy, nor does he seek that equitable remedy. *Floars v. Insurance Co., supra.* When we consider his testimony in the most favorable light for him, we find that he has not sustained the allegation of fraud. In *Whitehurst v. Insurance Co., supra,* we held that the false representation must have induced the plaintiff to accept the policy and to part with his money by the payment of premiums, before he can recover the amount thus paid, with interest. If he fails in this respect, no actionable fraud is shown. The plaintiff did not believe the agent and, therefore, could not have

been induced by his alleged representations to take the policy and pay the premiums. He was advised by his attorney and acted upon what he said. We do not mean to imply that the plaintiff might (62) recover, under the circumstances of this case, if he had relied on the statements of the agent. It is not necessary to consider that question.

No error.

Cited: Clements v. Ins. Co., 155 N. C., 61; *Brite v. Penny,* 157 N. C., 114.

NEW BERN BANKING AND TRUST COMPANY v. R. N. DUFFY ET AL.

(Filed 21 September, 1910.)

1. Notes—Pleadings—Judgments—Interest—Default—Demand—Stipulations.

In an action upon a promissory note before the date named for its maturity, the note providing that if "any instalment of interest is not paid when due or ten days after demand" the principal shall become due and payable, it is necessary to show that default was made under the terms of the proviso, for the note is not due till then; and when the allegation of a demand for the interest has been denied, a judgment can not be had upon the pleadings, for an issue of fact has been raised.

2. Same—Waiver.

The provision in a promissory note that upon default of the payment of interest when due "or" within ten days after demand, "the principal shall become due and payable," is a valid one. The word "or" is construed so as to read "nor" (within ten days after demand); and the waiver of the notice of dishonor and protest in a subsequent clause, wherein the makers and endorsers agree to become bound, notwithstanding an extension of time, is not construed as a waiver by the payee of the right to a demand for the payment of interest, before the principal sum shall become due.

3. Same—Joint Makers.

Judgment for plaintiff upon the pleadings will not be granted against one of two joint makers of a note for default in the payment of interest in an action brought before maturity, it appearing that in his answer he denies that demand was made on him under the terms of a provision in the note that it would become due and payable "if any instalment of interest is not paid when due or within ten days after demand," and the admission of demand and default for the ten days of one of the makers is no evidence as to the admission of the other.

APPEAL from *Lyon, J.,* at May Term, 1910, of CRAVEN. (63)

The facts are stated in the opinion of the Court.

Moore & Dunn and Loftin, Varser & Dawson for plaintiff.
Simmons, Ward & Allen for defendant.

WALKER, J. This action was brought to recover the amount of a note, which is in the following words and figures:

"$5,000. NEW BERN, N. C., 3 March, 1909.

"On or before three years after date, we promise to pay to the order of D. H. Green five thousand dollars ($5,000.00), with interest from date at six per cent (6 per cent) per annum, payable at the National Bank of New Bern, N. C. Value received.

"Interest is payable one year after date and annually thereafter.

"If any instalment of interest is not paid when due or within ten days after demand, then the principal of said note shall become due and payable.

"The makers and endorsers of this note hereby waive notice of dishonor and notice of protest and protest itself, and agree and become bound, notwithstanding any extension or extensions.

"Witness our hands and seals. R. N. DUFFY. (Seal)
A. C. BURNETT. (Seal)"

The note was endorsed and transferred for value by D. H. Green, the payee, to the plaintiff, who is now the owner thereof.

It is alleged in the complaint that the first instalment of interest not having been paid when it was due, demand was made for the payment of the same and no part thereof has been paid. The defendant, A. C. Burnett, was not served with process, and the defendant, R. N. Duffy, failed to appear and answer. The defendant D. H. Green answered and denied that any demand had been made for the payment of interest as alleged in the complaint. Plaintiff moved for judgment against the defendants, R. N. Duffy and D. H. Green, "upon
(64) the answer of Green, no other answers having been filed." The defendant resisted the motion upon the ground, among others, that no judgment could be given upon the pleadings, as the allegation of a demand for the payment of interest had been denied, which raised an issue as to the truth of the allegation, and, therefore, for the purposes of the motion, it must be assumed that the principal of the note was not due when the action was commenced. The court refused to render judgment and the plaintiff appealed. The contention of the plaintiff is that a demand was not necessary, as it had been waived by the very terms of the note, and besides, that by a proper construction of the note, the principal became due when there was a default in the payment of the first instalment of interest, the words "or within ten days after demand," being immaterial or surplusage.

The clause by which the makers and endorsers of this note waive notice of dishonor and protest and agree to remain liable, notwithstanding any extension of the time of payment, does not refer to the next preceding clause as to nonpayment of interest and the maturity of the principal, but to the notice required to prevent a discharge of the endorser under the law of commercial paper. It can hardly be supposed that the parties would make an agreement as to demand for the payment of interest in one clause, and then waive it in the next clause.

As to the other question, it is well settled that a contract should receive that construction which will best effectuate the intention of the parties, which must be collected from the whole of the agreement, greater regard being had to their clear intent than to any particular words which they may have used in the expression of it, and for the purpose of executing the intent, courts will disregard or correct obvious mistakes in writing and grammar. Clark on Contracts (2 Ed.), secs. 218, 219. We can not reject the words "or within ten days after demand," as we think they were intended to be of the essence of the contract, and, therefore, to be considered in construing it. There is no rule of law authorizing us to ignore those words. Why insert them if they were deemed to be not material? The true meaning of the clause is that if the interest is not paid when due and there shall be further default in its payment for ten days after demand, the (65) principal of the note shall become due and payable. The two defaults must concur before the maturity of the note is accelerated. The word "or" was used for "nor." The context shows it. As we must assume, at this stage of the case, that no demand for the payment of interest had been made, the right of action against D. H. Green, for the recovery of the principal and interest, had not accrued when this action was commenced. *Kinsal v. Ballou,* 151 California, 754. The stipulation that the note shall become due and payable, if there is a default in the payment of interest for ten days after a demand, is valid. 7 Cyc., 599 and 859; 1 Daniel Neg. Instr. (5 Ed.), sec. 48; *Whitehead v. Morrill,* 108 N. C., 65.

The plaintiff is entitled to a judgment against R. N. Duffy, as he did not answer, but his failure to answer can not prejudice D. H. Green. The admission by Duffy of a demand upon him for the payment of the interest can not be taken as any admission by Green of such a demand. The latter still has the right to deny that any demand was made, which he has done, and to have the issue thus joined submitted to a jury. Judgment will be entered in the court below against R. N. Duffy. Plaintiff moved in the Superior Court that judgment be rendered against D. H. Green for the principal and interest of the note. The court properly refused to grant the motion. Until it is found that a demand was made

and the interest was not paid within ten days thereafter, the plaintiff will not be entitled to judgment for the principal of the note, as by its terms the note will not be due, so that an action can be brought upon it until the expiration of the definite time fixed for payment, that is, three years from its date, unless there has been, or hereafter is, a default in the payment of interest for ten days after demand. *Kinsal v. Ballou, supra.*

The costs of this court incurred by D. H. Green will be paid by the plaintiff, who will recover of the defendant, R. N. Duffy, all other costs.

Modified.

(66)

COMMISSIONERS OF BEAUFORT COUNTY v. L. D. BONNER.

(Filed 21 September, 1910.)

1. Eminent Domain—Condemnation—Power Express or Implied—Interpretation of Statutes.

The right of condemnation, being in derogation of a common-law right, must be conferred by the Legislature either in express terms or by necessary implication.

2. Same.

When a legislative enactment does not, by express terms, confer on a public corporation exercising its powers strictly for the public benefit, the right of condemnation, this power does not arise by implication unless the necessity for it is so strong that without it the grant of the powers conferred will be defeated. *Dewey v. R. R.*, 142 N. C., 392, cited and distinguished.

3. Same—County Commissioners—Public Landings.

Chapter 23, Revisal, sec. 1318, subsec. 19, does not confer in express terms the power on the commissioners to condemn land for public landing on a navigable stream; there is no provision for awarding compensation; and no necessity apparent which would imply this power; and construing this section in connection with the other provisions of the chapter, especially section 8, the intent of the Legislature is manifest that such power was not to be conferred; but the commissioners are confined to lands already dedicated to a public use sufficient to embrace or include the purpose proposed by them, or they must acquire a site by agreement or purchase.

APPEAL from BEAUFORT, *Ferguson, J.*, at chambers, May, 1910.

The record disclosed that at January Session, 1910, of the Board of Commissioners of Beaufort County, on a petition to condemn about an acre of defendant's land for a public landing, at a point in said county

where the "public road runs along the banks of Durham Creek," the following order was made and entered:

"At the January Session, 1910, of the Board of Commissioners of Beaufort County, the following order was passed, to wit:

RECORD OF COMMISSIONERS. (67)

"In the matter of the petition of Gilbert Bonner and others."

"The board of commissioners having heard all the evidence in these matters and argument of counsel, and having duly deliberated upon these matters and questions at issue, it is now unanimously ordered by the board as follows:

"First. The petition to remove the draw and establish a new road is continued.

"Second. The petition to establish a public landing is granted, and the board offers to pay for the same the sum of seventy-five dollars. If this offer is refused, the board having decided same is necessary, the county attorney is instructed to take all necessary steps looking to this end and as early as practicable."

Thereupon, the present proceedings were instituted before the clerk for the purpose of condemning the land and assessment of the damages therefor, and filed complaint in terms as follows:

"The plaintiff for cause of complaint, alleges and says:

"First. That it is a corporation duly created, organized and existing under and by virtue of the laws of the State of North Carolina, and as such has the power to discharge the duties set out in Revisal, ch. 23.

"Second. That among other powers conferred upon the board, is the right to establish such public landings as the board of commissioners may think proper.

"Third. That it is necessary for a public landing to be established on Durham's Creek, at some place on the land of defendant L. D. Bonner. That the land which the defendant desires to condemn as a public landing is described as follows: 'About one acre, fronting on Durham's Creek and the public road.'

"Fourth. That L. D. Bonner, the defendant above named, is the only one who owns or has any interest in said land; that the land described as aforesaid is required for a public landing, and L. D. Bonner is a resident of Beaufort County."

A demurrer of defendant having been overruled and exception duly noted, defendants answered, denying the power of commissioners to condemn defendant's land for the purpose indicated; denying that necessity existed for such condemnation and demanding a jury trial of the issue as to the necessity, etc. The motion was overruled and on (68)

the hearing before the clerk, plaintiff offered in evidence the record of the order of the county commissioners above quoted and introduced a witness who testified "That one acre of defendant's land is available for a public landing site at the point described in the complaint," and rested.

Defendant offered to prove that it was not necessary to establish the landing, and the evidence was excluded on the ground that the necessity for the land was conclusively established by the action and order of the county commissioners, and defendant excepted. The clerk gave judgment of condemnation, and appointed commissioners to go upon the land, lay out and make the site, and assess the damages. On appeal this order of the clerk was reversed by the judge, and plaintiff excepted and appealed.

W. C. Rodman for plaintiff.
Ward & Grimes for defendant.

HOKE, J., after stating the case: Whatever right may arise to the public in this case by reason of the fact that a public road lay along the banks of the creek (presumably a navigable stream), they did not include or embrace the easement sought to be established in this proceeding; the appropriation of an acre of defendant's land "for the purposes of a public landing." This right as proposed and described entirely exceeded the easement of a public highway and could only be acquired *in invitum*, except by condemnation and under the power of eminent domain. *Barrington v. Ferry Co.*, 69 N. C., 169; *Pipkins v. Wynne*, 13 N. C., 402; *Chambers v. Ferry*, 6 Pa., 167; 3 Kent Com., 420.

The claim of the petitioners admits and proceeds upon the theory that the exercise of such power is required to uphold it as made. And we concur with the appellee and the ruling of the clerk thereon, that if this right of condemnation has been granted to the board of commissioners the occasion and necessity for its exercise rests very largely in their discretion. *Broadnax v. Groom*, 64 N. C., 244, cited and ap-
(69) proved in several recent cases, notably in *Burgin v. Smith*, 151 N. C., 567; *Board of Education v. Commissioners;* 150 N. C., 116; *Ward v. Commissioners*, 146 N. C., 534. Nor is the issue as to the quantum of damages one entitling the private owner to a common law jury trial as a matter of right. *S. v. Jones*, 139 N. C., 613; *R. R. v. Parker*, 105 N. C., 246; *R. R. v. Davis*, 19 N. C., 451; *Baumann v. Ross*, 167 U. S., 548, 2 Lewis Eminent Domain, sec. 311.

After giving the matter, however, the full and careful consideration which its importance demands, the Court is of the opinion that the statutes controlling the question have not conferred upon the commis-

sioners the right to acquire defendant's property for the purpose indicated by condemnation, and that the judgment of the Superior Court to that effect and dismissing the petition on that ground must be affirmed.

There is general consensus of authority to the effect that the right of condemnation may not be exercised unless conferred by the law-making power in express terms or by necessary implication. In 1 Lewis Eminent Domain, sec. 240, the author says: "The exercise of the power being against common right, it can not be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. If the act is silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that the Legislature intended that the necessary property should be acquired by contract. Thus the authority to construct and maintain booms, or bridges, does not carry with it the right to condemn property. If the act makes no provision for compensation, it is presumed that the Legislature did not intend that the power of eminent domain should be exercised."

And well considered decisions support the doctrine as stated. *U. S. v. Raners,* 70 Fed., 748; *Schmidt v. Dinsmore,* 42 Mo., 225; Chaffee's appeal, 56 Mich., 244; *Allen v. Jones,* 47 Indiana, 438; *Hayden v. Rochester,* 50 N. Y., 438; *Tacoma v. State,* 4 Wash., 64.

And while the courts may have differed at times in defining the necessity required for the grant of this power by implication and are disposed to be less exacting in cases where the right is claimed (70) in behalf of public corporations exercising their powers strictly for the public benefit (Lewis, sec. 240), there is eminent authority for the proposition that the right of condemnation will not arise by implication unless the necessity for it is so strong that without it the grant itself will be defeated. Thus in *Pa. R. R.'s* Appeal, 93 Pa., 159, *Gordon, J.,* delivering the opinion, said: "It is true that a franchise is property, and as such may be taken by a corporation having the right of eminent domain, but in favor of such right there can be no implication unless it arises from a necessity so absolute that, without it, the grant itself will be defeated. It must also be a necessity that arises from the very nature of things, over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience or for the sake of economy. To permit a necessity, such as this, to be used as an excuse for interference with, or extinction of, previously granted franchises would be to subject these important legislative grants to destruction on a mere pretense, in fact, at the will of the holder of the latest franchise." A position referred to and on a given state of facts approved by this Court in *Street R. R. v. R. R.,*

142 N. C., 435. True there is a well recognized general principle, stated and approved in *Dewey v. R. R.*, 142 N. C., 392, and in other cases, "That when a power is conferred by statute everything necessary to make it effective or requisite to attain the end is inferred." But in applying the principle to the question of condemnation, this being in derogation of common right, the necessity must be determined in view of the principles heretofore stated, and in *Dewey's case* the Court was careful to note that the power of condemnation in that case had been given in express terms.

Again the courts have held that in certain instances the fact that an act of the Legislature conferring a given power had failed to provide any method of procedure for awarding compensation to the individual owners would, of itself, afford sufficient evidence that the right of appropriation by condemnation was not intended. *Chamberlain v. Steam Cordage Co.*, 41 N. J. Eq., 43. And a decision of our own Court is to the effect that a statute which purports "to authorize the seizure of private property, in the exercise of the right of emi-
(71) nent domain, but making no provision for compensation to the owner, would be void." *S. v. Lyle,* 100 N. C., 497, a case that has been referred to with approval in several recent decisions of the Court. *S. v. Wells,* 142 N. C., 594; *S. v. Jones,* 139 N. C., 619.

In the present case the power in question is claimed under and by virtue of chapter 23, Revisal 1905, sec. 1318, subsec. 19, in terms as follows: "The board of commissioners shall have power—subsec. 19—to establish such public landings and places of inspection as the board of commissioners may think proper, and to appoint such inspectors in every town or city as may be authorized by law." The statute purports to contain an enumeration of the general powers conferred on boards of commissioners throughout the State, and this subsection quoted being section 1318, subsec. 19, expresses all the provision of our statute law relating to the subject to which we were referred by counsel or which we have been enabled to discover. It will be noted that the law does not confer in express terms the power of condemning the lands of the citizen for the purpose indicated, and we are of opinion there is no such necessity shown as would justify the exercise of the power by implication. Furthermore there is no provision made for awarding compensation to the owner. And applying the principles approved and sustained by the authorities referred to we are impelled to the conclusion that in establishing these public landings provided for in section 1318, subsec. 19, the commissioners are confined to lands already dedicated to a public use sufficient to embrace or include the purpose proposed or that they must acquire a site by agreement or purchase. We are confirmed in the view we have taken of this subsection by a

perusal of the other portions of the statute. Thus, in subsection 8, the commissioners are authorized to lay out, alter, or discontinue public roads, to establish and settle ferries, to build and keep up bridges, etc., and this subsection further provides that in exercising the powers thus conferred the commissioners shall act under the "Rules, regulations, restrictions and penalties prescribed and imposed in the statute on roads, ferries and bridges." In this chapter referred to express provision is made for condemning land and awarding (72) compensation therefor "in the case of roads and ferries," showing that the Legislature in framing this very statute had in mind the necessity of expressly granting the right of condemnation where they considered it desirable to confer it. We are not inadvertent to the great importance of having these public landings established at places convenient to the citizens of different communities, and if it is demonstrated that the well ordering of the affairs of the county require it, the Legislature will no doubt be quick to confer the power of condemnation for the purpose. But the granting or withholding such power is for the Legislature and not for the courts. And until the Legislature has seen fit to grant the power for a public use and in express terms or by necessary implication, we are not permitted to sanction or uphold its exercise. There is no error, and the judgment of the court below dismissing the action is

Affirmed.

BROWN, J., not sitting.

Cited: *S. v. R. R., post,* 562; *Lloyd v. Venable,* 168 N. C., 533; *Lang v. Development Co.,* 169 N. C., 664.

FIRST NATIONAL BANK OF KANSAS CITY v. CHARLES S. GRIFFIN ET AL.

(Filed 21 September, 1910.)

In an action brought by plaintiff bank against the makers of a promissory note, the defense, supported by evidence, being that the paper was procured by false representations and fraud in the procurement by the payee, there was uncontradicted evidence on the part of the plaintiff, through its officers, that it was an endorsee, for value, before maturity, without notice of infirmity of the paper, if any there was. An instruction to the jury, that if they should find all the facts to be as testified by the witnesses in the case, they should answer the issue for the plaintiff: *Held,* correct.

APPEAL from *Ward, J.*, at May Term, 1910, of BERTIE.

Plaintiff's endorsees, and claiming to be holders, in due (73) course, sued upon the following instrument:

"WINDSOR, N. C., 18 December, 1907.

"1 July, 1909, after date, for value received, we jointly and severally promise to pay McLaughlin Bros., or order, fifteen hundred dollars, at the Bank of Windsor, N. C., with interest at six per cent per annum, payable annually. (Signed) Griffin Bros. and fourteen others," upon which note was endorsed a payment of one hundred dollars, and which said note was endorsed by "McLaughlin Bros." There was allegation with evidence on part of defendants tending to show that the note was procured from defendants by false and fraudulent representations on the part of the payees. In reply, plaintiffs offered evidence on the part of the officers of the bank tending to show that said bank was an endorsee for value and a holder in due course of the instrument sued on.

The exception presented, with the attendant facts and relevant evidence, is stated in the case on appeal as follows: The plaintiff then introduced the depositions of the president, the cashier and discount teller of the plaintiff bank, who testified as follows: "That the plaintiff bank is a corporation doing a banking business in Kansas City, Mo., and that said bank purchased the note sued on in this action of McLaughlin Bros., the payees of the said note, before its maturity, to wit, in February, 1909, and for value; that the said note was purchased and taken by the plaintiff bank in due course, and the said bank and none of its officers or agents had any knowledge of the said McLaughlin Bros. or any agent of theirs, if any were made, or any equities whatever in favor of the defendants, or any other defenses set up by the defendants, in their answer." They further testified that the plaintiff bank purchased said note in regular course of business, in good faith, without any notice of any defects in its execution or of any equities in favor of the defendants, and that it paid full value for said note, less the usual discount; that on the date of its purchase by the plaintiff the amount due on said note was fifteen hundred and twenty-nine and 02-100 dollars, and that plaintiff paid for same fourteen hundred and eighty-eight dollars, which was the full amount (74) due thereon, less the regular discount of six per cent, which discount amounted to $41.02; that said McLaughlin Bros. endorsed said note to the plaintiff bank, and the amount of the purchase, to wit, $1,488, was placed to the credit of said McLaughlin Bros. upon the books of the bank, and by them checked out in the regular course of their business; that McLaughlin Bros. are, and have been for several years, regular customers of the bank, and Mr. William McLaughlin, of the firm of McLaughlin Bros., resides in Kansas City.

Upon cross-examination the witnesses stated that they knew McLaughlin Bros., that they were solvent, and had been for many years customers of the bank; but they did not know any one of the makers of the said note and knew nothing of their financial standing.

Here the plaintiff rested. Whereupon the defendants offered evidence tending to show that the agent of McLaughlin Bros., who took the note, made the representations to the defendants set out in the answer, and that these representations were false, and they were induced to sign the said note on account of the said representations. Here the defendants' counsel stated that the defendants had no evidence to offer upon the question of plaintiff's being a holder in due course. The court charged the jury, if they should find all the facts to be as testified by the witnesses in this case, they should answer the issue "Yes."

There was verdict for plaintiff for the amount due on note. Judgment on verdict and defendants excepted and appealed.

Winston & Matthews for plaintiff.

Pruden & Pruden, Gilliam & Davenport and S. Brown Shepherd for defendants.

HOKE, J., after stating the case: This case is governed by the decision of the Court in *Bank v. Fountain,* 148 N. C., 590, and affords a good illustration of the principles declared and approved in that opinion. A new trial was granted in *Fountain's case* for the reason that after evidence had been offered tending to show fraud in the procurement of the note and the president of the bank in reply had testified in substance that the bank had purchased the note in (75) due course and was endorsee for value before maturity and without notice, the judge below charged the jury, among other things, that the *prima facie* case of plaintiff, the holder of the note, had been restored by the uncontradicted evidence of the president of the bank that it had acquired the note in the usual course of business before maturity and without notice of any vice in it, thereby erroneously invading the province of the jury by assuming that the evidence of the bank president was true and should be so accepted by them. After holding that this was reversible error in the trial below, the Court in the opinion, speaking further to the subject, said:

"It may be that when fraud is established in procuring the instrument or there has been evidence offered tending to establish it, if the plaintiff, as he is then required to do, should lay before the jury all the evidence available as to the transaction and it should thereby appear with no evidence to the contrary and no other fair or reasonable infer-

ence permissible, that plaintiff was the purchaser of the instrument in good faith, for value, before maturity and without notice the court could properly charge the jury if they 'believed the evidence' or if they 'found the facts to be as testified'—a more approved form of expression—they would render a verdict for plaintiff. But here, the fraud having been established or having been alleged, and evidence offered to sustain it, the circumstances and *bona fides* of plaintiff's purchase were the material questions in the controversy; and both the issue and the credibility of the evidence offered tending to establish the position of either party in reference to it was for the jury and not for the court. *S. v. Hill,* 141 N. C., 771; *S. v. Riley,* 113 N. C., 650."

And in concluding the opinion, the Court again stated the position as follows: "If when all the facts attendant upon the transaction are shown, there is no fair or reasonable inference to the contrary permissible, the judge could charge the jury, if they believed the evidence, to find for plaintiff, the burden in such case having been clearly rebutted. But the issue itself and the credibility of material evidence relevant to the inquiry is for the jury, and it constitutes reversible error for the court to decide the question and withdraw its consideration from the jury."

(76)

The facts presented bring the present case clearly within the principles stated. All the officers of the bank who were cenversant with the matter testified in effect that the bank was an endorsee for value before maturity and holder in due course of the instrument sued on. There was no evidence which contradicted or tended to contradict their testimony and the judge below properly charged the jury, "if they believed the evidence or if they found the facts to be as testified they would render a verdict for plaintiff." There is

No error.

Cited: Smathers v. Hotel Co., 168 N. C., 72.

G. W. WHITEHURST v. KERR AND WOLCOTT, RECEIVERS N. & S. RY. CO., McLEAN CONTRACTING COMPANY, AND McDERMOTE CONTRACTING COMPANY.

(Filed 21 September, 1910.)

1. **Foreign Corporations—Process—Statutory Regulations.**

The Legislature may provide for service of process on foreign corporations doing business within the State, provided the service is reasonable and to be made only upon such agents as are representative, and the provisions of Revisal, sec. 440, meet with this requirement.

2. Same—"Local Agent"—Interpretation of Statutes.

The proviso of section 440 (1) of the Revisal, "that any person receiving or collecting money within this State for, or on behalf of" a foreign corporation, with respect to service of process, "shall be deemed a local agent," does not limit the meaning of the word agent, but extends its meaning; and service made in this State on the various officers or agents of a foreign corporation enumerated in this section is binding on the corporation, without the requirement that the corporation has property in the State, or the cause of action arose, or the plaintiff resided therein.

3. Same—Definition.

An agent of a foreign corporation upon whom process may be served under the provisions of the Revisal, sec. 440 (1), must be one regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served on him; and the term agent does not extend to a subordinate employee, without discretion.

4. Same.

One who has charge of the funds of a foreign corporation building a railroad bridge in this State, which carries on an enterprise of large proportions, employing large numbers of hands and expending large sums of money, the said agent paying off the hands and keeping the company's money in local banks in his name as its agent, comes within the meaning of the term "local agent," Revisal, sec. 440 (1), upon whom process on a foreign corporation may be served.

APPEAL from *Ferguson, J.*, at May Term, 1910, of PASQUO- (77) TANK.

Action instituted in Pasquotank on 15 January, 1910. Return of service on the McLean Contracting Company as follows: "Received 26 February, 1910. Served 26 February, 1910, by reading to and leaving a copy with Mr. F. H. Cameron, bookkeeper and acting agent for the above defendant company, the McLean Contracting Company."

At Spring Term, 1910, of PASQUOTANK, before *Ferguson, J.*, the defendant, the McLean Contracting Company, a special appearance having been entered for the purpose, moved to dismiss the action as to said company for want of proper service. Motion allowed and plaintiff excepted and appealed.

J. C. B. Ehringhaus and E. F. Aydlett for plaintiff.
S. Brown Shepherd and Pruden & Pruden for defendant.

HOKE, J. The power of a State Legislature to provide for service of process on foreign corporations doing business within the State is no longer questioned. Speaking to the subject in *St. Clair v. Cox,* 106 U. S., *Justice Fields* said: "The State may, therefore, impose as a con-

dition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the State, it will accept as
(78) sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And the condition and stipulation may be implied as well as expressed. If a State permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and the corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon those principles of natural justice which require notice of a suit to a party before he can be bound by it. It must be reasonable and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision of this Court in *Lafayette Insurance Co. v. French,* to which we have already referred, sustains these views." And the doctrine so stated is universally recognized and acted on.

Our State statute applicable to and controlling the question presented on this appeal, Revisal 1905, sec. 440, is in terms as follows: "If the action be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof: *Provided,* that any person receiving or collecting moneys within this State for, or on behalf of, any corporation of this or any other State or government, shall be deemed a local agent for the purpose of this section; but such service can be made in respect to a foreign corporation only when it has property within the State, or the cause of action arose therein, or when the plaintiff resides in the State, or when such service can be made within the State, personally upon the president, treasurer, or secretary thereof."

Construing a statute of similar import it has been held, that the first clause enumerates the persons on whom service of process can be made, to wit, on the president or other head of the corporation, secretary, treasurer, director, managing or local agent thereof, and in that respect applies to all corporations both domestic and foreign.
(79) Then follows the proviso as to who shall be considered local agents for the purpose of the section and the last clause establishes certain conditions, restrictive in their nature, which are required and necessary to a proper and valid service on foreign corporations. That is, service on the persons designated in the first clause shall only be good as to foreign corporations: (1) When they have

property in the State, or (2) when the cause of action arose therein, or (3) When plaintiff resides in the State. And then a fourth method is established: (4) "When service can be made within this State personally on the president, treasurer or secretary thereof."

This construction will be found approved and sustained in *Foster v. Lumber Co.*, 5 S. D., 57, and authoritative decisions here and elsewhere are in accord with the general principles of that well considered case. *Higgs v. Sperry*, 139 N. C., 299; *Clinard v. White*, 129 N. C., 251; *Jones v. Insurance Co.*, 88 N. C., 499; *In re Hohorst, Petitioner*, 150 U. S., 653; *Societe Fonciere v. Millikin*, 135 U. S., 304; *Touchband v. R. R.*, 115 N. Y., 437; *Express Co. v. Johnston*, 17 Ohio, 641; *Porter v. R. R.*, 1 Neb., 14.

In *Jones v. Insurance Co., supra*, it was expressly held that service on a foreign corporation could be made either on a general agent or local agent, and construing the terms of the proviso in the statute to the effect "that any person receiving or collecting moneys within the State for or on behalf of any corporation of this or any other State or government, shall be deemed a local agent for the purpose of this section." It has been further held that this "authority to receive money is not the exclusive test of a local agent upon whom service of process could be made," and that these words of the proviso were not intended to "limit service to such class of agents, but to extend the meaning of the word agent to embrace them." *Copeland v. Telegraph Co.*, 136 N. C., 12. While there is some apparent conflict of decision in construing these statutes providing for service of process on corporations arising chiefly from the difference in the terms used in the various statutes on the subject, the cases will be found in general agreement on the position that in defining the term agent it is not the descriptive name employed, but the nature of the busi- (80) ness and the extent of the authority given and exercised which is determinative, and the word does not properly extend to a subordinate employee without discretion, but must be one regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him. 19 Enc. Pl. & Pr., 665, 676, 677; *Simmons v. Box Co.*, 148 N. C., 344; *Jones v. Ins. Co.*, 88 N. C., *supra; Angerhoefer, Jr., v. Bradstreet Co.*, 22 Fed., 305; *Hill v. St. Louis Ore and Steel Co.*, 90 Mo., 103. And by express provision of our statute as stated, including "Any person receiving or collecting moneys within this State for or on behalf of any corporation of this or any other State or government." Applying the principles established by these decisions and on the facts appearing in the record,

we are of opinion that F. H. Cameron was an agent of defendant corporation, appellee, upon whom process could be lawfully served; that conditions existed authorizing service on him as such agent and that service of process upon said F. H. Cameron, as shown by the sheriff's return, "by reading and leaving a copy with F. H. Cameron, bookkeeper and acting agent," was a valid service, and said company is thereby properly in court.

Although the parties were so intent on the question of the kind of agency required to a proper service that they failed to state the nature of the action or that the plaintiff resides in the State, or in express terms that it had property therein, and although there is evidence to the effect that F. H. Cameron was styled only a bookkeeper of the defendant company "merely that and nothing more," it does appear from a perusal of the record, that at the time this summons was issued and before and after that time, defendant company was engaged in building a railroad bridge across Albemarle Sound in the State at a point where it is from three to five miles wide, the width suggested being a physical fact of which the court may take judicial notice; that it was an enterprise of unusual proportions, requiring an extensive equipment (81) and necessarily involving the employment of large numbers of hands and the expenditure of large sums of money; that the agent F. H. Cameron had charge and control of the money of the company appropriated for the purpose and kept it on deposit in a local bank, the bank entries showing that this continued in one bank from 5 May, 1909, to 18 March, 1910; that he had the company's pay rolls, and disbursed this money in payment of the hands and other claims against the company. Thus an affidavit of the sheriff filed at the instance of defendant and in explanation of a prior affidavit made by that officer states, "That he, the sheriff, does not know that F. H. Cameron received money in any way for the company; that his only information upon the subject is, that said F. H. Cameron upon one occasion paid to him for the McLean Contracting Company certain costs that he (the sheriff) held against said company in an attachment proceeding on behalf of the Edenton Ice and Cold Storage Company and others amounting to $64, and in addition was informed that the said Cameron for the said contracting company paid to the plaintiff in that action the amount of these claims, etc."

This former affidavit was as follows: "That he knows F. H. Cameron, who was acting as agent for the McLean Contracting Company, in building a bridge across the Albemarle Sound for the Norfolk and Southern Railway Company near Edenton; that he knows the said F. H. Cameron received money and paid out money for the said McLean Contracting Company."

The affidavit of Charles H. Wood, the cashier of the Citizens Bank of Edenton, N. C., is as follows: "That he knows F. H. Cameron, employed by the McLean Contracting Company, in building a bridge across the Albemarle Sound, near this place (Edenton, N. C.), for the Norfolk and Southern Railway Company; that he knows that the said F. H. Cameron deposited moneys from the McLean Contracting Company, after handling the pay roll to his credit as agent, and drew on same for payment of sundry accounts. The pay rolls were not deposited but the money deposited by F. H. Cameron, agent, was received from said McLean Contracting Company. According to our books, his first deposit, as F. H. Cameron, agent, was 5 May, 1909; his last deposit was 18 March, 1910." (82)

And while the affidavit of F. H. Cameron, himself, and several other officers of the company, state that he is only a bookkeeper and without authority to receive or collect money for the company, he also states, "That his sole duties are to keep the books of the company wherever it is engaged in contracting work and to settle with and pay off its mechanics and laborers."

So far as appears, this agent was the only representative of the company on the ground having any charge or control of the financial features of this transaction, and we are of the opinion as stated that from the facts in evidence it is clear that his authority and occupation went far beyond the duties of an ordinary bookkeeper, and, if not a managing agent as defined in some of the decisions, that he came well within the meaning of the term local agent on whom process could be properly served; and that at the time of action commenced the company was doing business in the State and had property therein.

There is nothing either in *Moore v. Bank,* 92 N. C., 590, or in *Kelly v. Lefaiver,* 144 N. C., 4, cases cited and relied on by defendants, which militates in any way against the disposition we make of this appeal. In *Moore's case* it was held that an attorney-at-law who had certain claims to collect for a foreign corporation was not in the regular employment of the company so as to become a local agent within the true meaning of our statute on the service of process. And in *Lefaiver's case, supra,* the Court, in stating the essential facts, said, "It will be noted that the person in question was not an agent in the course of the company's business while it was being operated, nor in closing out said business, nor in making general disposition of the company's property after it had ceased to do business. In fact, he was not an agent of the company at all, nor even an employee in the ordinary acceptation of the term, but simply a care taker—acting, as found by the Court, out of friendship and without salary or any pecuniary recompense," showing that neither decision is applicable to the facts presented here. For the

reasons stated the order of the court below dismissing the action as to appellee company will be set aside, and the cause proceeded with according to law and the course and practice of the Court.

Reversed.

Cited: Menefee v. Cotton Mills, 161 N. C., 165; *Furniture Co. v. Bussell,* 171 N. C., 482.

(83)

IN RE WILL OF AMELIA EVERETT.

(Filed 21 September, 1910.)

Wills—Devisavit Vel Non—Undue Influence—Confidential Adviser—Evidence, Sufficient.

In an action to set aside a will for undue influence, evidence is sufficient to go to the jury which tends to show that deceased was illiterate, and devised or bequeathed her whole estate to her brother and his daughter, leaving to her son, the caveator, only $10; that the brother, her confidential business adviser, upon whom she relied, had the testatrix at his house during her last illness, and at that time would not permit the caveator to see his mother without the presence of himself or his daughter, and had the will written and signed under circumstances tending to show that the testatrix was unaware of its contents and kept it in his own possession; that the testatrix had theretofore expressed the desire of providing for her son, with whom she was on good terms; that he procured the testatrix, just before her death, to sign a check drawing all her money from the bank, which he gave to his daughter, who then left and remained from the State. The doctrine of presumptions, burden of proof and the character of the evidence required, discussed by BROWN, J.

APPEAL from *Ferguson, J.,* at January Special Term, 1910, of WASHINGTON.

This is an issue of *devisavit vel non.*

The propounders of the will are Addison Everett, the brother of testatrix, the executor to the will, and certain other legatees. The caveator is Harry Wheelock, the only son of testatrix.

This issue was submitted: Is the paper-writing propounded and every part thereof the last will and testament of Amelia Everett? Answer: No.

From the judgment rendered the propounders appeal. The facts are fully stated in the opinion of the Court.

(84) BROWN, J. The only assignment of error presented here is the refusal of the judge to charge the jury that there is no sufficient evidence of undue influence.

The testimony tends strongly to prove that Addison Everett, the executor, was the business adviser of his sister, the testatrix; that a few days before her death, at a time when she was very sick in bed, he procured from her a check for about $900, all the money she had in bank; that Addison stated he was getting the money for testatrix' mother, but in fact he gave it to his own daughter, who afterwards left for New York and has not returned. Said daughter was in the room when the will was signed, and had the will when the witness entered the room. When Addison went in the room with the witnesses, he said, "Here are parties to witness will." All the witnesses agreed that from the time the parties entered the room, up to the time they left, the sick woman did not speak a word to anybody about the will or anything else, she being in bed in desperate condition at the time. Addison was appointed executor. He got a large part of the dead woman's property. His wife, his daughters and his brother got all the balance of her property, except ten dollars, which by the terms of the will were given to her son. It appears that the son sent some squirrels to his mother, who was sick, and when Addison saw the son he offered to pay him for the squirrels. It appears that the daughter of Addison offered to pay the sick woman's son for something he had sent her to drink. It appears from the testimony that the only person from whom the sick woman had been in the habit of getting advice about her business affairs was Addison Everett. She was sick in Addison's house at time referred to. It further appears that Addison, when the witnesses went in the room, after saying, "Here are the witnesses to sign the paper," himself got the pen for D. Lee, one of the witnesses, to sign. It further appears that after the woman was dead Addison refused to let her son go in the room to see her body until one of his daughters was there to go in with him, and that Addison himself took sole charge of the funeral arrangements; that he has always "been against the caveator," to use the language of Wheelock, and that in arranging for the funeral he put himself and family to follow the corpse, then allowing a lot of people who were not related in any way to the dead woman to come immediately behind his family, and that the caveator, the only son of the (85) dead woman, was assigned to a place at the back end of the procession; that after said will had been offered for probate before the clerk, Addison remarked to said son that his mother had given him more than she ought to have given him. It appears from Wheelock's testimony that Addison, his wife and daughter, would give him no opportunity at any time to talk to his mother without one or more of them being in the room with her; that he and his mother were friendly and he went to see her each day. It appears that the will was written by one Johnson, who says the deceased never spoke to him about it; that he

wrote it at the instance of an attorney, in the attorney's office, testatrix not being present, and said attorney was in the court-room during the entire trial, and propounder did not put him on the stand as a witness; that the woman, for years before her death, had been friendly with her son, and had said she intended to properly provide for him. Under the will the executor, Addison Everett, and his daughters get practically the testatrix's entire estate.

Experience has shown that direct proof of undue or fraudulent influence is rarely attainable, but inference from circumstances must determine it. Therefore, it seems to be generally held that when a will is executed through the intervention of a person occupying a confidential relation towards the testatrix, whereby such person is the executor and a large beneficiary under the will, such circumstances create a strong suspicion that an undue or fraudulent influence has been exerted, and then the law casts upon him the burden of removing the suspicion by offering proof showing that the will was the free and voluntary act of the testator. Pritchard on Wills, sec. 133, and cases cited. *Watterson v. Watterson,* 1 Head., 1; Gardner on Wills; *Maxwell v. Hill,* 5 Pick., 584; sec. 62; Schouler, sec. 240.

In such condition of the proof, as said by Gardner, "the proponent must then go on with the evidence and cause the scales to at least balance." Wills, sec. 62; *Coghill v. Kennedy,* 119 Ala., 641.

The decided cases are numerous wherein some feeble, decrepit or dying person appears, as in this instance, to have been brought under a
(86) strong and exclusive influence to make an unfair will such as the testator was not likely to have made at his own instance. Then combined circumstances, less suspicious than those in evidence here, become of great consequence and easily shift the burden of proof of *bona fides* upon those who set up the instrument and claim its benefits. *Marx v. McGlyn,* 88 N. Y., 357; *Harvey v. Sullen,* 46 Mo., 147; *Ray v. Ray,* 98 N. C., 566; Schouler, sec. 240, and cases cited.

By the Roman law *qui se scripsit hacredem* could take no benefit under the will. While such is not the rule of the common law, yet that law requires proof which must free the paper from suspicion. It was long ago laid down by *Sir John Nichol* in *Parker v. Ollatt* (2 Phillim, 323), and approved by *Baron Parke* in *Barry v. Butler,* 12 Eng. Reports, that where a party prepares or procures the execution of a will under which he takes a benefit, that of itself is a circumstance that ought generally to excite suspicion and calls upon the court to be vigilant in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is satisfied that the paper propounded does express the true will of the deceased.

General evidence of power over a testator, especially of weak mind, or suffering from age and bodily infirmity, though not to such an extent as to destroy testamentary capacity, has been held in this country to be enough to raise a presumption that ought to be met and overcome before a will is allowed to be established. *Robinson v. Robinson,* 203 Pa. St., 403; *Miller v. Miller,* 187 Pa., 572; *Boyd v. Boyd,* 66 Pa., 283. In this last case, referring to above rule, the Court says: "Particularly ought this to be the rule when the party benefited stands in a confidential relation with the testator."

Judge Redfield says: "Where the party to be benefited by the will has a controlling agency in procuring its execution, it is universally regarded as a very suspicious circumstance and one requiring the fullest explanation." Wills, 515.

This text has been adopted and approved generally by the courts of this country. 27 A. & E. Enc., 488; Gardner on (87) Wills, 189.

Prof. Wigmore says: "Where the grantee or other beneficiary of a deed or will is a person who has maintained intimate relations with the grantor or testator, or has drafted, or advised the terms of the instrument, a presumption of undue influence or of fraud on the part of the beneficiary has often been applied." Section 2503, and cases cited in note.

The courts of appeals of Virginia declare: "When a will executed by an old man differs from his previously expressed intentions and is made in favor of those who stand in relations of confidence or dependence towards him, it raises a violent presumption of undue influence which should be overcome by satisfactory testimony." *Hartman v. Strickler,* 82 Va., 238; *Whitelaw v. Sims,* 90 Va., 588; 1 Jarman Wills, 71, 72.

Undue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence.

From the several facts offered in evidence by the caveator the inference is strong that the will in question was the result of a controlling and improper influence upon the part of the propounders and especially the executor. The making and execution of the paper was surrounded by all the *indicia* of undue influence.

The testatrix was an old and feeble woman in her last illness in the house of propounders. She could not read or write and had to make her mark. There is no evidence that the paper was explained to her or that she fully understood its contents. The inference is strong that the executor, and chief beneficiary, had the paper written at a lawyer's office and kept possession of it, and that he was "master of

ceremonies" at its execution. He and his daughters take the entire estate except ten dollars, which is the sole legacy to testator's only child, for whom she had, only a short time before, expressed a purpose to properly provide.

Shortly before the execution of the will the executor had procured from testator a check for her entire bank funds and given them to his own daughter. The son was carefully excluded from any private conversation or intercourse with his mother, and not permitted to
(88) see her except in presence of propounder's wife and daughters.

The executor was for years her confidential adviser and business agent as well as brother.

In view of such facts in evidence, under the rulings of many courts, as well as the teachings of text-writers, the doctrine of presumptions would be applied and the burden be cast upon the propounders to rebut a presumption of fraud and undue influence.

But it is not necessary that we pass on that question now, as the court below, so far as the record discloses, did not apply the doctrine or place such burden upon the propounders. His Honor appears to have submitted the question of undue influence to the consideration of the jury without instruction as to the burden of proof, and to the charge as given no exception seems to have been taken.

No error.

Cited: *King v. R. R.*, 157 N. C., 62; *In re Patrick*, 162 N. C., 520; *Causey v. R. R.*, 166 N. C., 8; *In re Cooper, ibid.*, 211; *In re Mueller*, 170 N. C., 29, 30; *Brown v. Brown*, 171 N. C., 651.

ELIZABETH WHITEHEAD ET AL. v. MARY ELIZA WEAVER ET AL.

(Filed 29 September, 1910.)

Estates—Remainders—Deeds and Conveyances—Interpretation.

An estate to D. for life, then to W. and the children of R., the said W. surviving the life tenant: *Held*, W. and the eight children of P. held in common an undivided one-ninth interest, each; and at the time of proceedings in partition the said W. being dead, her one-ninth interest descended to her three children.

APPEAL from *Guion, J.*, at February Term, 1910, of WILSON.

The facts are stated in the opinion.

Appeal by defendants from the clerk of Superior Court of Wilson in a petition for partition. Both parties claim under a deed from S.

A. Woodard, 21 January, 1884, to Jesse P. Dixon and wife, Elizabeth, for 400 acres. The habendum is as follows: "To have and to hold, to them, the said Jesse P. Dixon and wife, for life, and the life of each of them, and after the death of the survivor, then to the living sister and the children of the deceased sister or sisters of the said (89) Elizabeth Dixon, in fee, and in the event of the death of the living sister of the said Elizabeth Dixon without issue living at her death, before the death of the said Jesse P. Dixon and wife, and both of them, then the whole of the said land shall go to the children of the other sister in fee.

"The purpose of this deed is to vest the title of the said land in the said Jesse P. Dixon and wife for their joint lives, then in the survivor for his or her life, and then in Polly Whitehead and the children of Penina Dixon, deceased, and if at the death of the said Dixon and wife, or the survivor, the said Polly Whitehead shall be dead without issue living at her death, then to the children of the said Penina Dixon in fee simple."

Jesse P. Dixon and wife are dead. Polly Whitehead had since died, leaving three children, these plaintiffs. The defendants are the eight "children of Penina Dixon." The clerk adjudged that Polly Whitehead was seized of one-ninth undivided interest in the land. The judge reversed this and held that she was owner of an undivided one-half, and the defendants appealed.

Pou & Finch and Murray Allen for plaintiffs.
Daniels & Swindell for defendants.

CLARK, C. J. The conveyance of the remainder to "Polly Whitehead and the children of Penina Dixon, deceased," vested such remainder in fee in them as tenants in common, an undivided one-ninth interest to each, there being eight children of Penina Dixon. Upon the death of Polly Whitehead, who died after the life tenancy ceased, her undivided one-ninth descended to her three children, the plaintiffs herein.

In *Helms v. Austin,* 116 N. C., 752, a deed to "Sarah Staton and her children" was held to convey a fee simple to said Sarah and children as tenants in common. This was cited and approved. *Darden v. Timberlake,* 139 N. C., 182.

In *King v. Stokes,* 125 N. C., 514, the words "Unto Alfred May during the term of his natural life, and after his death to his wife, the said Ida Eugenia, and her children" were held to confer a remainder upon said wife and children as tenants in common. In *Gay v. Baker,* 58 N. C., 344, the conveyance in trust for a woman and (90)

her children was held to make the mother and children tenants in common. The same construction was held as to a devise in *Moore v. Leach,* 50 N. C., 88; *Hunt v. Satterwhite,* 85 N. C., 73; *Hampton v. Wheeler,* 99 N. C., 222.

In *Silliman v. Whitaker,* 119 N. C., 89, it was held that a devise to "S. and her children, if she shall have any," vested the title in S. and her children as tenants in common.

The ruling below that the devise carried a half interest to Polly Whitehead must be

Reversed.

Cited: Lewis v. Stancil, 154 N. C., 327.

THOMAS A. VICK v. JOSHUA TRIPP, JR., ET AL.

(Filed 29 September, 1910.)

1. **Tenants in Common—Partition—Infant—Parties.**

A proceeding in partition of lands among tenants in common does not bind an infant not represented in any manner nor properly made a party.

2. **Same—Ratification—Estoppel—Election.**

An infant having an interest in lands as a tenant in common and not bound by partition had thereof by the other tenants, by joining in a deed from his cotenants after his majority, to a part of the lands so held, and reciting the partition proceedings for description only, is only estopped to claim title as against those claiming under the deed; and is a ratification only of the lands conveyed; and his joining in the deed does not evidence his election to take the land conveyed therein as his part of the lands held in common.

3. **Same.**

C. bequeathed certain property to his wife and devised certain of his real property to his four surviving children, T., R., M., and L., T. died devising all of his estate therein to his mother for life, "at her death to" the plaintiff. R. conveyed his said interest to his mother. Afterwards, in proceedings in partition, the tenants in common divided the lands without in any manner making the plaintiff, who was then a minor, a party. In these proceedings three certain tracts of the land were set apart to the mother, on one of which there was a storehouse; to one of the tracts the defendant claims title by mesne conveyances from the mother. After coming of age the plaintiff joined in a deed with the widow of C. conveying the storehouse, and subsequently the widow died. *Held,* (1) by joining in the deed to the storehouse property the plaintiff is not estopped in his action for possession and accounting for the rents and profits of the other lands; (2) the doctrine of election has no application; (3) a recital in the

deed of the proceeding in partition would only have the effect of estopping plaintiff from denying the existence thereof and the conclusiveness of its effect as a division of the real estate.

4. Partition—Tenants in Common—Vendee.

A vendee of an undivided interest in lands held in common can commit such waste as "is destructive of the estate and not within the usual legitimate exercise of the right of enjoyment of the estate."

APPEAL from *Peebles, J.*, at January Term, 1910, of PITT. (91)

T. R. Cherry died in the spring of 1890, in Pitt County, leaving a last will and testament, which was duly admitted to probate. After bequeathing all his household and kitchen furniture and all other personal property in his house to his wife, Sallie A. Cherry, he devised all the balance of his estate to his four surviving children, to wit, T. A. Cherry, R. D. Cherry, Mrs. Maggie S. James and Lillian Cherry. The balance of his estate consisted of several town lots and several parcels of farm lands, including the land involved in this controversy. Subsequently, T. A. Cherry died in 1891, leaving his last will and testament, which was duly admitted to probate in Pitt County, in which he devised all his estate to his mother, Sallie A. Cherry, "to have and to hold her lifetime and to use for her benefit exclusively; at her death to Thomas Argall Vick," and if he should die under twenty-one years, then other disposition was made. Thomas Argall Vick is the plaintiff and was a nephew of T. A. Cherry. Subsequently, also, to the death of T. R. Cherry, R. D. Cherry—a son and devisee of the testator, T. R. Cherry—conveyed his undivided interest to his mother, Sallie A. Cherry, by deed duly recorded. Still later, a special proceeding for partition was brought in the Superior Court of Pitt County by J. B. Cherry, S. A. Cherry, Lillie Cherry, Maggie James and her husband, D. L. James, against Thos. J. Jarvis, H. E. Daniel and another. J. B. Cherry, one of the plaintiffs in the partition proceeding, was a tenant in common with the testator, T. R. Cherry. The (92) plaintiff, Thomas Argall Vick, being at that time an infant of tender years, was not made a party, plaintiff or defendant, to said proceeding, nor was any guardian *ad litem* or next friend appointed for him, nor any process served upon him, or his name mentioned in the petition. The petition alleged that the plaintiffs were tenants in common, seized in fee and in possession of the lands and lots described, among them the land in this controversy. As a result of, and by the judgment of, the court in that proceeding, begun in 1895, three lots were set apart to, and alloted to, Sallie A. Cherry, to wit, a storehouse and lot in Greenville, a lot in Greenville containing 3 1-5 acres, and the farm containing 192 1-2 acres, the land admitted to be in the possession of the defendant. It was admitted that the storehouse and lot, at the

date of the partition, was worth twice as much as the other two parcels of land. On 25 September, 1897, Sallie A. Cherry sold and conveyed the land in controversy to Henry Sheppard, and it has by mesne conveyances come to the possession of the defendant Tripp. At the date of these deeds the plaintiff was an infant and did not join therein. Sallie A. Cherry died 30 December, 1908, and this action was commenced 21 April, 1909. On 21 July, 1905, the plaintiff then being of age, joined Sallie A. Cherry in a deed for the storehouse and lot, which in the description these words are used, "which was allotted to the said S. A. Cherry in the division of the lands of T. R. Cherry & Co., as recorded in the clerk's office of Pitt County, in the record of the division of lands in Book 2, page 163, to which reference is hereby made." The plaintiff sues to be let into possession with the defendant, as tenants in common, entitled to an undivided one-half interest, for an accounting for rents, and timber cut and sold. The court intimated upon the foregoing facts:

"1. That plaintiff could not ratify the partition proceedings as to the quantity of land allotted to S. A. Cherry and repudiate it as to the quality of the estate. 2. That his joining in the deed to the store lot with S. A. Cherry was an election to take it as his share of the lands.

3. That if he had not signed the deed to the store lot, the plain-
(93) tiff had the right in equity to compel S. A. Cherry to take the two tracts conveyed to her as her share of the common property, and that the plaintiff having, by signing the deed to the store lot, deprived defendant of this means of protecting himself, was in equity and good conscience estopped from claiming any interest in the *locus in quo.*" To this intimation of his Honor, plaintiff, having excepted, submitted to a nonsuit and appealed to this Court.

W. F. Evans and Harry Skinner for plaintiff.
Jarvis & Blow for defendants.

MANNING, J. As an adjudication of the right, title or interest of the plaintiff in the common property, the judgment of the court in the special proceedings was a nullity. The plaintiff was not a party to that proceeding in name or by service of process, nor did anyone pretend to appear for or represent him. It is contended, however, that he is effectually concluded and estopped by that judgment as if he were a party thereto, because ten years thereafter he joined Mrs. S. A. Cherry—one of the parties to that proceeding—in a deed to one Brown, conveying one of the lots allotted to Mrs. Cherry, and because reference to that proceeding is made in the deed for a more particular description of the lot. But the deed to the *locus in quo* was made by Mrs. Cherry

several years before the deed to Brown, and while the plaintiff, it seems from the evidence, was an infant. So that it is now contended that the plaintiff is estopped by a judgment entered in a proceeding to which he was not a party, and by a deed to which he was not a party and of which he had no knowledge, solely because he joined in the deed to Brown. It would seem that the fact that the plaintiff joined with Mrs. Cherry in the deed to Brown was, at least, an assertion of claim by him to an interest in the land conveyed and a recognition of such claim by Mrs. Cherry and the grantee. Otherwise, his joinder was wholly unnecessary. The defendants were strangers to that deed; they assert no title under it. If we concede that the recital in the descriptive clause was a recognition of the special proceedings and could be held an estoppel upon plaintiff to deny the existence of the special proceedings and the conclusiveness of its effect, it (94) could be taken advantage of only by the grantee in that deed, or those claiming under him. This is discussed in *Lumber Co. v. Hudson, post,* 96. In *Johnston v. Case,* 132 N. C., 795, *Walker, J.,* speaking for this Court, said: "It must be conceded that the description in one deed may be referred to in another deed for the purpose of identifying and making more certain the lines and boundaries of the land which is intended to be conveyed (*Everett v. Thomas,* 23 N. C., 252; *Reed v. Reed,* 93 N. C., 462; *Davidson v. Arledge,* 88 N. C., 326; *Hemphill v. Annis,* 119 N. C., 514), provided, as is said in the last case cited, the language used points so clearly to the explanatory deed or instrument as to make it possible to identify it, and provided further, that the deed to which reference is made is produced at the trial." This is undoubtedly the ordinary purpose, but it may, in exceptional cases, in conjunction with other facts, constitute an estoppel upon the grantor as well as the grantee. The other facts in this case all tend to contradict, instead of supporting, an estoppel against the plaintiff, and would seem to limit the reference to the special proceedings to the purpose of aiding in the description of the lot. We do not think the doctrine of election applicable to or decisive of this case; this "doctrine rests on the maxim that he who asks equity must do it, and means that where two inconsistent rights are presented to the choice of a party, by a person who manifests a clear intention that he shall not enjoy both, he must accept or reject one or the other; in other words, that one can not take a benefit under an instrument and then repudiate that instrument." Fetter on Equity, 51; *Tripp v. Nobles,* 136 N. C., 99; *Norwood v. Lassiter,* 132 N. C., 52, in which case several illustrations are given of the application of this doctrine. The facts of this case certainly do not disclose any of the circumstances essential to the application of the doctrine to the plaintiff, certainly to the extent that will in any way

inure to the benefit of the defendants. At the most, it can be said that the joinder of the plaintiff in the deed containing the references to the special proceedings, was only a recognition by him that the lots set apart to Mrs. S. A. Cherry in that proceeding were the
(95) shares of R. D. Cherry and T. A. Cherry, as tenants in common in the lands devised under the will of T. R. Cherry; and the effect of this would be simply to avoid another proceeding for partition. Accepting this as the limit of conclusiveness upon plaintiff of the recital in the deed executed by him with Mrs. Cherry the plaintiff would be tenant in common of an undivided one-half interest in the other parcels of land allotted to Mrs. Cherry; and as the defendants have, by the deed of Mrs. Cherry, become the owners in fee of her interest, it must follow that the plaintiff is entitled to be admitted into possession of the *locus in quo* as tenant in fee of an undivided one-half interest, and to an accounting for the rents and profits since Mrs. Cherry's death, and for the timber sold. The life tenant, Mrs. Cherry, could not, by her deed, authorize her vendee to commit waste, nor could the defendant, Tripp, as tenant in common of an undivided one-half interest, commit such waste as "is destructive of the estate and not within the usual legitimate exercise of the right of enjoyment of the estate." *Dodd v. Watson,* 57 N. C., 48; 17 A. & E. Enc., 671; *McPherson v. McPherson,* 33 N. C., 391; *Roberts v. Roberts,* 55 N. C., 131. Nor can we see, as intimated by his Honor, how plaintiff's joining with Mrs. Cherry in the deed to Brown, with its reference to the special proceedings, was a ratification by him, not only of the land set apart to Mrs. Cherry as the part she was entitled to under the deed of R. D. Cherry and the will of T. A. Cherry—her only sources of title to any interest—but also that she was the owner in fee thereof and that he, the plaintiff, became divested of all interest devised to him under the will of T. A. Cherry. We can not perceive any element of ratification in this act further than we have already suggested as its ultimate limit. If we concede that plaintiff's act was a recognition of the partition proceedings, to the extent of the allotment to Mrs. Cherry as the shares of R. D. Cherry and T. A. Cherry, the plaintiff, upon the death of Mrs. Cherry, became entitled as tenant in common to an undivided one-half interest in the lands so allotted, the other tenants in common being those claiming under Mrs. Cherry as the assignee of R. D. Cherry. This tenancy in common extended to each separate tract unless, as in the case of the lot sold to Brown, the plaintiff had joined in a deed conveying it. This must be true regardless
(96) of, and unaffected by, the value of any particular tract. There has been no partition by deed or otherwise between those claiming under Mrs. Cherry, as the assignee or vendee of R. D. Cherry, and the

plaintiff, as the devisee of the fee of the interest of T. A. Cherry under his will. For the reasons given, the judgment of nonsuit will be set aside and the action further proceeded in accordance with the rights of the parties.

Reversed.

Cited: *Vick v. Wooten,* 171 N. C., 121, 122.

JOHN L. ROPER LUMBER COMPANY v. SAM HUDSON, E. T. BENDER ET AL.

(Filed 29 September, 1910.)

1. Foreign Wills—Registration—Certificates—Sufficiency.

In this case the record and certification by the Orphan's Court, of Baltimore, having jurisdiction to admit wills and testaments to probate, is sufficient under Revisal, 3135, and it will be admitted to probate and registration in this State, though the pages of the manuscript exemplified copy are not orderly arranged.

2. Mortgagor and Mortgagee—Cancellation of Record—Estoppel.

A mortgage deed passes the title to the lands mortgaged which is defeasible by the subsequent performance of the conditions of the mortgage, and the entry of satisfaction on the margin of the page of its registration, by the proper person, is conclusive of the fact of the discharge of the mortgage and its satisfaction as to strangers to the mortgage.

3. Same—Estoppel by Deed—Heirs at Law—Evidence.

In an action of trespass the plaintiff and defendant claimed title through one H., the plaintiff through mesne conveyances, and the defendants as widow, and her son and heir at law. The plaintiff introduced a mortgage deed from one R. to said H. reciting that it was of a tract of land deeded by said H. to him, the mortgagor; and evidence that thereafter, for several years R. was in actual possession and then conveyed it to D., in plaintiff's chain of title, and a few days thereafter H. made an entry on the margin of the page whereon the mortgage was recorded reciting the cancellation of the mortgage by the mortgagor's giving a deed to said D., and that thereafter H. recognized the title of D. *Held,* evidence as tending to show that H. had sold and conveyed the *locus in quo* to R., received a mortgage to secure the purchase price, which he had cancelled on the margin of the registration book upon satisfaction from the proceeds of the sale by R. to D., the entry of satisfaction of record being conclusive on defendants claiming as widow and heir at law of H.

APPEAL from *Peebles, J.,* at Spring Term, 1910, of JONES.

The issues, with the responses of the jury, were as follows:

1. Is the plaintiff the owner of the lands described in the complaint? Answer: Yes.

2. Did the defendant, E. T. Bender, trespass on said lands? Answer: Yes.

3. What damages is plaintiff entitled to recover of the defendant, E. T. Bender? Answer: $23.53½.

The defendant, Sam Hudson, died pending the action and before trial, and his widow and son, his only heir at law, were made parties. It was admitted that the trespasses charged against Bender were committed by him as agent of Sam Hudson. In deraigning title, the plaintiff offered a paper purporting to be the last will and testament of W. T. Dixon, who died domiciled in Baltimore, Md., where his will was admitted to probate by the decree of the Orphans' Court of that city; it was attested by three witnesses, and the proof of its execution was taken by the register of wills of that court, in a form substantially similar to the method prescribed by the statutes of this State. An exemplified copy of the will and probate was offered for probate in Jones County, but it was improperly done. The will was probated in Baltimore on 25 August, 1904, and filed in the clerk's office of Jones 18 November, 1908. When this will, as recorded in Book of Wills of Jones, was offered in evidence, upon objection by defendants, his Honor permitted the clerk *nunc pro tunc* to order its probate in proper form, and it was received over defendants' objection. The plaintiff also offered a mortgage deed duly recorded in Jones County, dated 4 October, 1883, by Randolf Harris and wife to Samuel Hudson, conveying the land in controversy to secure an indebtedness evidenced by notes aggregating seven hundred dollars. After describing the land,
(98) the mortgage contained this language: "It being all of the Thomas Hall tract of land deeded to me in a deed made to me this day by S. Hudson." The plaintiff proved and offered the following writing on the margin of the book of registration of the mortgage: "This mortgage is discharged by the mortgagor giving a deed to W. T. Dixon & Bro., the present owners of the mortgage and notes described therein. 6 May, 1889. Samuel Hudson. Witness, J. A. Smith, Reg."

The deed from Randolf Harris to W. T. Dixon & Bro. was offered in evidence, dated 19 April, 1889, and was registered on 21 May, 1889. The plaintiff offered declarations of Samuel Hudson, tending to show a recognition of Dixon's title, which were admitted over defendants' objection. No deed from Samuel Hudson was offered in evidence. The defendants offered evidence of deeds antedating any of the deeds offered by plaintiff, placing the title in Samuel Hudson, the last one dated 19 March, 1871. The plaintiff offered evidence tending to show possession by Harris from the date of his purchase to his sale to Dixon, and

then by tenants of Dixon to his death, and by other mesne holders of the title to the plaintiff and its possession up to the bringing of this action. The acts constituting the alleged trespass were admitted. The defendants offered evidence to show that Hudson was indebted to Dixon and transferred notes sufficient to secure his indebtedness, and that the indebtedness was paid by the proceeds of the sale of lumber cut from the land. The evidence was excluded, and defendants excepted. Judgment was rendered upon the verdict for plaintiff, but the right of dower of the widow of Samuel Hudson was preserved. The defendants excepted and appealed.

Moore & Dunn and Loftin, Varser & Dawson for plaintiff.

Simmons, Ward & Allen, Thos. D. Warren, and P. M. Pearsall for defendants.

MANNING, J., after stating the case: One of the exceptions seriously argued before us was to the admission in evidence of the will of W. T. Dixon. We have carefully examined the record and certification of its probate in the Orphans' Court of Baltimore, the court having jurisdiction to admit wills and testaments to probate, and though the pages of the manuscript exemplified copy are not orderly (99) arranged, yet an examination discloses every fact required by section 3133, Revisal, to entitle the will to be admitted to probate and record in this State. *Roscoe v. Lumber Co.*, 124 N. C., 42. The older decisions, as *Drake v. Merrill*, 47 N. C., 368, do not apply, for the reason that the statutes are not the same. The will was executed according to the laws of this State, and the probate substantially made according to our form, and that fact appears in the certified probate or exemplification of the will. We can not sustain this exception. The plaintiff, admitting the title to have been in Samuel Hudson and producing no deed from him, offered evidence which it contends amounts to an estoppel upon his heirs at law and his agent, who claim title under Samuel Hudson. The other defendant is the widow of Hudson, who claims no title to the fee in the land, but who is entitled to her dower therein. The question presented by these exceptions is, Do the facts proven, taken together or singly, amount to an estoppel. These facts are that Samuel Hudson took a mortgage from Randolf Harris, in which was the recital: "It being all of the Thomas Hall tract of land deeded to me in a deed made to me this day by S. Hudson"; and that thereafter, for several years, said Harris was in the actual possession of said land; that he conveyed the land to Dixon for the consideration of $700, on 19 April, 1889, and in a few days thereafter—on 6 May, 1889—the said Samuel Hudson made the following entry on the record of the registration of the mortgage: "This mortgage is discharged by

the mortgagor giving a deed to W. T. Dixon & Bro. the present owners of the mortgage and notes described therein"; and after that time the evidence tended to show that Hudson recognized the title to be in Dixon. The mortgage by Harris to Hudson was a conveyance to him of the legal title. "In some of the States a mortgage is held by statutory regulation or judicial construction to be simply a lien, leaving the legal estate in the mortgagor. In North Carolina and many other States, the common law prevails, and the mortgage deed passes the legal title at once, defeasible by subsequent performance of its conditions." *Hinson v. Smith,* 118 N. C., 503; *Williams v. Teachey,* 85 N. C., 402; *Modlin v. Ins.* Co., 151 N. C., 35, and cases cited. And this is true not-
(100) withstanding the statute has prescribed simple methods of acknowledgment of satisfaction which restores the legal title in the mortgagor, other than by deeds of defeasance. In *Smith v. Fuller,* 152 N. C., 9, it is held by this Court that the entry of satisfaction on the margin of its registration, by the proper person, is conclusive of the fact of the discharge of the mortgage and its satisfaction as to strangers to the mortgage. In *Fort v. Allen,* 110 N. C., 183, this Court, in discussing estoppels by recitals in deeds, quotes with approval the following language of *Henderson, C. J.,* in *Brinegar v. Chaffin,* 14 N. C., 108: "Recitals in a deed are estoppels when they are the essence of the contract; that is, where, unless the facts recited exist, the contract, it is presumed, would not have been made." It is inconceivable, unless it were true, that Hudson would have accepted a deed from Harris for land claimed by him, Hudson, containing a recital that he, Hudson, had conveyed the same land on the same day to Harris, and accepted it as security for $700—evidently the whole or a part of the purchase price. It is evident that the conveyance from Hudson to Harris was the basis of the contract, and without such a conveyance, it is fair to assume the mortgage deed would not have been made. "Such, we think, is the necessary inference to be drawn from the recital in the deed." This inference is made conclusive by the fair interpretation of the entry of satisfaction of the mortgage deed. From that, it is evident that Hudson had previously assigned the notes secured by the mortgage to Dixon, and recognized the discharge of those notes and the satisfaction of the condition of the mortgage by the deed of conveyance from Harris to Dixon. Harris settled the notes by making a deed to the land, and Hudson was satisfied. *Raby v. Reeves,* 112 N. C., 688; 2 Herman on Estoppel, secs. 636, 917. In 2 Herman on Estoppel, sec. 926, the principle is thus stated: "Where a person takes from another a mortgage of lands, the record title, which is in himself at the time such mortgage is executed, and in good faith assigns such mortgage, and it is foreclosed, neither such mortgagee nor his representatives or privies can set up

such prior title in him to defeat the mortgage." *Rogers v. Cross,* 3 Chand., 34; *Carver v. Jackson,* 4 Pet., 1 (pp. 83-88). In this action, Samuel Hudson was the original defendant; he died pend- (101) ing the suit and his widow and only heir at law were made parties; they claim as privies to the title of Samuel Hudson—not by any adverse or paramount title. And we think it is clear, from the authorities cited, they are estopped—as Samuel Hudson was estopped—by the recitals in the deed, by the entry on the record of satisfaction of the mortgage deed as a recognition of Harris' title and his conveyance to Dixon & Bro. of the land. The right of the widow of Samuel Hudson to dower is preserved to her in the judgment of his Honor. Having carefully examined the other exceptions taken at the trial, we do not think they can be sustained.

No error.

Cited: Vick v. Tripp, ante, 94; *Jones v. Williams,* 155 N. C., 192.

MARY A. TAYLOR ET AL. v. M. W. CARMON, ADMINISTRATOR OF GEORGE WILCOX ET AL.

(Filed 29 September, 1910.)

1. Notes, Negotiable—Equities—Notice—Due Cause.

While our statute authorizes the assignment of things in action and allows the assignee to sustain a demand therefor in his own name, it must be "without prejudice to any set-off or other defense, existing at the time of, or before notice of, the assignment," making an exception of "negotiable promissory notes or bills of exchange transferred in good faith, and upon good consideration before due."

2. Same—Offsets.

In an action brought to cancel certain notes secured by mortgages, the plaintiff alleged that the notes were without valuable consideration and had been paid to the mortgagee with certain money and personal property. It appeared that the defendant's intestate W., the holder of the mortgages, was indebted to one M. and had transferred the mortgages as security to this debt. There was no evidence that plaintiff had notice or knowledge of this last assignment of the notes and mortgages, or that M. was a holder in due course. The case was referred, and the referee found for the defendant, but the jury substantially reversed the findings of the referee on issues duly submitted and found that the B. note was paid to W. before notice of transfer, and that the value of personal property, etc., of plaintiff received by him was in a greater sum than the amount of the mortgage notes. *Held,* (1) The value of plaintiff's property received by the original

mortgagee should be applied to the mortgage notes held by the administrator of W. with judgment against the administrator for the balance; (2) as M. was not a holder in due course, his note was taken subject to the equities existing between the plaintiff and W.

(102) APPEAL from *Peebles, J.*, at the April Term, 1910, of CRAVEN.

On exceptions to a report of referee and on issues submitted to a jury, there was judgment for plaintiff, and defendant excepted and appealed.

W. D. McIver for plaintiff.
Guion & Guion for defendant Meadows.
Moore & Dunn for defendant Carmon.

HOKE, J. The court has carefully considered the record and testimony presented and finds no reversible error to appellant's prejudice.

It appears that plaintiff, having executed three mortgages on her land, one to T. Burke for $300 acquired by George W. Wilcox, intestate of defendant Carmon, one to Wilcox himself for $221 and the third to said Wilcox for $190, instituted this action alleging that the two mortgages made direct to Wilcox were for accommodation of said intestate and without valuable consideration, and that all of them had been much more than paid and satisfied by certain personal property delivered by plaintiff to said Wilcox for the purpose in the course of the dealings between them, and to an amount of not less than $1,000.

Defendant Carmon, administrator of George Wilcox, answered denying payment and denying the other allegations and averring that the amounts secured by said mortgages were still due, and alleged that plaintiff owed other sums to her intestate to an amount of $380.

Defendant Jane Meadows, administratrix of J. A. Meadows, answered, denying plaintiff's allegations and alleged further that said mortgages had been acquired by her intestate for full value, and were held by him to secure certain sums due from George Wilcox and that no part
(103) of same had been paid. The cause was referred, according to the course and practice of the court, and the referee made report finding that the amounts secured by the mortgages were due and unpaid and that over and above said amounts there was a small balance still due from plaintiff to the intestate Wilcox.

The court sustained several exceptions to said report, and on issues raised by specific exceptions, the jury further rendered the following verdict:

"1. Was the Burke bond and mortgage of $300 paid to George S. Wilcox before notice of transfer? Answer: No.

"2. What amount have plaintiffs paid on the Burke $300 note and mortgage? Answer: $150.

"3. What is the value of the personal property received and had by George S. Wilcox from plaintiffs as alleged in the complaint? Answer: Eight hundred and one dollars and sixteen cents."

On this verdict and the rulings of the court sustaining plaintiff's exceptions to the report and which together substantially reversed the conclusions of the referee, the court gave judgment that the sum established in plaintiff's favor to the extent required should be applied in the discharge and satisfaction of the mortgages and that plaintiff have and recover the remainder of said amount of defendant Carmon, administratrix of Wilcox. There is no evidence in the record that plaintiff had either knowledge or notice of the assignment and transfer of these mortgages to J. A. Meadows, the intestate, nor is there any claim or evidence tending to show that said Meadows was a holder in due course of the notes which the mortgages were given to secure, and while our statute authorizes the assignment of things in action, allowing the assignee to sustain a demand therefor in his own name, the law also provides as follows:

"In the case of an assignment of a thing in action the action by the assignee shall be without prejudice to any set-off or other defense, existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due." The mortgages therefore were held by the intestate Meadows subject to any set-off or other defense existing in plaintiff's (104) favor against the intestate Wilcox and the sum of $801.16, established by the verdict to the extent required, was properly applied to their satisfaction. This being true, the many exceptions noted to the rulings of the court on the question of the transfer of these mortgages to J. A. Meadows become immaterial. As heretofore stated there is no sustainable objection shown to the validity of the trial. The only one that could be seriously urged was to the exclusion of certain items of charge against plaintiff appearing on the books of intestate, Wilcox. The judge below finds that these books were never offered in evidence, and if it were otherwise, the proof concerning them was very far from meeting the conditions required for the admission of entries in a party's own favor.

No error.

W. H. HILLIARD, ADMINISTRATOR OF Y. Z. NEWBERRY ET AL., v. A. O. NEWBERRY ET AL.

(Filed 29 September, 1910.)

1. Mortgages—Notes—Partnership—Retiring Partner—Indemnity—Definite Liability—Loss—Right of Action.

When a collateral obligation is in strictness one of indemnity an action at law will not lie unless and until some actual loss or damage has been suffered; but when the obligation amounts to a binding agreement to do or refrain from doing some definite, specific thing materially affecting the rights of the party an action will presently lie for breach of such agreement, and no loss or damage need be shown prior to its commencement.

2. Same—Notice—Demand—Waiver—Written Instrument—Parol Evidence.

A retiring partner from the firm sold his interest to his copartner and received in payment therefor certain tracts of land on which there was a debt secured by a mortgage. In order to secure the vendor partner from loss by reason of the mortgage, the vendee gave his note in a certain sum, with interest, payable at a fixed time, duly dated, signed and sealed. Upon default of the vendee partner, under the term of the mortgage the vendor partner brought his action on the note. *Held*, (1) The note was to pay a definite sum at a specified time, and it was unnecessary for plaintiff, to maintain his action on the note, to show loss or damage by reason of the mortgage it was given to indemnify against; (2) failure to give notice of loss suffered under the mortgage does not affect plaintiff's right of action, but only his right to presently sue without first making demand, and this requirement was waived by a general denial of liability; (3) evidence of a contemporaneous verbal agreement that time of payment could be extended was inadmissible as contradictory to the written note definitely fixing the time thereof.

(105) APPEAL from *Peebles, J.*, at June Term, 1910, of CARTERET.

The action was instituted on 2 February, 1910, and the complaint of plaintiffs duly verified contained allegations to the effect that on the 27th day of January, 1908, plaintiff's intestate and defendant A. O. Newberry dissolved partnership theretofore existent between them, defendant A. O. Newberry buying out the interest of the intestate, and in payment for such interest conveyed to plaintiff's intestate three tracts of land on which there was a mortgage, duly registered and now held by codefendant M. Hahn. This mortgage, annexed to and made a part of the complaint, showed that it was given to secure a sum of money on which there was a balance now due and owing to defendant Hahn, as stated; that at said time in order to secure the intestate against said mortgage debt, the defendant A. O. Newberry executed and delivered to intestate his note under seal as follows:

"$3,000. On or before the first day of January, 1909, I promise to

pay to Y. Z. Newberry $3,000, with interest from date at the rate of 6 per cent per annum, for value received.

"This note is given to secure Y. Z. Newberry against any loss which might arise from the amount now due Meyer Hahn, and with the understanding that if this note is paid when due it shall be returned as though never given.

"Given under my hand and seal, this 27 January, 1908.

A. O. NEWBERRY (Seal.)"

There was a balance due on said mortgage which defendant (106) had failed to pay. Before bringing this action plaintiff, administrator, had demanded payment and settlement of said note and mortgage of defendant A. O. Newberry, and he had failed to pay same. Replying to defendant's answer, there was further allegation to the effect that A. O. Newberry was insolvent and his property encumbered by specific liens thereon to different persons, and that judgment on the note was necessary to the preservation and protection of plaintiff's rights under the contract, etc. Defendant A. O. Newberry answered admitting the dissolution of partnership and purchase of the assets, the conveyance of the realty in part payment and the execution of the note declared on, and admitted further that the mortgage had not been paid and that a balance was still due thereon. Denying liability, defendant further alleged and claimed in effect—

1. That the obligation was strictly one of indemnity and that no action thereon arose to plaintiff until he had suffered actual loss or damage by reason of the mortgage.

2. That no definite time was set for paying off the mortgage, and that it was understood and agreed at the time the note was given that if A. O. Newberry was not in a position to pay the mortgage debt when due he was to be at liberty to obtain an extension thereon from Hahn and have the benefit of same in respect to the plaintiff's present claim; that defendant had obtained such extension and was gradually paying off the mortgage and there was no likelihood that plaintiff would ever suffer damage by reason thereof.

3. That no notice of loss or damage actually suffered had been given before action brought.

On perusal of the pleadings and motion duly made the court gave judgment for plaintiff on the note to be discharged on "production and surrender of said mortgage duly paid and satisfied of record" or on payment of amount due thereon, principal and interest to plaintiff and costs of present action, and defendant excepted and appealed.

D. L. Ward, Moore & Dunn, Guion & Guion, and Loftin, Varser & Dawson for plaintiff.

Abernathy & Davis for defendant.

(107) HOKE, J., after stating the case: On the question presented the authorities are to the effect that when a collateral obligation is in strictness one of indemnity, an action at law will not lie unless and until some actual loss or damage has been suffered; but when the obligation amounts to a binding agreement to do or refrain from doing some definite, specific thing materially affecting the rights of the parties, an action will presently lie for breach of such an agreement and no damage need be shown. Even on a bond of strict indemnity, however, while an action at law would not lie until damage suffered, our own decisions under the old system were to the effect that a person could invoke the aid of the equity courts when the facts disclosed that such action required for the preservation and maintenance of his rights under the contract. *Burroughs v. McNeill,* 22 N. C., 297. Recurring to the principle first stated in 16 A. & E., 179, it is said: "Where the promisor has undertaken to do a particular act or make a specific payment as well as to indemnify the promisee the contract is broken and a recovery for such breach may be had as soon as the time for doing such act or making such payment has arrived and the promisor has failed to perform his obligations and in such case it is no defense that the promise has not been damnified." In Pingrey on Suretyship and Guaranty the author, in speaking to the question, section 182, says: "It is settled that no action can be maintained by the surety upon an implied promise, if the principal has made default, without first making payment of the debt, except where the principal has broken his promise to do or refrain from doing some particular act or thing or to save the surety from some charge or liability. Thus where the maker of a note agrees with the surety to pay the amount of the note to the payee on a given day, but makes default, the surety can recover from his principal without first making payment of the note.

"In like manner, where a partnership is dissolved by one partner leaving the firm with the debts outstanding, and a new firm agrees with the outgoing partner to pay the debt of the old partnership and save him harmless from any costs, trouble or liability on account of (108) the same, upon default of the new firm, the partner who withdrew can recover against the new firm without first paying such debts. When an obligation to do a particular thing or to pay a debt for which the covenantee is liable, or to indemnify against liability, is broken, the right of action is complete upon the principal's failure to do the particular thing he agreed to perform or to pay the debt or discharge the liability.

"If the contract be one of indemnity simply, and nothing more, then damages must be shown before the party indemnified is entitled to recover; but if there be an affirmative contract to do a certain act or to

pay a certain sum or sums of money, then the surety can sue the principal before paying the debt to the creditor." And the authorities cited fully support this statement of the doctrine, many of them being on facts very similar to those presented in the present case. *Dorrington v. Minnick,* 15 Neb., 397-403; *Wilson v. Stillwell,* 9 Ohio St., 467; *Lathrop v. Atwood,* 21 Conn., 117; *Kohler v. Matlage,* 72 N. Y., 259; *Hall v. Nash,* 10 Mich., 303; *Loosemoore v. Radford,* 9 M. & W. Exch., 656.

In *Stillwell v. Wilson, supra,* the digest appears in the official report as follows: "Where S., a retiring member of a firm, took from his late partner T. a bond, with W. as surety thereon, conditioned that T. would pay all the debts of the late firm, which condition was broken: *Held,* (1) That S., without having first paid any of said debts, or been otherwise specifically damnified, is entitled to recover on said bond against the obligors therein, to the amount of such debts remaining unpaid. (2) In such action it is proper that the creditors of the firm should be made parties, and that the court should, in the judgment, authorize the application of the amount recovered to the payment of the debts of the firm in discharge of the judgment."

And in *Loosemoore v. Radford,* the doctrine is stated in the headnote as follows: "The plaintiff and defendant, being joint makers of the promissory note, the defendant as principal and the plaintiff as surety, the defendant covenanted with plaintiff to pay the amount to the payee of the note on a given day, but made default. Held, in an action on the covenant, that the plaintiff was entitled, though (109) he had not paid the note, to recover the full amount of it by way of damages."

In the present case while the note sued on was undoubtedly given to secure plaintiff's intestate from any loss or liability by reason of the mortgage, it contained, further, the promise to pay a definite sum by a stated time, and we concur with the judge below in the opinion that under the authorities cited and the principle established and sustained by them, the plaintiff was entitled to judgment. And we agree with his Honor also in the position that no valid defense is set up in defendant's answer, and no issue raised in bar of plaintiff's demand. As heretofore stated, the obligation sued on is not in strictness one of indemnity simply, but contains in addition a positive promise to pay a definite sum, and at a specified time, and entitles the plaintiff to judgment according to the tenor of the bond. The claim that there was a contemporaneous oral agreement to the effect that the time could be further extended is in direct contradiction to the written stipulation of the agreement, and under several recent decisions of the court such a position was not open to defendant. *Woodson v. Beck,* 151 N. C., 145; *Walker v. Cooper,* 150

N. C., 129; *Walker v. Venters,* 148 N. C., 388; *Mudge v. Varner,* 146 N. C., 147; *Bank v. Moore,* 138 N. C., 529.

On the question of notice raised by defendant, it will be observed that there is no denial in the answer "that before bringing this suit plaintiff administrator demanded payment and settlement of the note and mortgage," but the allegation is "that before bringing this suit, defendant had not been notified of any loss or damages suffered by plaintiff." The position of defendant in regard to the necessity of notice before action brought applies to collateral obligations strictly of indemnity, and has no bearing when the suit is on an obligation which contains in addition binding stipulations to do or refrain from doing specific things, and on breach of which, as we have endeavored to show, neither actual loss or the notice of it is required. An examination of the authorities relied on by defendant here, notably *Cox v. Brown,* 51 N. C., 100; *Sherrod v. Woodard,* 15 N. C., 360, and others, will disclose too (110) that even on bonds of indemnity strictly, the failure to give notice was held not to affect a plaintiff's cause of action at all, but only his right to presently sue without first making demand, and in cases of that character a demand is generally waived by an answer denying any and all liability on part of defendant. The doctrine last referred to was approved by this court in a recent case, *Smith v. French,* 141 N. C., 1, and its application would in any event deprive defendant of defense on that ground. There is no error and the judgment below is

Affirmed.

Cited: Bizzell v. Roberts, 156 N. C., 275; *Supply Co. v. Lumber Co.,* 160 N. C., 432.

POLLY NEWBY ET AL. V. SHADE EDWARDS.

(Filed 29 September, 1910.)

Deeds and Conveyances—Grantee—Middle Initial—Identity of Grantee—Importance.

The father purchased land and had the conveyance made to his unborn child, he and his wife, Julia A., joining in the deed of the vendor, and for the purpose of the conveyance the child was named Julia C. The wife died before childbirth. In an action of ejectment brought by the heirs at law of the deceased wife against the husband, upon an issue as to whether the wife or the child was intended as the grantee: *Held,* That the middle initial was material and important, being upon the question of identity of the grantee; that a charge to the contrary would deprive plaintiff of the benefit of his testimony tending to show that the grantee was not his deceased wife.

APPEAL from *Peebles, J.*, at April Term, 1910, of CRAVEN.

Civil action in ejectment tried at April Term, 1910, Craven Superior Court, his Honor, *Judge Peebles,* presiding.

These issues were submitted:

1. Is the *feme* plaintiff the owner in fee simple and entitled to the possession of the lands described in the complaint? Answer: Yes.

2. Does defendant wrongfully withhold the possession of the land from the plaintiff? Answer: Yes.

3. If so, what damages, if any, is plaintiff entitled to recover of the defendant for wrongfully withholding possession of the (111) land from *feme* plaintiff? Answer: $2.50 for whole rent, $4.16 for plaintiff.

From a judgment for plaintiff the defendant appealed.

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

BROWN, J. The *feme* plaintiff claims the land in controversy as the heir at law of Julia, the deceased wife of defendant Shade Edwards, who died intestate without having given birth to a child.

The land was purchased by defendant from W. G. Brinson and conveyed by a deed dated 11 February, 1891, wherein said Brinson, Shade Edwards and his wife Julia A. Edwards are grantors and Julia C. Edwards grantee.

Defendant Shade Edwards testified that he was married to Julia A. Edwards in 1875, and lived with her for twenty-four years; that he had never heard her called by any other name than Julia A. Edwards; that he purchased this land from W. G. Brinson; that prior to this purchase he had made over most of his property to his wife, Julia A. Edwards, as he was a drinking man and was afraid that he might encumber his property while under the influence of whiskey; that he and his wife agreed that they would have the lot described in the complaint deeded to their unborn child, supposed to be *in esse;* that he paid the purchase money and was advised by Brinson that in order to have the deed made to an unborn child it must be named and that, thereupon, he and his wife agreed upon the name of Julia C. Edwards; that his wife Julia died and no child was ever born to them.

It further appears that thereafter the heirs of Brinson executed a deed dated 23 September, 1907, to defendant for the land. Polly Newby is one of the three heirs at law of defendant's deceased wife.

There is much other evidence in the record introduced by both parties unnecessary to refer to.

The seventh assignment of error is as follows: The court erred in

charging the jury: "If you are satisfied by the greater weight of
(112) the evidence that Julia, the wife of Shade, was sometimes called Julia Caroline and sometimes called Julia Ann, you will answer the first issue, Yes, for the plaintiff is the owner in fee simple, entitled to possession of the land described in the complaint, because the Supreme Court says the middle name is no important part of anybody's name, and the law presumes where there was a living person to take that land that that person was intended instead of somebody that had no existence." The exception must be sustained. It is true that in certain cases the initial of the second Christian name is unimportant, but this is only in such cases where the identity is certain. If there is any question as to the identity of the person the initial or "middle name," becomes very important. *Patterson v. Walton,* 119 N. C., 500; *Gibbs v. Fuller,* 66 N. C., 116; *State v. Best,* 108 N. C., 748; *Steves v. West,* 51 N. C., 50; 29 Cyc., 264, *et seq.;* 5 Words and Phrases, p. 4660; *Long v. Campbell,* 37 West Va., 665.

The instruction appears to us to make the case turn exclusively upon the proposition that defendant's wife was sometimes called Julia Ann and sometimes Julia Caroline.

Whereas the real point in the case is as to who was the real grantee in the deed of 11 February, 1891, defendant's wife Julia or their unborn child, then supposed to be in its mother's womb. If the former then plaintiff is entitled to recover a one-third interest in the lot. If the latter, then plaintiff takes nothing by her writ. This instruction further deprives defendant of the benefit of his entire testimony explaining why Julia C. Edwards, the grantee in the deed, was not his deceased wife.

It further deprives defendant of a very potent argument to the effect that the deed to Julia C. Edwards was executed by Julia A. Edwards, the wife, and that it is not likely that she would be grantor and grantee in the same deed, and engaged in the legal anomaly of making a deed to herself.

The credibility of defendant's statement, and its reasonableness, is a matter for the jury.

The matter involved is essentially one of fact to be determined by the jury under proper instructions.

New trial.

(113)

HENRY CLARK BRIDGERS v. W. W. ORMOND.

(Filed 29 September, 1910.)

Contracts—Interpretation—Questions of Law—Words and Phrases.

When the terms of a written contract are explicit its construction is for the court; and the word "*or*" of a contract to construct a railroad from F. to H. "*to a depot to be* erected within *or* adjacent to the present southern limits of H." will not be construed as "*and*," so as to require the road to be constructed to a depot to be erected "*within and* adjacent to" the town limits, for therein the substitution of a conjunctive for a disjunctive attaches a qualification that necessarily changes the terms and meaning of the contract in an essential feature.

APPEAL from *Guion, J.*, at April Term, 1910, of EDGECOMBE.

Plaintiff seeks to recover $1,120 upon the following bonds:

$1,050.

For and in consideration of the building and equipment of a permanent standard railroad from Farmville to Hookerton, N. C., to a depot to be erected within or adjacent to the present southern limits of the town of Hookerton and on the south side of Contentnea Creek, within twenty-four months from the 29th day of March, 1906, we promise to pay to Henry C. Bridgers, or order, the sum of one thousand and fifty dollars.

It is agreed and understood that this note shall be held and kept by W. W. Ormond, J. I. Beaman, J. E. W. Sugg, F. M. Taylor and B. F. D. Albritton, committee, or by either of them, as may be agreed by the others; and when said depot is erected as set out above, and said railroad is completed and equipped to within one-half mile of the Academy building in the town of Hookerton, then this note shall become due and payable, and said W. W. Ormond and others may proceed to collect the same and hold the proceeds, to be paid to said Henry Clark Bridgers when he shall have built and equipped said road and depot as set out above in first paragraph; and it is further understood and stipulated that if said Henry C. Bridgers should fail to build and equip said railroad and erect said depot by 29 March, 1908, as first set forth herein, then this note is to be null and void. (114)

Witness our hand and seal this 19 April, 1906.

W. W. ORMOND. (Seal.)
ELIAS TURNAGE. (Seal.)
Y. T. ORMOND. (Seal.)

The above change in date and time for the completion of the railroad referred to in this note was made with my knowledge and consent.

W. W. ORMOND.

The defendant W. W. Ormond executed another note, of like tenor and purport, for the sum of seventy and no-100 dollars. At close of evidence the court intimated that plaintiff could not recover, and he submitted to a nonsuit and appealed.

John L. Bridgers for plaintiff.
Y. T. Ormond for defendant.

BROWN, J. Plaintiff introduced evidence tending to prove that he had constructed, equipped and had in operation, within the time required by the contract, a permanent standard railroad from Farmville to Hookerton, N. C., to a depot erected within the town of Hookerton and on south side of Contentnea Creek. These facts are not controverted.

But it is contended that the contract requires that the depot shall be erected in Hookerton "and" adjacent to the present southern limits of the town. The learned judge below seems to have so construed the contract. We are unable to adopt such construction, as we feel unauthorized to strike out the word "or" in the contract and substitute in its place the word "and."

The one purpose of a written contract is to make certain what the contract is. "Words must not be forced away from their proper signification to one entirely different, although it might be obvious that the words used, either through ignorance or inadvertence, express a very different meaning from that intended." 2 Parson Cont., 7. The terms being explicit, the construction is for the court. *Wilson v. Cotton Mills,* 140 N. C., 52; *Banks v. Lumber Co.,* 142 N. C., 49.

(115) In the phrase under consideration an important word is the disjunctive "or." We have no more right to strike it out than we have to strike out the word Hookerton.

To substitute the conjunctive "and" for it in the contract is not warranted by either the uses of language or the context of the writing. There have been such changes in the words of a written instrument when clearly demanded by the context. Such a substitution would put upon the plaintiff in this case a double liability, and a condition he did not contract for. The substitution of a conjunctive for a disjunctive attaches such a qualification that of necessity changes the terms and meaning of the contract, and in effect materially alters it in an essential feature.

The real purpose of the contract was to secure the building of a standard railroad from Farmville to Hookerton, and that is the only consideration expressed upon its face. One of the termini was to be a depot erected in Hookerton, or adjacent to its southern limits. There is nothing doubtful or ambiguous in the words used. They plainly confer upon the plaintiff the optional right to erect the depot in Hookerton, or if not in Hookerton, then adjacent to its southern boundary.

It is admitted that the plaintiff has constructed the depot and located it within the corporate limits of Hookerton.

His Honor should have instructed the jury that upon the uncontradicted facts as presented in this record the plaintiff is entitled to recover.

New trial.

HOKE, J., concurs in result.

Cited: Gilbert v. Shingle Co., 167 N. C., 289; *Finger v. Goode*, 169 N. C., 73; *Potato Co. v. Jenette*, 172 N. C., 5.

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(116)

CORNELIUS MITCHELL v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 29 September, 1910.)

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

It appearing that plaintiff's intestate, deaf and dumb, endeavored to rush across defendant's track in front of a rapidly approaching train and was killed, and that the approach of the train could readily have been seen by him when within eleven feet of the track, his contributory negligence bars his recovery.

2. Contributory Negligence—Evidence—Plaintiff's Proof—Nonsuit.

Contributory negligence is a matter of defense, but a motion as of nonsuit upon the evidence should be allowed when plaintiff's own proof establishes this defense.

APPEAL from *Cooke, J.*, at January Term, 1910, of FRANKLIN.

Action to recover damages for personal injury. Defendant moved to nonsuit; overruled; exception. There was a verdict for plaintiff and from judgment rendered defendant appealed.

The facts are sufficiently stated in the opinion.

Spruill & Holden for plaintiff.
Murray Allen for defendant.

BROWN, J. All the evidence tends to prove that plaintiff, a deaf and dumb negro man, was struck by fast passenger train sixty-six while crossing defendant's tracks at Youngsville; that plaintiff spends much of his time around defendant's station there, and is familiar with train schedules. The evidence is plain to the effect that plaintiff stepped from behind a box car and started across track in front of a fast coming train without looking, or if he did look he did not heed the approach of the

train and endeavored to rush across in front of it. There was eleven feet space between the box car and the main line track, and a mere glance of the eye along the track would have discovered the train.

(117) To enter on a track and attempt to cross it under such circumstances is such contributory negligence as bars recovery.

This has been decided so often that it should be considered as settled. *Cooper v. R. R.*, 140 N. C., 209; *Royster v. R. R.*, 147 N. C., 350; *Daily v. R. R.*, 106 N. C., 301; *Beach v. R. R.*, 148 N. C., 153; *Allen v. R. R.*, 141 N. C., 340; *Champion v. R. R.*, 151 N. C., 197.

It is also equally well settled that while contributory negligence is a matter of defense, it is proper to nonsuit plaintiff upon his own evidence when the proof of such defense is thereby fully made out. *Strickland v R. R.*, 150 N. C., 4; *Baker v. R. R.*, 150 N. C., 562.

The motion to nonsuit is allowed.

Reversed.

Cited: Coleman v. R. R., post, 327; *Fann v. R. R.*, 155 N. C., 144, 145; *Penninger v. R. R.*, 170 N. C., 476; *Davidson v. R. R.*, 171 N. C., 636.

C. L. PERRY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 29 September, 1910.)

1. Removal of Causes—Injury to Realty—Venue.

An action against a railroad company to recover damages for burning land is a local one in its nature and triable in the county in which the injury occurred (Revisal, sec. 419), and upon demand in writing (Revisal, sec. 425) should be removed to that county if brought in a different one.

2. Same—Railroads.

The Acts of 1905, ch. 367, amending the Code, sec. 192 (Revisal, sec. 424), providing that actions against railroads may be tried in the county where the plaintiff resided at the time the cause of action arose, expressly excludes actions for injury to lands by making it apply to other cases than those specified in the previous sections, and does not repeal or modify section 419 in regard to the venue of actions of this character, it being for damages for personal injuries.

3. Same—Appeal and Error.

An appeal directly lies from the refusal of the trial judge to remove a cause to the county in which injury to the plaintiff's land, the subject of the action, was committed.

PERRY *v.* R. R.

APPEAL from *D. L. Ward, J.*, at May Term, 1910, of WILSON. (118) The facts are stated in the opinion.

Daniels & Swindell for plaintiff.
Murray Allen for defendant.

WALKER, J. This action was brought in the Superior Court of Wilson to recover damages for an injury to land situated in Bladen. Plaintiff alleged that the defendant had negligently started a fire near its track which spread over his land and burned the timber thereon. The defendant demanded in writing, as required by Revisal, sec. 425, that the case be removed for trial to the proper county, that is, to the county of Bladen. This motion, called a demand in the statute, was refused and defendant appealed.

With regard to their venue, actions are divided into local and transitory. A local action is one where the principal facts upon which it is founded are of a local nature, an action, in other words, the cause of which could have arisen only in some particular county. Actions to recover damages for injuries to land are classified as local in their nature, because, generally speaking, the wrongful act or the damage to the land could only have been done in the county where the land, or some part thereof, is situated. 22 Enc. Pl. & Pr., 776. The Revisal, sec. 419, provides as follows: "Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial in the cases provided by law: 1. For the recovery of real property or of any form of such right or interest, *and for injuries to real property.*" The negligent burning of timber on land is an injury to real property within the meaning and intent of that section (*R. R. v. Foster,* 107 Ind., 430; *R. R. v. Weeks,* 81 Tenn., 148), and by its provisions an action to recover damages for such an injury should be tried in the county where the injury was committed, and where it is brought elsewhere the court will remove it for trial to the proper county, upon application duly made. We have recently so decided in a case similar to this one. *Cooperage Company v. Lumber Company,* (119) 151 N. C., 455. But the plaintiff contends that by Laws 1905, ch. 367, amending the Code, sec. 192 (Revisal, sec. 424), it is provided that actions against railroads may be tried in the county where the plaintiff resided at the time the cause of action arose, and, therefore, that the action was properly brought in Wilson County, and should be tried there, and he relies on *Propst v. R. R.,* 139 N. C., 397, to support his contention. The cause of action in that case was transitory, not local, in its nature, as is the cause of action in this case, and the mean-

ing of the proviso to section 424 is that actions against railroads, where not otherwise provided, shall be brought as therein prescribed. This is clear from the language of section 424. It is provided in the preceding sections where actions shall be tried, having reference to the nature of the causes of action, and without reference to the character of the defendant as being a natural or artificial person, and then provision is made for the trial of actions against public officers, executors and administrators, domestic and foreign corporations. It is then provided by section 424 that in "all other cases" the action shall be tried as therein specified, with a different provision as to actions against railroads. We held in *Propst v. R. R.*, that the proviso applied to all railroads, whether resident or non-resident, and we necessarily referred to an action of the kind then under consideration. It was not intended to decide, and we did not decide, that the proviso repealed section 419, or even modified it. The expression, "in all other cases," *ex vi termini,* excludes the idea that the Legislature intended the proviso to apply to an action against a railroad for the recovery of land, or any injury thereto, so that such an action will not be subject to the provisions of Revisal, sec. 419. When an action is brought for the recovery of real property, or any estate or interest therein, or for injuries thereto, the place of trial is determined by the nature of the cause of action, which is local, and not by the fact that one of the parties, the defendant, happens to be a railroad, and, therefore, it can make no difference who the parties are, whether natural or artificial persons. The proviso of section 424 is restricted to the kind of actions to which that section applies, (120) and was not intended to except actions against railroads from the provisions of section 419 and 420. In *McCullen v. R. R.*, 146 N. C., 568, decided in 1908, it was conceded in the opinion that an action for a penalty must be brought in the county where the "cause of action or some part thereof arose," under section 420 of the Revisal. This would not be so unless the proviso to section 424 is to be construed as we have said in this case it should be. We held, it is true, in *Propst v. R. R.*, that it embraced railroad corporations, foreign and domestic, and to that extent created an exception to section 423 relating to such corporations, as to all causes of action coming within the provisions of section 424, to which it is an amendment, and this is so because the language of the amendment was so comprehensive as to take in both foreign and domestic railway corporations. The language of the opinion must be read with reference to the particular nature of that action, which was brought to recover damages for an injury to the person.

This appeal was properly taken from the order refusing to change the place of trial. *Connor v. Dillard,* 129 N. C., 50.

The court erred in refusing to grant the application for a removal of the case to the proper county for trial.

Reversed.

Cited: Rackley v. Lumber Co., post, 173; *Forney v. R. R.,* 159 N. C., 158; *Cedar Works v. Lumber Co.,* 161 N. C., 606; *Brady v. Brady, ibid.,* 326.

H. A. ROBERSON, ADMINISTRATRIX, v. THE GREENLEAF JOHNSON LUMBER COMPANY.

(Filed 29 September, 1910.)

1. Domestic Corporations—Principal Office—Foreign Office—Venue.

While a domestic corporation may be authorized to maintain an office at a place beyond the State, at which some corporate meetings may be held, it is also required to maintain a principal office in some county in this State, which fixes its place of residence therein for the purpose of suing and being sued.

2. Interpretation of Statutes—Domestic Corporations—Remedial—Venue.

The purpose of Revisal, sec. 422, was not to change the provisions of section 424, or to deny plaintiff's right to sue a domestic corporation in the county of his residence; but to remedy the defect of said section 424 so that a domestic corporation can be sued in the same venue as an individual, excepting railroads in certain specified instances, and where the venue is fixed by sections 419, 420, 421.

3. Same—Railroads.

In an action by plaintiff for damages arising from a negligent killing of her intestate, it is immaterial to consider for the purposes of removal of the action, whether the defendant, operating a steam railroad for hauling its own logs, was a railroad within the meaning of Revisal, sec. 424; it appearing that both plaintiff and her intestate were residents of the county in which the action was brought at the time the cause of action accrued, and that plaintiff was a resident thereof at the time of bringing the action.

APPEAL from *Guion, J.,* at March Term, 1910, of MARTIN. (121)

Motion of defendant heard by *Guion, J.,* at March Term, 1910, of MARTIN, for a change of venue.

The plaintiff instituted this action against the defendant, a corporation, in Martin County, to recover damages for the negligent killing of her intestate, J. W. Roberson, while in the service of the defendant. The injuries resulting in immediate death of Roberson were received by him in Warren County. His Honor found the following facts: "That the plaintiff administratrix

and her intestate were residents of the county of Martin at the date of the alleged death of intestate; that the Greenleaf Johnson Lumber Company is a corporation engaged in the lumber business, with its principal office and place of business in Warren County, and in connection with its lumber business is engaged in running and operating a steam railroad for the transportation of its own logs and lumber only, and neither equipped for nor engaged in the transportation of passengers thereon; said railroad being operated under and by virtue of the special acts of the General Assembly, Private Laws 1889, ch. 27." Whereupon his Honor denied the motion for a change of venue and the defendant excepted and appealed to this Court.

No counsel for plaintiff.
Winston & Matthews for defendant.

MANNING, J. While section 3 of the act incorporating the de-
(122) fendant (Private Laws 1889, ch. 27) provides that Norfolk, Virginia, shall be the place of its principal office, this Court held in *Simmons v. Steamboat Company,* 113 N. C., 147: "It has been held without reference to any express provision of law or specific requirement of the charter, that it is the duty of a corporation to keep its principal place of business, its books and records and its principal officers within the State which incorporates it, to an extent necessary to the fullest jurisdiction and visitorial power of the State and its courts, and the efficient exercise thereof in all proper cases which concern said corporation." While at the time of that decision (1893) there was no statute specifically imposing such duty upon a corporation created under the laws of this State, it was held that there was "a general system of legislation" imposing such duty. But the Act of 1901, now section 1179, specifically requires that, "Every corporation shall maintain a principal office in this State, and have an agent in charge thereof, wherein shall be kept the stock and transfer books for the inspection of all who are authorized to see same, and for the transfer of stock," and the same act, now section 1176, Revisal, provides the method to be pursued to change the location of the principal office from one place in the State to another in the State. Although a domestic corporation may be authorized to maintain an office at some point beyond the State, at which some corporate meetings may be held, under our present statutes the corporation is not absolved from the duty of maintaining a *principal* office in some county in this State, which fixes its residence in such county for the purpose of suing and being sued. *Garrett v. Bear,* 144 N. C., 23. The words "principal place of business," as used in section 422, Revisal, must be regarded as synonymous with the words

"principal office," as used in sections 1137, 1176, 1179, and other sections of the Revisal. The purpose of section 422, Revisal, was not to change the provisions of section 424, Revisal, or to deny to a plaintiff the right to bring his action against a domestic corporation in the county in which he resides, except, of course, in those causes of action where the venue for trial is particularly fixed by other sections of the Revisal, such as sections 419, 420, 421, Revisal. *Propst v. R. R.,* 139 N. C., 397. The sole purpose of this section was to remedy (123) a defect in our statute law, as contrued in *Cline v. Mfg. Co.,* 116 N. C., 837; *Alliance v. Murrell,* 119 N. C., 124, in which cases it was held that a domestic corporation had no residence within the meaning of section 424, Revisal (Code, sec. 192), although it had a principal office or place of business in the State and, being without a legal residence in any particular county in the State, it could be sued to its great inconvenience and loss, by a non-resident in any county designated in the summons. This defect was remedied; and a domestic corporation can be sued in the same venue as an individual, except railroads under the proviso of section 424, Revisal. His Honor also finds that the intestate, at the time the injury was received resulting in his death, was a resident of Martin County, and that the plaintiff his administratrix, was a resident of the same county at the commencement of the action. It is immaterial, in determining the proper venue of this action, to decide whether the defendant is a "railroad" within the meaning of that word as used in the proviso to section 424, Revisal, it being alleged that the plaintiff, an employee, was negligently killed on defendant's lumber road, because if a "railroad" (as that word is applied in *Blackburn v. Lumber Co.,* 152 N. C., 361, and cases cited), Martin County was the residence of the plaintiff and her intestate at the time the cause of action accrued; and if not a "railroad," then the action was properly brought in that county, as the plaintiff resided therein at the commencement of the action. We think his Honor properly denied the motion of defendant to change the venue, and his judgment is

Affirmed.

Cited: Rackley v. Lumber Co., post, 173; *Smith v. Patterson,* 159 N. C., 112.

(124)

W. H. POWELL v. NORTH STATE MUTUAL LIFE INSURANCE COMPANY.

(Filed 6 October, 1910.)

1. **Appeal and Error—Exceptions to Charge—Allowable—Final Judgment—Two Appeals.**

While an exception to a charge should ordinarily be reserved until a final judgment and an appeal taken from the judgment, in this case it is desirable, if not necessary, for the court to pass upon the exception in considering the appeal in the same cause by the adverse party from the refusal of the lower court to sustain a motion for judgment upon the verdict, the latter appeal depending upon the correctness of the charge.

2. **Insurance—Policy Contract—Ambiguity—Issues—Evidence, How Considered.**

While in interpreting a written policy of life insurance any ambiguity or doubt as to the true meaning of the words employed is to be construed favorably to the insured, it is not so as to the evidence in the trial of the issues before a jury; and an instruction that they should allow to the plaintiff a more favorable consideration of the evidence than to the defendant, and resolve any doubt in his favor, is erroneous.

3. **Insurance—Policy Contract—Issues Determinative.**

When, in an action to recover upon a policy of life insurance, the pleadings raise an issue as to whether there had been a delivery of the policy sued on, that issue should be directly submitted to and passed upon by the jury, the issues as to whether any recovery may be had on the policy, being dependent upon the answer to that issue.

4. **Same—Policy Stipulations.**

When the pleadings raise an issue as to the delivery of a policy, and there is evidence as to whether there had been a delivery, such as fraud in the procurement, etc., of the policy, the subject of the action, the indisputable clause is but one of the terms of the policy dependent for its efficacy upon the valid delivery thereof, which should first be shown.

5. **Insurance—Policy Contract—Delivery—Regulations—Fraud—Evidence.**

When the policy of life insurance states that it is "based upon the payment of premiums in advance," and there is evidence tending to show that, by the rules and regulations of the company, a new examination of the insured is required if it is not delivered within sixty days; that the premium must be paid on its delivery, and that it can not be delivered unless the applicant is in good health; that none of these requirements were complied with and the policy was delivered when the insured was sick, only a few days before his death, it is sufficient upon the issue as to whether there had been a valid delivery of the policy sued on.

6. **Insurance—Principal and Agent—Rules and Regulations—Knowledge Presumed.**

An agent of a life insurance company is presumed to have knowledge of the company's rules and regulations relating to the delivery of policies, and the law requires that he shall act in good faith when he is dealing with the company in his own behalf.

7. Insurance—Policy Contract—Delivery—Requirements.

A requirement in a written policy of life insurance that the policy shall not be effective until there has been a delivery thereof, is valid and binding, and the delivery must be either actual or constructive.

APPEAL from *Cooke, J.*, at November Term, 1909, of EDGE- (125) COMBE.

The facts are sufficiently stated in the opinion.

F. S. Spruill for plaintiff.
Rouse & Land and Gilliam & Gilliam for defendant.

PLAINTIFF'S APPEAL.

WALKER, J. This action was brought to recover five thousand dollars, the amount of an insurance policy alleged to have been issued by the defendant on the life of Henry D. Teel. The defendant denied that the policy had ever been delivered to Henry D. Teel, and that it had ever become a binding contract between the parties. It averred in the answer that Teel, in his application, had made a false and material representation as to his habit of using opium or any of its preparations, with the fraudulent intent of procuring the policy to be issued to him, as he knew, at the time of making the statement, that it was false. Issues were submitted to the jury which, with the answers thereto, are as follows:

1. Did Henry Teel, in his application for the policy, represent that he did not then have and never had any habit of taking opium or any of its preparations or any narcotics? Answer: No.

2. Did Henry D. Teel, on the date of said application, have the habit of taking opium or any of its preparations or any (126) narcotics? Answer: No.

3. Was said representation a material inducement to the issuing of the policy by the defendant? Answer: No.

4. Did Henry D. Teel, on the 10th day of May, 1907, have the habit of taking opium or any of its preparations or any narcotics? Answer: No.

5. Was the delivery of the policy to Teel fraudulent? Answer: No.

6. Did the defendant company, either on the date of the issuing of said policy or the receipt of the note for the first premium, have any knowledge that H. D. Teel had the habit of taking opium or any of its preparations or any narcotics? Answer: No.

In the charge to the jury the court gave the following instruction: "You are instructed that the testimony in this case must be viewed most favorably for the plaintiff; and whenever you are in doubt or un-

certainty in respect to the evidence, the same must be solved in favor of the insured." The defendant excepted, and after the verdict was returned, moved for a new trial, upon the ground that the said instruction was erroneous. The court refused the motion and the defendant again excepted. The defendant then moved to set aside the verdict upon the third, fourth and fifth issues. The motion was granted and the case continued for trial upon those issues. The defendant reserved its exception to the refusal of the motion for a new trial. The plaintiff moved for judgment upon the remaining issues, that is, the first, second and sixth. This motion was denied. The plaintiff having excepted and appealed, the defendant also appealed.

If the plaintiff is otherwise entitled to judgment upon issues one, two and six, we think the court erred in giving the instruction to which exception was taken by defendant. As the plaintiff has appealed from the refusal of the court to render judgment in his favor, it becomes necessary to consider the defendant's appeal in connection with the plaintiff's, although the general rule is that a party can not appeal from an order refusing a new trial until there is judgment, but should (127) reserve his exception until the case is ripe for an appeal by him. The circumstances of this case, though, as we have said, make it necessary and desirable that both appeals should be heard, as we can not well pass upon the plaintiff's motion without first ascertaining if there has been a valid verdict upon which a judgment can be entered. If we should decide for the plaintiff and enter judgment, without considering the defendant's exception to the charge, we might afterwards decide that the defendant's exception was well taken, which would involve a new trial and thus produce confusion, as judgment would already have been rendered for the plaintiff.

The instruction of the court that the evidence should be viewed most favorably for the plaintiff, and if the jury are in doubt or uncertainty in respect to the evidence, they should solve the doubt in favor of the insured, was erroneous. *Asbury v. R. R.,* 125 N. C., 568. There is no rule of law giving the plaintiff such an advantage over the defendant. We presume his Honor had in mind the rule which requires insurance policies to be construed favorably to the insured, when there is any ambiguity or doubt as to the true meaning of the words which are chosen by the insurance company to express the terms of the contract. *Bank v. Insurance Co.,* 95 U. S., 673. When a motion to nonsuit is made, the testimony is construed most favorably to the plaintiff, but not so as to the evidence in the trial of issues before a jury. In this case the court correctly instructed the jury as to the burden of proof, but went too far in telling them to allow to the plaintiff a more favorable consideration of the evidence than to the defendant, and to resolve

any doubt in his favor. This entitles the defendant to a new trial upon the issues, and the plaintiff, consequently, is not entitled to judgment.

But there is another reason which sustains the refusal of the court to render judgment for the plaintiff. The defendant, in its answer, denies that the policy was ever delivered or that any contract of insurance was made, and that question should be settled by the submission of proper issues to the jury before there can be any judgment for the plaintiff. *Bryant v. Insurance Co.*, 147 N. C., 181. If there was no contract of insurance either because the policy was not delivered or for any other reason, such fraud in its procurement, (128) the indisputable clause providing that the policy shall be absolutely incontestable from date, can be of no avail to the plaintiff. The indisputable clause is but one of the terms of the contract of insurance, and if there was no contract, there can, of course, be no such stipulation. We need not consider the clause with a view of determining its validity and effect, for the jury may find, under proper instructions, that there was no contract between the parties, and we are of the opinion there was evidence fit to be considered and tending to show that there was no such contract. The policy states that it is "based upon the payment of premiums in advance," and the witness Adams, one of the agents of the company, as partner of H. D. Teel, testified that, by the rules and regulations of the company, if a policy has not been delivered within sixty days, a new examination of the applicant by a physician is required; that the premium must be paid when the policy is delivered, and that a policy can not be delivered unless the applicant is then in good health. There was other evidence that the conditions, upon which the policy was to take effect, were not complied with. This case, as now presented, is not like *Rayburn v. Casualty Co.*, 138 N. C., 379, nor is it like *Kendrick v. Insurance Co.*, 124 N. C., 317, and *Grier v. Insurance Co.*, 132 N. C., 545, where the policies had been delivered. In those cases there was no dispute as to the fact of delivery and no suggestion of fraud, and in *Grier's case* there was a special provision in the application by which the contract was completed when the policy was issued. H. D. Teel was agent or local manager of the defendant at Tarboro, N. C., and is presumed to have known the rules and regulations relating to the delivery of policies. His position with respect to the company required that he should act in good faith (*Sprinkle v. Insurance Co.*, 124 N. C., 405, 16 A. & E. Enc., 2 Ed., 912), if it did not require that he should disclose to the company any material change in his physical condition, that is, such as he knew would "naturally influence the judgment of the company in making the contract at all or in estimating the degree or character of the risk, or in fixing the rate of premium." *Bryant v. Insurance Co.*, 147 N. C., 181; (129)

Fishblate v. Fidelity Co., 140 N. C., 589. At the time the policy is alleged to have been delivered, if there was any delivery, H. D. Teel was in a precarious condition of health and in his last illness, as he died a day or two afterwards.

If all the terms of the contract have been agreed upon with the intention that the contract shall take effect, the formal delivery of the policy by the insurer and its acceptance by the insured, are not essential to its validity, but if it is provided that the contract shall not become effective until there has been a delivery of the policy to the applicant, it will not be binding until delivery, either actual or constructive. 16 A. & E. Enc. (2 Ed.), 855, and cases in note. "Whether an insurance policy has or has not been delivered after its issuance so as to complete the contract and give it binding effect, does not depend upon its manual possession by the assured, but rather upon the intention of the parties as manifested by their acts or agreement. As a general rule, whenever one parts with the custody and control of anything with the intention at the time that it shall pass into the possession of another, its delivery to such other person has, in contemplation of law, become complete. The manual possession of the thing which it is intended to deliver is a matter of little consequence. Such possession may exist without any legal delivery, and it may not exist where a legal delivery has been effected. The controlling question is not who has the actual possession of the policy, but who has the right of possession." So we held in *Waters v. Annuity Co.,* 144 N. C., 669, that "a binding acceptance can be, and frequently is, indicated by the mailing of a letter in due course containing an unconditional acceptance, or by sending a policy to an agent with instructions for unconditional delivery, where there is no contravening stipulation in the contract itself." *Assurance Co. v. McArthur,* 116 Ala., 659; *Insurance Co. v. Babcock,* 104 Ga., 67; 67 Am. St. 134. We also said in *Waters' case, supra,* that "where a policy which complies with the application has been unconditionally delivered, in the absence of fraud, it is held to be conclusive
(130) evidence that the contract of insurance exists between the parties." We do not see why an insurance company may not stipulate in its agreement to insure, that its risk shall not begin until some definite time in the future, or until some specified act has been done. *Insurance Co. v. Babcock, supra.* There are peculiar facts and circumstances in this case which may have an important bearing upon the question as to the delivery of the policy or the completion of the contract.

It is considered by us, as necessary to a determination of the rights of the parties, that issues should be submitted to the jury, with proper instructions from the court, as to the consummation of the contract by

delivery of the policy or otherwise. We will not undertake to formulate the issues, as we could not well do so without anticipating what the course of the next trial will be.

No error.

DEFENDANT'S APPEAL.

WALKER, J. It follows from what we have said in the plaintiff's appeal, that there must be a new trial of the case upon all the issues, and it is so ordered.

New trial.

Cited: Mfg. Co. v. Assurance Co., 161 N. C., 100; *Pender v. Ins. Co.,* 163 N. C., 100; *Gardner v. Ins. Co., ibid.,* 373; *Ins. Co. v. Woolen Mills,* 172 N. C., 539; *Trust Co. v. Ins. Co.,* 173 N. C., 568.

CHADBOURN SASH, DOOR AND BLIND COMPANY v. C. E. PARKER.

(Filed 6 October, 1910.)

1. **Homestead—Actions to Declare Void—Parties—Independent Action—Procedure.**

After judgment obtained, the judgment debtor conveyed his lands to defendant who had the sheriff to lay off homestead of the judgment debtor in the lands seized by the sheriff under execution; the judgment creditor brings his action against defendant and the sheriff to have exemption declared void. *Held,* An independent action was properly brought, the vendee and sheriff being the parties to be affected and not parties to the original action of debt; and if a motion in the cause were held proper, the court would treat the present action as such and regard the summons a notice thereof.

2. **Homestead—Action to Declare Void—Independent Action—Procedure.**

An action brought to declare null and void a homestead laid off, under execution, in the lands of a judgment debtor, does not fall within the provisions of Revisal, 699, relating to an erroneous valuation or irregularities, and hence the plaintiff's remedy is not by exception to the valuation of the allotment, and the principle of *res judicata* therein has no application.

3. **Homestead—Exemption Right—Estates.**

A homestead in lands is not an estate therein, but a "mere exemption right."

4. **Homestead—Judgment Debtor—Vendee—Execution—Constitutional Law.**

To claim a homestead in lands (Constitution, Art. X, sec. 2) it must be owned and occupied by and allotted to the claimant at the time of the issuance of the execution; and the vendee of a judgment debtor can not claim

and have laid off a homestead in the lands conveyed as against a levy by the sheriff thereon under a judgment had against the vendor prior to his deed.

5. Same—Constitutional Law—Legislative Interpretation—Precedents.

A legislative construction of the Constitution, though not binding on the courts, is entitled to great weight. Revisal, 686, is in accordance with the views of the court, and expresses the proper construction of Constitution, Art. X, sec. 2.

(131) APPEAL from *Whedbee, J.*, at July Term, 1910, of NEW HANOVER.

The facts are sufficiently stated in the opinion.

Davis & Davis for plaintiff.
S. M. Empie for defendant.

CLARK, C. J. The plaintiff docketed a judgment against defendant Parker in New Hanover 7 December, 1908. Subsequently said Parker and wife conveyed his lot in Wilmington in said county to the defendant Pae by deed which was duly registered 20 January, 1909. On 30 January, 1909, execution issued upon plaintiff's judgment, whereupon the defendant Pae, who was in possession under his deed from Parker, demanded that Parker's homestead be allotted to said Pae. This the sheriff proceeded to have done over the plaintiff's objection. This is a proceeding against Parker, Pae and the sheriff to have said allot-
(132) ment declared void and to direct the sheriff to proceed to sale of said lot under the execution in his hands.

The defendants move to dismiss on the following grounds:

(1) That the plaintiff should have proceeded by a motion in the cause. But the defendant Pae and the sheriff were not parties to the original cause and they are the parties to be affected by this proceeding. The defendant Parker has no interest to be affected, for all his interest in the land has been conveyed to the defendant Pae. In *Formeyduval v. Rockwell,* 117 N. C., 320, and *Adrian v. Shaw,* 82 N. C., 474, both relied on by the defendants, the proceeding for the same purpose as herein was by summons. But if it could serve any material purpose to proceed by motion in the cause, the court would not dismiss this proceeding but would treat it as a motion and the summons as a notice. *Jarman v. Saunders,* 64 N. C., 367.

(2) That the plaintiff's remedy is by exception to the valuation and allotment, and (3) that this not being done, the allotment is *res judicata.* But these, as well as the first ground (above given) are based upon a misconception of this proceeding, which is not to call into question the allotment for erroneous valuation or irregularities

under Revisal, 699, but to have the allotment declared null and void, because the lot was not "owned and occupied" by the defendant in the execution and because the defendant Pae was not entitled to have Parker's homestead allotted to defendant Pae.

(4) The last exception is that Parker's homestead in the land could be set apart and allotted to Pae. This presents the real question in the case.

Revisal, 686 (Laws 1905, ch. 111), provides: "Conveyed Homestead not Exempt, when.—The allotted homestead shall be exempt from levy so long as owned and occupied by the homesteader, or by any one for him; but when conveyed by him in the mode authorized by the Constitution, Article X, sec. 8, the exemption thereof ceases as to liens attaching prior to the conveyance. The homestead right being indestructible, the homesteader who has conveyed his alloted homestead can have another allotted, and as aften as may be necessary: *Provided,* this does not have any retroactive effect." (133)

Leaving out unnecessary words, Article X, sec. 2 of the Constitution, as applicable to this case, reads as follows: "Every homestead, . . . to be selected by the owner thereof, . . . owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution, or other final process on any debt."

Clearly the Constitution intends that the homestead shall be exempt only from and after its selection by the owner, and then only such land shall be exempt as shall be owned and occupied by a resident of this State.

So that, according to the true intent and meaning of the Constitution, land must be selected by the owner and allotted before it becomes exempt. But it must also be both owned and occupied by the homesteader, and this at the time of issuance of the execution.

Certainly the defendant Parker was not entitled to have a homestead allotted in land which he had ceased to own and occupy, nor could he convey to Pae a right which he did not possess himself.

Even if the homestead had been allotted to Parker before he conveyed to Pae, when thereby he ceased to be "owner and occupier," his right of homestead in that land ceased, just as it would if he had ceased to be a "resident of this State," which is the third qualification (in addition to "owner and occupier") required by the Constitution to entitle one to be a homesteader. Indeed, even when a homesteader has the above three qualifications, and the homestead has been allotted to him, the homestead may cease as to so much of the homestead as becomes in excess of $1,000 by reason of betterments or enhancement in values. *Van Story v. Thornton,* 110 N. C., 14; *Shoaf v. Frost,* 116 N. C., 677;

McCaskill v. McKinnon, 125 N. C., 184; Revisal, 691. While the homestead right is indestructible, the particular homestead itself may cease, in whole or in part, in the ways just stated.

Chapter 111, Laws 1905, now Revisal, 686, is a clearly expressed legislative construction in accordance with the above views.
(134) This Court had expressed the same view in *Fleming v. Graham,* 110 N. C., 374, and practically to same effect are *Allen v. Bolen,* 114 N. C., 565, and the reasoning in *Jones v. Britton,* 102 N. C., 169, and other cases which have held that the homestead is a "stay of execution" and "a determinable exemption." *Bank v. Green,* 78 N. C., 247, and other cases. It is true that a different view was held in *Vanstory v. Thornton,* 112 N. C., 196, by a divided court, and other cases since (usually with two dissents). The original case which so held, *Adrian v. Shaw,* 82 N. C., 474, was put upon the ground that the homestead was an "estate in land," which has been repeatedly overruled since and the doctrine held that it is a "mere exemption right."

In this state of uncertainty, the Legislature of 1905 thought that the public interest required that the matter should be settled and expressed what was, we believe, the preponderating opinion of the bar of the State by the enactment of chapter 111, Laws 1905 (now Revisal, 686). The bill was introduced in the Senate by Senator (since Judge) D. L. Ward, and was favorably reported by Senator O. F. Mason for the Judiciary Committee. In the House, Judge B. B. Winborne, for the Judiciary Committee, reported it favorably with the *proviso* added, which amendment was accepted by the Senate. The Judiciary Committee in both houses were more than ordinarily numerous and able. There appears to have been no minority report and the bill was passed unanimously in both houses.

We would not be understood as holding that the legislative construction is binding on this Court, but it is always held that such construction is entitled to great weight. Especially is this so, when it is a legislative construction of a constitutional provision in which eminent lawyers have concurred and the decisions of the Court have not been uniform. Besides the Constitution does not define the procedure for securing and allotting the homestead, but left it to be provided by the Legislature. In these circumstances, we should be slow to hold an act unconstitutional, for the United States Supreme Court has held that no act should be so held unless it is "proved beyond all reasonable doubt." *Ogden v. Saunders,* 12 Wheaton, 213, Cooley Cons. Lim. (7 Ed.), 254.

Indeed after full consideration we think the Act of 1905 (Re-
(135) visal, 686) expresses the proper construction. That act has been

acquiesced in, and not questioned, for five years. We think the matter should be deemed finally settled as therein expressed.

If the homestead was an "estate" the homesteader would destroy his right if he conveyed the allotted land, thenceforward depriving his children and himself of this constitutional protection, or else he could have a half dozen homesteads, successively taken, but all in force, when the Constitution gives him but one.

The judge properly held that the land in the hands of Pae was not exempt from sale under the execution against Parker.

Affirmed.

Cited: *Fulp v. Brown, post,* 533; *Davenport v. Fleming,* 154 N. C., 293, 295; *Rose v. Bryan,* 157 N. C., 174; *Dalrymple v. Cole,* 170 N. C., 107; *Brown v. Harding,* 171 N. C., 690; *Watters v. Hedgpeth,* 172 N. C., 312; *Kirkwood v. Peden,* 173 N. C., 462.

M. E. HUGHES, SR., ET AL. v. D. T. PRITCHARD ET AL.

(Filed 6 October, 1910.)

1. **Process—Infants Under Fourteen—Service—Guardian Ad Litem.**

It appearing on appeal that the trial judge set aside a final judgment in proceedings to partition land, because there were certain infants under the age of fourteen who were not personally served as required by the statute, the judgment is affirmed, though a guardian *ad litem* had been appointed and served with process.

2. **Same—Interpretation of Statutes.**

Revisal, sec. 441, validating decrees and judgments in civil actions and special proceedings in which there was no personal service of summons on infant defendants, does not cure the defect of failing to meet the requirements of the statute where neither the infants nor any other person in their behalf are served with summons.

3. **Process—Infants Under Fourteen—Legislation.**

The reason that under the age of fourteen is fixed by the statute as that wherein service of summons should be personally made on infants, etc., is one for the Legislature. *Ita lex est scripta.*

4. **Process—Infants Under Fourteen—Partition—Final Judgment—Meritorious Defense—Representation—Estoppel.**

While a final judgment in proceedings to partition land is ordinarily merely voidable as against infants under fourteen not personally served with summons as required by the provisions of the Revisal, secs. 440(2), 406, the order of the trial court in setting aside the judgment as to the infants will not be disturbed on appeal, it appearing that the action is

between the original parties and that no rights of third persons have intervened; that they had a meritorious defense, claiming an equitable estate in the lands partitioned; that though a guardian *ad litem* had been appointed, he made no real defense; and *held*, that the doctrine of representation, the parties being *in esse*, and of estoppel, is inapplicable. (*Larkins v. Bullard*, 88 N. C., 35, cited and approved; *Roseman v. Roseman*, 127 N. C., 494, cited and distinguished.)

(136) APPEAL from *Ferguson, J.*, at March Term, 1910, of CAMDEN.

This was a motion made in a special proceeding to set aside the final decree theretofore entered, appealed to the Superior Court of Camden and heard in term. The defendants, other than D. T. Pritchard, moved before the clerk of the Superior Court of Camden to set aside and vacate the final decree, report of commissioners and order of partition in the special proceeding for partition, begun in said court on 9 June, of 1898. Upon the affidavits and records offered before him, his Honor found the following facts:

At Spring Term, 1896, of Camden, M. E. Hughes and M. E. Hughes, Jr., commenced action against D. T. Pritchard to recover an undivided two-thirds of that certain tract of land in Camden County, known as the D. L. Pritchard home place of five hundred acres and set up a parol contract and recovered an undivided two-thirds of the said tract of land against the said D. T. Pritchard.

On 9 June, 1898, the said plaintiffs commenced a special proceeding before the clerk of the Superior Court of Camden for partition of said tract of land, in which these plaintiffs alleged that they were owners of two-thirds interest, and D. T. Pritchard the owner of the other one-third, making D. T. Pritchard and all of his children party defendants. That the summons was served upon them by the sheriff of Camden County, on D. T. Pritchard and each of the children personally,

(137) by the sheriff reading the summons to each of them, and by leaving a copy of the summons with D. T. Pritchard, with whom the children resided.

D. T. Pritchard was appointed by the court guardian *ad litem* for the infant defendants and declined to serve. On 23 June, 1898, the court appointed M. B. Hughes, guardian *ad litem* of William, John Franklin, George, Judson, Sanborn, Iva and Florine Pritchard. That summons was issued for M. B. Hughes, guardian *ad litem* for said defendants, and he accepted service upon the said summons.

The said M. B. Hughes, guardian *ad litem* for the infant defendants, filed an answer for them, which is made a part of the findings of this Court. There was no copy of the summons left with either of the infant defendants. It was adjudged by the court that the plaintiffs and D. T. Pritchard owned the said tract of land as tenants in com-

mon, and that the plaintiffs own two-thirds, and defendant, D. T. Pritchard, owns one-third thereof. The commissioners appointed in the order at the time failed to serve and make partition. In lieu of them was appointed John Jacobs, H. D. Sawyer and S. R. Edney, who went upon the lands, after being duly sworn by the said sheriff, and made division of said lands, and filed their report with the clerk of the Superior Court.

That the report of the commissioners remained on file from 30 August, 1898, until its hearing on 21 November, 1898. That notice was served on each of the defendants personally, no copy being left with any of the infant defendants, at which time defendants appeared and filed exceptions to the confirmation of the report. Said objections are made a part of the findings of this court.

Objections were overruled.

"That afterwards counsel was employed and appeared in the name of all the defendants, who gave notice of appeal, and the same was appealed to the Superior Court at term. The court finds the ages of the infant defendants as set out in the petition for partition of said lands in this cause.

"Upon the hearing of the appeal before *Coble, J.,* he found the facts and filed his judgment, which is made a part of the findings of this Court. Upon the foregoing findings, the court is of the opinion that the infant defendants under fourteen years of age were not (138) properly served and are not bound by the judgment. And that the interest of D. T. Pritchard and the infant defendants were adverse.

"It is, therefore, ordered and adjudged by the court, upon motion of H. S. Ward and W. A. Worth, that the judgment be vacated as to the infant defendants, who at the time of the alleged services, to wit, on 11 June, 1898, were under fourteen years of age, and that the plaintiffs pay the cost of these proceedings, to be taxed by the clerk of this court."

It further appears, from the petition filed on 13 June, 1898, that the plaintiffs, as petitioners, alleged that the plaintiffs and defendant, D. T. Pritchard, were tenants in common of the land described therein, the plaintiffs owning two undivided thirds and the said D. T. Pritchard owning one undivided third; that the land was capable of actual partition; that the plaintiffs desire to have their said part set apart to them in severalty; that Mary E. Hughes, Sr., owns a life estate in the two-thirds part, and Mary E. Hughes, Jr., owns the remainder in fee of the two-thirds part; that the defendant Alice is the wife of D. T. Pritchard and the other defendants (eleven in number) are their children and heirs at law of D. T. Pritchard; of these, four, whose names are given were over twenty-one years of age, three under twenty-one, but over

fourteen, and four under fourteen years of age. The summons was served upon the defendant, as appears by the return of the sheriff, in the manner found by his Honor. Prior to the institution of the special proceedings, the plaintiffs had brought suit and it had been ended by a final judgment (122 N. C., 59), establishing their equitable title to a two-thirds interest in the land sought to be partitioned. D. T. Pritchard was the owner of the legal title, but these plaintiffs in that action attached to it a parol trust in their favor for a two-thirds interest. D. T. Pritchard was the sole defendant to that action. They also recovered a judgment against him for something over $1,000 for rents received by him and held for plaintiffs. The infant defendants in the special proceeding claim that their father is the holder of the legal title in trust for them and that the plaintiffs were fixed with notice of their equitable title, because in the very action in which they
(139) established their equitable title, the witnesses of the plaintiffs testified to the terms of the trust, upon which D. T. Pritchard held the legal title, to wit, two-thirds for the plaintiffs and one-third for the children of D. T. Pritchard. Upon the foregoing facts, his Honor granted the motion of such of the defendants as were, on 11 June, 1898, under fourteen years of age, and denied it as to the other defendants. From the judgment of his Honor the plaintiff appealed to this Court.

Pruden & Pruden, J. C. B. Ehringhaus, and E. F. Aydlett for plaintiffs.

W. A. Worth and H. S. Ward for defendants.

MANNING, J. In the consideration of the question presented by this appeal, neither the rights of a stranger to the proceeding nor the rights of a purchaser for value without notice, are involved; the only parties interested are the original parties to the special proceedings. After the final judgment in the special proceeding was entered, the plaintiffs had execution to issue on their money judgment recovered in the previous action against D. T. Pritchard, and, after having his homestead allotted in the part allotted to him in the special proceedings, purchased the excess at a nominal sum at execution sale and took deed therefor. They claim now under that deed. The record of the special proceedings presents some unusual features. While D. T. Pritchard, his wife and all his children are made parties defendant, infants and adults, it is distinctly alleged that the only tenants in common of the land described in the petition are the plaintiffs owning a two-thirds interest, and the defendant, D. T. Pritchard, owning a one-third interest. The only ground even suggested in the petition why the children of D.

T. Pritchard are proper parties is that they are the "heirs at law" of their *living* father. No relief is asked as to them; no estate, legal or equitable, in fee or for life, present or contingent, is alleged to be theirs, but it is particularly stated in the petition that the defendant, D. T. Pritchard, is the owner of the other one-third interest. There are other irregularities in the proceedings. The summons for the guardian *ad litem* was issued on 23 June, 1898, returnable 28 June; (140) service accepted 24 June, 1898; the answer filed by him is verified 20 June, 1898; the order of the court directing partition in the proportions stated in the petition is made 28 June. Having received notice of the equitable estate of the infants in the action brought by the plaintiffs to establish their own equitable title, it is not difficult to discover the purpose that prompted them to make these infants party defendants, and to now insist that, having been parties, though with no allegation of any interest in the subject-matter of the litigation, they are concluded by the judgment because they were parties to the record. Within ten days after the final order confirming the petition, the plaintiffs caused execution to be issued on their money judgment against D. T. Pritchard and purchased, for a small sum, the excess over the homestead at the execution sale, as before stated, and assert title thereto under the deed made to them by the sheriff. Unless constrained to do so by well-settled principles of law, approved by the decisions of this Court, we are unwilling to sanction the method pursued and to consummate, by our decision, the apparent wrong to these infants, for to do so would be, first, to bind them and then to take from them their estate. Proceeding now to consider the grounds upon which the learned counsel of the plaintiffs seek to sustain the finality of the judgment in the special proceedings for partition, and the freedom from impeachment by these infants of those proceedings, it is contended that as some of the defendants to that proceeding, adults as well as infants over fourteen years of age, having the same interest in the litigation as the infants under fourteen years of age, were properly served with summons, the court had jurisdiction to appoint, and did appoint, a guardian *ad litem* for all the infant defendants, and, he having answered, the infants under fourteen years of age are concluded by the judgment of the court as effectually as if they had been personally served; and this contention is rested upon the provisions of section 406, Revisal, Code, sec. 181; Bat. Rev., sec. 59, c. 17; Acts of 1871-2, ch. 95, sec. 2. This result, it is contended, would follow notwithstanding there was a failure to serve the summons upon these infants in the manner prescribed by section 440 (2) of Revisal. In its final analysis, this contention means that no (141) service of summons on infants under fourteen years of age need be made where there are other persons defendant, upon whom proper

service has been made; and that the court may appoint a guardian *ad litem* for them and render judgment which will effectually conclude them. This contention, if sound, would require the prescribed service upon infants under fourteen years of age to be made only in those civil actions or special proceedings where such infants are the sole defendants. Such a construction of the statute we do not find supported by any decision of this Court, nor is it in accord with the adjudications of other courts. On the contrary, in *Moore v. Gidney,* 75 N. C., 34, *Bynum, J.,* in speaking for the Court, said: "When infant defendants, in a civil action or special proceeding, have no general or testamentary guardian, before a guardian *ad litem* can be appointed, a summons must be served upon such infant and a copy of the complaint also be served or filed according to law." Then, after discussing the procedure prescribed by section 406, Revisal, he continues in these forceful words: "So careful is the law to guard the rights of infants and protect them against hasty, irregular and indiscreet judicial action. Infants, are, in many cases, the wards of the courts, and these forms, enacted as safeguards thrown around the helpless, who are often the victims of the crafty, are enforced as being mandatory, and not directory only. Those who venture to act in defiance of them, must take the risk of their action being declared void or set aside." *Nicholson v. Cox,* 83 N. C., 44; *Matthews v. Joyce,* 85 N. C., 258; *Young v. Young,* 91 N. C., 359; *Ward v. Lowndes,* 96 N. C., 367; *Carraway v. Lassiter,* 139 N. C., 145; *White v. Morris,* 107 N. C., 93; *Stancil v. Gay,* 92 N. C., 462; *Gulley v. Macy,* 81 N. C., 356. In *Carraway v. Lassiter, supra, Connor, J.,* speaking for this Court, said: "The only serious question of law presented by the exceptions, is whether the court acquired jurisdiction of the person of Inez Carraway. The petition was filed on or about the 12th day of October, 1896, and the clerk, on the 15th day of the same month, and before any summons was issued, made an order appointing a guardian *ad litem.* This was certainly irregular, and if not cured would have been fatal to any further proceeding. Clark's Code, (142) sec. 181, and cases cited. The clerk on the same day, issued summons which was duly served on the infant defendant and her husband and the guardian *ad litem.* This certainly brought her into court, as it did the guardian prematurely appointed. He filed his answer, and the court, upon the return day, proceeded to judgment." In the proceedings considered in that case, there were other defendants than the infant. The learned judge then proceeded: "We have carefully examined the cases relied upon by petitioners, and find that the court has, in cases wherein the proceedings were instituted since the adoption of The Code, set aside judgments, etc., when no service of process was made upon the infants and refused to do so when the infant was in

court, notwithstanding irregularities in the proceeding. In *Moore v. Gidney, supra; Gulley v. Macy, supra; Young v. Young, supra; Stancil v. Gay, supra;* no summons was served on the infant defendant, guardians *ad litem* were appointed without personal service on the infants, and filed answers. This Court has, in such cases, invariably held that the court acquired no jurisdiction. When, however, personal service was made on the infants, a contrary ruling has been made." In *Gulley v. Macy, supra; Young v. Young, supra; Ward v. Lowndes, supra; Stancil v. Gay, supra,* there were defendants other than infants, upon whom there had been proper service of summons. In *Ward v. Lowndes, supra, Merrimon, J.,* speaking for this Court, said, and this is quoted with approval in *Carraway v. Lassiter, supra:* "This statute (Code, sec. 181) should be strictly observed, but mere irregularities in observing its provisions, not affecting the substance of its purpose, do not necessarily vitiate the action or special proceedings or proceedings in them. The substantial purpose of this statute is to have infants in proper cases made parties defendant, have them make proper and just defense, and to have their rights protected, and to this end have guardians make their defense for them." The present statute, in its present wording, has been the law of this State for nearly forty years, and questions involving the property and rights of infant defendants, upon whom process has not been regularly served, have been, in many cases, presented to this Court, and in none of these numerous cases can there be found a suggestion of this Court that supports the construction of the statute now contended for by the plaintiffs, (143) although according to its letter, the statute may admit of such construction. If such construction had been adopted, the decision of the many cases presented would have been rendered easy. In addition to the influence of these decisions, the Legislature of the State, following the construction of this statute, as declared in *Moore v. Gidney, supra; Allen v. Shields,* 72 N. C., 504; *Bass v. Bass,* 78 N. C., 374 (as is suggested by this Court in *Cates v. Pickett,* 97 N. C., 21), enacted at its session in 1879, the curative act, now section 441, validating the decrees and judgments in civil actions and special proceedings, in which there was no personal service of summons on the infant defendants; and the irregularity which that act was intended to cure was the omission to make personal service on the infant, "but it did not embrace cases where no service was made upon the infant or any other person in his behalf, as the statute requires to be done." *Perry v. Adams,* 98 N. C., 167; *Cates v. Pickett, supra; Hare v. Holloman,* 94 N. C., 14; *Stancil v. Gay,* 92 N. C., 462. It is further contended that no protection can come to the estate of an infant under fourteen years of age by requiring summons to be delivered to him. That is a legislative

question, and its wisdom or lack of wisdom should be properly addressed to the legislative branch of the State government. It has never been held as a fault in the law-making power of the State that it has required an excess of service of judicial process, but only has the deficiency of its method of service been called in question before the Court. Why the Legislature has seen proper to prescribe a different manner of service upon infants over fourteen years of age and under fourteen, why reading to one and a delivery of a copy to the other, it is not for us to say, the conclusive answer is *"Ita lex est scripta."* The decisions of other courts are in accord with the decisions of this Court, as cited above: *Wells v. Mortgage Co.,* 109 Ala., 430; *Hearing v. Ricketts,* 101 Ala., 340; *Bondurant v. Sibley,* 37 Ala., 565; *Cheatham v. Whitman,* 86 Ky., 614; *Chambers v. Jones,* 72 Ill., 275; *Whitney v. Porter,* 23 Ill., 445; *Helms v. Chadbourne,* 45 Wis., 60; *Price v. Winter,* 15 Fla., 66; *McMautry v. Fairley,* 194 Mo., 502; *Wright v. Hink,* 193 Mo., 130; 10 Cyc., 678. Construing the two sections together, we hold that section 440 (2), Revisal, prescribes the manner of service upon
(144) infants under fourteen years of age, and that section 406, Revisal, authorizes the appointment of guardians *ad litem* and prescribes the procedure to be observed after their appointment; so that, as has been uniformly held in this State, where a defective or incomplete service upon such infants has been made, but a guardian *ad litem* has been appointed in substantial compliance with the requirements of section 406, Revisal, and the court has proceeded to judgment in the action or proceedings, such defective or incomplete service upon the infants constitutes but an irregularity, which renders the judgment not void, but voidable only, which can not be collaterally impeached, and which will not be vacated or set aside solely for such irregularity, when the rights of *bona fide* purchasers for value without notice have intervened. The reasoning which induced the holding that such defects rendered the judgment merely irregular, are stated with great force and clearness by *Ruffin, J.,* in speaking for this Court in *Sutton v. Schonwald,* 86 N. C., 198, which case has since been many times cited with approval.

It is further contended by the plaintiffs that the interests of the infants under fourteen years of age were identical with the other children of D. T. Pritchard, some of whom were adults and others infants over fourteen, who were brought into court by proper service of summons, and there being this identity of interest, the principle of class representation would apply, and the alleged irregularity in the proceedings would be cured. This is an extension of the doctrine of class representation beyond the limitation which we think this Court has placed upon it. In *Card v. Finch,* 142 N. C., 140, this Court said: "The defendants

suggest that the widow, life tenant, being a party, those in succession are bound by the judgment, upon the doctrine of representation. It is true that the courts have uniformly held that where there are contingent limitations, or bare possibilities, and all the persons who may, upon possible contingencies, become entitled, are not *in esse,* they may be bound by decrees made when the owners of the land are parties. This doctrine has well-defined limitations which exclude its application to the plaintiffs. It originated in necessity—to prevent titles being en- (145) cumbered for unreasonable periods, and the sacrifice of the interests of one or more generations. It is also sustained upon the ground that a bare possibility is not a vested right. It has never been applied to the divesting of a vested remainder, or *in any case* where those who would be entitled in remainder are *in esse* and may be brought before the court in *propria persona.* In such cases, there is no necessity for resorting to the doctrine of representation. *Cessante ratione legis cessat et ipsa lex." Springs v. Scott,* 132 N. C., 548. See also *Lawrence v. Hardy,* 151 N. C., 123, wherein is considered the effect of a judgment in partition upon "parties unknown." It is further suggested that the decision of this Court in *Roseman v. Roseman,* 127 N. C., 494, is in conflict with the conclusion we have reached in this case. We do not think there is necessarily such conflict. In that case, being an action brought to substitute a trustee for one named in a will, who declined to accept his testamentary appointment and perform the trusts declared by the will, there were, among the defendants, infants under fourteen years of age. The summons was served upon them by delivering a copy, but no copy was delivered "to the father, mother or guardian," etc., as prescribed by the statute. A guardian *ad litem* was regularly appointed, summons regularly served upon him and he filed answer. The mother of the infants was a party defendant and served with summons. The court appointed a trustee, who entered upon the discharge of the trusts and performed important services thereunder. Subsequently the infants moved to set aside the judgment, solely upon the ground of defective service upon them. The motion was denied, and upon appeal to this Court the judgment was affirmed. It does not appear in the case, as reported, that any injury was done the infants by the appointment of a trustee or the judgment of the court. That the judgment was irregular and not void, under the decisions of this Court as applied to the facts of the case, is clear; but we are constrained to repeat again the doctrine so clearly stated in *Sutton v. Schonwald,* that "whatever formalities are prescribed must be punctually fulfilled, as the courts have no power to dispense with the requirements of a (146) statute, and most especially is this principle rigidly adhered to in the case of judicial and probate sales." While the neglect to ob-

serve the statutory requirements to serve process in the prescribed way is a menace *inter partes* and except as to purchasers for value in good faith and without notice, to the integrity of a judgment rendered in a civil action or special proceeding, yet it does not follow that for such irregularity the court will vacate its judgment upon motion in every case, and this condition, as it should be, is largely due to the view that the courts are the guardians and protectors of the rights and property of infants. The principle which should govern the courts in the exercise of this remedial power are clearly stated by this Court in *Williamson v. Hartman,* 92 N. C., 236 (quoted with approval in 1 Black on Judg., sec. 326, and many times approved by this Court): "This, however, does not imply that every judgment affected in any degree, directly or indirectly, by some, or any irregularity in the course of the action leading to it, will be set aside. Some irregularities are unimportant and do not affect the substance of the action or the proceedings in it; there are others of more or less importance that may be waived or cured by what may take place or be done in the action after they happen; and there are yet others so serious in their nature as to destroy the efficacy of the action and render the judgment in it inoperative and void. Whether the court will or will not grant such a motion in any case, must depend upon a variety of circumstances and largely upon their peculiar application to the case in which the motion shall be made. Generally, a judgment will be set aside only when the irregularity has not been waived or cured, and has been or may be such as has worked, or may yet work, serious injury or prejudice to the party complaining interested in it, or when the judgment is void. The court will always, upon motion, strike from its record a judgment void for irregularity." Speaking to the facts of the particular case, the Court further said: "Granting that the method by which the appellant was made a party to the proceeding was not strictly regular, still he has not shown that he was reasonably diligent in looking after his interests in it after he became of age, nor has he shown that he has suffered serious wrong or prejudice by reason of the irregularity (147) of which he complains, or that he may yet probably so suffer. Indeed it appears the judgments complained of were just and proper."

Our conclusion is that the judgment of his Honor in setting aside the judgment complained of in behalf of these infants, should be affirmed upon the facts of the case as presented, because (1) the summons was irregularly served upon them, (2) according to the ages given in the petition filed in the special proceedings, three, certainly, and probably all of them, are still minors, (3) they had a meritorious defense in that, for the purposes of this motion, it sufficiently appears that they

had an equitable estate in one-third undivided interest in the land sought to be partitioned, (4) that no real defense was made for them by the guardian *ad litem,* (5) under the doctrine of estoppel, which applies to proceedings in partition, as held by this Court in *Buchanan v. Harrington,* 152 N. C., 333, and the authorities therein cited, and which it is contended would conclude these infants in the present case, it would be, as is said in *Larkins v. Bullard,* 88 N. C., 35, "a plain violation of right to leave the judgment standing so as to operate as an estoppel upon these infants, when the Court can see no real defense was ever made for them," though we leave open the interesting question whether parties made defendant to an action or special proceedings, against whom, in the one case, no cause of action is stated, and in whom, in the other case, no interest or estate in the subject-matter of the litigation is alleged to exist, are estopped and concluded by the judgment solely because they were parties to the action or special proceedings. Finding no error, the judgment is

Affirmed.

Cited: Holt v. Ziglar, 159 N. C., 277; *Harris v. Bennett,* 160 N. C., 343; *Bullock v. Oil Co.,* 165 N. C., 67; *Johnson v. Whilden,* 171 N. C., 154.

(148)

W. F. PICKETT AND WIFE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 6 October, 1910.)

1. Pleadings—Amendments—Damages—Limitation of Actions.

An amendment to the complaint in an action against a railroad company to recover damages to a crop caused by diversion of the natural flow of water, so as to allege permanent damages to the lands (Revisal, 394-2) does not add a new cause of action, but relates only to the measure of damages arising from the injury; and the statute of limitations (Revisal, sec. 394-2) will not bar the plaintiffs by reason of the amendment alone.

2. Evidence—Photographs.

After preliminary proof of the correctness of photographs taken of lands on which damages are alleged to have been caused by the diversion of water from its natural flow by an adjoining owner, it is competent for a witness to use them to explain his testimony as to what effect the diversion of the water had upon the land.

3. Instructions—Modifications.

A modification of instructions requested, which is necessary, in view of the evidence and the nature of the issue being tried, to confine the investigation of the jury to the real questions presented and to state with accuracy the law applicable, is not erroneous.

APPEAL by defendant from *Guion, J.*, at February Term, 1910, of DUPLIN.

The facts are sufficiently stated in the opinion.

Rountree & Carr for plaintiffs.
Davis & Davis and H. L. Stevens for defendant.

WALKER, J. This action was brought to recover damages for injury to plaintiffs' land by the diversion of water, caused by the defendant in repairing one of its trestles, whereby the water was turned from its natural course, or that direction in which it was wont to flow, and emptied upon the land of plaintiffs, filling the ditches, preventing effective drainage and flooding the land. The plaintiffs, Annie Pickett and her husband, W. F. Pickett, originally sued for damages to the crops of the *feme* plaintiff, but on 21 February, 1910, by leave of the court, amended their complaint by inserting the following allegation:
(149) "That by reason of the acts of the said defendant hereinbefore set out and alleged the said lands of the plaintiffs have been rendered almost worthless for farming purposes and have been permanently injured and damaged, exclusive of the annual damage to crops, in the sum of six thousand dollars." They had alleged the damage to crops to be $2,000. Defendant denied that there had been any wrongful diversion of water by it which injured the plaintiffs' land, and pleaded the statute of limitations. Revisal, sec. 394 (2).

There was much testimony introduced by the parties as to the alleged injury to the land by the diversion of water. Plaintiffs introduced in evidence certain photographs of the premises, showing the condition of the land after the diversion of the water. The court, over defendant's objection, permitted these photographs to be used for the purpose of enabling a witness to explain his testimony as to what effect the diversion of the water had upon the land. Preliminary proof was heard as to the correctness of the photographs and as to the time and the manner in which they were made. There was no error in admitting them for the purpose indicated. Wigmore on Evidence, secs. 790 and 792; *Hampton v. R. R.*, 120 N. C., 534; *Davis v. R. R.*, 136 N. C., 115.

The defendant contended that, in order to determine whether the statute of limitations barred the plaintiffs' action as to permanent damages, time should be counted to the date of the amendment of the complaint. We do not think the amendment added a new cause of action, but related only to the quantum of damages. The cause of action was the injury to the land and the consequent damage. The statute (Revisal, sec. 394-2), requires that the jury shall assess the entire damages which the aggrieved party is entitled to recover by

reason of the wrong of which he complains. The allegations of the original complaint were sufficient to authorize a recovery of such damages as resulted from the injury, and the additional allegation that the injury alleged in the complaint is of a permanent nature, and asking for the assessment of permanent damages, did not essentially change the cause of action. The amendment merely laid the foundation for a recovery of all damages which the statute re- (150) quired to be assessed in this kind of action, instead merely of a part thereof. *Simpson v. Lumber Co.*, 133 N. C., 95. In *Beasley v. R. R.*, 147 N. C., 362, we held that the assessment of "permanent damages" in a case against a railroad for injuries to land in the construction or repair of its roadbed, is made compulsory by Revisal, sec. 394, subsec. 2.

The statute begins to run from the date of the first substantial injury. *Stack v. R. R.*, 139 N. C., 366; *Staton v. R. R.*, 147 N. C., 428; *Ridley v. R. R.*, 118 N. C., 996; *Beach v. R. R.*, 120 N. C., 498.

We have carefully considered the instructions of the court, both those given in response to the defendant's prayers and those to be found in the charge, and it appears therefrom that the case was fully and fairly submitted to the jury upon the main issue and the statute of limitations. Where the court modified the instructions as requested by the defendant, there was no error committed, as the amendments were necessary, in view of the evidence and the nature of the issues being tried, to confine the investigation of the jury to the real questions presented and to state with accuracy and precision the law in regard thereto. It seems to us that the court substantially gave every instruction pertinent to the case, and we have found no reversible error in its rulings. The case is without any complication, and depends largely for its decision upon the view taken by the jury of the conflicting evidence.

No error.

Cited: Person v. Roberts, 159 N. C., 174; *Campbell v. R. R., ibid.,* 587; *Bank v. McArthur,* 165 N. C., 376; *Hoyle v. Hickory,* 167 N. C., 622; *Lupton v. Express Co.,* 169 N. C., 673; *Bane v. R. R.,* 171 N. C., 332.

CABLE COMPANY v. W. H. MACON.

(Filed 6 October, 1910.)

1. Contracts—Warranty—Breach—Damages—Pleadings—Counterclaim—Procedure.

When there has been a breach of warranty of quality in the sale of goods, the buyer may retain the goods and recover for the breach, by way of counterclaim to an action by the purchaser for the purchase price.

2. Contracts—Warranty—Breach—Measure of Damages.

The general rule is that the measure of damages for a breach of warranty in the sale of goods having a market value is *prima facie* the difference in the market value at the time and place of delivery, between the goods as they were and as they would have been had the warranty been complied with.

3. Same—Instructions.

In the present case, being a sale of a piano with a warranty against certain defects, the above rule is substantially complied with, in the absence of a more specific prayer for instruction, by a charge, that "if there was a breach of warranty causing damages, the measure of damages would be the lessened value of the piano by reason of the defects complained of and shown to exist."

(151) APPEAL from *Cooke, J.*, at October Term, 1909, of FRANKLIN.

Action to recover balance due on purchase price of piano.

Defendant, admitting the contract of purchase and a balance due of $60 with interest, answered further and alleged a breach of warranty in the contract of sale and damage by reason of such breach.

Plaintiff replied admitting the warranty and denying breach thereof or damage. The jury rendered the following verdict:

1. What is the amount due on the note? Answer: $60 and interest.

2. Was there a breach of the warranty? Answer: Yes.

3. What damage, if any, is the defendant entitled to receive on account of said breach? Answer: $125.

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

W. M. Person for plaintiff.
Bickett & White for defendant.

HOKE, J. The only exception urged for error is to the charge of the court on the issue as to the amount of damages. It is well established that when there has been a breach of warranty of quality in the sale of goods, the buyer may retain the goods and recover for the breach by way of counterclaim to an action by the vendor for the purchase

price. And in case of goods having a market value, the correct rule for admeasuring the damages is *prima facie* the difference in the market value at the time and place of delivery, between the (152) goods as they were and as they would have been if they had complied with the warranty. *Parker v. Fenwick,* 138 N. C., 209-218; *Manufacturing Co. v. Gray,* 126 N. C., 108-115; *Spiers v. Halsted,* 74 N. C., 520; *Marsh v. McPherson,* 105 U. S., 709; Hale on Damages, 247; Tiffany on Sales, 240; 35 Cyc., 468.

In several decisions on this question of damages, the Court has said that the true rule was the difference between the contract price and actual value of the goods, but an examination of these cases will disclose that the Court spoke from inadvertence because there was nothing in the facts to call the matter specially to their attention, or the goods in question from their character or structural features had no market value and the contract price was adopted as the basis of estimate because, from the testimony, there was none other available. This distinction was pointed out when *Mfg. Co. v. Gray* was again before the Court. 129 N. C., 438, 441. And in which the present *Chief Justice,* after recognizing the general rule to be as stated, on the facts in evidence, differentiated that case and approved the following prayer for instructions:

"If the jury find that there was no apparatus on the market which had the capacity claimed for that in question, then what its value was would be speculative and not a fair basis on which to estimate the damages; and in that case, the measure of damages would be the difference in value between the apparatus as delivered and the contract price."

In 35 Cyc., *supra,* p. 468, the general rule on the subject and some of the decisions apparently at variance are thus referred to: "The general rule as to the measure of damages on a breach of warranty, is that the buyer is entitled to recover the difference between the actual value of the goods, and what the value would have been if the goods had been as warranted, and in the application of the rule, it is held, that the fact that the goods were actually worth the price paid for them is immaterial. . . . It is true that in some cases the rule has been stated that the measure of damages is the difference between the purchase price and the actual value of the goods, (153) but in nearly all of these cases, the theory undoubtedly is that in accordance with the general rule, if there is no other evidence of the actual value of the goods, the purchase price will be regarded as the actual value."

It may be well to note that we speak throughout of the general rule, which *prima facie* obtains on breach of an express warranty in

sale of goods without more, and that no reference is had to cases where different or additional damages may at times be recovered by reason of special circumstances which otherwise affect the rights of the parties. On the admissions in the pleadings and the facts in evidence, we think that the amount of damages in the present case has been determined in substantial accord with the rule stated when his Honor charged the jury that, "If there was a breach of warranty causing damage, the measure of damages would be the lessened value of the piano by reason of the defects complained of and shown to exist."

The testimony offered by plaintiff as to the amount required to put the piano in good fix, while relevant to the injury, was not necessarily controlling, and in the absence of more specific prayers for instructions on the issue, should not be allowed to affect the result. There is no error and the judgment below is affirmed.

No error.

Cited: *Winn v. Finch,* 171 N. C., 275, 276.

THOMAS J. NEWSOME v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 6 October, 1910.)

1. Telegraphs—Contract—Notice—Damages Speculative.

A telegraph company, as a public agency, is compelled to accept telegrams for transmission and delivery with the charges for such service fixed by the Corporation Commission, and it is not held to contract with reference to all special damages claimed because of information given its agent by the sender, as to the purpose and effect of the message, and remote or speculative damages are not recoverable.

2. Telegraphs—Damages Speculative.

Only such damages are recoverable as flow directly and naturally from the negligence of a telegraph company in transmitting a telegram, and they must be certain in their nature and in respect to the cause from which they proceed.

3. Same—Evidence—Nominal Damages.

In an action for damages against a telegraph company alleged to have been caused by the change of name of the sender of the message in transmission, the message reading, "Send four gallons corn, Mintz Siding, Rush, Raft hands," upon the ground that the error prevented the sender from receiving four gallons of corn whiskey which he had contracted to furnish his raft hands to raft rosin and timber to Wilmington, and that in consequence the hands would not go into the water to raft the stuff, causing

plaintiff to lose advantage of the freshet to his damage, and that these facts were communicated to defendant's agent at the time the message was sent: *Held*, Damages too speculative and remote, and recovery, except nominal damages, denied.

APPEAL from *Cooke, J.*, at May Term, 1910, of SAMPSON. (154)

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

These issues were submitted:

1. Was the defendant guilty of negligence in the transmission of the message as delivered to it by the plaintiff? Answer: Yes.

2. What damage, if any, has plaintiff sustained by reason of the failure of the defendant to transmit the message as written and delivered to the defendant? Answer: $524.10.

From a judgment for plaintiff defendant appealed.

John D. Kerr and Geo. E. Butler for plaintiff.

Robert C. Strong and A. S. Barnard for defendant.

BROWN, J. The facts of this case are stated fully in 137 N. C., and 144 N. C., 178. The alleged negligence consists in transmitting a telegram to one Royal, Benson, N. C., ordering four gallons corn whiskey to be sent by express to Mintz Siding in Sampson County, N. C. The signature was transcribed on the delivered telegram as T. J. Sessons instead of T. J. Newsome. The plaintiff alleges that he ordered the whiskey by agreement with his raft hands who were preparing to construct rafts and take his timber and rosin to Wilmington during a freshet in February, 1902, and that they re- (155) fused to go into the water without it; in consequence of which he lost the benefit of the freshet and was greatly endamaged.

The defendant requested an instruction that in no view of the evidence can plaintiff recover more than nominal damages, which was refused.

The courts will be careful not to apply to a contract of this character a rule of damage which will impose upon the defendant an unreasonable and speculative liability, which an individual may avoid by declining to enter into the contract.

The fact that the plaintiff informed the defendant's operator that he needed the whiskey in order to get his rafting done will not allow us to hold the defendant to damages which from the very nature of the case must be purely speculative and remote. It should be borne in mind that the defendant, being a public agency, was compelled to accept the telegram and to agree with the plaintiff, at the price fixed by the North Carolina Corporation Commission, to transmit it. Under such circumstances it can not be said that the defendant contracted with reference to

the damages claimed by the plaintiff simply because its agent was informed of the purpose for which the plaintiff wanted the whiskey. While we apply the rule of *Hadley v. Baxendale* to this kind of a contract, yet that rule will not justify the imposition of remote and speculative damages upon a public service corporation.

In *Tanning Co. v. Telegraph Co.*, 143 N. C., 376, cited and approved in *Mfg. Co. v. Tel. Co.*, 152 N. C., 157, this Court said: "Damages are measured in matters of contract, not only by the well-known rule laid down in *Hadley v. Baxendale*, 9 Exch., 341, but they must not be the remote, but the proximate consequence of a breach of contract and must not be speculative or contingent." See also *Byrd v. Express Co.*, 139 N. C., 273. It is an elementary principle that all damages must flow directly and naturally, and that they must be certain both in their nature and in respect to the cause from which they proceed. Shearman and Redfield on Neg., secs. 25, 26.

(156) Damages which are uncertain and speculative, or which are not the natural and probable result of the breach, are too remote to be recoverable. 2 Joyce, sec. 1284.

It is universally held that damages are not to be based upon mere conjectural probability of future loss or gain. 8 A. & E., 610, and cases cited. Something more than a possible result must appear.

The fact that the whiskey was not sent may have caused the hands not to go into the water, but it is a far cry between constructing the raft at Thomas and marketing the product at Wilmington. The whiskey may have arrived and still the raft remain unconstructed. The raft may have been constructed and loaded and still never have reached Wilmington.

It requires quite a stretch of the imagination to conceive that had the four gallons of corn whiskey arrived at Thomas, the raft would have been properly constructed, loaded and safely conducted over a heavy freshet to Wilmington and the merchandise duly and profitably marketed. Whiskey is very potential at times, but it can not be relied upon to produce such beneficent results as is claimed for it in this case.

It is a singular fact in the county where the four gallons of corn whiskey were expected to produce such unusual results, its use was decried and its sale prohibited by law. It was contraband, outlawed, and dealing in it made a crime.

We are of opinion that the plaintiff is entitled to recover nominal damages only. It is so ordered.

Error.

JOHN F. MARQUETTE AND WIFE v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 12 October, 1910.)

Telegraphs—Office Hours—Attempted Delivery—Evidence—Nonsuit.

In an action for damages against defendant for delayed transmission and delivery of a message, it appeared from plaintiff's evidence that the telegram was filed at a substation of another company in Baltimore at 8 P. M. Saturday, and upon the face of the original message, introduced by plaintiff, that it was not transmitted from main office in Baltimore until 10:15 P. M. It further appeared that the message was delivered to this defendant at Raleigh for transmission to Kinston, N. C., and was delivered to sendee at 9:15 next morning. It further appeared that in the regulation fixing the office hours of the Kinston office it was closed from 9 P. M. Saturday to 9 A. M. Sunday. *Held,* no evidence of negligence upon part of defendant. Evidence that at 9:30 P. M. Saturday defendant's messenger had attempted to deliver a message in defendant's envelope addressed to plaintiff to one of a similar name, who did not open it, and informed the messenger where plaintiff was to be found, and that the message sued on was unusually dry the next morning, when delivered, for a message just received, is too conjectural to identify the message attempted to be delivered Saturday night as the one sued on.

APPEAL from *Cooke, J.,* at March Term, 1910, of LENOIR. (157)

Action brought by the *feme* plaintiff against the Western Union Telegraph Company and the Postal Telegraph Company for damages caused by alleged negligence in the transmission and delivery of the following telegram, set out in the complaint and the original of which was introduced in evidence by the plaintiff, viz.:

POSTAL TELEGRAPH COMMERCIAL CABLES.
TELEGRAM.

Time filed, Check,

10:15 P. M. BALTIMORE, MD., March 13th, '09.

48 W. MF FR—4 Paid. RUSH.

MRS. JOHN F. MARQUETTE,
Kinston, N. C.

Coming on first train. JOHN. 11P.

This telegram was delivered to the sendee 9:15 A. M. on Sunday, 14 March, 1909. It appears in the record that the controversy was settled as to the Postal Telegraph Company upon payment by that company of all "costs and disbursements in this action."

The issues relating to the Western Union are as follows:

1. Did the defendant, the Western Union Telegraph Company, negligently fail to deliver the message complained of to the plaintiff? Answer: Yes.

(158) 2. What damage, if any, has the plaintiff sustained on account of mental anguish caused by such negligence? Answer, Six hundred and fifty dollars ($650). The court reduced the damages by consent of plaintiff to three hundred dollars and rendered judgment against the Western Union Telegraph Company. Defendant excepted and appealed. There was a motion in apt time by appellant to nonsuit, which was renewed at close of all the evidence. It was denied, and defendant excepted.

G. V. Cowper and W. D. Pollock for plaintiff.
John D. Bellamy for defendant.

BROWN, J. In the clear and exhaustive charge of his Honor, the liability of the defendant, the Western Union Telegraph Company, for the damages claimed is made to depend upon one theory only, and that is that this defendant received the telegram at its Kinston office on the night of 13 March, in time for delivery that night and failed to deliver it until following morning.

The learned judge charged as follows: "If the jury shall find by the greater weight of the evidence that the Western Union agent at Kinston received that message on the night of the 13th and negligently failed to deliver the same until the next morning, and the jury shall find by the greater weight of the evidence that the said agent at Kinston had notice of the cause of the telegram, then the jury should allow such damages as they shall be satisfied by the greater weight of the evidence would be reasonable compensation for the mental anguish which the *feme* plaintiff suffered."

The defendant contends that there is no sufficient evidence that the message was received at its Kinston office on the night of 13 March, but that all the evidence shows that it was not and could not have been received there until about 9 A. M. 14 March, and delivered at 9:15 A. M.

The only evidence we can find to support this theory is that on Saturday night, 13 March, defendant's messenger called about 9:30 P. M. on Mrs. B. F. Marquette with a Western Union telegraph envelope, addressed to Mrs. John F. Marquette. Mrs. B. F. Marquette did not open the envelope, but directed the messenger to where Mrs. John

(159) Marquette resided. It is further contended that the telegram delivered Sunday morning was on a blank that was dry, when if it had been copied it should have been somewhat damp from copying. We do not think the evidence at all sufficient to warrant the conclusion that the telegram set out in the complaint reached Kinston the night of

the 13th. There is no connection whatever disclosed between the telegram carried to Mrs. B. F. Marquette and the one which is the basis of this action, and the mere fact that the blank was dryer than plaintiff thinks it should have been is the merest conjecture and proves nothing. But in addition to the inherent weakness and conjectural character of such proof—all the evidence in this case—plaintiff's as well as defendant's—shows conclusively that the telegram sent to Mrs. B. F. Marquette's house could not have been the one delivered to plaintiff at 9:15 Sunday morning.

It appears from plaintiff's evidence that her baby was sick and she wired her husband to his place of business, care Tregales Hertel & Co., Baltimore, on 9 March and again on 13 March. The telegrams were duly delivered to Tregales Hertel & Co., but they did not send them promptly to the sendee who was sick at his boarding house. The message of 13th was received by him 7 o'clock P. M. "It was sent out by the store," he states. Mr. Marquette at once went to Union Station, Baltimore, and took first train home.

At eight o'clock P. M. he delivered to the Postal Company at its booth in Union Station the telegram set out in the record.

The original was offered in evidence by plaintiff, and being in evidence, the defendant may of course derive any advantage it can from it. The original telegram shows on its face that it was not transmitted from the Postal's main office in Baltimore until 10:15 P. M., or after, 13 March. The delay probably occurred in transmitting it from the booth to the main office. Nor does the evidence offered by the defendant help out plaintiff's contention, but on the contrary corroborates and establishes the evident fact that the telegram did not reach Kinston until Sunday morning.

The Postal (having no office at Kinston) transmitted it to Raleigh, where it was delivered to this defendant at 11:10 P. M. and transmitted to the relay office, Richmond, Va., at 11:47 P. M., (160) 13 March. The Kinston office being closed for the night, Richmond transmitted the telegram to that office Sunday morning, 14 March, at 8:52 A. M., and it was delivered at 9:15 A. M.

The plaintiff's own evidence, as well as all the other evidence in the case, shows conclusively that the telegram in question could not have been in the hands of the messenger when he went to Mrs. B. F. Marquette's house Saturday night, 13 March. It is possible the messenger may have had some service message, or tracer, as it is called, for the plaintiff, as the Kinston office had been endeavoring by tracers to ascertain why her husband had not replied to his wife's telegrams. But whether it was a tracer or not all the evidence proves conclusively it was not the telegram which is the basis of this action.

It may possibly be that plaintiff has turned loose the wrong defendant, but as to the appellant, the Western Union Company, the motion to nonsuit should have been allowed and the action dismissed. It is so ordered.

Reversed.

Cited: Barnes v. Tel. Co., 156 N. C., 153; *Penn v. Tel. Co., ibid.,* 315.

J. A. P. MOTTU v. J. A. DAVIS.

(Filed 12 October, 1910.)

1. Judgments of Other States—Collateral Attack—Fraud—Perjury—Allegations—Demurrer.

While perjury is a fraud in obtaining a judgment, and judgments obtained in another State may be impeached here for fraud, the facts should appear that the courts may see and determine whether new evidence relied on is merely contradictory or cumulative of that offered on the former trial, and that the probable result will be different if the relief is granted; and a demurrer *ore tenus* to a complaint alleging the "belief" that plaintiff is now prepared "to show that the said testimony was, in fact, false," should be sustained.

2. Judgments of Other States—Jurisdiction—Issues.

In this action to set aside a judgment of the court of another State, an issue as to the jurisdiction of the foreign court was submitted, and it appearing that the necessary jurisdiction was conferred by the statutes of that State introduced in evidence without objection, an instruction to find in favor of the jurisdiction was proper.

(161) APPEAL from *Guion, J.,* at April Term, 1910, of EDGECOMBE.

This case was before this Court at Fall Term, 1909, and is reported in 151 N. C., 237. The Court then directed that an issue as to the jurisdiction of the Corporation Court of Manchester, Virginia, be submitted to the jury. After the certificate of this Court had been filed in the Superior Court, the defendant moved to amend his answer by substituting for the fifth section, the following: "The defendant is informed and believes, and so alleges, that plaintiff obtained the judgment upon fraudulent, false, material and pertinent testimony offered by him in order to secure the same, viz.: That said cotton described in the complaint was actually purchased by him on defendant's account through Ladenburg, Thalman & Co., of New York, and there stored in a warehouse; that said purchase was not made by the parties with the intent that said cotton was not to be delivered, but should be settled for accord-

ing to the future market, as the price should be greater or less at the time of sale; that he had not been advised by an attorney in North Carolina that he could not collect on the contracts in the State of North Carolina, but had so concluded by reading the statute himself; that he had paid to C. De Witt, his partner, one-half of the amount of the alleged account; whereas, defendant is informed and so believes and avers that said statements were not at the time and never had been true; that especially it is not true that plaintiff purchased the actual cotton of Ladenburg, Thalman & Co., on defendant's account and stored it in a warehouse, and that the same was purchased with intent that it should be delivered and not settled for according as the future market price should rise or fall. The defendant had no knowledge or information before the trial that plaintiff made any such claim or claims in respect to such trade and dealings, and was therefore, taken by complete surprise and was unable to meet the same, as his first information thereof was in the midst of the trial, but he believes he is now (162) prepared to show said testimony was in fact false, and but for said false testimony plaintiff could not have secured the judgment sued on in this action." The court, over plaintiff's objection, allowed the amendment to be made by the defendant. The plaintiff at first replied to the answer and denied the allegations of the fifth section as amended. When the case was called for trial, the plaintiff demurred *ore tenus,* upon the ground that the allegations of that section of the amended answer did not constitute a defense to the action. The court sustained the demurrer and refused to submit the issue of fraud to the jury, and the defendant excepted. The issue as to the jurisdiction of the Virginia court was submitted to the jury and found in favor of the plaintiff. The court instructed the jury that, upon all the evidence, their answer to the issue should be, Yes, to which charge the defendant excepted, and from a judgment upon the verdict in favor of the plaintiff, he appealed.

J. R. Gaskill, Overton Howard, and F. L. Spruill for plaintiff.
G. M. T. Fountain for defendant.

WALKER, J. The defendant has not, in the amendment of his answer, presented a case which entitled him to the favorable consideration of the Court. It has been held by many courts, and the text writers seem to adopt the principle as settled by the great weight of authority, that perjury being intrinsic fraud, is not ground for equitable relief against a judgment resulting from it, but the fraud which warrants equity in interfering with such a solemn thing as a judgment must be such as is practiced in obtaining the judgment and which prevents the losing party from having an adversary trial of the issue. Perjury is a fraud in

obtaining the judgment, but it does not prevent an adversary trial. "The losing party is before the court and is well able to make his defense. His opponent does nothing to prevent it. This rule seems harsh, for often a party will lose valuable rights because of the perjury of his adversary. However, public policy seems to demand that there be an end to litigation. If perjury were accepted as a ground for relief,
(163) litigation might be endless; the same issues would have to be tried repeatedly. As stated in the leading case, 'the wrong, in such case, is of course a most grievous one, and no doubt the Legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied.' Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is, that a final judgment can not be annulled merely because it can be shown to have been based on perjured testimony; for if this could be done once, it could be done again and again *ad infinitum.*" 6 Pomeroy Eq. Jur., sec. 656, and cases cited in note; *U. S. v. Throckmorton,* 98 U. S., 61; *U. S. v. Beebe,* 180 U. S., 343. While the doctrine, as thus stated, has been adopted in many jurisdictions, this Court has held that a verdict and judgment obtained by perjured testimony may, under certain circumstances, be set aside and a new trial ordered, or that relief against the judgment may be awarded in some other form. *Pegram v. King,* 9 N. C., 605; *Dyche v. Patton,* 56 N. C., 332; *Burgess v. Lovengood,* 55 N. C., 457. It is said, though, that this power should be exercised with extreme caution and that the application of the doctrine being greatly restricted, is confined to cases which present peculiar circumstances, under the maxim that the public interest requires that there should be an end to litigation. *Burgess v. Lovengood, supra.* It is further said in that case that "there must not only be newly discovered evidence, but such evidence must bear directly upon the merits of the case, and must be decisive of it, and not tend simply to impeach the testimony of a witness at a former trial, or to add cumulative evidence as to a matter before controverted. . . . It is not alleged that any new matter was discovered, and the plaintiff relies upon the general allegation that the testimony upon which the certificate issued was false, but he was unable to prove it, because there was no way of getting his witnesses before the commissioners, and upon the further general allegation that both the Cardens 'were, as now, and have been generally, citizens of the State of Tennessee.' It is useless to consume time by going into particulars for the purpose of showing that such general allega-
(164) tions can not make a case to which the doctrine as to the interference of courts of equity with verdicts and judgments in the courts of law is applicable. It is also useless to refer to the evidence,

except to remark that no particular falsehood is proved, either by deed, *writing,* or *conviction of perjury,* or in any other way, except by proof of general admissions and conversations of the parties, deposed to by witnesses who themselves appear under very questionable circumstances." The Court will not even grant a motion for a new trial upon the ground that evidence has been discovered since the trial of the case, unless it is shown: 1. That the witness will testify as alleged. 2. That the evidence he will give is apparently true. 3. That it is material and will probably change the result. 4. That the applicant has not been guilty of laches in not obtaining the testimony at the trial, but has used due diligence. 5. That manifest injustice and wrong has been done and no other relief is attainable. The motion will be denied if the new evidence tends only to contradict a witness, who was examined at the trial, or to discredit such witness, or if it is merely cumulative. *Turner v. Davis,* 132 N. C., 187; *Simmons v. Mann,* 92 N. C., 12. In this case the averments in the amended answer are all made upon information and belief. It is not stated from what source defendant derived his information. For all that appears the proof, upon which he relies to show the falsity of the testimony introduced by the plaintiff at the trial, may be nothing more than hearsay. He expresses the "belief" that he is now prepared "to show that said testimony was, in fact, false," but whether there is any reasonable expectation that he will be able to do so, we are unable to determine. The new evidence may be merely contradictory of that offered by the plaintiff, or only cumulative. How can we see that it is probable that the result will be different if we grant the relief? If the newly discovered evidence is of such a character as to clearly show the perjury, "it would directly bear upon the merits of the case and might be decisive of it." The belief of the defendant that he can establish the perjury and that the plaintiff acted fraudulently in using the evidence, may be due to his unwarranted confidence in the proof he has discovered, the nature of which is not disclosed to us. He does not allege that any member of the firm of Ladenburg, (165) Thalman & Co., will testify to the facts he states in the amendment. The power of a court of equity to grant a new trial in a case at law, or to afford other relief from a verdict and judgment alleged to have been obtained by fraud, is capable of great abuse and has always been exercised with great caution. *Dyche v. Patton,* 56 N. C., 332. It is easy to allege, upon information which may turn out to be unreliable or even worthless, that your adversary won his case by fraudulent practices, and to avoid doing him an injustice, the Court should require a free disclosure of the facts in order that it may proceed intelligently and with due regard for the rights of both parties, and that when litigation is once closed, it may not be reopened upon slight or frivolous grounds, but

only for good and sufficient cause, so that there may, as far as possible, be an end to further strife. It would appear from defendant's new averment that he expects only to contradict the plaintiff's former evidence, and thus to fortify or reinforce the defense which he made to the suit in the Virginia Court. It would be dangerous to heed such an application without fuller and more satisfactory allegations as to the probability that another hearing will result favorably to the defendant. We should, at least, know the character of the new evidence.

In *Dyche v. Patton,* 56 N. C., 332, the proofs had been taken upon bill and answer, but the Court refused to examine them upon the ground that the bill was fatally defective in not alleging a conviction of the imputed perjury, although it was charged directly and explicitly that a witness, who was called by the plaintiff in the suit at law, had testified falsely and corruptly to a material matter with the knowledge of said plaintiff, who willfully and corruptly suborned and procured the witness thus falsely to testify in his behalf, and that the fact of the falsity of the testimony had come to complainant's knowledge just before he filed his bill of complaint. The bill was dismissed as upon demurrer *ore tenus.* It was in that case *Chief Justice Nash* quoted with approval the words of his predecessor, *Chief Justice Ruffin,* used by him when at the bar as counsel for the defendant in *Peagram v. King,* 9 N. C.,
(166) 605. Referring to the rule which calls for satisfactory and decisive allegation and proof in such cases, he said: "It results from the palpable truth of the position that a second or third trial, or any number of trials, will not and can not, in the nature of things, insure a final decision absolutely just." Public convenience, as well as private interests, require that there should be an end of litigation, and a sufficient case should be clearly presented before a court is asked to interfere with the verdict of a jury and the solemn judgment of the law. We should not be required to grope in the dark or to surmise that the party *may* possibly be able to turn the verdict into one for himself.

When this case was here before we held that fraud in procuring the judgment in the Virginia court could be set up as a defense in this action, but that no such fraud had been properly pleaded. We do not think the defendant has yet presented a case of fraud which a court of equity recognizes as sufficient for its intervention.

The other question is easy of solution. An issue was submitted to the jury as to the jurisdiction of the Corporation or Hustings Court of Manchester, Virginia. The statutes of that State were introduced without objection, and it appears therefrom that it is a court of superior and general jurisdiction in that city, and has the same jurisdiction as the Circuit Courts in the counties. The jurisdiction of the suit in Virginia

clearly appears from an inspection of the statute. The charge of the court as to the law in this respect was correct.

We find no error in the several rulings of the court.

No error.

Cited: Johnson v. R. R., 163 N. C., 454.

JENNIE B. WILLIAMS ET AL. v. A. P. HYMAN, ADMINISTRATOR OF MAGGIE W. HYMAN ET AL.

(Filed 12 October, 1910.)

Appeal and Error—Objections and Exceptions—Referee—Findings—Evidence.

Exceptions to the findings of fact by a referee, approved by the trial judge, if supported by any evidence, will not be considered on appeal.

APPEAL from *Guion, J.,* at April Term, 1910, of EDGECOMBE. (167)

Civil action heard upon exceptions to report of referee.

His Honor overruled defendant's exceptions, affirmed the findings of fact of the referee and rendered judgment for plaintiff. Defendant excepted and appealed.

Gilliam & Gilliam, B. M. Gatling for plaintiff.

W. Stamps Howard, G. M. T. Fountain & Son for defendant.

PER CURIAM. Upon a consideration of this record we are of opinion that the controversy is practically determined by the findings of fact made by the court below, which we are not at liberty to disturb. There is evidence to support the findings and in such case they are binding upon us. *Gudger v. Baird,* 66 N. C., 438; *Battle v. Mayo,* 102 N. C., 413; *Dunavant v. R. R.,* 122 N. C., at page 1001; *Lewis v. Covington,* 130 N. C., 542. In the latter case it is said: "The exceptions of the defendant to the findings of fact by the referee are that said findings are contrary to the weight of evidence, or that they are not supported by the evidence, but none of these exceptions are put upon the ground that there was no evidence to support them. And this being so, we have no right to review them and must take them as found by the referees and the presiding judge."

The judgment of the Superior Court is

Affirmed.

Cited: Jeffords v. Waterworks Co., 157 N. C., 13.

G. G. EDGERTON & SON v. J. T. EDGERTON & BRO.

(Filed 12 October, 1910.)

1. Contracts—Gaming—Intent—Void—Cotton Futures—Questions for Jury.

When a defense to an action brought upon contract is that it was given upon an illegal consideration and made in contravention of public policy; that it was merely a gaming contract, with a profit to the one party and loss to the other, based upon the rise and fall of the cotton market, without contemplating the actual delivery of the cotton, the form of the contract is not conclusive in determining its validity; and if upon issue joined the jury find that it was a gaming contract of the character indicated, no recovery thereon may be had.

2. Contracts—Gaming—Certainty of Amount—Void—Penalty—Forfeiture.

A gaming contract in cotton futures is void and no recovery can be had thereon, irrespective of whether the amount of the stake is certain or uncertain, and recovery can not be had of a penalty in a fixed sum specified in a contract of this character as a forfeit for its breach.

(168) APPEAL by plaintiff from *O. H. Allen, J.,* May Term, 1910, of JOHNSTON.

The facts are sufficiently stated in the opinion.

Aycock & Winston, Abell & Ward, and Chas. Edgerton for plaintiff.
W. J. Hooks and N. Y. Gulley for defendant.

WALKER, J. This action was brought by the plaintiffs to recover the sum of $2,205, as damages for the breach of a contract to sell and deliver to the plaintiffs 100 bales of cotton weighing 45,000 pounds. By the contract, which was in writing and dated 9 June, 1909, the defendants agreed to sell and deliver the cotton for ten and one-tenth cents per pound, delivery to be made in the months of September, October, November and December of the same year, with the stipulation that if either of the parties failed to perform the contract, they should pay to the other a forfeit of $500. The defendants, in their answer, substantially allege that it was not intended that the cotton should be actually delivered, although so stated in the contract, but that the contract should be discharged by the payment of the amount gained by the one or lost by the other, to be determined by the rise or fall of the market price of cotton, the maximum amount to be paid not to exceed five hundred dollars, and that the contract is, therefore, void. The sole question involved is the legality of the contract. The plaintiff contends that the defendants, in their answer, do not set up their defense sufficiently. The pleading may not be drawn with technical accuracy, but construing it liberally, we think the defense is sufficiently, even if defectively,

stated, and in this respect it is, at least, good as against a de- (169) murrer. Besides there was no objection to the issue. *Hendon v. R. R.*, 127 N. C., 114. The court submitted an issue to the jury as to whether it was intended by the parties that there should be an actual delivery of the cotton, and charged that if the parties did not contemplate an actual delivery of the cotton, but merely intended that the payment of the $500, by the one party or the other, should depend upon the rise or fall in the price of cotton, this contract would be illegal and void as founded upon a gaming consideration, but if an actual delivery of the cotton was intended, then it would be valid and enforceable. The jury under this instruction returned a verdict for the defendant. The plaintiff excepted and appealed from the judgment.

The form of the contract is not conclusive in determining its validity, when it is assailed as being founded upon an illegal consideration and as having been made in contravention of public policy. If under the guise of a contract of sale, the real intent of the parties is merely to speculate in the rise or fall of the price and the property is not to be delivered, but only money is to be paid by the party who loses in the venture, it is a gaming contract and void. "The true test of the validity of a contract for future delivery is whether it can be settled only in money and in no other way, or whether the party selling can tender and compel acceptance of the particular commodity sold or the party buying can compel the delivery of the commodity purchased. The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties." 20 Cyc., 930; *Williams v. Carr,* 80 N. C., 295; *S. v. McGinnis,* 138 N. C., 724; *S. v. Clayton, ibid.,* 732. In *Dillaway v. Alden,* 88 Me., 230, the rule is thus stated: "When, however, there is no real transaction, no real contract for purchase or sale, but only a bet upon the rise or fall of the price of a stock, or article of merchandise in the exchange or market, one party agreeing to pay, if there is a rise, and the other party agreeing to pay if there is a fall in price, the agreement is a pure wager. No business is done—nothing is bought or sold, or contracted for. There is only a bet." But the rulings and charge of the court in this case are fully sustained by *Rankin v. Mitchem,* (170) 141 N. C., 277, where it is said: "The insertion of the last clause can not be said to be *conclusive* evidence of the *intention* of both parties that the contract should be discharged only by a payment of the difference between the contract price and the market price of the cotton on the day fixed for delivery. That being so, the matter is to be settled by ascertaining the real underlying intention of the parties to the contract. Was it the intention of both parties to the contract that the cotton should not be delivered? Was it their purpose to conceal, in the terms of a fair contract, a gambling deal in which the parties contemplate no real

transaction as to the article to be delivered? This purpose and underlying intent his Honor properly left to the jury, the contract not being a gambling one on its face." The charge of the court in that case, with reference to the issue submitted to the jury, was substantially like the one in this case, as will appear at p. 281.

The plaintiff contended that the provision in the contract by which the party who should break the contract is to forfeit $500, imposes a penalty and for that reason is void, and plaintiff, therefore, can recover the difference between the contract price and the market price at the time fixed for the delivery, though in his complaint he demands judgment for both the five hundred dollars and the amount of the difference between the two prices. It can make no difference what amount he seeks to recover. The jury have found that the real transaction was a dealing in differences between prices, and that no delivery of the cotton was intended by the parties. The gain or loss depended upon a chance or contingency, the rise or fall of the price. It was essentially a contract of wager and is void without regard to the amount at stake, or whether the amount is certain or uncertain. The other exceptions can not be sustained.

No error.

Cited: Harvey v. Pettaway, 156 N. C., 377; *Rodgers v. Bell, ibid.,* 382; *Pfeifer v. Israel,* 161 N. C., 411; *Holt v. Wellons,* 163 N. C., 129; *Orvis v. Holt,* 173 N. C., 233.

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(171)

LEMON RACKLEY v. THE ROWLAND LUMBER COMPANY.

(Filed 12 October, 1910.)

Domestic Corporations—Residence—Venue—Removal of Causes.

Section 422, Revisal, fixing the residence of a domestic corporation at its principal place of business, should be construed in connection with section 424, and a plaintiff may elect to sue the corporation for damages for a personal injury in the county of his residence at the time of the commencement of the action, or at the residence of the corporation, and if in the former county it may not be removed to the latter one, on the ground of improper venue.

APPEAL from *Cooke, J.,* at August Term, 1910, of WAYNE.

The facts are sufficiently stated in the opinion.

W. T. Dortch and Geo. E. Hood for plaintiff.

Stevens, Beasley & Weeks for defendant.

WALKER, J. This action was brought by the plaintiff in the Superior Court of the county of Wayne, to recover damages for personal injuries alleged to have been caused by the negligence of the defendant. The plaintiff was an employee of the defendant and was injured while working in its mill in the county of Duplin, where its principal office is. The defendant moved that the place of trial be changed to the county of Duplin, upon the ground that the residence of the defendant, under Revisal, sec. 422, is in that county. The court found the following facts: "1. The original charter of the defendant corporation, dated 28 June, 1899, located the principal offices at Goldsboro, in the county of Wayne. 2. The injury complained of by the plaintiff occurred in October, 1909. 3. The principal office was changed, by amendment to charter made by Secretary of State 22 January, 1910, to Bowden, in the county of Duplin. 4. The plaintiff was, at the time of the alleged injury, a resident of the county of Sampson. 5. The alleged injury occurred at Bowden. 6. This action was brought to Wayne Superior Court on the 8th day of August, 1910, and at that time the plaintiff was, and is now, a *bona fide* resident of the county of Wayne."

The court adjudged that the venue was properly laid in Wayne (172) County and refused the motion. Defendant excepted to this ruling and appealed.

The contention of the defendant is that section 424 of the Revisal does not apply to this case, as by section 422 it is specially provided that, for the purpose of suing and being sued, the principal place of business of a domestic corporation shall be its residence, and that this means that an action against a domestic corporation shall be brought in the county of its residence. We do not think this is the proper construction of that section. It was merely intended by these words to define what should be the residence of a domestic corporation, in determining under section 424 where an action, to which it is a party, shall be brought. It is provided by section 424 that in all other cases, that is, cases in which a contrary provision had not already been made, an action should be tried in the county in which the plaintiffs or the defendants, or any of them, shall reside at the commencement of the action, or if none of the defendants shall reside in the State, then in the county in which the plaintiffs, or any of them shall reside; and if none of the parties shall reside within the State, then the same may be tried in any county which the plaintiff shall designate in his summons and complaint, subject, however, to the power of the court to change the place of trial in the cases provided by statute. It will be seen that, by this section, an action for personal injuries may be tried in the county in which the plaintiff or the defendant resides. If the action is brought against a domestic corporation, the plaintiff may elect whether it shall

be tried in the county of his residence or in the county where the defendant resides, and in the latter case the residence of the defendant shall be determined by the location of its principal place of business. If a suit is brought by a domestic corporation, it may lay the venue or place of trial in the county where it has its principal place of business, provided it is such an action as is embraced by the provisions of section 424. In other words, it is provided by section 424 that an action of the class therein mentioned shall be tried in the county in which the plaintiffs or the defendants shall reside at the commencement of the action, and considering this section in connection with section 422, as (173) we must do, it is further provided that, if a domestic corporation be either plaintiff or defendant, its residence shall be determined as provided by the latter section. It was not intended by section 422 that a domestic corporation must be sued in the county where it has its residence, even though the plaintiff may reside in another county, but the plain meaning is, that where it is necessary to determine the venue of an action, to which a domestic corporation is a party, by its residence, then and in that case, the county in which it has its principal place of business shall be considered as its residence. If the plaintiff does not sue a domestic corporation in the county of his own residence, he must then bring his action in the county where the defendant has its principal place of business. Section 422 (Acts 1903, ch. 803) was enacted because this Court had held, in *Cline v. Manufacturing Co.,* 116 N. C., 837, and *Alliance v. Murrell,* 119 N. C., 124, that a domestic corporation had no residence within the meaning of section 192 of The Code, now section 424 of the Revisal. Where, however, the venue of an action depends upon the residence of a party, under section 424, and that party is a domestic corporation, the venue should be laid in the county where it has its principal place of business. We have held in *Roberson v. Lumber Co., ante,* 120, that the purpose of Revisal, sec. 422, was not to change the provisions of section 424, or to deny to the plaintiff the right to bring his action against a domestic corporation in the county of his residence. Neither section applies to those causes of action where the venue or place of trial is specially fixed by other sections of the Revisal, such as sections 419, 420 and 421, the sole purpose of section 422 being to remedy a defect in our statute law, which was pointed out in the two cases we have already cited. See also *Propst v. R. R.,* 139 N. C., 397, and *Perry v. R. R., ante,* 117.

No error.

(174)

FRANK S. FERRALL v. SUSIE PATTERSON FERRALL.

(Filed 12 October, 1910.)

1. Races—Intermarriage—Third Generation—"Pure Negro Blood."

To bring an action for divorce *a vinculo* within the meaning of Revisal, sec. 2083, which, among other things, declares void a marriage "between a white person and a person of negro descent to the third generation inclusive," etc., it must be shown the ancestor of the generation stated must have been of pure negro blood.

2. Same—Constitutional Law—Evidence.

The Constitution, Art. XIV, sec. 8, by prohibiting marriages between "a white person and a person of negro descent to the third generation inclusive," adopted the language of statutes of the same or similar terms as the Revisal, sec. 2083, which the decisions of the Court had construed to mean that the ancestor stated must have been of pure negro blood to render the marriage void; and while the adoption of this language is not necessarily conclusive, it is well-nigh convincing evidence that the words contained in the Constitution were intended to bear their established meaning.

3. Appeal and Error—Verdict Set Aside—Substantial Right—Procedure.

A party litigant has a substantial right in a verdict obtained in his favor, and where one has been rendered on issues which are determinative and is set aside as a matter of law and such ruling is held erroneous, the appellate court will direct that judgment be entered on the verdict as rendered.

APPEAL from *Cooke, J.*, at October Term, 1909, of FRANKLIN.

The summons was issued in November, 1907, and complaint filed and duly verified, alleging that plaintiff was a white man; that he had married defendant in January, 1904, and seeking divorce on the ground that defendant "was and is of negro descent within the third generation" and averring plaintiff's ignorance of this fact at the time of the marriage. Defendant answered formally denying the allegation in reference to her being of negro blood within the third generation and averred with reference thereto: "While plaintiff was courting her he was repeatedly informed that there was a strain of Indian or Portuguese blood in defendant's veins, and he was also informed that some people (175) insisted that there was a strain of negro blood in defendant's veins, and defendant said he proposed to marry her in spite of such rumors. Defendant told plaintiff that she did not want to marry him on account of these rumors, but he insisted on the marriage."

Defendant further answered, by way of cross bill duly verified and alleged, "That the plaintiff, after the birth of their little girl, cruelly treated her; would get drunk and abuse her in the vilest manner, refuse to provide her with the common necessities of life, and abandoned her

and his own child, and left her without providing her any support. He left her in a delicate condition and expressed the wish that her condition would kill her. Wherefore she prays for divorce from bed and board from plaintiff and for alimony for herself and child."

The cause was tried at the term of court stated, on issues arising upon plaintiff's complaint, and the jury rendered the following verdict:

1. Were the plaintiff and defendant married as alleged in the complaint? Answer: Yes.

2. Has plaintiff been a resident of the State of North Carolina for two years next before the bringing of this action? Answer: Yes.

3. Is the defendant of negro descent within the third generation as alleged in the complaint? Answer: No.

4. Did the plaintiff abandon the defendant as alleged in the cross bill? Answer: Yes.

The evidence tended to fix a strain of negro blood in Julius Coley, a great-grandfather of defendant, and in reference to this claim the court charged the jury: "But it is contended by the defendant that the taint in the blood came from the defendant's great-grandfather, Julius Coley, who the plaintiff contends was a negro, and the court instructs the jury that if they are satisfied by the greater weight of the evidence that the said Julius Coley was a real negro, then they should answer the third issue Yes, but if they should not be so satisfied, then they should answer that issue, No." And as follows:

6. "The court further instructs the jury that by real negro he meant one that did not have any white blood in him."

(176) On coming in of the verdict there was motion by plaintiff to set the same aside for error in law in the portion of the charge contained in the sixth instruction above quoted. The court, being of opinion that said instruction was erroneous, set the verdict aside on that ground, and defendant excepted and appealed.

F. S. Spruill for plaintiff.
Bickett & White for defendant.

HOKE, J. The statute law applicable to the question presented, being the first part of section 2083, Revisal of 1905, is as follows: "Who May Not Marry.—All marriages between a white person and a negro or Indian or between a white person and a person of negro or Indian descent to the third generation inclusive . . . shall be void." This or some enactment expressed in similar terms, has long been the statute law of our State governing questions of this character, and when before the Court the accepted construction with us, so far as examined, has always been that where all other persons whose race or blood affected

the question were white, in order to bring a marriage within the prohibited degree, one of the ancestors of the generation stated must have been of pure negro blood. Thus in *Hare v. Board of Education,* 113 N. C., 10, on the right of an applicant to be admitted into the white schools, the statute providing separate schools for the two races, at that time defined the status of a rightful applicant in language exactly similar to this law as to marriage, it was held that the ancestor of the third generation whose blood should determine the issue must have been of pure negro blood. *Associate Justice Avery,* delivering the opinion, after stating that the question was controlled by section 1810, the Code of 1883, now the section of the Revisal above quoted, said further: "The words used in section 1810 as to the third generation inclusive must, therefore, be construed to prohibit intermarriage of whites with persons who are not beyond the third generation or in the fourth generation from the pure negro ancestor." Again in *State v. Waters,* 25 N. C., 455, where the validity of the marriage in question was affected by statutes since repealed, which established the fourth generation as the (177) determinative period, the ancestor whose blood must decide the issue was referred to by *Chief Justice Ruffin* as a "full negro." And so in *S. v. Chavers,* 50 N. C., 11, involving the construction of a statute defining free negroes as "all free persons descended from negro ancestors to the fourth generation inclusive." The Court, *Battle, J.,* delivering the opinion, approved a charge, "That every person who had one-sixteenth negro blood in his veins was a full negro," within the meaning of the statute, and said further, referring to the expression to the fourth generation inclusive, "That no person can cease to be a full negro unless he has reached the fifth generation from his African ancestor." A similar principle of construction has been established by authoritative decisions in other States where this matter is of vital importance. *McPherson v. Commonwealth,* 69 Va., 639; *Linton v. State,* 88 Ala., 217. And we find nothing which tends to the contrary except a very recent decision of the Supreme Court of the District of Columbia in *Wall v. Oyster,* a case which has not yet appeared in the official reports, and was kindly procured for us by the diligence of plaintiff's counsel. That case involved the construction of a statute of Congress providing for separate white and colored schools in the district, and arose on application for *mandamus* to the board of education to enroll petitioner in a white school, the admission having been made that the petitioner had not less than one-sixteenth negro blood. The application was denied on the ground chiefly that as Congress had not undertaken by enactment to define "What race or what percentage or proportion of racial blood shall characterize an individual as 'colored,' the term, being without legislative definition, is left to the import ascribed to it in the common

parlance of the people," and applying this rule it was held that according to the principle there adopted the applicant must be considered a colored child within the meaning of the statute." If this decision was in direct contravention of the principle obtaining here it would not justify the Court in departing from a line of precedents long recognized as (178) authoritative and controlling in this State, but it will be noted that the language of that statute is very general in its terms "white" and "colored" schools, and on that very account the common parlance of the people was allowed to prevail, and the case, therefore, presents a very different question from the one we consider in construing a statute which defines the status as "a person of negro or Indian blood to the third generation inclusive."

In this connection an interesting compendium of the laws of the Southern States on this subject was furnished us by defendant's counsel, showing that the four States of Alabama, Tennessee, Maryland and North Carolina make substantially the same provision with reference to these marriages, and that all of them have regulations on the subject in terms equally specific and definite. In view, then, of these decisions of our own courts, to which reference has been made, and the very definite language of our statute, we may not approve the position earnestly insisted upon by plaintiff's counsel that the negro ancestor, whose blood must determine the issue, should be considered not a negro of pure African blood, but one who has his status as a negro ascertained and fixed by the recognition and general consensus of the community where his lot is cast. Such a position ignores the ordinary and usual acceptation of the words, "Of negro descent to the third generation inclusive," is contrary, as stated, to a long line of authoritative precedents here, and is further objectionable in setting up a varying and uncertain standard by which to determine a most important legislative requirement in the civic and social polity of the commonwealth. We are confirmed in this view by the fact that this same enactment as to negroes long embodied in our statute law, and with this repeated and well-known construction by the Court, was afterwards transferred without any change whatever into the Constitution of the State and is now a part of our organic law. In Art. IV, sec. 8, it is ordained "That all marriages between a white person and a negro or between a white person and a person of negro descent to the third generation inclusive are hereby forever prohibited." The action of our Constitutional Convention in thus adopting a public statute of accepted construction and on a subject of momentous (179) interest and making the same, in its entirety and very words, a part of our organic law, while not necessarily conclusive, affords well-nigh convincing evidence that the words were intended to bear

their established meaning, and on this subject should so prevail as the law of the land. *Rhyne v. Lipscombe,* 122 N. C., 650, 654.

It may be well to note that since the decision of *Hare v. Board of Education, supra,* the legislation as to separate schools for the two races has been changed, and it is now provided, "That all white children shall be taught in the public schools provided for the white race and all colored shall be taught in schools provided for the colored race, but no child with negro blood in its veins, however remote the strain, shall attend a school for the white race." Public Laws 1903, ch. 435, sec. 22; Revisal 1905, sec. 4086. The language of our Constitution on this subject, Art. IX, sec. 2, is: "And the children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of or to the prejudice of either race." It will be observed here that unlike the section controlling the question of marriage, the words used are of more general import and permit of legislative definition in fixing the status of the two races as in the case of *Wall v. Oyster, supra.* It is well established that a party litigant has a substantial right in a verdict obtained in his favor, and where one has been rendered on issues which are determinative and is set aside as a matter of law, and such ruling is held to be erroneous, the appellate court will direct that judgment be entered on the verdict as rendered. *Shives v. Cotton Mills,* 151 N. C., 290, 294; *Abernethy v. Yount,* 138 N. C., 337. Being of opinion that the original charge of his Honor correctly stated the law applicable to the case, we hold there was error in setting aside the verdict and this will be certified that judgment be entered thereon for defendant.

Reversed.

CLARK, C. J. I concur in all respects with the opinion of the Court so clearly stated by *Mr. Justice Hoke.* Not only is the wife protected by the law upon the facts as found by the jury under a correct charge of the judge, but it would be difficult to find a case so void of (180) merit as that which the husband presents.

Years ago the plaintiff married a wife, who, if she had any strain of negro blood whatever, was so white he did not suspect it till recently, so he states. He does not aver even that she deceived him, so she herself must have been unaware of the fact, if it existed. She has borne him children. If he could show fault in her conduct in any way, it is to be presumed that in these days of easy divorce he would have sued on that ground. His divorced wife might in some circumstances have been still entitled to alimony and dower.

The plaintiff by earnest solicitation persuaded the defendant to become his wife in the days of her youth and beauty. She has borne his

children. Now that youth has fled and household drudgery and child-bearing have taken the sparkle from her eyes and deprived her form of its symmetry, he seeks to get rid of her, not only without fault alleged against her, but in a method that will not only deprive her of any support while he lives by alimony, or by dower after his death, but which would consign her to the association of the colored race which he so affects to despise. The law may not permit him thus to bastardize his own innocent children—Revisal, 1569; *Setzer v. Setzer,* 97 N. C., 252—but he would brand them for all time, by the judgment of a court, as negroes—a fate which their white skin will make doubly humiliating to them.

If indeed, the plaintiff had discovered any minute strain of colored origin after the youth of his wife has been worn away for his pleasure and in his service, justice and generosity dictated that he keep to himself that of which the public was unaware—or if the knowledge had become public and was disagreeable, the plaintiff, if possessed of any sentiment of manhood, would have shielded his wife and children by removing to another locality or to a State where the fact, if known, would not be deemed a stigma. Certainly of all men he should have welcomed the verdict that decided his wife and children are white.

The eloquent counsel for the plaintiff depicted the infamy of social degradation from the slightest infusion of negro blood. He
(181) quoted from a great writer not of law, but of fiction, the instance of a degenerate son who sold his mulatto mother "down the river" as a slave. But his crime was punished, and surely was not greater than that of this husband and father, who for the sake of a divorce, would make negroes of his wife and children, hitherto white and whom the jury still find to be so. He deems it perdition for himself to associate with those possessing the slightest suspicion of negro blood, but strains every effort to consign the wife of his bosom and the innocent children of his own loins to poverty and to the infamy that he depicts. The jury did not find with him and he has no reason to ask any court to aid him in such a purpose.

Cited: S. v. Webb, 155 N. C., 429; *Corporation Commission v. Construction Co.,* 160 N. C., 588; *Johnson v. Board of Education,* 166 N. C., 473; *Davis v. R. R.,* 170 N. C., 600.

DELIA STOKES v. SILAS COGDELL, IN RE WILBUR C. NEWTON.

(Filed 12 October, 1910.)

Appeal and Error—Habeas Corpus—Objections and Exceptions—Facts Found—Conclusiveness.

Upon an appeal from a judgment upon a writ of *habeas corpus* awarding the custody of a minor child, the court will only review errors of "law or legal inference," Constitution, Art. IV, sec. 8, and not the findings of fact made by the lower court upon competent evidence; and Revisal, 1854, allowing an appeal in such cases, does not affect the matter.

APPEAL by defendant from *W. R. Allen, J.*, at June Term, 1910, of WAYNE.

The facts are sufficiently stated in the opinion.

E. W. Hill for petitioner, appellee.
George E. Hood for appellant.

CLARK, C. J. This is an appeal from a judgment upon a writ of *habeas corpus* awarding the custody of a minor child. The first two exceptions rest upon the ground that "the evidence did not justify the findings of fact." This presents the question whether this Court will review the findings of fact by the judge.

The decisions of this Court are uniform that "The findings of (182) fact by the judge, when authorized by law or by consent of parties, are as conclusive as when found by a jury, if there is any evidence to support them." *Matthews v. Fry,* 143 N. C., 384; *Shoaf v. Frost,* 127 N. C., 306; *Brafford v. Reed,* 125 N. C., 311; *Roberts v. Ins. Co.,* 118 N. C., 429; *Nimocks v. Shingle Co.,* 110 N. C., 230; *Travers v. Deaton,* 107 N. C., 500; *Millhiser v. Balsley,* 106 N. C., 433; *Branton v. O'Briant,* 93 N. C., 99. The reason for the rule is the same in both cases. The jury, or the judge when authorized to find the facts, see the witnesses, their bearing on the stand, the attendant circumstances and incidents of the trial, and hence are far more competent to judge of the weight to be given to the evidence than this Court can be. Therefore, we have never reviewed the evidence in any case upon the ground that the findings of fact, whether by jury or judge, were against the weight of evidence. We have never gone beyond passing upon the question whether or not there is any evidence, which is a matter of law. The only exception is as to appeals in injunction cases which are heard upon affidavits and by the uniform practice of the courts, the judge is not required to find the facts, and in those cases only do we pass upon the facts.

As a rule, no appeal lies from a judgment in *habeas corpus, S. v.*

Miller, 97 N. C., 451 (though this Court may in its discretion allow a *certiorari* to bring up a case), but by the Act, 1858-9, ch. 53, sec. 2, now Revisal, 1854, an appeal lies "in favor of either party where the contest is in respect of the custody of minor." This does not alter the rule that an appeal lies to this Court only to review errors of "law or legal inference." Cons., Art. IV, sec. 8.

Appeal lies from the judgment applying the law to the facts found. *Harris v. Harris,* 115 N. C., 587, which is the rule in all cases. *Ladd v. Teague,* 126 N. C., 544; *Norton v. McLaurin,* 125 N. C., 185.

Upon the facts found the judgment herein should be

Affirmed.

Cited: In re Jones, post, 317; *Adicks v. Drewry,* 171 N. C., 671.

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(183)

SLOAN & SWEENEY v. ETTA HART ET AL.

(Filed 12 October, 1910.)

Appeal and Error—Former Appeal.

The trial judge having followed the opinion in this case reported 150 N. C., 269, no error has been committed by him.

APPEAL from *Cooke, J.,* at May Term, 1910, of NEW HANOVER.

Robert Ruark for plaintiffs.
E. K. Bryan and J. D. Bellamy for defendants.

PER CURIAM. This case was before this Court at Spring Term, 1909, 150 N. C., 269. By the opinions then rendered certain matters were settled. It was settled that the defendants made a valid and binding contract of lease with the plaintiffs, and that there had been a breach of that contract, for which breach plaintiffs were entitled to recover damages; that the entire damages for the breach of the contract are to be recovered in this action; that the trial judge committed error in his charge to the jury as to damages, and that the defendants were entitled to a new trial upon the issue as to damages.

Under our judgment the Superior Court had no power to try any other issue except that relating to damage.

In the trial before *Cooke, J.,* at May Term, 1910, the issue as to damage was again submitted to the jury. We find no reversible error and are of opinion that his Honor carefully followed the rule of damage laid down in the opinion of this Court.

No error.

(184)

MAYNARD HOWELL v. SOUTHERN RAILWAY COMPANY.

(Filed 12 October, 1910.)

Evidence—Accident—Nonsuit.

This case, wherein plaintiff was injured by a railroad rail dropping on his foot while he was carrying rails in defendant's employment, is governed by *Brookshire v. Electric Co.*, 152 N. C., 669, and a judgment as of nonsuit upon the evidence should have been granted.

APPEAL from *O. H. Allen, J.*, at May Term, 1910, of JOHNSTON.

Action to recover damages for alleged negligence. The defendant in apt time made motion to nonsuit, which was overruled. Defendant excepted and appealed.

J. A. Wellons and Aycock & Winston for plaintiff.
Abell & Ward for defendant.

PER CURIAM. The evidence, taken in its most favorable view for the plaintiff, tends to prove that plaintiff and three other employees of defendant, Worley, Faucett and Stevens, were sent by the section foreman after a guard rail. No tools were given or requested and there is no evidence that such tools are in general use. Plaintiff states that the usual method of carrying rails is with the hands.

On way back with the rail Faucett and Stevens carried one end, Worley and plaintiff the other end. The end carried by Faucett and Stevens was dropped and that jerked the other end and it fell on plaintiff's foot.

In *Brookshire v. Electric Co.*, 152 N. C., 669 (a defendant to which the fellow servant act, Revisal, sec. 2646, is applicable) we have a case on all fours with this, in which we held the casualty to be the result of an accident and no evidence of negligence.

In operations of this character such accidents are not uncommon and are difficult to guard against.

The court should have sustained the motion to nonsuit and dis- (185) missed the action.

Reversed.

MARY J. GLISSON, ADMINISTRATRIX OF DANIEL GLISSON, v. H. J. GLISSON ET AL.

(Filed 12 October, 1910.)

Executors and Administrators—Sales—Judgments — Motion to Set Aside — Reasonable Time—Pleadings—Prima Facie Case—Coverture—Infants—Service.

A decree and confirmation of sale by an administrator of the deceased, in proceedings to sell lands to make assets, will not be set aside as against

a *bona fide* purchaser for value, upon motion of petitioners, claiming, as heirs at law, that they were infants at the time and not duly served with process, if not made within a reasonable time, and in the absence of allegation of such facts as will make out a *prima facie* case that they had a valid defense to the sale of the lands in the original petition to sell. The statute of limitations for the commencement of actions is not applicable to the decision of such cases, and the coverture of female defendants is immaterial.

APPEAL from *Guion, J.*, at February Term, 1910, of DUPLIN.

Motion in the above cause to vacate and set aside the decree of sale and confirmation entered in above cause 9 February, 1883, in behalf of Kate Rackley, Florence Glisson and Theodocia Spellman. Issues of fact were submitted to a jury at February Term, 1910, of the Superior Court of Duplin.

1. When was the petitioner Kate Rackley born? Answer: 1862.

2. Were the petitioners Kate Rackley, Florence Glisson and Theodocia Spellman served with summons in the special proceedings to sell the land of Daniel Glisson to make assets to pay debts, entitled Mary Glisson, admrx., v. Florence Glisson et al.? Answer: No.

3. Were the petitioners Florence Glisson and Theodocia Spell-
(186) man married prior to the institution of the action to sell land to make assets, and were their husbands living at the time? Answer: Yes.

4. Were the other devisees under the will of Daniel Glisson and children of Robert Glisson served with summons in the action of Mary Glisson, admrx., to sell the land of Daniel Glisson? Answer: No.

5. Did F. M. Roberts, in good faith and without any notice of any actual defect in the proceedings under which the land described in this proceeding were sold, buy said land at such sale? Answer: Yes.

The court charged the jury that if they believed the evidence they would answer the issues and each of them as found in the record. To the submission of the fifth issue and the charge upon it the petitioners excepted, and from the ruling and judgment of the court appealed.

Kerr & Gavin for petitioners, appellants.
Stevens, Beasley & Weeks for appellee, Mrs. F. M. Roberts.

BROWN, J. *Rackley v. Roberts,* 147 N. C., 204, is an original action brought by petitioner Kate Rackley to set aside the decrees, sale, deed, etc., made in this special proceeding of *Glisson v. Glisson* upon the ground of fraud.

In the opinion it is held that the proceeding can not be attacked collaterally in that case and the decrees in it set aside for irregularity. It is also held that no issue of fraud was submitted in due form, as it should have been, and that no evidence of fraud was set out in the record.

The cause was sent back for a new trial and we presume is pending in the Superior Court of Duplin County.

The petitioners now move in the original special proceeding to set aside the decrees therein for irregularity.

In the view we take of the matter it is unnecessary to consider the specific assignments of error, for upon the entire record the petitioners are not entitled to have the decree now vacated for irregularity. It appears that while petitioners were not served with summons a guardian *ad litem* was appointed for them who employed reputable counsel who appeared in behalf of these petitioners, then infants, and filed (187) an answer raising issues which were transferred to the Superior Court for trial.

The decree of sale is not in this record, but evidently a decree was entered, for the sale was made and confirmed by decree of 6 February, 1883. The deed from the administratrix Mary Glisson, to the purchaser Mrs. F. M. Roberts is dated 16 February, 1883, and recites the payment of the purchase money. Mary Glisson died in 1903. The petitioner Kate Rackley was born in 1862, Theodocia Spellman was born in 1857 and Florence Glisson was born in 1859. The fact that they were married at the time the special proceeding was commenced is immaterial. We are not now dealing with statutes of limitation affecting the commencement of actions.

An irregular judgment, or decree, such as the one sought to be set aside, is one entered contrary to the method of procedure and the practice of the court. A motion in the cause is the proper remedy, and may be made at any time within a *reasonable period.* This is held in many cases. *Carter v. Rountree,* 109 N. C., 29, and cases cited.

It is true that courts have power to connect their records and set aside irregular judgments at any time, but it is settled practice that they will not exercise the power where there has been long delay or unexplained and unwarranted laches on the part of those seeking relief against the judgment. *Harrison v. Hargrove,* 109 N. C., 346; *Carter v. Rountree, supra.* The decree was made 9 February, 1883, and this motion made 16 December, 1908. The administratrix had died and a quarter of a century elapsed before petitioners moved in this cause. This is certainly a most unreasonable delay and we are unable to discover anything in the record which excuses it. Coverture is no excuse, and even that would not help Theodocia Spellman who became discovert in 1885.

Not only do petitioners fail to offer any satisfactory excuse for such laches, but they fail to allege meritorious grounds for the relief asked.

It is true they vaguely allege in their petition, "That there were very few valid and *bona fide* debts against the estate of the said Daniel Glisson, and this affiant verily believes that the personal property (188)

would have paid said debts." But on the hearing they offered no evidence whatever to the court in support of such belief and nothing to show that they had any defense against the original petition to sell the land for assets, even if the decree should be set aside and petitioners permitted to answer. They offered nothing tending to controvert the allegations of the original petition.

The petitioners should have set forth facts instead of vague and general allegations and presented them to the court showing *prima facie* a valid defense, and the validity of that defense is for the court and not for the petitioner to determine.

Unless the Court can now see reasonably that defendants had a good defense, or that they could make a defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside? *Jeffries v. Aaron,* 120 N. C., 169; *Cherry v. Canal Co.,* 140 N. C., 423.

The administratrix being now dead and the evidence of the indebtedness of Daniel Glisson doubtless destroyed or lost, after a lapse of 25 years most extraordinary circumstances must be shown to justify us in setting aside the decree of sale for irregularity.

Affirmed.

Cited: Phillips v. Denton, 158 N. C., 303, 304; *Harris v. Bennett,* 160 N. C., 346; *Rawls v. Henries,* 172 N. C., 218.

GAINESVILLE AND ALACHUA HOSPITAL ASSOCIATION v. GEORGIA HOBBS AND ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 October, 1910.)

1. Statute of Frauds—Debt of Another—Direct Obligations.

The statute of frauds requiring that a promise to pay the debts of another be in writing, etc., "does not apply to original promises or undertakings, though the benefit accrues to another than the promisor."

2. Same—Promise Relied on—Evidence—Questions for Jury.

Upon demurrer to the evidence, the evidence must be considered in the view most favorable to the plaintiff, and the weight of the evidence, the credibility of the witnesses and reasonable deductions therefrom must be left to the decision of the jury, in an action brought by a hospital association against a railroad company for services rendered an employee of the latter, in good standing in its relief department, when it tends to show that the employee was sick, adjudged by the medical attendants of the railroad to require attention at one of the defendant's hospitals, which it had contracted with the employee to furnish free at one of the hospitals

under its control; that the medical and other officials of the defendant attended to and arranged for the employee to be transported and cared for at plaintiff's hospital, one carried on independently of the railroad, where the services were rendered for which the action was brought; and the fact that the employee was joined in the action as a party defendant, does not preclude the plaintiff, as a matter of law, in this action against the railroad, the question as to whether the plaintiff relied upon the implied promise of the railroad and that credit was extended thereon, being, under the circumstances, a question for the jury.

3. Damages—Services Rendered—Verified Statement—Evidence—Questions for Jury.

The filing of an itemized statement duly verified, in an action against a railroad for services rendered an employee in its relief department, Revisal, sec. 1625, is not proof as to the damages recoverable, the action not being instituted upon an account for goods sold and delivered; but as, in this case, there was sufficient evidence of the services rendered, the length thereof, etc., a motion for judgment as of nonsuit upon the evidence should be denied.

APPEAL from *Whedbee, J.*, at August Term, 1910, of SAMPSON. (189)

At the close of the evidence the defendant railroad company moved for judgment as of nonsuit. Motion allowed. Plaintiff excepted and appealed. Miss Hobbs, the defendant, offered as a witness by the plaintiff, testified as follows: "I live in Clinton. I was working at Hawthorne, Florida. Dr. Bowman, medical examiner for defendant railroad, relief department, examined me and I passed, and this certificate and book showing the rules of the relief department, was handed to me in the regular course of the railroad mail. I was agent and operator. My dues to relief department were $1.50 per month and I paid them up to the time I was taken sick with typhoid fever about the last of May, 1907. I was taken to plaintiff's hospital on 2 June, 1907. I got Miss Dixon to wire Superintendent H. O. McArthur, (190) and she received the telegram marked Exhibit E."

EXHIBIT E.

Form A 97. Office Stamp.

Atlantic Coast Line Railroad Company.
Gainesville, Fla.

To MISS F. M. DICKSON, *Hawthorne, Fla.*

Subject your wire date 1. This message properly stamped and countersigned by agent at Hawthorne. Will pass yourself and Miss Hobbs Hawthorne to Gainesville and regular transportation will be handed conductor on arrival at this point.

F. M. Dickson. H. O. M.

Reference No.: G. E. Hobbs.

On back of this telegram is stamped "A. C. L. R. R. Co., 2 June, 1907, Hawthorne, Fla." This wire was in reply to wire from Miss Dixon to Superintendent H. O. McArthur, marked Exhibit F.:

EXHIBIT F.

Form A 97. Office Stamp.

Atlantic Coast Line Railroad Company.

To H. O. M., Gv. Ha., 1st.

Subject—Letter from Dr. Hodges and he thinks Miss Hobbs best be taken to hospital tomorrow. Please arrange to have her taken in baggage car on cot. Dr. Hodges wrote for me to accompany her to Gv. Have reliable boy in office who could manage things until I return. Please advise. Reference No. F. M. D.

On 29 May, about two days before telegram, Exhibit F, was sent, Miss Dixon wired Superintendent McArthur as follows:

(191) EXHIBIT G.

Form A 97. Office Stamp.

Atlantic Coast Line Railroad Company.

Hawthorne, 29.

To H. O. M., Gv.

Subject—Miss Hobbs is a great deal worse and I do not know what to do, as there is no doctor here now, or nearer than Gainesville. She is a member of relief department. Is it the company's place to send a doctor. Please advise quick. F. M. DICKSON.

Reference No.: O. K. Wu. F. D.

On 30 May Superintendent McArthur wired:

EXHIBIT 1.

Form A 97. Office Stamp.

Atlantic Coast Line Railroad Co.

Gainesville, 30.

To Miss Dixon, Ha.

Subject—Doctor on 89. H. O. M.

"Exhibit E was our pass to go to Gainesville. After Miss Dixon wired to know about a doctor and received the reply that the doctor was on 89, I looked for a doctor. He did not come on 89, but Dr. Hodges came next day on 78. This was Sunday. I did not know what doctor was to come to see me. Dr. Hodges came and examined me. He said

it was best for me to get to a hospital. He said he would go back and make arrangements with Mr. McArthur to have me taken to a hospital. He was a local surgeon for the A. C. L. R. R. Co. Dr. Bowman, the medical examiner, who examined me for entrance into the relief department, came to see me Wednesday after Dr. Hodges came Sunday, and offered his services and I told him Dr. Hodges was treating me and making arrangements to carry me to a hospital, and he said all right, and did not treat me. Dr. Hodges came on train No. 78 on Sunday and Dr. Bowman came on 89 on Wednesday afterwards. I was carried from Hawthorne on the telegram as a pass. At Rochelle, about nine miles from Hawthorne, Mr. T. A. Marshburn, an employee of the A. C. L. R. R. Co., met us with a pass to Gainesville, and we (192) went on there on the pass. I was on a cot and Miss Dixon was with me and we were in the baggage car. I was not delirious, knew what was going on. The hospital at Waycross was a railroad hospital. I did not know whether the hospital at Gainesville was a railroad hospital or not. Dr. Hodges met us at the depot in Gainesville with ambulance and took me right up to the hospital. My room and bed were ready, and I was carried right on up and stayed there until 29 July, 1907, when I was released as cured. I had paid up my dues from the time I became a member of the relief department in April, 1907, until I was taken sick the latter part of May, 1907, at the rate of $1.50 per month and the relief department paid me after I was taken sick one dollar per day for 365 days as sick benefits. I do not know how far Waycross is from Hawthorne. Dr. Bowman had nothing to do with taking me to the hospital. I don't know whether Dr. Hodges is president of the hospital at Gainesville or not. I did not know what doctor was to call to see me. Dr. Hodges came once and examined me. I made no arrangements about being taken to a hospital and did not know where they were going to carry me. Dr. Hodges and Miss Dixon and T. A. Marshburn took me off the train and carried me to the hospital. I thought I was being taken to a railroad hospital."

The plaintiffs also offered their account made out to Miss Georgia Hobbs for $127.75, for eight weeks' attention; $120—$2.00 laundry, and $5.75 medicines, etc. It also offered certificate of membership of Miss Hobbs in the relief fund of the relief department of the Atlantic Coast Line Railroad Company and the book of regulations governing said relief department. Among these regulations are the following:

"12. The medical examiners shall make the required physical examination of applicants for membership in the relief fund, prepare applications, report the condition of sick or injured members, decide when members are disabled, prepare claim for benefits, certify bills for surgical treatment, perform such other duties as may be required of them by the

chief surgeon, and conform to such rules as he may establish."
(193) "47. 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 (52) 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."

Faison & Wright for plaintiff.
Davis & Davis and F. R. Cooper for A. C. L. R. R. Co.

MANNING, J. The sole question presented by this appeal is whether the evidence, considered in the view most favorable to the plaintiff, is sufficient to be submitted to the jury to charge the defendant railroad company as an original promisor, upon an implied promise to pay the plaintiff the reasonable charges for the board and attention to Miss Hobbs. If not sufficient for this purpose, then the judgment of nonsuit should be sustained; and if sufficient, it should be reversed. It is too well settled to require the citation of sustaining authorities, that the statute of frauds "does not apply to the original promises or undertakings, though the benefit accrues to another than the promisor." We think the evidence, considered in the view most favorable to the plaintiff, as we must consider it under the uniform rulings of this Court, sufficient to charge the defendant railroad company. The weight of the evidence, the credibility of the witnesses and the reasonable deductions therefrom, must be left to the decision of a jury. The regulations, which we have quoted in the statement of the case, entitled Miss Hobbs—a member in good standing of the relief fund—to free medical treatment in one of the hospitals under the control of the defendant. The evidence offered clearly tends to prove that the resident medical director and the surgeon of the company, sent especially to take charge of her case, were endeavoring, by direction of defendant's superintendent, to carry out this express stipulation of the contract. The removal of Miss Hobbs from
(194) Hawthorne, Fla., to Gainesville, Fla., and to plaintiff's hospital, was done by the orders of the superintendent and the medical director. We do not see that the conclusion of this Court in *Barden v. R. R.*, 152 N. C., 318, in which we held a certain stipulation in the contract of membership to be void as in contravention of public policy, conflicts with our conclusion in the present case, that the evidence should have been submitted to and passed upon by a jury. If the defendant's relief department, under that decision, is treated as an "association sup-

ported 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," we can not see how this conclusion absolves the defendant from the performance of its promise that its sick members shall be entitled to receive the benefit guaranteed by the contract to them. One of these benefits is free medical treatment in one of the hospitals under defendant's control; "free medical treatment" means, of course, without cost to the disabled member. The place of treatment—one of the hospitals under its control—as between the member and the defendant, must mean the hospital to which the sick member is taken by the medical examiner of the defendant, as the member can not be presumed to know what hospitals are under the control of the defendant.

It was stressed in the argument before us that the account offered by the plaintiff in evidence was made out to Miss Hobbs, and she was sued jointly with the defendant railroad company; and these facts conclusively proved that the plaintiff did not rely upon the implied promise of the defendant company and the credit was not extended solely upon that promise. These are evidential facts to be considered by the jury, but we do not think conclusive, in view of the other facts in evidence. 2 Page on Contracts, secs. 619, 632. It would be competent for the jury to give to them controlling weight, but we do not think that the law attaches to them such artificial weight as to make them conclusive. It was, also, suggested that the plaintiff could not sue into the contract between Miss Hobbs and the defendant railroad company, evidenced by her benefit certificate and the rules of the department. This is not the question presented, but the proper and sole question is, can a jury reasonably infer from the entire evidence an original promise (195) to pay the plaintiff for its care of Miss Hobbs? Is the liability of the defendant primary? If so, then there can be no question that the service performed—the detriment or loss to the plaintiff—is a sufficient consideration to support the contract. 2 Page on Contracts, sec. 618. We, however, do not think it was competent to prove the account, by an itemized statement duly verified as prescribed in section 1625, Revisal, as the action is not instituted "upon an account for goods sold and delivered." There, however, was evidence offered of the services rendered and the length of time from which the jury could have found an amount fixed by them as the reasonable value of such services. The judgment of nonsuit is set aside.

New trial.

Cited: Peele v. Powell, 156 N. C., 557; *Whitehurst v. Padgett,* 157 N. C., 427; *Nall v. Kelly,* 169 N. C., 719; *Charlotte v. Alexander,* 173 N. C., 518.

S. P. TAYLOR v. JOHN T. RILEY ET AL.

(Filed 12 October, 1910.)

Injunction—Cutting Timber—Undefined Right—Equity.

An injunction against cutting timber will not be granted when it appears that the plaintiff claims an ill-defined balance of profits made by some of the defendants with others, thereof, under a contract which clearly contemplates the cutting of the timber within a prescribed time; when some of the defendants are solvent and may be made to respond in damages; and in passing upon the question of injunction the courts of equity will consider the relative loss or advantage to the parties, as, in this case, the expiration of the time in which defendant may cut the timber under the terms of the contract. As to whether Revisal, secs. 807, 808, 809, apply. *Quœre?*

APPEAL from *Cooke, J.*, from PENDER, heard 6 April, 1910, upon a motion to continue a restraining order to the hearing.

His Honor disallowed the motion and dissolved the restraining order, and plaintiff appealed.

The plaintiff alleged that he entered into a written contract in June, 1905, with W. T. Sears and S. M. Lloyd, whom he averred were (196) the purchasing agents of the defendants Riley & Co., under the terms of which he procured deeds to be made to a large amount of standing timber, in Pender County, to Riley & Co.; that he, the plaintiff, held at that time options on the said timber. The nature of the contract between Sears and Lloyd and the defendants, Riley & Co., is thus stated by plaintiff in the third paragraph of his complaint: "3. That, on or about the 14th day of April, 1905, the defendants, W. S. Sears and S. M. Lloyd, entered into a contract with the defendants, John T. Riley and Henry C. Riley, partners, trading as Charles S. Riley & Co., under and by the terms of which contract the said W. T. Sears and S. M. Lloyd were to buy timber in the eastern part of North Carolina, and that the defendants, Chas. S. Riley & Co., were to furnish the money to pay the purchase price of said timber, the title to which was to be taken in the name of the defendants, Charles S. Riley & Co., and held by them as security for the purchase money, together with interest on the same, at six per cent per annum, until the said W. T. Sears and S. M. Lloyd should repay the purchase money to the said Charles S. Riley & Co., to belong to the said W. T. Sears and S. M. Lloyd."

The plaintiff also in the fourth paragraph of his complaint, thus stated his contract with Sears and Lloyd: "4. That, on the 31st day of July, 1905, the plaintiff, S. P. Taylor, entered into a contract with W. T. Sears and S. M. Lloyd, whereby it was agreed that the plaintiff, S. P. Taylor, then holding and owning certain timber rights and options

as hereinbefore alleged, should sell and convey the same, and have the same conveyed to the defendant, Charles S. Riley & Co., in consideration of which the said W. T. Sears and S. M. Lloyd did agree to buy and pay for the said timber then owned and controlled by the said S. P. Taylor (which said timber is hereinafter described), out of the funds provided for in the contract between W. T. Sears and S. M. Lloyd and Charles S. Riley & Co., and did, in said contract of conveyance, convey to the plaintiff, S. P. Taylor, one-half interest and profits in the said timber, which said contract and conveyance is duly recorded in the record of Pender County, in Book 51, at page 347, and a copy of which said contract and agreement is hereto attached, marked Exhibit A, and made a part of this paragraph as fully and completely as if (197) the same were set out herein in full."

The complaint further alleges that subsequent to this time, S. M. Lloyd and W. T. Sears incorporated their business and organized a company known as W. T. Sears & Co., incorporated, and that this company took over all of the contracts and obligations of W. T. Sears and S. M. Lloyd, and, "9. That, on the 20th day of June, 1907, the plaintiff, S. P. Taylor, entered into a contract and agreement with the defendant, W. T. Sears & Co., incorporated, whereby the defendant, W. T. Sears & Co., incorporated, agreed to pay the plaintiff, S. P. Taylor, the sum of fifty cents (50 cts.) per thousand feet stumpage on all of the timber described in paragraph sixth of this complaint, being the same the title to which was, and is, held by Charles S. Riley & Co., and, to secure the performance of said agreement and stipulation on the part of the said W. T. Sears & Co., incorporated, the said W. T. Sears & Co., incorporated, conveyed to the said plaintiff, S. P. Taylor, all their title, right, equity and estate in the timber described in paragraph six of this complaint, which said contract and conveyance is duly recorded on the record of Pender County, in Book 55, at page 155, a copy of which contract and conveyance is hereto attached, marked Exhibit B, and made a part of this paragraph as fully and completely as if the same were set out herein in full."

The defendants denied that any such contract, as stated in paragraph 3 of the complaint, was made by them with Lloyd and Sears, and specifically any and all knowledge of any right or equity in the plaintiff; and further answering the complaint, the defendants said: "15. Defendants Charles S. Riley & Co., further answering the plaintiff's bill, say that at the time they purchased and paid for the timber mentioned in the bill filed, they were the owners of other timber in Columbus, Bladen and Brunswick counties, which W. T. Sears and S. M. Lloyd had agreed to purchase, upon terms which included the performance by W. T. Sears and S. M. Lloyd of all contracts with Charles S. Riley & Co., and

the payment of a price which would net Charles S. Riley & Co. fifty cents per thousand above the purchase money paid, with interest
(198) at six per cent. The timber mentioned in the bill filed was purchased by Charles S. Riley & Co. at the solicitation of W. T. Sears and S. M. Lloyd, with the intention that it should be included with the other timber lands, upon the same agreement of sale to W. T. Sears and S. M. Lloyd; although no writing to that effect was executed. Defendants further say that while the insolvency of W. T. Sears and S. M. Lloyd and of W. T. Sears & Co., Inc., will prevent the completion of the contracts which was a prerequisite of the consummation of the sale, Charles S. Riley & Co. are willing to give to the receiver of W. T. Sears & Co., if exercised promptly, the right to purchase and receive a conveyance of all of the said timber in said counties, including the timber set out in the bill, upon payment of the sum which should have been payable by W. T. Sears and S. M. Lloyd, assuming that they had not lost their rights by their failure to perform their contracts, which sum would be one hundred and twenty-five thousand nine hundred and eighty-seven dollars and twenty-five cents ($125,987.25)."

W. T. Sears is dead, S. M. Lloyd is insolvent, and the corporation, W. T. Sears & Co., Inc., is insolvent and in the hands of a receiver, John D. Bellamy. The defendants, Riley & Co., are solvent. Subsequently to the bringing of this action, Riley & Co. sold to Joseph G. McNeal, L. G. Cannon and W. A. Cannon, who were acting for the Garysburg Manufacturing Company, incorporated (all of whom were solvent), and they are cutting the timber in Pender County. S. M. Lloyd filed an affidavit in which he stated, among other things: "This affiant further swears that neither he nor W. T. Sears ever had anything more than a possibility of an equity in said timber and timber rights that is alleged in plaintiff's petition, the deeds of which are enumerated in said petition, and that the firm of W. T. Sears & Co. or W. T. Sears & Co., Inc., had no contract whatever with Chas. S. Riley & Co. to purchase land or timber in Pender County, by which the said W. T. Sears or S. M. Lloyd, or W. T. Sears & Co., Inc., were to have an equity in said timber in Pender County.

"This affiant further swears that he and his co-partner, W. T. Sears, had various and sundry contracts to furnish lumber to the Han-
(199) nah Box Shook Company of Wilmington, North Carolina, to make box shooks, and that he and his partner were engaged in shipping lumber, and that Chas. S. Riley & Co., purchased large tracts of timber land in Columbus, Brunswick and Bladen counties and agreed with this affiant and his partner, and after W. T. Sears & Co., Inc., was organized with W. T. Sears & Co., Inc., that if this affiant and his partner and W. T. Sears & Co., Inc., would perform all of their contracts,

that is, cut the timber and furnish the lumber to complete the contracts with the Hannah Box Shook Company and other contracts, that Chas. S. Riley & Co. had made to take the output, that then after they had paid Chas. S. Riley & Co. back the money that Chas. S. Riley & Co. had put into the timber in Brunswick, Bladen and Columbus counties and six per cent interest and fifty cents per thousand feet profit on the timber, and if there was any standing timber remaining after complying with the contracts and performing the contracts and paying off all that W. T. Sears and S. M. Lloyd and W. T. Sears & Co., Inc., owed to Chas. S. Riley & Co. for money furnished for the operation of the business, that then Chas. S. Riley & Co. would recover whatever timber they had in Bladen, Brunswick and Columbus counties after these contracts had been performed, and all debts had been paid, but the holdings in Pender County were not included in that agreement, and there was no writing therefor, but it was the intention that if W. T. Sears & Co., Inc., and W. T. Sears and S. M. Lloyd performed their contract, that then they reasonably expected that the Pender County timber should be included under a like agreement.

This affiant further swears that it is true that a contract with this affiant and W. T. Sears was made on the 31st day of July, A. D. 1905, and signed by affiant, but affiant does not recall that he knew the purport thereof, for the reason that he was the financial manager of W. T. Sears & Co. and W. T. Sears & Co., Inc., and W. T. Sears made all of the contracts and sent them to him to sign, and he was in Norfolk and down with a spell of fever when it was sent to him, but affiant does distinctly remember a conversation that took place between S. P. Taylor and Henry C. Riley, of the firm of Chas. S. Riley & Co., at the Kennon House, a hotel in Goldsboro, North Carolina, some time about the first of October, 1905, in which S. P. Taylor (200) stated to Henry C. Riley, of the firm of Chas. S. Riley & Co. that he had whatever equity S. M. Lloyd and W. T. Sears had in the timber now in controversy, and that Henry C. Riley told said Taylor that neither this affiant nor W. T. Sears, nor W. T. Sears & Co., Inc., had any interest whatever in said timber, and that no person, firm or corporation, had any interest whatsoever in said timber, except the firm of Chas. S. Riley & Co., and that if he, Taylor, expected anything out of that property, that he had best get that notion out of his head, and that if he, Taylor, had any claim whatsoever against W. T. Sears & Co., or W. T. Sears & Co., Inc., that he would have to get it personally out of them, as they had no right, title, interest or equity whatever in the Pender County holdings.

This affiant further swears that it is true that W. T. Sears and himself, through the plaintiff, procured this Pender County timber for

the use of Chas. S. Riley & Co., and that Chas. S. Riley & Co. paid every dollar for the timber at the time they purchased it and furnished the money to this affiant and W. T. Sears to pay for the same, and that the plaintiff, S. P. Taylor, went out and got options on the timber and estimated the same, and that it frequently occurred that the plaintiff would buy the timber and land at a certain specific price, and the timber was deeded to Chas. S. Riley & Co. for what both the timber and land cost, and the title to the land was taken sometimes in the name of S. P. Taylor individually, and at other times in the name of other parties to this affiant unknown; but he does recall a number of instances in which this was done, and when the land was sold the proceeds derived therefrom were divided between S. P. Taylor, the affiant, and W. T. Sears, and this was a clear profit to S. P. Taylor; and whatever amount this affiant and W. T. Sears, or W. T. Sears & Co., received from the transactions of that kind, their part of it went into the business of W. T. Sears & Co., Inc., and the plaintiff pocketed his amount.

This affiant further says that it is true that whatever profit he and his partner, W. T. Sears or W. T. Sears & Co., Inc., were to get out of this timber in buying the same, they were to pay to the plaintiff one-half of the same and the plaintiff bore one-half of the ex-
(201) penses and they the other half; but affiant avers that any such profit was contingent upon W. T. Sears and himself and W. T. Sears & Co., Inc., being able to carry out their part of the other contracts with Chas. S. Riley & Co., as hereinbefore set out.

This affiant further says that he and his partner composed the firm of W. T. Sears & Co., and that W. T. Sears & Co., the partners individually, and the corporation known as W. T. Sears & Co., Inc., fell down on every contract they made with Chas. S. Riley & Co., and were unable to perform any of the contracts either for cutting timber or manufacturing timber into lumber, or furnishing timber or lumber to the Hannah Box Shook Company, and that their equity in the timber in Bladen, Brunswick and Columbus counties was dependent upon the performance of all these various and sundry contracts, and by the failure on their part to comply with the terms of the contracts that they had made, they forfeited any equity they had in any timber in Columbus, Bladen and Brunswick counties that stood in the name of Chas. S. Riley & Co., and having failed in their contracts made, and never having begun in Pender County, they never had, and never claimed, any equity whatsoever in the timber in Pender County, and this affiant does not recall any conversation that he ever had with the plaintiff, in which he stated to him that he had an equity, or that his firm or corporation had an equity in the Pender County timber; and that at the time of the conversation the plaintiff and Henry C.

Riley had at Goldsboro, North Carolina, this affiant told the plaintiff then that neither he nor W. T. Sears, nor W. T. Sears & Co., nor W. T. Sears & Co., Inc., had any contract with Chas. S. Riley & Co. as to the Pender County timber; that the contracts they had were for the timber that Chas. S. Riley & Co. owned in Columbus, Bladen and Brunswick counties, and did not apply specifically to Pender County and was not so construed.

In the contract between plaintiff and W. T. Sears & Co., Inc., it is expressly agreed that W. T. Sears & Co., Inc., "shall immediately enter upon the cutting of the said timber and shall continue the cutting and delivering of the same until all of the said timber is (202) cut," and provided for payment to plaintiff of a stipulated sum per 1,000 feet so cut.

E. K. Bryan and Stevens, Beasley & Weeks for plaintiff.
Geo. Rountree and J. T. Bland for J. G. McNeill and L. G. Cannon.
Herbert McClammy for C. S. Riley & Co.

MANNING, J., after stating the case: We approve his Honor's judgment declining to continue the injunction to the hearing. According to the evidence presented to him, it is very doubtful if sections 807, 808, 809, Revisal, govern in this case. The plaintiff does not claim title to "timber lands," nor is this action brought to try the title thereto. The most that plaintiff claims is not a very clearly defined equity in any balance that may be left after certain obligations of Sears & Co. have been discharged to Riley & Co., and this resting upon a contract which clearly contemplates the cutting of the timber and its manufacture into lumber, the doing of which he now seeks to enjoin. The affidavits disclose that all the defendants, except S. M. Lloyd and W. T. Sears & Co., Inc., are amply solvent and able to respond to any judgment the plaintiff may eventually recover. As the action is not terminated, we refrain from comments upon the facts presented in the affidavits, and content ourselves with saying that we do not think the plaintiff has brought himself either within the statutory provisions or the general principles of equity which entitle him to injunctive relief. This is particularly true, in view of the ample solvency of defendants and the stipulation that the timber shall be cut, and the further fact that the deeds conveying the timber provide that it shall be cut in a stipulated number of years, which will soon expire, so the injury to the plaintiff can not be irreparable. To enjoin the cutting of the timber until the action shall be finally determined will result in great loss to the defendants, with no commensurate advantage to the plaintiff. The measure of loss to one party and the advantage to the other by granting

or refusing the injunctive relief, has its proper influence in determining the relief to be administered in a court of equity, except in (203) those cases controlled by some positive statutory enactment. *Lumber Co. v. Wallace,* 93 N. C., 22; *Newton v. Brown,* 134 N. C., 439; *Lumber Co. v. Hines,* 127 N. C., 130; *Lewis v. Lumber Co.,* 99 N. C., 11; *R. R. v. Mining Co.,* 112 N. C., 661; *Blackwell v. McElwell,* 94 N. C., 425; *Heilig v. Stokes,* 63 N. C., 612; *McCorkle v. Brem,* 76 N. C., 407.

It is unnecessary to pass upon some of the interesting questions argued before us, as they will more properly be considered at the trial of the action upon a more complete presentation of the facts. Discovering no error, the judgment is

Affirmed.

SUPREME LODGE KNIGHTS OF HONOR v. BENJAMIN R. SELBY ET AL.

(Filed 12 October, 1910.)

1. **Interpleader—Pleadings—Defect of Statement—Procedure—Demurrer.**

A defect of overstatement in a bill of interpleader is waived by answers of the parties defendant, such defect should be availed of by demurrer.

2. **Interpleader—Pleadings—Tender—Interest.**

An assessment life insurance company having filed its bill of interpleader avowing its readiness to pay into court the amount of its policy claimed by two contestants, is assumed, nothing else appearing, to have continued ready and able to pay upon the order of court, and is not chargeable with interest on the amount by reason of delay caused by litigation, in favor of the successful defendant.

3. **Interpleader—Attorney's Fees.**

A successful interpleader is not entitled to reasonable attorney's fees incurred in litigation over the funds held by it as a stakeholder.

APPEAL from *Guion, J.,* at February Term, 1910, of WILSON.

The Supreme Lodge Knights of Honor is a fraternal beneficiary association under the laws of the State of Missouri, issuing (204) benefit certificates to its members. The member has the right to designate a beneficiary, but the right of revocation is reserved, and the by-laws provide that, if all the beneficiaries designated by the member die before the decease of such member, if no other benefit certificate has been procured by him, the benefit shall be paid to the widow and children of the member, and if no widow, then to his children.

One John Selby became a member of the order and received a benefit certificate for the sum of two thousand dollars ($2,000), and died on 4 December, 1908. At the time of his death he was a member in good standing in appellant's said order, and appellant became bound to pay the amount of the benefit certificate to whomsoever should be lawfully entitled thereto.

The benefit certificate was payable to the wife of the member, Esther Selby, who died in his lifetime, and at the time of his death, Selby had not obtained a new benefit certificate. He left no widow, but three children, namely, the defendants Benjamin R. Selby, Susan B. Rierson and Minnie B. Walls. After the death of Selby, the said children made demand on appellant for the payment of the amount of the certificate to them. They resided in Wilson County. About the same time the defendant, Smyth Bros., McCleary-McClellan Co., a corporation, with headquarters at Richmond, Va., made demand on appellant for the payment of the amount of the benefit certificate to it, claiming that in his lifetime said John Selby delivered and pledged to said corporation the said benefit certificate to secure advances made by it to him; that the said benefit certificate was always and then was in its possession, and that said company had paid all assessments and premiums on said benefit certificate for a period of four years, and that the amount of the indebtedness of Selby to the company at the time of his death largely exceeded the amount of said certificate, and said company threatened to sue plaintiff for the said amount unless the same was paid to it.

On the first day of March, 1909, the appellant filed in the Superior Court of Wilson County its action against the respective claimants of this fund, making as additional parties the husbands of the defendants, Mrs. Rierson and Mrs. Walls.

The Virginia corporation entered its appearance in such suit as interpleader in Wilson County, so that all questions might (205) be determined in the one suit.

The plaintiff, in its complaint filed, prayed that it might be allowed to pay into court the sum of $2,000 and stand discharged from any and all liability; and that the defendants be required to litigate their claims to the same; and that it be allowed its costs and reasonable attorney's fees. The children of John Selby answered admitting the allegations of the complaint except that the plaintiff was a mere stakeholder; stated their right to the fund and demanded judgment against the the plaintiff for the amount and interest and costs, and denied its right to be allowed attorney's fee. The corporation defendant filed answer and stated its claim to the fund. There was no order made before the final judgment, requiring the plaintiff to pay the fund into

court and the defendants to interplead. Upon the admissions in the pleadings his Honor adjudged that the children of John Selby were entitled to the fund, and gave judgment against the plaintiff for the amount, with interest from 4 March, 1909; denied the motion of plaintiff for allowance of attorney's fees, and taxed the costs against the defendant corporation. The plaintiff excepted to the judgment because it awarded interest against it, and because its motion for attorney's fees, fixed at $25, was disallowed, and appealed to this Court.

Pou & Finch and F. H. Bacon for plaintiff.
Connor & Connor for defendants.

MANNING, J. In 4 Pomeroy Equity Jurisprudence (3 Ed.), sec. 1322, the learned author thus states the essential elements required to invoke the equitable jurisdiction of the court by a bill of interpleader or a complaint as a substitute for the bill: "1. The same thing, debt or duty, must be claimed by both or all the parties against whom the relief is demanded. 2. All their adverse titles or claims must be dependent, or be derived, from a common source. 3. The person asking the relief —the plaintiff—must not have nor claim any interest in the subject-matter. 4. He must have incurred no independent liability to (206) either of the claimants, that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder." And in speaking further in section 1328 of the averments of the bill, the same author says: "The bill need not show an apparent title in either of the defendants. On the contrary, if the bill should show that plaintiff was fully informed of the defendants' rights and of his own liability, or if it should show that one of the defendants was certainly entitled, on the facts alleged, to the thing, debt or duty, in either case it would be demurrable; there would be no ground for an interpleader." Citing, among other cases, in the note *Barker v. Swain,* 57 N. C., 220. Such is the defect in the present complaint, a defect of overstatement of the plaintiff's case, but neither of the defendants demurred to it; they both answered and set up their conflicting claims to the fund, and we think by so doing waived this defect. For such defect the proper pleading would have been a demurrer, and this not having been interposed, it can not now be taken advantage of, and we must, for the purposes of the action, treat the complaint as a sufficient bill of interpleader, and determine the questions presented accordingly. *Printing Co. v. McAden,* 131 N. C., 178; *Ladd v. Ladd,* 121 N. C., 118; *Knowles v. R. R.,* 102 N. C., 59; *Halstead v. Mullen,* 93 N. C., 252. The complaint having been filed and the contesting claimants regularly brought into court, the first question presented in the due and orderly course of

procedure, upon a demurrer filed by either or all of the defendants, was the sufficiency of the complaint as a bill of interpleader. This being determined, the court should have ordered the plaintiff to pay the amount into court and the defendants to interplead. No such order was entered nor does it seem to have been asked for. If, upon demurrer, the complaint had been adjudged insufficient as a bill of interpleader, then the action would have been dismissed and the defendants left to assert their respective rights against the plaintiff in any way they might have been advised. The contesting defendants, however, filed answer stating their respective claims for and upon the fund. The plaintiff was prompt in bringing this action and in filing its complaint; it offered therein to pay the money into court, and prayed thereupon to be discharged from further liability. If an order directing pay- (207) ment to be made into court had been made and the plaintiff had failed to comply, then it would have been proper to charge it with interest for such default. The plaintiff being an assessment company, and having avowed its readiness to pay the amount of the certificate into court, and nothing appearing in the record to the contrary, we must assume that it continued ready to pay the same into court at any term when it was so ordered. There were five of these terms between the return term and the term at which the judgment was rendered, at any one of which it was competent for the court to make such an order. It is not suggested that the plaintiff invested the assessments collected to pay this certificate, or that it received any interest on this fund. We think, therefore, his Honor ought not, upon the facts presented, to have charged the plaintiff with interest on the amount of the benefit certificate. The case is somewhat analogous to a proper tender of money; this stops interest, the reason being that the person to whom the tender is made is in the wrong in declining to receive it. In this case the conflicting claims for the fund justify the plaintiff, as a mere stakeholder, in appealing to the court to compel the claimants to litigate their claims.

We do not think there was any error, however, in the ruling of his Honor, disallowing an attorney's fee to the plaintiff, to be paid out of the fund, and ultimately to be taxed against the unsuccessful defendant. We do not think such practice has obtained in this State. In *Gay v. Davis,* 107 N. C., 269, this Court said: "There is no statutory provision in this State that has been brought to our attention, or within our knowledge, that prescribes or authorizes an allowance of compensation directly to the counsel of commissioners charged with a particular duty by an order of the court, or otherwise, or to counsel of trustees, whatever may be the nature of the trusts wherewith they may be charged. Nor is there any general rule of practice prevailing in courts that permits such al-

lowances to be made. In the absence of statutory provision, the courts, in the exercise of chancery powers, make allowances to commissioners and trustees in appropriate cases, and such allowances are sometimes enlarged so as to embrace reasonable compensation to counsel of (208) such commissioners or trustees, in cases where counsel is necessary to a proper discharge of their duties; but in such cases the courts are careful to see that the services were necessary; that the charges are reasonable and are charged against the proper parties." *Mordecai v. Devereux,* 74 N. C., 673; *R. R. v. Goodwin,* 110 N. C., 175; *Chemical Co. v. Johnson,* 101 N. C., 223; *Patterson v. Miller,* 72 N. C., 516; *Devane v. Royall,* 52 N. C., 426; *Moore v. Shields,* 69 N. C., 50; *State ex rel. Whitford v. Foy,* 65 N. C., 265. In the case last cited this Court said: "It is not disputed that a trustee may, if necessary, and ought to employ counsel to advise him in the execution of his trust, at the expense of the trust fund. This is considered settled here, although in some of the States a contrary doctrine prevails." The plaintiff, in the present case, can not be regarded as a trustee. As modified, the judgment is affirmed. The costs of this appeal will be divided equally between the plaintiff and the children of John Selby.

Modified and affirmed.

JUSTICE BROWN did not sit upon the hearing or decision of this case.

Cited: Banking Co. v. Leach, 169 N. C., 711.

M. W. BAREFOOT ET AL. v. ELIZABETH MUSSELWHITE ET AL.

(Filed 12 October, 1910.)

1. Evidence—Destroyed Records—Title—Recitals in Deed—Prerequisites—Interpretation of Statutes.

The preliminary fact of the destruction by fire or otherwise of the courthouse or records must be first shown before "the recitals, reference to, or mention of any decree, judgment or other record" recited in a deed of conveyance, etc., shall have the effect as evidence given by Revisal, sec. 341; and when both parties to the action admit title in a certain person in their claim of title, one of them may not show disseizin by a recital of a sale under partition proceedings in his deed, without first showing that the courthouse, etc., had been destroyed, according to the statutory requirement.

2. Evidence—Destroyed Records—Recitals in Deeds—Constitutional Law.

Revisal, sec. 341, making recitals in deeds, etc., of judgments, records, etc., evidence, etc., upon condition that the courthouse, records, etc., have been destroyed by fire, etc., are constitutional.

3. Judgments—Irregularities—Collateral Attack—Motions—Procedure.

The plaintiffs claiming the fee in lands allege damages for waste committed thereon by the tenant in dower; by order of court other parties were made defendant, and filed answer claiming the reversionary interest as heirs at law. To show that the title of the ancestor of the new parties had been divested, plaintiff introduced a deed, reciting that the *locus in quo* had been sold under proceedings in partition, and had he met the requirements of Revisal, sec. 342, so as to make the recitals evidence of his title, the defendants' remedy, to avail themselves of any irregularity in the proceedings, was by motion in the original action.

APPEAL from *O. H. Allen, J.*, at March Term, 1910, of HAR- (209) NETT.

This was an action instituted to recover damages for waste. The plaintiffs are the heirs of one Kinion Barefoot, and allege that they are the owners of the fee, subject to the life estate of Elizabeth Musselwhite (formerly Elizabeth Barefoot, the widow of L. L. Barefoot), as tenant by dower. The waste is charged to have been committed by the tenant in dower through her lessees. By order of the court, the other defendants, who are the heirs at law of L. L. Barefoot, his infant grandchildren, were made parties, and they by their guardian *ad litem* filed answer denying that plaintiffs were the owners of the fee in the land; they admitted that Elizabeth Musselwhite was entitled to a life estate as tenant by dower, but they alleged the fee to be in them as heirs at law of L. L. Barefoot. It was admitted that the land in controversy at one time belonged to L. L. Barefoot, and the plaintiffs offered in evidence a deed of D. H. McLean, commissioner, containing the following recitals: "That by an order of the Superior Court of Harnett County, 1 March, 1878, D. H. McLean was appointed commissioner to sell the real estate belonging to the estate of L. L. Barefoot, late of said county, deceased, was licensed and empowered in the case of *Isham McLamb v. Elizabeth Barefoot,* administratrix of L. L. Barefoot, and the (210) heirs at law made parties under a creditors' bill, the said D. H. McLean, commissioner, being empowered to sell and convey the said land hereinafter described to pay debts and charges of said L. L. Barefoot estate," etc. The deed is made to Kinion Barefoot, ancestor of plaintiff, as the last and highest bidder. The record of said action, if any existed, was not offered in evidence, nor its absence in any way accounted for. No other evidence was offered that the title of L. L. Barefoot had ever been divested. His Honor held that the recitals in the deed made out a *prima facie* case, and that the verity and validity of the action recited therein could not be collaterally impeached, and under his instructions the jury answered the issues in favor of the plaintiffs. The defendants excepted. In their answer, the defendants denied the existence of the record of any such action and that the heirs at law of L. L. Barefoot, who

were infants at that time, had ever been served with process. There was no evidence offered or admission of the destruction of the records of the county of Harnett by fire or otherwise. From the judgment rendered upon the verdict, the defendants appealed.

R. L. Godwin and E. F. Young for plaintiffs.
J. C. Clifford and N. A. Townsend for defendants.

MANNING, J. Upon the record presented to us, we do not think his Honor's ruling as to the effect of the recitals in the deed of D. H. McLean, commissioner, to Kinion Barefoot, can be sustained. No evidence was offered to bring the deed and its recitals under the operation of section 341, Revisal. That section provides: "The recitals, reference to, or mention of, any decree, order, judgment or other record of any court of record of any county in which the courthouse, or records of said county, or both, have been destroyed by fire, or otherwise, contained, recited or set forth in any deed of conveyance, paper-writing or other *bona fide* written evidence of title, executed prior to the destruction of the courthouse and records of said county, by any executor, etc., or commissioners appointed, etc., shall be deemed, taken and recognized as true in fact, and shall be *prima facie* evidence of the existence, (211) validity and binding force of said decree, etc., and shall be to all intents and purposes binding and valid against all persons mentioned or described in said instrument of writing, deed, etc., as purporting to be parties thereto," etc. The constitutionality and validity of this section and the next section (342) can not now be open to dispute. *Hare v. Holloman,* 94 N. C., 14; *Everett v. Newton,* 118 N. C., 919; *Irvin v. Clark,* 98 N. C., 437. But in order to invoke the aid of these sections, it is essential that the preliminary fact of the destruction by fire or otherwise of the courthouse or records must be shown; otherwise the benefit and protection of these sections are not available, and the recitals in the deed would be valueless as proof of the existence of the facts therein set forth, and incompetent as evidence to prove that the title of L. L. Barefoot was divested. If the preliminary fact required by the statute were proven or admitted, the proper remedy of the defendants to avail themselves of any irregularity in the action or proceeding would be by motion in the original action, and not by way of defense, and the prayer for affirmative relief—to have the deed set aside as a cloud upon their title as is attempted in this action. This has been repeatedly held by this Court. *Rackley v. Roberts,* 147 N. C., 201, in which case the previous decisions of this Court are reviewed in an able and exhaustive opinion by *Mr. Justice Walker.* See also *Hargrove v. Wilson,* 148 N. C., 439.

Upon the evidence appearing in the record, his Honor's ruling was

erroneous as to the effect of the deed and its recitals, and as it may have induced the plaintiffs to withhold evidence of the record itself of the action recited or its destruction by fire or otherwise, a new trial is ordered.

New trial.

Cited: Pinnell v. Burroughs, 168 N. C., 320; *S. c.,* 172 N. C., 186.

(212)

CHARLES EDGE v. ATLANTIC COAST LINE RAILWAY COMPANY.

(Filed 19 October, 1910.)

1. **Contributory Negligence—Proximate Cause—Last Clear Chance—Railroads.**

In an action for damages against a railroad for personal injuries, *held,* contributory negligence for an employee in going along a path crossing railroad tracks to go between and under cars standing on a live track and giving indications that they might at any time be moved from their placing.

2. **Contributory Negligence—Proximate Cause—Last Clear Chance—Railroads.**

In such case, however, the negligence of the plaintiff is not the proximate cause unless it continues to the time of the injury complained of, and it is the defendant's duty, notwithstanding plaintiff's previous negligent act, to observe that degree of care required by the doctrine of the last clear chance when through its agents it knew or should have perceived, by keeping a proper lookout, that plaintiff was in such a position of danger or peril that ordinary effort on his own part would not avail to save him.

3. **Same—Evidence—Nonsuit.**

Upon a motion to nonsuit upon the evidence, in an action to recover damages for personal injury against a railroad, the evidence of plaintiff should be taken as true and accepted in the light most favorable to him; and when it appears therefrom, upon the doctrine of the last clear chance, that notwithstanding the negligent act of plaintiff, defendant's engineer saw his danger, that "he was looking straight at me" and afterwards, that "he was looking toward me with his cap pulled down in front of his face," the latter testimony will not be taken to mean necessarily that the engineer's view was obstructed so that he could not see the plaintiff, and the cause should be submitted under the doctrine of the last clear chance and the principles applicable.

4. **Same.**

In his action against a railroad for damages for personal injury, it appeared that plaintiff was a "handy man" or messenger in defendant's

railroad yard, and in the course of his employment was directed to bring some articles from another part of the yard in a hurry; in doing this it was necessary for him to cross defendant's tracks, and on one of them was a detached engine, and eighteen box cars, and the engineer was looking out of the cab window with a plain and unobstructed view, and plaintiff endeavored to go between the cars, under the bumpers, when the engine was backed upon the cars, producing the injury. There was evidence by plaintiff, that, at the time, the engineer was looking right at him, and, he then testified, "that he was looking towards him with his cap pulled down in front of his face": *Held*, sufficient to be submitted to the jury upon the issue of the last clear chance, and that a motion as of nonsuit upon the evidence should not be granted.

(213) APPEAL from *Guion, J.*, at April Term, 1910, of EDGECOMBE.

Action to recover damages for physical injury caused by alleged negligence on part of defendant company.

On motion at the close of plaintiff's testimony, there was judgment of nonsuit, and plaintiff excepted and appealed.

T. T. Thorne and G. M. T. Fountain & Son for plaintiff.

F. S. Spruill and J. L. Bridgers for defendant.

HOKE, J. There was allegation with testimony on part of plaintiff tending to show that on or about 28 September, 1908, plaintiff was in employ of defendant company on its yards at South Rocky Mount, N. C., as "handy man or messenger," and in the line of his duty was sent by his foreman or boss, with urgent directions to hurry, to the storeroom or roundhouse of defendant with a requisition for a keg of nuts or bolts. The path to the roundhouse led over the tracks of defendant company and on one of these tracks and across the path was a line of box cars, 18 in number, coupled together, five of them being towards a switching engine, detached and some ten feet ahead. That as plaintiff approached, this engine was standing still with a little smoke showing, with a man in the cab, looking towards plaintiff. That plaintiff, as he came to the train of cars, attempted to pass under the drawheads of the cars across the path, and while he was in this position "of peril," the switching engine, without signal or warning of any kind, backed against the cars, shoving them along about half a car length and causing serious injury to plaintiff. So far as appears there was nothing to obstruct the view, and, speaking more directly to the question presented, the plaintiff testified: "There was a line of box cars, about 18, across the path leading to the roundhouse, and I looked towards the
(214) engine to see if I saw any one. The engine was not connected with the cars, but about 10 feet ahead of them standing still, etc. I was walking along whistling—saw a man sitting in the window of

the engine, he had his head right towards me, and afterwards I got between the cars going on towards the other side when the engine struck the cars and knocked me," etc. And again, "Don't know the engineer. He was looking towards me with his cap pulled down in front of his face; I did not hear any signal at all," etc. "When the cars struck I was crawling under the drawheads between the cars."

On this testimony, or on facts of similar import, we have held in *Beck v. R. R.*, 149 N. C., 168, that it was a negligent act on the part of plaintiff in endeavoring to pass between these cars standing as they were on a live track and with an engine sufficiently near as to make its approach probable and such conduct would bar a recovery unless after the peril was developed there was a negligent failure on the part of defendant company to avail itself of the last clear chance to avoid the injury. In such case the prior negligence of plaintiff would not be contributory because it would not be the proximate or concurrent cause of the injury. Speaking to this question in *Sawyer v. R. R.*, 145 N. C., 29, the Court said: "A negligent act of the plaintiff does not become contributory unless the proximate cause of the injury; and, although the plaintiff, in going on the track, may have been negligent, when he was struck down and rendered unconscious by a bolt of lightning his conduct as to what transpired after that time was no longer a factor in the occurrence, and, as all the negligence imputed to defendant on the first issue arose after plaintiff was down and helpless, the responsibility of defendant attached because it negligently failed to avail itself of the last clear chance to avoid the injury; so its negligence became the sole proximate cause of the injury; and the act of the plaintiff in going on the track, even though negligent in the first instance, became only the remote and not the proximate or concurrent cause." And on this doctrine of the last clear chance, in the recent case of *Snipes v. Manufacturing Co.*, 152 N. C., 42 and 46, this Court said: "Ordinarily, cases calling for application of the doctrine indicated arise when the injured person was down on the track, apparently uncon- (215) scious 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 circumstances should resolve doubts in favor of the safer course."

This doctrine, here termed and referred to as the last clear chance, meaning responsibility arising by reason of a negligent failure of a

defendant to avail himself of the last clear chance of avoiding the injury, is very firmly implanted in our law and the duty and the breach of it, upon which it is properly made to rest, has been illustrated and applied in many recent decisions of the Court, as in *Farris v. R. R.*, 151 N. C., 483, 491; *Lassiter v. R. R.*, 133 N. C., 244, 247; *Arrowood v. R. R.*, 126 N. C., 629, 362; *Powell v. R. R.*, 125 N. C., 374; *Purnell v. R. R.*, 122 N. C., 832; *Stanley v. R. R.*, 120 N. C., 514; *Lloyd v R. R.*, 118 N. C., 1010; *Dean v. R. R.*, 107 N. C., 687; *Bullock v. R. R.*, 105 N. C., 180, 198.

Thus in the well considered case of *Farris v. R. R.*, where a railroad company had negligently killed an employee who was walking along the track about the place of a yard crossing, and who had grabbed for his hat, which had suddenly blown from his head on or towards the track and causing the employee to grab for the hat and thus expose himself to danger, *Manning, J.*, delivering the opinion, and, in reference to the question we are discussing, said: "The defendants objected to his Honor's submitting the third issue—that issue presenting the 'last clear chance.'" While this issue has become immaterial, in view of the finding of the jury on the first and second issues, we think it was proper for his Honor to have submitted it. If the jury had found with defendants on the second issue, having found the first issue with plaintiff, the ultimate liability of defendants would have been determined by
(216) their finding on the third issue. In the presence of the concurring negligence of a plaintiff and a defendant, it is a generally accepted doctrine, and well settled in this State, that the ultimate liability must depend upon whether the defendant could at the time have avoided the injury by the exercise of reasonable care, under the attendant circumstances. *Ray v. R. R.*, 141 N. C., 84; *Read v. R. R.*, 140 N. C., 146; *Lassiter v. R. R.*, 133 N. C., 244; *Arrowood v. R. R.*, 126 N. C., 629; *Pickett v. R. R.*, 117 N. C., 616." In *Lassiter v. R. R., supra,* a railroad conductor of a freight train, in the performance of his duty on a railroad yard had negligently stepped up on a side track where some shifting was going on, and was run over by a shifting engine pushing some cars backwards on the side track referred to, and it appeared that the engineer on the cab could not have seen the conductor, and there was no one in position to keep a lookout, and there was no evidence that the bell was not ringing or the whistle sounding, and it was held to be an issue on the last clear chance; and *Montgomery, J.*, in the opinion, said: "It is the duty of railroad companies to keep a reasonable lookout on moving trains. When Thomason saw the intestate step up on the side track the end of the box car attached to the shifting engine was twenty steps from him and the cars were moving at the rate of four miles an hour. The same witness said that the intestate had time

to have gotten off if he had heard the witness when he hallooed to him. That evidence was competent and fit to have been submitted to the jury upon the question of the last clear chance of the defendant—that is, whether if both the plaintiff and the defendant had been negligent the defendant could have prevented the death of the intestate by the use of means at hand or that reasonably ought to have been at hand." In *Pickett v. R. R.,* 117 N. C., 616; 53 Am. St., 611; 30 L. R. A., 257, the Court said: "If it is a settled law of North Carolina (as we have shown) that it is the duty of an engineer on a moving train to maintain a reasonable vigilant outlook along the track in his front, then the failure to do so is the omission of a legal duty. If, by the performance of that duty, an accident might have been averted, notwithstanding the previous negligence of another, then, under the doctrine of *Davies v. Mann* and *Gunter v. Wicker,* the breach of duty was (217) the proximate cause of any injury growing out of such accident, and when it is a proximate cause the company is liable to respond in damages. Having adopted the principle that the one whose duty it is to see does see, we must follow it to its logical results." In *Arrowood v. R. R.,* 126 N. C., 629, the Court said: "The duty of keeping a lookout is on the defendant. If it can keep a proper lookout by means of the engineer alone, well and good. If for any reason a proper lookout can not be kept without the aid of the fireman, he also should be used. If by reason of their duties either the fireman or the engineer, or both, are so hindered that a proper lookout can not be kept, then it is the duty of the defendant at such places on its road to have a third man employed for that indispensable duty." The same doctrine was announced in *Jeffries v. R. R.,* 129 N. C., 236; *Bradley v. R. R.,* 126 N. C., 741, and *Pharr v. R. R.,* 119 N. C., 756.

In *Powell v. R. R.,* the present *Chief Justice* said: "There was also evidence tending to show that the engineer with a proper lookout might have seen the deceased. The fact that the engineer, sitting on the right-hand side of the cab on a moonlight night, did not know till two days thereafter that his engine had knocked a man off on the side of the track (as the verdict finds), is itself some evidence to be considered upon the question whether there was a negligent lookout, especially taken in connection with the plaintiff's evidence that the train was running from twenty-five to thirty-five miles an hour at night, and sounding no whistle at public crossings."

In *Sawyer v. R. R., supra,* the Court spoke of the duty and the reason for it as follows: "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., 617.

This particular duty arises not so much from the fact that
(218) 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, injuries are almost certain to result in case of collision. As said by *Burwell, J.*, in *Haynes v. Gas Co.*, 'The utmost degree of care, so far as skill and human foresight can go, is required, for the reason that a neglect of duty is likely to result in great bodily harm and sometimes in death to those who are compelled to use that means of conveyance.' And quoting from Ray on Negligence, page 53, "As a result of the least negligence may be of so fatal a nature, the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accidents."

It will be noted from these citations, and many others could be made, that the doctrine we are discussing is called for, notwithstanding the previous negligent conduct of the person injured, and its application is frequently permissible, not only when the perilous position of such person is observed, but when it should or might have been observed by the exercise of proper care. Considering, then, the duty imposed by the law upon defendant's engineers to keep a careful outlook along the track, and to observe and note conditions which threaten a collision, and mindful of the principles embodied in the doctrine of the last clear chance, we are of opinion that there was error committed in directing a nonsuit in this case. According to plaintiff's testimony, and as the case is now presented, under repeated decisions of the Court, we are to accept this as true and construe it in the light most favorable to him, the engine was, at most, not over 150 or 160 feet from the crossing; there was a clear and unobstructed view along the track and plaintiff's approach to it. The plaintiff himself testified that the man in the cab, afterwards spoken of as the engineer, was looking right at him as he went up to the train, for it is no fair, certainly no necessary, interpretation of the testimony of this witness, "That the engineer was looking towards me with his cap pulled down in front of his face," that the witness intended to
(219) convey the impression that the line of vision was shut off. The witness' first statement was that he "saw a man sitting in the cab with his head right towards me," and a perusal of the entire statement of the witness permits the construction that the engineer saw or could have seen him as he went up to the train. And in view of all the facts and attendant circumstances, we think the plaintiff is entitled to have the cause

submitted to the jury on an issue as to the defendant's negligence and on the question whether there was a negligent breach of duty on the part of defendant's engineer in failing to observe and note the position of peril in which the plaintiff was placed or had placed himself and in moving his engine against the cars when plaintiff was in that position. Whether he knew of the dangerous position of plaintiff or in the exercise of the care and duty incumbent upon him, he should have known it, and was guilty of a negligent act, the proximate cause of the injury, in running his engine against the cars at the time when it was done. It is no sufficient answer to the view we take of this evidence, and the inferences permissible from it, to suggest that the engineer was not required to suppose that a man standing by the train was going to dive under the cars, or that this may have been done so suddenly that the engineer, with his hand on the throttle, could not have seen or realized plaintiff's position in time to have saved him. On the contrary, there is testimony on the part of plaintiff which tends to show that moving along the path in the performance of a duty which required him to go to another part of the yard, plaintiff approached the train in full view of defendant's engineer, and seeing that the engine was detached and having been urged to hurry, he endeavored to pass under the cars which were across the path and blocking his way, when defendant's engineer, without signal or warning, moved his engine against the cars, causing plaintiff's hurt. The inferences of fact to be drawn from this testimony are for the jury and they alone must determine them, unaffected by the comments of the court, but, considered in its legal aspect, the evidence referred to permits the construction that the engineer saw the plaintiff when he endeavored to pass under the cars and certainly when viewed in reference to the duty imposed by the law upon the engineer or his assistants to keep a constant and continuous outlook along the track in the direction in which they intend to move, it is a fair (220) inference that they would have seen plaintiff if they had been in the proper performance of their imposed duty. A duty nowhere more exigent than in one of these railroad yards, where the employees, in the performance of their duties, are required to move from point to point across numbers of tracks, and where the shifting of cars is constantly going on. The suggestion referred to as favoring defendant's position should not be allowed to prevail on this appeal, for if permissible at all on the evidence, it is the view which makes most strongly for the defense, whereas we have repeatedly held that on a motion to 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, as the jury, if the case had been submitted to them, might have found those facts from

the testimony." *Walker, J.,* in *Cotton v. R. R.,* 149 N. C., 227. A statement of doctrine affirmed in many decisions of this Court. *Deppe v. R. R.,* 152 N. C., 79, 80; *Freeman v. Brown,* 151 N. C., 111; *Biles v. R. R.,* 139 N. C., 528; *Brittain v. Westhall,* 135 N. C., 492; *Hopkins v. R. R.,* 131 N. C., 464. There was error in directing a nonsuit, and this will be certified that the judgment may be set aside and the cause proceeded with in accordance with law.

Reversed.

BROWN, J., dissenting: I think the learned judge in the Superior Court properly sustained the motion to nonsuit, and that in doing so he followed the decisions of this Court.

The evidence of the plaintiff shows him to be a grown man, entirely familiar with conditions necessarily prevailing on the defendant's switching yards. He was a "handy man" or messenger in the round house, and was directed by his boss to take a message to the storeroom for supplies. On his way plaintiff came to a track on which was standing a train of eighteen freight cars. At one end of the train was a switching engine under steam plainly engaged in switching and handling these cars.

When plaintiff reached this train on his way to the storeroom,
(221) instead of going around the end of the train about one hundred feet further, he attempted to pass between the coupled cars in order to reach the other side, and was hurt by the engine backing just at the moment he was crawling under the drawheads.

The principle has been laid down by almost every court in this country and by text-writers, and adhered to with undeviating uniformity, that one who attempts to cross the track between the cars of a train, which he either knows, or might by observation see, is likely to move at any moment, is guilty of such gross negligence, if not recklessness, that he can not recover if injured. Beach Cont. Neg., 40, 258, and cases cited. *R. R. v. Kendrick,* 40 Mass., 374; *R. R. v. Henderson,* 43 Pa. St., 449; *R. R. v. Pinchin,* 112 Ind., 592.

"It is a danger so immediate and so great that he must not incur it." *Ranch v. Lloyd,* 31 Pa. St., 358. In *R. R. v. Copeland,* 61 Ala., 376, *Chief Justice Stone* characterizes such an attempt as "negligence bordering on recklessness." So does the Court of Appeals of Maryland. *Lewis v. R. R.,* 38 Md., 588.

This Court unanimously held in *Beck v. R. R.,* 149 N. C., 168, that "When it appears that plaintiff's intestate was injured by attempting to go between cars of defendant's train, on a live track in use, and that he could easily have walked around the train by going ninety feet and have avoided injury, the act constitutes such contributory negligence as bars recovery."

It must be admitted, as it is manifest from all the authorities, that the engineer owes no duty whatever to keep a lookout for persons near his train to see if they go in between the cars, and he is not chargeable with negligence for failing to do so. The engineer has a right to assume that a person approaching his train or standing alongside of it will not venture between the cars, an act which has been universally denounced as reckless. If, as plaintiff contends, he was seen by the engineer while he was walking along near the cars, whistling, then the engineer was not required to watch him, on the supposition that he might crawl between the cars on the bumpers. The engineer had the right to assume that, seeing the danger, he would not voluntarily rush into it. Upon exactly the same principle it is held that an engineer of a train seeing a man walking ahead on the track, may reasonably expect (222) that he will step off. *Beach v. R. R.*, 148 N. C., 153.

It being thus demonstrated that the engineer owed plaintiff no duty to watch his movements to see if he went between the cars, and had the right to assume that plaintiff would not attempt so foolhardy and reckless an act, there is only one theory left upon which the engineer or the company can be held liable, and that is that the engineer actually knew that plaintiff was between the cars and in a position of peril at the moment he backed his engine. It is not a question of whether by the exercise of reasonable care and watchfulness the engineer might have known it, for he was not required to keep a lookout for any such purpose.

In other words, it is contended that the engineer, knowing plaintiff's perilous position, actually caused the injury by backing the cars on him.

I regret sincerely that a majority of my brethren think that such an inference may be fairly and legitimately drawn from the plaintiff's testimony. Common humanity forbids that any such imputation should be cast upon the engineer unless the evidence fully warrants it, for if such be true, then not only is the company liable for the damage, but the engineer himself would be guilty of either murder or manslaughter had the plaintiff been killed. The evidence relied upon to support this theory is confined to plaintiff's own testimony, and is so meagre that I quote it *verbatim*. Plaintiff stated that, as he approached this train: "I saw the engine standing in front of the cars fixing to shift them; I saw a man sitting in the window of the engine, he had his head right toward me, and *afterwards* I got up between the cars going on towards the other side when the engine struck the cars and knocked me towards the left." Again, "I don't know the engineer. He was looking toward me with his cap pulled down in front of his face. I did not hear any signal at all; if anything blew or rung did not hear it. When cars struck I was crawling under the drawheads between the cars." This is all the evidence contained in the record relied upon to warrant a recovery.

It is not contended that it was the duty of the engineer to blow
(223) his whistle or ring his bell for the purpose of keeping persons from going between the cars. And it must be borne in mind that it is not a question as to whether the engineer might by close lookout have seen plaintiff as he started to "crawl under the drawheads between the cars," for he had a right to assume that no grown man in possession of his faculties would attempt so reckless an act, and he was, therefore, not required to keep any such lookout.

The question is, does the evidence quoted justly warrant the inference that the engineer knew plaintiff was between the cars, and knowing it, backed his engine against the train and injured him?

It is inconceivable to think that the engineer would have done such a thing, and no such inference is warranted from the mere fact that at one time he was looking "towards plaintiff with his cap pulled down in front of his face."

My brethren fail entirely to note that plaintiff does not state that the engineer was looking at him when he jumped in between the cars. Plaintiff says that he saw the engineer in the window of his engine with his head towards plaintiff, "and *afterwards* I got up between the cars going on towards the other side when the engine struck the cars." How long after he saw the engineer before he entered between the cars plaintiff does not say. The engineer may have been looking towards plaintiff one moment and turned his head the next. He was not required to continue to look towards plaintiff, or he may have looked towards him and yet never have noticed him. The engineer may have been looking towards plaintiff and he may have seen him approaching the train, but that is no evidence he saw him dive between the cars.

In fact our observation teaches us that an engineer in his seat in the cab can not see a man half way down his train go between the cars. When he saw plaintiff approaching the train the engineer was not required to keep his eye on him. He had a right to suppose that plaintiff, or any other sane man, standing right by the train, would walk around it rather than crawl under it, especially when, as plaintiff admits,
(224) he saw the engine fixing to shift the cars.

The act of diving between cars for the purpose of crossing over to the other side takes but a few seconds. It is such an instantaneous act that if the engineer had seen it at same time he opened his throttle, he could not have stopped quick enough to prevent injury.

From plaintiff's own testimony it is apparent that when he jumped between the cars the engineer was then about starting to back his engine. The two acts must have been almost simultaneous, else plaintiff, an active man, would have gotten through without hurt.

I think the inference which the majority of the Court thinks can

possibly be drawn from this evidence is unwarranted and is unjust to the engineer. I am willing to hold engineers up to the full measure of their duty and to hold their employers responsible for their negligence, but I am not willing to place an imputation of gross negligence upon their good name upon such flimsy evidence as is presented in this record.

It may be said that this is not a suit against the engineer and that he has no interest in the result as the railroad company will have to foot the bill.

But the engineer has a direct personal interest in the result, for it seriously affects his professional standing. While this can have no effect upon the members of this Court, it should at least make us careful not to place a construction upon evidence so injurious to the engineer unless the evidence clearly warrants it.

MR. JUSTICE WALKER concurs in the dissent.

Cited: Roberts v. R. R., 155 N. C., 88; *Boney v. R. R., ibid.*, 109; *Cabe v. R. R., ibid.*, 412; *R. R. v. R. R.*, 157 N. C., 373; *Holman v. R. R.*, 195 N. C., 46; *Young v. Fiber Co., ibid.*, 377; *Smith v. R. R.*, 162 N. C., 34; *Shepherd v. R. R.*, 163 N. C., 521; *Meroney v. R. R.*, 165 N. C., 613; *McNeill v. R. R.*, 167 N. C., 400; *Gray v. R. R., ibid.*, 437; *Hill v. R. R.*, 169 N. C., 741; *Hinson v. R. R.*, 172 N. C., 651.

(225)

NANNIE R. JONES v. W. A. MYATT ET AL.

(Filed 19 October, 1910.)

1. Wills, Interpretation of—Devises—Realty—Words and Phrases.

While the term used in a will, "distributive share," ordinarily refers to personal property, and "distributee" denotes the person or persons upon whom such property devolves, this definition is not controlling so as to exclude real property when it appears from the interpretation of the will that real property was the subject of disposition.

2. Same—Estates—Remainders.

A devise of negroes to be kept on the plantation until the daughter of testator shall marry or become of age, or until the two named sons become of age, then the property, both real and personal, shall be equally divided between them; and by the next following item, a devise of one-half of each distributive share to these three children "as directed above, shall be settled upon each one of my children, . . . so that they shall have the use of said half of each one's distributive share during their natural lives, and at their death to be equally divided between their children, and

should either of them die and leave no child, then the said half distributive share shall go to the living child or children." *Held*, the intent or meaning of the words "distributive share" used in the last named item, in connection with the words "devise," "as directed above," was to include both real and personal property; (2) the entire estate was devised to the testator's three children in equal shares, with the time of actual division fixed as specified, and upon division each child would take one-half of one-third in fee, and in the other half a life estate only with remainder in fee to his or her children, to be equally divided among them at the parent's death.

3. Wills—Tenants in Common—Division by Deed—Remaindermen—Title.

Tenants in common may agree upon and apportion among themselves by deeds the land held in common under devises to them made by their two different ancestors; but when only a life estate is devised in part of the lands, this method of division can not affect the title of the remaindermen, as their interest is derived exclusively from the will, and the deeds can not have the effect of creating or manufacturing a title.

(226) APPEAL from *O. H. Allen, J.*, at April Term, 1910, of WAKE. Special proceedings for partition.

From the judgment adjudging that the plaintiffs, the children of Alfred Jones, were tenants in common of an undivided one-half interest in the tract of 590 acres with the defendant Myatt, the defendant appealed.

Armistead Jones & Son and Murray Allen for plaintiff.
J. H. Fleming and Holding, Snow & Bunn for defendant.

MANNING, J. The rights of the parties depend, first, upon the proper construction of the following items in the will of Elizabeth T. Jones: "Second. I devise that the negroes be kept together on the plantation and the farm be carried on in the same way as it was in my lifetime, until Nancy P. Jones shall marry or become of twenty-one years of age, or either Needham P. Jones or Alfred Jones shall become of twenty-one years of age, then the property, both real and personal, shall be equally divided between them.

"Third. I devise that one-half of each distributive share to my children, Nancy P. Jones, Needham P. Jones and Alfred Jones, as directed above, shall be settled upon each one of my children, which shall always and at all times be free from all claims of any and all persons, so that they shall have the use of said half of each one's distributive share during their natural life, and at their death be equally divided between their children, and if either of them shall die and leave no children or no will (which power I give either of them over said one-half of each distributive share to will), then the said half distributive share shall go to the living child or children." The will was written in 1850, and,

upon the death of the testatrix in 1864, was duly admitted to probate. The three children of the testatrix were then minors and unmarried. The property of the testatrix in her negroes was, soon after her death, swept away by the stern command of "grim visaged war," and the case presents for determination solely the disposition of her lands. The first contention of the defendant Myatt is that by item 2 the testatrix devised her real and personal property to her three children to be equally divided between them, and that by the use of the (227) words, "distributive share," in item 3, the testatrix limited the property disposed of under that item to personal property. We do not think this construction properly interprets the intention of the testatrix as manifested by the other words of the will. It may here be stated that the children of Elizabeth T. Jones are dead, each leaving children, except Mrs. Nannie P. Jones, who is living and has children, and the plaintiffs are the children of Alfred Jones, and neither of them exercised the power of disposition by will, each dying intestate. While it is undoubtedly true that the words "distributive share," ordinarily refers to personal property, and "distributee" denotes the person or persons upon whom such property devolves by act of law in cases of intestacy (Revisal, secs. 132, 144, 145, 155; *Boyd v. Small,* 56 N. C., 39; *Henry v. Henry,* 31 N. C., 278; 3 Words & Phrases Judicially Defined, 2133, 2134, 2135), yet, as is said in Schouler on Wills (2 Ed.), sec. 470, "technical words are liable to other explanatory and qualifying expressions in the context which discloses the testator's actual intention; and where a different meaning is fairly deducible from the whole will, the technical sense must bend to the apparent intention. In short, the testator's intention, as gathered from the will, shall prevail against the technical meaning of words or phrases so far as may consist, at least, with the rules of sound policy." So in Gardner on Wills, p. 403, the author says: "So words intrinsically applicable to personal estate may, by force of the context, be made to include land. This frequently happens where an expression is evidently used as referential to and synonymous with an anterior word, clearly descriptive of real estate, in which case its extent of operation is measured, not by its own inherent strength, but by the import of its synonym. Even the expression 'personal estates,' and it being clear beyond all possibility of doubt upon the face of the will that the testator meant by these words (not what is ordinarily understood by them but) such real property over which he had an absolute personal power of disposition and control, we have no hesitation in saying that the freehold passed by this description." In *Hope v. Taylor,* 1 Burrows, 268, *Lord Mansfield* held that the word "legacy" in the will construed in that case, extended to and embraced land. No other word has so fixed and determinate mean- (228)

ing in English jurisprudence, yet it was held in the case just cited, decided in 1757, in order to give effect to the intention of the testator, that "a different construction has been sometimes put upon the very same words, as applied to money and lands, in order to support the intent of the testator." In *Burwell v. Mandeville's Executors,* 2 How., 560 (577 and 578), *Judge Story* says: "It is said that, admitting such to be his intention (disposal of all his estate), the testator has not carried it into effect; because the residuary clause declares John West his 'residuary legatee' only, and not his residuary devisee also; and that we are to interpret the words of the will, according to their legal import, as confined altogether to the residue of the personal estate. This is, in our judgment, a very narrow and technical interpretation of the words of the will. The language used by the testator shows him to have been an unskillful man and not versed in legal phraseology. The cardinal rule in the interpretation of wills is, that the language is to be interpreted in subordination to the intention of the testator, and is not to control that intention, when it is clear and determinate." So the Court held that if the words, "residuary legatee," were restrained to the mere personalty, the intention of the testator would be defeated, and they were enlarged to embrace realty as well. The decisions of our Court are in entire harmony with these authorities. *Foil v. Newsome,* 138 N. C., 115; *Page v. Foust,* 89 N. C., 447, and cases cited. Therefore, it seems to us clear that the testatrix, Mrs. Elizabeth T. Jones, intended by the use of the words "distributive share," in the third item of her will, to mean both real and personal property; she uses the words "devise," "as directed above," referring to the property devised in the second item, and in our opinion to restrain the meaning to personal property would defeat the general scheme of the testatrix in the disposal of her estate. It clearly appears from these two items (quoted above) that the testatrix devised her entire estate to her three children in equal shares; that she fixed the time of actual division, to wit, the marriage of her only daughter or the arrival at the age of twenty-one of any one of her three children, and that, upon division, each of (229) her children should own one-half of the one-third (his or her equal part) in fee, but should, in the other one-half of his share, have a life estate only, with remainder in fee to his or her children, to be equally divided at the parent's death among them. The remainder in fee could be defeated by the exercise of the power of disposal by will, but this was not done.

It also appears in the case that Nancy Price died in 1874, leaving a last will and testament, which was duly admitted to probate, in which she devised in fee and in equal parts, a large body of land in Wake County to her three grandchildren, Nancy P. Jones, Needham P. Jones

and Alfred Jones—the children of Elizabeth T. Jones. These lands contained 1,526 acres; the lands devised under the will of Elizabeth T. Jones contained 1,230 acres. By the will of Mrs. Price the three Jones children became tenants in common in fee of undivided interests in the land devised by her to them. On the 5th day of June, 1876, the three Jones children, being then of age, agreed upon a division of the lands devised by Mrs. Price and Mrs. Jones. The partition was affected by deed, and we think it was competent to be so done. Being tenants in common of equal shares, but not of the same interests in both devised lands, they, instead of dividing the Price land into three shares of equal value, and of dividing the Jones land into three shares of equal value, and each taking one of these shares in each body of land, they agreed upon a different method of partition, as follows: Needham P. Jones took all the Price land at the valuation of $15,260; and the Jones land was divided between Alfred Jones, 590 acres at the valuation of $14,300, and Nancy P. Jones 640 acres at the valuation of $12,200. Equality of partition at these valuations was restored to Nancy P. Jones by the payment to her by Needham P. Jones of $1,140 and by Alfred Jones of $180. The result of this partition was the exchange by Alfred and Nancy Jones of their two-thirds interest in the Price land, which they held in fee, with Needham P. Jones, for his one-third share in the lands of Elizabeth T. Jones. It is expressly admitted that this partition has been ratified and confirmed by the children of Needham, Alfred and Nancy, and the precise question presented by this case is what fractional part of the 590 acres allotted to Alfred are his children entitled to under the will of Elizabeth T. Jones. (230) This interest is derived exclusively from that will. It is settled by several decisions of this Court that actual partition merely designates the share of the tenant in common and allots it to him in severalty. *Harrison v. Ray,* 108 N. C., 215; *Harrington v. Rawls,* 136 N. C., 65; *Carson v. Carson,* 122 N. C., 645. It does not create or manufacture a title. The partition could not, however, disturb the limitation affixed to the devised estate. As this Court said in *Williams v. Lewis,* 100 N. C., 142: "The partition separates into parts that which was before held in common as a whole, and no more disturbs the limitations affixed to the devised estates than would have been a devise of the several portions to the respective tenants by the testatrix herself. Indeed, the separate parts are, after the partition directed, as truly held under the contingent limitations as were previously thereto the undivided estates of each in the entire three hundred acres." But while the interests of Alfred's children in Alfred's share of the land of Elizabeth T. Jones could not be and were not affected by the actual partition, we can not see, as urged upon us by the learned counsel of the plaintiffs, how their

interest can be increased from the one-half of a one-third to the one-half of a one-half. We are considering now the interests of Alfred's children exclusively. As Alfred's interest in the Price land was in fee and unfettered by any limitations to his children, why should the property be received in exchange for that interest, fall under the limitations of the will of Mrs. Elizabeth T. Jones? It can not affect the question that the property he received in exchange was a part of the Jones land. The exchange inured to the benefit of Alfred and not to his children as devisees of Elizabeth T. Jones. The agreed valuation of the Jones land at the date of actual partition was $27,100; the interest of Alfred's children was, under Mrs. Jones' will, one-half of one-third or a one-sixth, and amounted to $4,516.67. The valuation of the 590 acres allotted to Alfred Jones was $14,300, and the fractional part of the said land to which the children of Alfred are entitled, by a simple arithmetical calculation, must be 315 one-thousandths, or practically 31 one-hundredths.

(231) The 590 acres must, therefore, be divided between the children of Alfred Jones and the defendant Myatt, so that the said children shall receive such number of acres as will equal in value 315 one-thousandths of the entire tract, of which they are the owners in fee under the will of Elizabeth T. Jones. His Honor adjudged that they were tenants in fee of one-half of the 590 acres. In this there was error, and his judgment will be modified to conform to this opinion, and, as modified, affirmed. The costs will be equally divided between the appellants and appellees.

Modified and affirmed.

Cited: Beacom v. Amos, 161 N. C., 364; *Weston v. Lumber Co.,* 162 N. C., 171, 200; *Norris v. Durfey,* 168 N. C., 325.

E. T. HERRING AND WIFE v. CARRIE WILLIAMS AND JOHN H. GREEN.

(Filed 19 October, 1910.)

1. Wills, Interpretation of.

In construing a will the primary purpose of the court is to ascertain the intention of the testator from the language used, and the entire will must be considered.

2. Same—Conditions and Surroundings.

It is competent to consider, in determining the intent of the testator, the condition of his family, how he was circumstanced, and his relationship to the objects of his testamentary disposition, so as nearly as possible to get his view-point at the time the will was executed.

3. Same—Life Tenant—Conveyance of Fee—Powers.

It appearing that the plaintiff was adopted by the testator and his wife, who had no children of their own, was raised by them and was living with them at the time of his death; that the property of deceased consisted chiefly of a farm, and a house and lot, all of small value or income, the testator apparently obtaining his living by employment as overseer, which constituted the principal source of support for his wife and foster child; and that he devised to his wife all his property, "to have and to hold during the term of her natural life, and at the death of my wife, the said property, or as much thereof as may be in her possession at the time of her death," to the plaintiff, "her heirs and assigns forever." *Held*, that by the express terms of the will the wife took a life estate with the power to dispose in fee of the property during her life, and that the plaintiff took, as the devisee of the remainder in fee, the real estate undisposed of by the wife.

APPEAL from *Guion, J.*, at March Term, 1910, of NASH. (232)

In August, 1902, William R. Williams died, resident in Nash County, seized of a tract of land containing about a hundred acres, of two town lots in the city of Rocky Mount, and of a small quantity of personal property. He left surviving him his widow, the defendant, Carrie Williams. He had no living children born to him and his wife, but when the *feme* plaintiff, Bettie Herring, whose maiden name was Bettie Melton, was only ten weeks old, he adopted her and took her into his home as his foster child. On 11 March, 1902, four months prior to his death the said William R. Williams had his neighbor, J. B. Stokes, to write his will for him, and in that will he disposes of and devises his property as follows, to wit:

"I give and bequeath unto my beloved wife, Carrie Williams, all my property—real, personal and mixed—of what nature or kind soever, and wherever the same may be situate at the time of my death, to have and to hold during the term of her natural life; and at the death of my wife, the said Carrie Williams, the said property or as much thereof as may be in her possession at the time of her death, is to go to Bettie Melton, her heirs and assigns, forever."

Upon the death of the testator, the widow and life tenant Carrie Williams went into the possession of all the testator's land and personalty. On 23 February, 1903, she conveyed the real estate in fee to her brother-in-law, the defendant Green, in exchange for land conveyed by him to her. Green, having thus gotten possession of the land, proceeded to cut from the 100-acre tract—being the only timbered land of which the testator died seized—all the standing timber growing thereon. It is admitted by the defendants that no part of the buildings and improvements, which were subsequently put on this tract of land by Green, were constructed from the timber which he cut and removed. It is further admitted that he cut the timber "solely for the purpose of sale and profit,

and not for the cultivation of the land or to increase the amount
(233) of cleared land for the purposes of cultivation." He received for the standing timber, on 5 March, 1905, the net sum of $458.

The plaintiff demanded judgment for the waste committed and the forfeiture of the life estate. The contentions of the defendants were that Carrie Williams, the wife of the testator, under the provision of this will above quoted, had full right and power to dispose of any and all the real estate devised by her husband, and that the plaintiff, Bettie, was entitled to only such of his property as remained undisposed of at his wife's death, and, therefore, the plaintiff had no cause of action against them. His Honor held against this contention of the defendants and adjudged that "under the will of the testator, the defendant Carrie Williams became and was entitled to an estate for life, and that the plaintiff Bettie is the owner of a vested remainder in fee in all the lands of which the testator died seized, after the death of his wife and the falling in of the life estate"; and that the deeds of Mrs. Williams to Green conveyed only the life estate of Mrs. Williams. The defendant Green also contended that he could offset the waste charged by showing the value to the inheritance of the buildings erected by him on the land. His Honor held against the defendants on this contention. The jury having found that there was waste and assessed the damages at $458, his Honor rendered judgment declaring the estate of plaintiff, Mrs. Melton, under the will of Mr. Williams, to be in fee, for the amount of damages found by the jury, and further adjudging that if the money judgment was not paid by a day named, the estate of the defendants in the wasted land should be forfeit to the plaintiff. The defendants moved for judgment as of nonsuit, but this was overruled. The defendants appealed.

Bunn & Spruill for plaintiffs.
T. T. Thorne and J. C. L. Harris for defendants.

MANNING, J. The primary purpose of the courts, when a will is presented for construction, is to ascertain the intention of the testator from the language used by him. In ascertaining such intention, the
(234) entire will must be considered, and it is competent to consider the condition of the testator's family, how he was circumstanced, and his relationship to the objects of his testamentary disposition, so as nearly as possible to get his view-point at the time the will is executed. In the present case, the testator's family was composed of his wife, the defendant Carrie Williams, and his foster-daughter, the plaintiff Mrs. Bettie Herring. He had no children of his own, and he and his wife had raised the *feme* plaintiff from an infant ten weeks old. She was living with the testator and his wife at the time of his death. The testator's

estate consisted of a few articles of personal property of small value; a tract of land of about 100 acres, of which the arable land was sufficient for a one-horse farm; the buildings and the arable land were only in fair condition, and the remainder of the land was timber land; also a house and lot in the town of Rocky Mount and an unimproved lot in the same town. The tract of farm land was worth, at his death, about $1,250 or $1,500; the evidence does not disclose the value of the house and lot or the unimproved lot, but the inference from the evidence is that they were not of large value, probably not exceeding $1,000 or $1,200. At the time of his death, the testator was employed as an overseer of another farm, and his own farm was rented, and his income from his work must have constituted the principal source of support for his wife and foster child. The will itself furnishes sufficient proof of the affection of the testator for his wife, and we will assume that he entertained feelings of affection for his foster daughter. It is clear, from the language of the will, that a life estate is vested in the wife, and a remainder in fee in the *feme* plaintiff. It is equally clear that the life estate vested in the wife covered the testator's entire estate—"all my property, real, personal and mixed, of what nature or kind soever, and wheresoever the same shall be at the time of my death." But the remainder in fee to his foster daughter, the *feme* plaintiff, is limited to the "said property or as much thereof as may be in her (his wife's) possession at the time of her death." So the precise question is, do the words "as much thereof as may be in her possession at the time of her death" annex as appurtenant to the life estate a power of disposition in the life tenant? If the power of disposition is appurtenant to, or incident to, the life estate, then (235) under the decision of this Court in *Parks v. Robinson,* 138 N. C., 269, the life tenant could convey in fee in the exercise of that power. In that case *Connor, J.,* speaking for this Court, said: "To restrict the power of disposal of her life estate would be to nullify its effect. She had such power incident to her life estate. To confine the power of disposal to such life estate would do violence to the rule of construction that every word used by the testator should be given force." The language of the will, construed in that case, was as follows: "I give, etc., to my beloved wife, Ann Parks, during her natural life and at her disposal, all the rest, residue and remainder of my real and personal estate." There was in that will, differing from the one now being considered, no limitation over. But in the case of *Troy v. Troy,* 60 N. C., 624, a will was presented to this Court with a remainder in fee to the son, limited upon the life estate of the wife, and *Pearson, C. J.,* speaking for the Court, said: "This is a power *appurtenant* to her life estate, and the estate which may be created by its exercise will take effect out of the life estate given to her, as well as out of the remainder. A power of this description is construed

more favorably than a naked power given to a stranger, or a power *appendant,* because, as its exercise will be in derogation of the estate of the person to whom it is given, it is less apt to be resorted to injudiciously, than one given to a stranger, or one which does not affect the estate of the person to whom it is given." *Stroud v. Morrow,* 52 N. C., 463; *Burleigh v. Clough,* 52 N. H., 267; *Herring v. Barrow,* L. R., 13 Chan. Div., 144; *Stuart v. Walker,* 72 Me., 145; *Ayer v. Ayer,* 128 Mass., 575; *Fairman v. Beal,* 14 Ill., 244; *Jackson v. Robins,* 16 Johns., 537; *Underwood v. Cave,* 176 Mo., 1; *McCullough v. Anderson,* 7 L. R. A. (O. S.) (Ky.), 836; 2 Underhill on Wills, sec. 687.

Do the words of this will confer upon the life tenant a power of disposal of the property devised? Unless such effect is given to them, we must reject as meaningless the words, "or as such thereof as may be in her possession at the time of her death." The contention of the *feme*

plaintiff is that the remainder in fee, vested in her by the will,

(236) extends to and embraces all the property of which the testator was seized and possessed at his death and in which he devised a life estate to his wife, except possibly such as *ipso usu consumuntur,* and so completely is the wife deprived of any power of disposition, the plaintiff can maintain an action to recover damages for voluntary waste. As we have said, to accept the contention of the plaintiff would be to strike from the will the words we have quoted. But we understand the rules of construction to require us to give effect to all the words used by the testator, unless they are in themselves meaningless, or so vaguely express a purpose that no definite intention can be inferred, or are plainly inconsistent with an otherwise clearly expressed intention, or are repugnant to some established rule of law. Redf. on Wills, 431-433. It will be noted that the testator does not use the word "dispose" or "sell" or any of their derivatives, but that it is not necessary to use these words or either of them to confer a power of disposal, has been held in numerous cases where the words used imply such power. *Clark v. Middlesworth,* 82 Ind., 240; *Henderson v. Blackburn,* 104 Ind., 227; *Bamforth v. Bamforth,* 123 Mass., 280; *Johnson v. Battelle,* 125 Mass., 453; *Leggett v. Firth,* 132 N. Y., 7; *Silvers v. Canary,* 109 Ind., 267; *Farish v. Wayman,* 91 Va., 430; *Underwood v. Cave, supra.* It is also settled by the weight of authority that when the power of disposal is given for specific purposes, as for support and maintenance of the devisee of the life estate or of such and others, the power is limited to be exercised for the particular purposes declared. *Chase v. Ladd,* 153 Mass., 126; *Monford v. Dieffenbacker,* 54 Wis., 593; *Swarthout v. Ranier,* 153 N. Y., 499; *Stewart v. Walker,* 72 Me., 145; *Henderson v. Blackburn,* 104 Ill., 227; *Griffin v. Griffin,* 141 Ill., 373; *Ward v. Robertson,* 113 Ind., 323; *Jenkins v. Compton,* 123 Ind., 117. In *Clark v. Middlesworth,* 82 Ind.,

240, the Court, in construing a will containing the following devise: "I hereby will, etc., all my property, real and personal, to my wife, Mary A. Clark, during her life, and at her death, should anything remain, the same to be divided among my heirs at law," said: "We think it quite clear that the will of A. B. Clark gave to his widow, Mary A. Clark, a life estate in said lot, and that it also gave her, by the (237) clearest implication, a power to dispose of the same. The words, 'and at her death, should anything remain,' are senseless and without meaning unless the testator intended that the tenant for life might, prior to her death, dispose of the property devised to her for life. The words show that he must have contemplated this at the time, and therefore have intended it." In *Paine v. Barnes,* 100 Mass., 470, a testator gave to his wife all his real and personal estate, "for her support and benefit during her natural life," and after his wife's death "if anything of said estate should remain," he gave it over to third persons, and it was held by the Court: "The Court are of opinion that the language of the devise to the wife can only be construed as giving her an estate for life, with a contingent power of disposition of the remainder only in case of its being needed for her support. The fact that there is a remainder devised over, after the estate for life to her, shows that it could not be intended to give her a fee, and that the purpose for which the estate is given can only, at the most, imply a power of disposal if the exigency should arise. Perhaps, upon the authorities, the use of the phrase, 'if anything should remain,' in connection with the devise of a remainder of real estate after an estate for life, would imply a power to convey, as otherwise there could be no reason for the doubt whether the estate would remain. *Blanchard v. Blanchard,* 1 Allen, 223; *Andrews v. Bank,* 3 Allen, 313; *Lynde v. Estabrook,* 7 Allen, 68." To the same effect is *Silvers v. Canary,* 109 Ind., 267, in which case the Court held that the words, "what may not be consumed of real and personal estate at my wife's decease," conferred by implication the power or disposal in fee, and that the remainder was limited to so much as remained unconsumed at the death of the tenant for life. In *Leggett v. Firth,* 132 N. Y., 7, the Court said: "But the remainder itself was in turn limited by the words, 'if any,' which show that the testator did not intend that necessarily there would be anything left upon the death of his wife. 'The remainder, if any,' means the same as, 'if there shall be any remainder,' and the gift over is of what may be left. As it all would be left unless there was a right to dispose of it, it follows, by necessary implication, that he intended his wife should have that power. Otherwise the (238) words, 'if any,' must be rejected as having no meaning whatever." In determining the intention of a testator, to grant to a tenant for life the power to dispose of the property devised or bequeathed, much weight

has been given to the words by which the limitation over is confined to what estate remains upon the death of the first taker. Such intention has been held to conclusively appear in case the property devised could only be diminished by a disposition of it by the one to whom the life estate is given. Such declarations are held to be inconsistent with a supposition that the whole property was to remain undiminished in the hands of the first taker." *Bramwell v. Cole,* 136 Mo., 201; *Harris v. Knapp,* 38 Pick., 412. Guided by these well-considered and well-reasoned opinions, we are led to the conclusion that the testator, by the words used by him, to wit: "or as much thereof as may be in her possession at the time of her death," conferred upon his wife—the devisee of the life estate—the power to dispose of any part or all of said property during her life; that such power was not limited to any specific purpose; and that a deed made by her conveyed the fee-simple title unless restrictive words were used in the deed, showing that a less estate was conveyed; and that the *feme* plaintiff was entitled, as the devisee of the remainder in fee, only to such of the real estate as was undisposed of by the wife. As to the status of the land Mrs. Williams received in exchange for the land owned by her husband and devised in the will, we will not now determine, as no question affecting that is presented by this appeal. If she die possessed of that, then its status can be determined, and not before. Having reached this conclusion, there is error in the rulings and judgment of his Honor, and the motion of the defendants for judgment as of nonsuit should have been granted. The judgment rendered will be set aside and a judgment as of nonsuit will be entered.

Error and reversed.

Cited: Griffin v. Lane, 154 N. C., 373.

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J. H. HORNE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 19 October, 1910.)

1. Nonsuit—Evidence—How Considered.

Upon a motion to nonsuit upon the evidence the testimony must be considered in its most favorable light to the plaintiff.

2. Master and Servant—"Green Hand"—Duty to Instruct—Negligence.

A railroad company owes the duty to instruct a perfectly green and totally inexperienced hand employed to couple cars, and its failure to do so is actionable negligence for consequent injury inflicted on him.

3. Master and Servant—"Green Hand"—Coupling Cars—Duty to Instruct—Contributory Negligence.

The act of a "green" and totally inexperienced hand employed to couple cars, etc., without instruction from the railroad company, in stepping momentarily between the moving engine and a car to couple them by opening the knuckle of the coupling, which for some unexplained reason would not work, does not constitute negligence *per se* on his part. Under the circumstances in evidence the question was properly submitted to the jury.

4. Nonsuit—Contributory Negligence—Defendant's Evidence—How Considered.

Upon a motion to nonsuit upon the evidence, the testimony relating to plaintiff's contributory negligence introduced by the defendant will not be considered.

APPEAL from *O. H. Allen, J.*, at March Term, 1910, of JOHNSTON.

1. Was the plaintiff J. H. Horne injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff J. H. Horne by his own negligence contribute to his injury, as alleged in the answer? Answer: No.

3. What damage, if any, has the plaintiff sustained? Answer: $5,000.

Motion by defendant to set aside the verdict; motion denied.

From the judgment rendered the defendant appealed.

J. A. Wellons and Aycock & Winston for plaintiff.

Abell & Ward for defendant.

BROWN, J. This case comes before us upon the sole question (240) as to the correctness of his Honor's ruling in denying the motion to nonsuit. There are no exceptions to evidence and the charge of the court is not sent up.

First. The testimony, taken in its most favorable light for plaintiff, as it must be upon the consideration of a motion to nonsuit, tends to prove these facts.

Plaintiff was employed by defendant in its yard at Rocky Mount to test and clean airbrakes; that he had no experience in coupling cars; that at the time of the injury he had been sent by his boss to the passenger yard to assist in coupling the locomotives to the passenger trains; that he had no instruction theretofore as to coupling trains and received none then; that he had never seen any of the printed rules; that he had seen cars coupled, but had never coupled one; that he had seen men in coupling cars go between the cars while they were still moving and couple cars and engines nearly every day; that being instructed to couple the engine to No. 49, when the engine began to back, he went up to the side of the car and took hold of the lift lever and walked along by the side of the car, jerking the lift lever two or three times to try to open the knuckle, and it would not work; that thereupon he stepped upon the

track to open the knuckle with his hand when his foot caught and he was run over by the engine and lost his leg in consequence; that while in between the cars, he tried to open the knuckle with one hand, and also continued jerking the lift lever with his left hand, but it could not open. The claim of negligence is founded upon the theory that it is the duty of employers to instruct their employees in the use of dangerous machinery before assigning them to such duty. Such obligation is recognized generally by the law writers and courts of the country. *Avery v. Lumber Co.*, 146 N. C., 592; *Chesson v. Walker*, 146 N. C., 511; *Craven v. Mfg. Co.*, 151 N. C., 352; *Marcus v. Loane*, 133 N. C., 54; *Turner v. Lumber Co.*, 119 N. C., 388.

According to the plaintiff's evidence this plain duty was disregarded by defendant's superintendent. He sent a perfectly "green hand" to perform the dangerous duty of coupling cars without instructing him how to do the work required of him. This was negligence. It (241) was a failure to discharge a duty the defendant owed plaintiff.

Second. Upon the issue of contributory negligence it is not necessary to consider whether upon the facts the defendant is denied the benefit of a plea of contributory negligence, as the issue was submitted to the jury. Inasmuch as the charge of the court is not sent up and no exceptions taken to it we presume it was unobjectionable to defendant. It is admitted that the engine and car were equipped with automatic couplers, but the plaintiff contends that for some unknown reason the knuckle would not open quickly as it should have done and that he momentarily stepped between the cars to loosen it, when his foot got caught and he was seriously injured so that his leg had to be amputated. Had plaintiff received instructions in car coupling this may not have happened.

We are not prepared to say upon this state of facts that the plaintiff's impulsive act in stepping between the engine and the car momentarily to open the knuckle was *per se* negligence, considering his lack of instruction and inexperience and the circumstances in which he was placed. Doubtless in submitting this to the jury his Honor properly instructed them and left it to the jury to say whether plaintiff, being uninstructed and inexperienced went into obvious danger and did what a prudent man similarly circumstanced would not have done.

There is evidence of contributory negligence, but it comes from defendant's witness Radford, assistant foreman, who testifies that he gave plaintiff positive instructions to sign the engineer down before ever going behind a moving engine.

We can not consider evidence of contributory negligence upon a motion to nonsuit unless it is offered by the plaintiff. *Strickland v. R. R.*, 150 N. C., 5.

No error.

CLARK, C. J., concurs on the further ground that the car coupler was a defective appliance and the defenses of "assumption of risk" and "contributory negligence" are barred by the statute, Revisal, 2636; *Coley v. R. R.*, 128 N. C., 534; *S. c.*, 129 N. C., 407; *Elmore v.* (242) *R. R.*, 132 N. C., 865. The facts in the last case are identical with those in this. To same effect is U. S. Stat., 1908, c. 149, sec. 3.

HOKE, J., concurs in concurring opinion of CLARK, C. J.

Cited: Walters v. Sash Co., 154 N. C., 325; *Brazille v. Barytes Co.*, 157 N. C., 458; *Thorp v. Traction Co.*, 159 N. C., 35; *Dunn v. Lumber Co.*, 172 N. C., 136.

M. D. McKENZIE v. ANNA C. McKENZIE.

(Filed 19 October, 1910.)

1. Divorce—Issues Material—Necessary Findings.

Material issues raised by the pleadings must be submitted to and answered by the jury, and they must be sufficient to support the judgment and dispose of the matters in controversy.

2. Same—Condonation.

The issue of adultery in an action for divorce from the wife is material, and must be answered to establish the fact; and an answer to a subsequent issue finding that the offense, if committed, has been condoned does not necessarily find the fact of adultery.

3. Divorce—Issues—Condonation—Pleadings—Objections and Exceptions.

In an action for divorce for adultery of the wife, an objection to an issue of condonation because not specially pleaded must be made at the time the issue is submitted; thereafter it is too late.

APPEAL by plaintiff from *W. R. Allen, J.*, at February Term, 1910, of COLUMBUS.

The facts are stated in the opinion of the Court.

David J. Lewis for plaintiff.
Schulken, Toon & Schulken for defendant.

WALKER, J. This is an action brought by the plaintiff against his wife, the defendant, for divorce upon the ground of her alleged adultery with one William Foreman. The Court submitted issues to the jury, which, with the answers thereto, are as follows:

1. Were the plaintiff and the defendant married as alleged? Answer: Yes.

(243) 2. Had the plaintiff been a resident of this State for more than two years prior to the commencement of this action? Answer: Yes.

3. Did the defendant commit adultery with William Foreman as alleged? (Not answered.)

4. If so, has the plaintiff condoned the offense? Answer: Yes.

The plaintiff moved to set aside the verdict because the jury failed to answer the third issue. The motion was overruled and the plaintiff, having excepted, appealed from the judgment upon the verdict which was in favor of the defendant. The material issues of fact raised by the pleadings should be submitted to the jury and, of course, answered by them. *Davidson v. Gifford,* 100 N. C., 18, and the issues with the responses thereto must be sufficient to support the judgment and dispose of the matters in controversy. *Falkner v. Pilcher,* 137 N. C., 449. In this case, the principal issue relates to the adultery of the defendant and the plaintiff was entitled to have the issue based thereon answered by the jury. If the jury had answered the third issue in the negative, an answer to the fourth issue would have been unnecessary, and if in the affirmative, then it would have been necessary for the jury to consider the fourth issue and to find whether or not the act of adultery had been condoned. The jury have not found that the defendant had committed adultery. There is no such finding in the answer to the fourth issue. The form of that issue and the answer of the jury do not necessarily imply such a finding. The jury might well have answered that issue in the affirmative without having found the fact of adultery. If the jury had really considered the third issue and found that the defendant had committed the act of adultery, there is no reason why they should not have answered that issue. It is evident that they merely assumed that the act had been committed for the purpose of passing on the question of condonation. They should have been required to answer the third issue with proper instructions as to the remaining issue, as heretofore indicated.

The plaintiff's objection to the fourth issue upon the ground that condonation was not specially pleaded comes too late, as it was not made at the time the issue was submitted. *Kinney v. Kinney,* 149 N. C., 321. The motion of the plaintiff should have been granted and the verdict set aside.

New trial.

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TOMLINSON CHAIR MANUFACTURING COMPANY v. C. M. TOWNSEND.

(Filed 19 October, 1910.)

1. Evidence—Depositions—Objections Waived.

The objections to the reading of the depositions of a witness under Rev., 1648, upon the ground that the subpœna, though duly issued, was returned "not to be found" is waived if not taken before the beginning of the trial.

2. Evidence, Immaterial—Depositions—Objections—Harmless Error.

Evidence merely immaterial in a deposition is harmless. A new trial will not be granted therein unless for prejudicial error.

3. Evidence—Depositions—Witnesses—Subpœna—Interpretation of Statutes.

By reasonable construction, Revisal, 1645 (9), means that where the deposition has been regularly taken, and where the witness is more than seventy-five miles from the place of trial without the consent of the party, and the presence of the witness can not be procured, the deposition may be read if a subpœna has been duly issued—not necessarily served.

APPEAL by defendant from *W. R. Allen, J.*, at May Term, 1910, of ROBESON.

The facts are sufficiently stated in the opinion.

McIntyre, Lawrence & Proctor for plaintiff.
McNeill & McNeill for defendant.

CLARK, C. J. The deposition of T. W. Andrews was regularly taken, the witness being duly subpœnaed, notice served on the opposite party and full opportunity for both sides to be present. During the trial after much evidence had been introduced, the defendant for the first time objected to the deposition when offered in evidence because it did not appear that the witness had been "summoned as required by Revisal, 1645 (9), he being within the State and more than 75 miles from Lumberton" (the place of trial). The subpœna had been duly issued to the county where the witness resided and was returned "not to be found."

The objection was waived by not having been taken before (245) the beginning of the trial (Revisal, 1648). It would manifestly be the greatest injustice to permit a party to go into a trial relying upon a deposition as a part of his evidence and then deprive him of it by an objection which if made before the trial might have been cured by other evidence or by procuring a continuance.

Besides, if it had been error to admit the deposition, it was harmless error in this case because the testimony contained in the deposition was

immaterial. A new trial will not be granted for an error unless prejudicial. *Freeman v. Brown,* 151 N. C., 113.

Besides, we are disposed to think that the words "duly summoned" as used in Revisal, 1645 (9), means "subpœna duly issued." That subsection reads, "If the witness has been duly summoned, and at the time of the trial is out of the State or is more than 75 miles, by the usual public mode of travel, from the place where the court is sitting, without procurement or consent of the party offering the deposition," it may be read. The statute, if strictly construed, would prevent any deposition being read if the witness lived out of the State, or was absent from it at the time the subpœna was issued. It must be given a reasonable construction to effectuate its purpose. Giving it such construction, it means that where the deposition has been regularly taken, and where the witness is more than 75 miles from the place of trial, without the consent of the party, and the presence of the witness cannot be procured, the deposition may be read if a subpœna has been duly issued.

Read in connection with the context "duly summoned" (which is a word not applicable to a witness) means, and must mean, "subpœna duly issued," *i. e.,* that due effort has been made to secure the presence of the witness. It cannot be the purpose of the statute to deprive a party of the benefit of a deposition, regularly taken, with due notice and opportunity to both sides to be present, because the witness cannot be found at the time of the trial. Indeed, the deposition is allowed to be used only because of the expense, or impossibility, of having the witness present at the trial. If the witness is found and served with the
(246) subpœna, it would be his duty to attend the trial. The plaintiff having done all that could be done to obtain the presence of the witness at the trial, by issuing subpœna to the county where he resided, and the subpœna having not been served by reason of his absence, no objection having been made before the trial on that ground, it would seem that the deposition was properly admitted.

No error.

Cited: Moore v. Horne, post, 416.

J. R. WATSON AND WIFE AND GEORGE W. RAINES v. ARTHUR SULLIVAN.

(Filed 19 October, 1910.)

Inheritances—Canons of Descent—Collateral Relations—Blood of Ancestor.

The proviso of Rule 6, Canons of Descent, Revisal, ch. 30, that in all cases where the person last seized shall have left no issue capable of inher-

iting, nor brother nor sister, etc., the inheritance shall vest in the father, if living, etc., should be construed in connection with rule 4, and in order for a collateral relation of the half-blood to inherit, he must be of the blood of the ancestor from whom the estate was derived.

APPEAL from *O. H. Allen, J.*, at May Term, 1910, of JOHNSTON.

The case was heard on facts admitted in the pleadings and from which it appeared:

1. That John Raines died in 1899, seized and possessed of a tract of which the land in controversy was a part.

2. That said John Raines at the time of his death left him surviving as his heirs at law, two children, George Raines and Bettie Watson, and a grandchild, Florence Sullivan, she being a child of Melvina Sullivan, a deceased daughter of John Raines and her husband, Arthur Sullivan, defendant.

3. In the division of the land of John Raines, seventeen acres of said tract of land were allotted to Florence Sullivan, the only child and heir at law of Melvina Raines, the wife of the defendant, who was then dead.

4. That after the death of John Raines, Arthur Sullivan re- (247) married, and by said last marriage several children were born unto him, and who are now living.

5. That Florence Sullivan died without lineal descendants, and plaintiffs, the two surviving children of John Raines, instituted the present suit against Arthur Sullivan, the father of Florence, to recover the seventeen acres of land inherited by her from John Raines, her grandfather.

There was judgment for defendant, and plaintiffs excepted and appealed.

W. C. Munroe for plaintiffs.
Abell & Ward for defendant.

HOKE, J. Rule 6 of our Canons of Descent, Revisal, ch. 30, sec. 1556, is as follows: "Collateral relations of the half blood shall inherit equally with those of the whole blood, and the degrees of relationship shall be computed according to the rules which prevail in descents at common law: *Provided,* that in all cases where the person last seized shall have left no issue capable of inheriting, nor brother nor sister, nor issue of such, the inheritance shall vest in the father if living, and if not, then in the mother if living."

It is contended for plaintiffs that under the proviso contained in this rule the father of the person last seized is only allowed to inherit in case such person, last seized, died without brothers or sisters of the half or

the whole blood and without reference to their capacity to take by inheritance, but the decisions of our Court construing the rule have been uniformly against the plaintiffs' position.

At common law, collateral descent was not allowed in case of land. 2 Blackstone, pp. 227-228. This was changed at an early date by our legislation on the subject, and it was provided by statute that on failure of lineal descendants, collaterals could inherit land provided they were of the blood of the first purchaser, the ancestor who had acquired the estate. Revisal, ch. 30, rule 4. The same statute established rule 6, and our courts construing the law have held as stated that this requirement of rule 4, that a collateral claimant should be of the blood of the
(248) purchasing ancestor, affected and controlled the interpretation of rule 6, the one before us, and required that in order for a collateral of the half blood to inherit, he should be of the blood of such ancestor. *Paul v. Carter, ante,* 26; *McMichael v. Moore,* 56 N. C., 471; *Bell v. Dozier,* 12 N. C., 333. This same construction has been extended and applied to the terms of the proviso and to the effect that the words brother and sister shall be understood to mean brother and sister who are capable of taking under this statute of descents. *Dozier v. Grandy,* 66 N. C., 484; *Little v. Buie,* 58 N. C., 10. In *Dozier's case, supra,* it was held: "It is well settled that in descended estates, where the person last seized dies without leaving issue, or brother or sister of the blood of the first purchaser, but a half-sister not of such blood, and remote collaterals of such blood, the inheritance shall descend upon such remote collaterals, rather than upon such half-sister." And in *Little v. Buie,* more directly applicable, the ruling was as follows: "Half-brothers and sisters, not of the blood of the purchasing ancestor, cannot take under the statute of descents; where, therefore, one died seized of land descended through his mother from her father, and left no issue, nor brother nor sister, except half-sisters, not any of his mother's blood, it was held, that the father, surviving, took the inheritance." The authorities are decisive and the judgment of the court below is

Affirmed.

A. M. CALMES v. JOSEPH LAMBERT.

(Filed 19 October, 1910.)

1. Process—Amendment—Effect—Seal of Court.

A summons issued to another county, but not attested by the seal of the court of the county issuing it, as provided by Revisal, sec. 431, may have the defect removed by amendment on application to the proper tribunal,

both as to original and final process, and the amendment, when made, will validate all acts done under the process, in so far as it affects the original parties to the suit or record.

2. Same—Irregular Judgments—Terms Imposed.

Upon motion to set aside a judgment by default, upon the grounds that the summons was issued to another county without having affixed the seal of the court issuing it (Revisal, sec. 431): *Held*, the judgment was irregular at best, and it was within the discretion of the trial court to set it aside upon the terms that the defendant enter a general appearance.

3. Judgments—Irregular—Set Aside—Motions, Time.

The trial judge may vacate an irregular judgment—*i. e.*, one rendered contrary to the course and practice of the courts, upon a proper showing, upon motion made in a reasonable time, and Revisal, sec. 274, providing for a motion to vacate a judgment upon the grounds of mistake, etc., if made within a year, etc., does not apply as a rule and certainly should not be allowed as controlling.

APPEAL from *W. R. Allen, J.*, at December Term, 1909, of (249) WAYNE.

Motion to set aside judgment. The facts as to the rendition of the judgment and relevant to the inquiry are set forth in the case on appeal as follows: This was a motion made by the defendant to set aside the judgment by default rendered in the above entitled action at August Term, 1909, of the Superior Court of Wayne County, and a verdict assessing damages, and a judgment rendered thereon at October Term, 1909, of said court upon the grounds hereinafter set forth heard before *W. R. Allen, Judge,* at November Term, 1909, of said court upon affidavits filed by the plaintiff and the defendant, and upon an inspection of the summons and the record. Upon the hearing of said motion his Honor found the following facts:

1. The summons in this action was issued on 19 June, 1909, by the clerk of the Superior Court of Wayne County, and directed to the sheriff of Wake County.

2. There was no seal on said summons or attached thereto.

3. That on 21 July, 1909, R. H. Biggs, deputy sheriff of Wake County, read said summons to the defendant.

4. That at the time said summons was read to the defendant there was pending in Wayne Superior Court an action between the plaintiff Calmes and G. A. Norwood, and the defendant had been notified that he would have to be a witness therein.

5. That the defendant, formerly living in Virginia, had been a resident of this State only a short time, and was unfamiliar (250) with legal proceedings in this State.

6. That prior to the time said summons was read to the defendant the

plaintiff had made no demand on the defendant, and defendant had no knowledge that the plaintiff claimed that he owed him anything.

7. That after said summons was read to defendant by said deputy sheriff the defendant asked him if he was summoned as a witness to Wayne Superior Court and was told that he was, which statement was made in good faith and because said deputy did not distinguish between a subpœna and a summons.

8. That relying upon the circumstances hereinbefore set out, and upon the statement of said deputy, the defendant believed that the paper served on him simply required him to attend as a witness, and did not know he had been summoned as a party.

9. That shortly thereafter the defendant wrote G. A. Norwood in whose behalf he thought he had been subpœnaed as a witness inquiring if it would be necessary for him to attend the August Term of the Superior Court of Wayne County, and received a reply, which is hereto attached, marked "A," and in consequence thereof did not attend said court.

10. That the defendant did not know of the pendency of this action until the execution issued upon the final judgment rendered in this action was served on him.

11. That the defendant has a meritorious defense. This finding is for the purpose of this motion only.

12. The notice to set aside the judgment and verdict on the ground of excusable neglect was issued 4 November, 1909, and at the hearing the defendant asked leave to amend by assigning as an additional ground the failure to attach a seal to the summons.

There was no mention in the affidavits filed by the defendant as a ground for setting aside said verdict of the fact that there was no seal on the summons. The motion to set side the verdict and judgment was continued by consent at the request of the plaintiff from 29 November until 7 December; and was continued by the request of the defendant's counsel, by consent, until 8 December. At the beginning of the
(251) hearing of the motion on 8 December, the defendant for the first time asked to amend his motion so as to include therein the fact that there was no seal on the summons as an additional ground for setting aside the verdict and judgment, which motion was allowed.

W. R. ALLEN, *Judge Presiding.*

Upon these facts the court entered judgment as follows: "And being of opinion thereon that the summons was not valid without a seal, and that it would not be just and equitable to allow the same to be attached now, except upon condition that said judgment and verdict be set aside, and being further of opinion that the neglect of the defendant is excus-

able, and so finding: It is thereupon considered and adjudged that the judgments rendered in this action at the August and October Terms of the Superior Court of Wayne County and the verdict rendered at said October Term be and the same are set aside upon condition that the defendant enter a general appearance. The defendant allowed thirty days from 20 December, 1909, to answer." Plaintiff excepted and appealed.

A. C. Davis, W. C. Munroe for plaintiff.

F. A. Daniels & Son, Aycock & Winston, and Connor & Connor for defendant.

HOKE, J., after stating the case. The Revisal of 1905, sec. 431, provides that "every summons, addressed to the sheriff or other officer of any county other than that from which it issued, shall be attested by the seal of the court."

There are many cases in our court in which the expression is used that "process to another county without seal is void," others speak of it as a "nullity." *McArter v. Rhea,* 122 N. C., 614; *Taylor v. Taylor,* 83 N. C., 116. If these expressions can be considered as in strictness correct, they are only so until the process is validated by amendment, for numerous decisions of this Court on the subject hold that the defect suggested may be removed by amendment on application to the proper tribunal, both as to original and final process, and the amendment when made will validate all acts done under the process, in so far as it affects the original parties to the suit or record.

This course, and the effect of it, was suggested as to final (252) process by *Henderson, C. J.,* delivering the opinion in the notable case of *Seawell v. Bank,* 14 N. C., 279, and the suggestion was soon thereafter approved by express adjudication as to final process in *Purcell v. McFarland,* 23 N. C., 34, and as to original process in *Clark, admr., v. Hellen,* 23 N. C., 421. The power of amendment as applied in these cases and now embodied and perhaps enlarged and extended in our statute, Revisal, 507, was sustained in the more recent case of *Henderson v. Graham,* 84 N. C., p. 496, in which the power of court to amend the summons was directly involved, and in which it was held: "It is error in the court to refuse to amend a summons upon the ground of a want of power. Whether the same should be amended is a discretionary matter and not reviewable. The authorities upon amendment of process (here, to allow clerk to affix his signature to summons) reviewed by *Smith, C. J.*" The very liberal and extensive power of amendment and the effect of it when made, approved in these cases, lead the Court in *Vick v. Flourney,* 147 N. C., 209, 216, to speak of the defect as an irregularity, though the comment was made only with reference to the

fact that the process could be amended in the discretion of the court. In the case at bar, whether the judgments were void, unless and until the defect was cured by amendment as the authorities seem to hold, or only voidable by reason of irregularity, in either case, we are of opinion that his Honor was right in setting them aside.

In the first case, the question of permitting an amendment and the terms on which such an amendment should be allowed, was entirely in his discretion, as held in *Henderson v. Graham, supra.*

And in the second, that is, regarding the defect as an irregularity, the question of setting aside such a judgment is referred by our decisions to the sound legal discretion of the court. We must not be understood as holding that where an adult business man of sound mind and memory hears a summons properly read to him to attend a given term of the Superior Court and answer a complaint, or judgment will be taken against him, he can be relieved from such judgment on account of surprise or excusable neglect under Revisal, sec. 513, because some
(253) local officer tells him that the summons is only a subpœna to testify in some other case. The section referred to, however, and the decisions under it, are not as a rule intended to be controlling in case of an irregular judgment. It was passed primarily to regulate applications to set aside judgments which were rendered according to the course and practice of the court, and were in all respects regular.

But in case of irregular judgments, different principles may be allowed to prevail; thus in *Becton v. Dunn,* 137 N. C., 559, on this subject, the Court held: "Section 274 of The Code, providing that a motion to set aside a judgment for 'mistake, inadvertence, surprise or excusable neglect,' must be made within one year, has no application to an irregular judgment, that is, one contrary to the course and practice of the court."

"3. A motion to set aside an irregular judgment need not be made within one year after rendition of same, but the trial judge may, in his discretion, vacate same upon a proper showing made within a reasonable time." And delivering the opinion, it was said: "The authorities are all to the effect that an irregular judgment may be set aside at a subsequent term, independent of section 274. *Wolfe v. Davis,* 74 N. C., 597. This is not done as a matter of absolute right in the party litigant, but rests in the sound legal discretion of the court. It is always required that a party claiming to be injured should show that some substantial right has been prejudiced, and he must proceed with proper diligence and within a reasonable time."

The judgments rendered in the present case are at best irregular, and on the entire facts as found by the court and relevant to the inquiry we think that his Honor wisely and properly exercised the legal discretion

conferred upon him by the law in setting them both aside, and the judgment of the court below is therefore

Affirmed.

Cited: Massie v. Hainey, 165 N. C., 179; *Cox v. Boyden,* 167 N. C., 321; *Lumber Co. v. Blue,* 170 N. C., 2; *Lee v. McCracken, ibid.,* 576.

(254)

H. F. McDONALD AND JOHN UNDERWOOD v. JOHN HOFFMAN AND MARY E. HALL ET AL.

(Filed 19 October, 1910.)

1. Mortgages—Foreclosure—Process—Judgment Conclusive.

A decree of foreclosure of a mortgage reciting that personal service of summons had been made can not be collaterally attacked by the plaintiff mortgagor, upon the ground that the summons had not been served, the procedure being by motion in the original cause; and the title of an innocent purchaser at the sale for value will not be disturbed.

2. Title Divested—Subsequent Defect.

The title of plaintiff having been divested by a decree of foreclosure of his mortgage, an objection to a subsequent defect of examination of a *feme* covert in the chain of title is immaterial.

APPEAL from *W. R. Allen, J.,* a jury being waived, at May Term, 1910, of CUMBERLAND.

On her application, Mary R. Hall was made a party, and she claimed the title in fee to the land described. His Honor made the following findings of fact:

1. That on 14 February, 1870, Charles J. Williams and others conveyed the lands described in the complaint to the defendant, Mary R. Hall, by deed which is registered in Book "O," No. 3, page 214, of the register's office of Cumberland County.

2. That on 22 December, 1887, the said Mary R. Hall and her husband, Thomas G. Hall, conveyed said lands to E. J. Lilly, now deceased, by mortgage deed to secure a debt recited therein, which said mortgage deed is registered in Book "I," No. 3, page 384, in said office.

3. That thereafter, default being made in the payment of the debt secured in said mortgage, an action was instituted in the Superior Court of said county by H. W. Lilly and R. T. Gray, executors of E. J. Lilly, against the said Thos. G. Hall and wife, Mary R. Hall, to foreclose said mortgage, and at September Term, 1899, of said court, a decree was rendered therein condemning said land to be sold, appointing J. C.

MacRae, Jr., commissioner, to make such sale; that said land
(255) was sold by said MacRae under said decree and report thereof was duly made, and at February Term, 1900, of said court, said sale and said report were duly confirmed, and it was ordered that the said MacRae execute deed, conveying said land to H. W. Lilly and R. T. Gray, executors of E. J. Lilly; they being the purchasers at said sale; that the summons in said action has been lost, but the decree rendered therein at September Term, 1899, adjudged that the said Thomas G. Hall and Mary R. Hall had been served with summons.

4. That pursuant to said final decree, the said J. C. MacRae, Jr., commissioner, on 24 February, 1900, conveyed said lands to said H. W. Lilly and R. T. Gray, executors of E. J. Lilly, by deed which was registered in said county in Book "G," No. 5, page 576.

5. That on 2 January, 1905, said H. W. Lilly and R. T. Gray, executors of E. J. Lilly, conveyed said lands to C. H. McLauchlin, by deed which was registered in said county in Book "Y," No. 5, page 452.

6. That on the said 2 January, 1905, the said C. H. McLauchlin and wife conveyed said lands to H. W. Lilly and R. T. Gray, executors of E. J. Lilly, by a deed of mortgage to secure a debt recited therein, which deed is registered in said county in Book "Y," No. 5, page 453.

7. That thereafter, default having been made in the payment of the debt secured in the said mortgage, said lands were sold under the power contained therein, at which sale John Underwood became the purchaser, and pursuant to said power, on the 26th day of August, 1907, said H. W. Lilly and R. T. Gray, executors of E. J. Lilly, conveyed said lands to said Underwood by deed which was registered in Book "M," No. 6, page 414, in said office. This finding is made subject to exceptions of the defendants which will appear in case on appeal.

8. That on 5 September, 1907, said John Underwood and wife conveyed said land to the plaintiff, H. F. McDonald, by deed which is registered in Book "M," No. 6, page 416, in said office.

Upon the facts as found by him, his Honor rendered judgment that
the plaintiff McDonald was the owner in fee of the land and
(256) entitled to the possession, subject only to his mortgage to his coplaintiff, John Underwood. From this judgment, Mary R. Hall appealed. The errors assigned by her are, (1) the reception in evidence of the mortgage deed from Charles McLauchlin and wife to H. W. Lilly and R. T. Gray, executors of E. J. Lilly, given to secure balance of purchase money, upon the ground that the private examination was not taken by a proper officer using a proper seal, (2) to the final decree and records of the action to foreclose the mortgage of Thos. G. Hall and wife (the appellant, Mary R. Hall), covered by findings 3, 4, 5, on the ground that summons was not in fact served, (3) that the

sale for foreclosure under the McLauchlin mortgage was prematurely made. Neither Hoffman nor the McLauchlins appealed from the judgment.

Q. K. Nimocks and Cook & Davis for plaintiffs.
C. W. Broadfoot, H. S. Averitt, and Sinclair & Dye for defendants.

MANNING, J., after stating the case: The exceptions noted to the foreclosure action against Thos. G. Hall and wife, Mary, upon the ground that summons was not in fact served, can not be sustained in the face of the recital in the judgment or decree in that action that personal service was made. This has been uniformly ruled by this Court, the proper proceeding being a motion in the original action to set aside the judgment, and not by collateral attack. *Bailey v. Hopkins,* 152 N. C., 748; *Yarborough v. Moore,* 151 N. C., 116; *Smathers v. Sprouse,* 144 N. C., 637; *Harrison v. Hargrove,* 120 N. C., 96; *Doyle v. Brown,* 72 N. C., 393. In addition, the rule of law applicable to cases of innocent purchasers for value of property sold under judicial proceedings, is stated with great force and clearness by *Ruffin, J.,* in *Sutton v. Schonwald,* 86 N. C., 198, case repeatedly cited with the approval by this Court: "In such cases the law proceeds upon the ground, as well of public policy as upon principles of equity. Purchasers should be able to rely upon the judgments and decrees of the courts of the country; and, although they may know of their liability to be reversed, yet they have a right so long as they stand, to presume that they have been rightly and (257) regularly rendered, and they are not expected to take notice of the errors of the court or the laches of parties. The contrary doctrine would be fatal to judicial sales and values of titles derived under them, as no one would buy at a price at all approximating the true value of property, if he supposed that at some distant day his title might be declared void, because of some irregularity in the proceedings altogether unsuspected by him, and of which he had no opportunity to inform himself." *Millsaps v. Estes,* 137 N. C., 544. The judgment of the court, having competent jurisdiction of the parties and subject-matter of the action, having divested the title of Mrs. Hall, and that having, by mesne conveyances, become vested in plaintiff McDonald, we see no ground upon which Mrs. Hall can sustain her claim or title to the land. Her only claim is that her title was not divested by the action to foreclose her mortgage; in this she is mistaken. As none of the other defendants appealed, we will not consider the other exceptions noted in the record, as they affected the rights of the non-appealing defendants and in no way affected the title asserted by Mrs. Hall. A defective taking of the private examination of Mrs. McLauchlin could not restore a title to Mrs. Hall which had long

prior thereto been effectually and completely divested by an unreversed judgment of a court of competent jurisdiction. The judgment is, therefore,

Affirmed.

Cited: Cooke v. Cooke, 164 N. C., 287.

NATHAN SIMMONS v. DEFIANCE BOX COMPANY.

(Filed 19 October, 1910.)

1. **Deeds and Conveyances—"Color"—Adverse Possession—Period of—Termination.**

When title is out of the State, one who enters upon a tract of land asserting ownership under a deed sufficiently defining its boundaries and constituting color of title, and continues in the exclusive possession for seven consecutive years, acquires the title, and it is not necessary that such claim and possession should have been next preceding institution of a suit.

2. **Deeds and Conveyances—"Color"—Adverse Possession—Outer Boundaries.**

One in adverse possession of lands, asserting ownership under a deed, having a house thereon and cultivating a small field within the boundaries of his deed under which he holds color of title, holds adverse possession of the lands described in his deed to its outer boundaries.

3. **Same—Ripening Title.**

When one enters under a deed, constituting color of title to a tract of land contained within the boundaries of a valid grant, or coterminous with it, and occupies any portion of the tract, asserting ownership of the whole, there being no adverse occupation of any part, the force and effect of such occupation is extended to the outer boundaries of his deed, and, if exclusive and continuous for seven consecutive years, will ripen into an unimpeachable title to the entire tract.

4. **Same—Senior Grantee.**

When the junior grantee claims title against the senior grantee of lands embraced in a "lappage" caused by the description in their grants by reason of adverse possession under "color," and has introduced evidence tending to show possession on the lappage, his possession, by construction of law, extends to the boundaries of his deed or grant upon which he relies, and is not confined to so much thereof as may have been in his occupation, if the senior grantee had no actual possession of the "lappage."

5. **Deeds and Conveyances—Possession—Trespasser—Right of Action.**

One in the exclusive possession of a tract of land can maintain trespass *quare clausum fregit* against the casual entry of a mere wrongdoer, even before his title matures.

6. Deeds and Conveyances—"Color"—True Title—Adverse Possession—Lappage—Inferior Title.

The principle of constructive possession operates only in favor of the true title, and such possession is not interrupted or impaired because of a deed of some adjoining claimant, under an inferior title, extending its description so as to overlap the lands thus held.

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

Action to recover damages for wrongfully cutting timber on (259) lands of plaintiff.

At the close of plaintiff's testimony and of the entire testimony there was motion by defendant to nonsuit plaintiff under statute; motion overruled and defendant excepted.

The court charged the jury, and on issues submitted the following verdict was rendered:

1. Is plaintiff entitled to recover of the defendant damages for the trespass alleged in the complaint? Answer: Yes.

2. If so, what amount? Answer: $522.

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

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

Simmons, Ward & Allen, and H. L. Gibbs for defendants.

HOKE, J. The objection urged for error to the validity of this trial was to the refusal of the court below to nonsuit the plaintiff, and this chiefly on the ground that plaintiff had failed to offer evidence sufficient to establish title to the *locus in quo*, but we are of opinion that the objection can not be sustained. The plaintiff introduced a grant from the State to one Francis Hill bearing date 25 July, 1716, and proved that this grant conveyed the land in controversy and all the land embraced and described in plaintiff's deed. Plaintiff further introduced deeds covering the land in controversy, and as set forth in the complaint, one from Leander Gilbert to Miles Jones, bearing date 1 August, 1893, and the second from Miles Jones to plaintiff, bearing date 27 December, 1897, and offered evidence tending to show that plaintiff, and those under whom he claimed, had been in the possession of a portion of this land, asserting ownership of the entire tract under these deeds for seven consecutive years prior to the institution of this suit and prior to the trespass complained of, the actual occupation having been of about 20 acres of cleared land and seemingly a tenement house within the boundaries of plaintiff's deed, as some of the witnesses speak of the claimants having lived on the land. Plaintiff further proved that about 1906 defendant company had entered upon

the land and cut and carried away the timber from about 87½ acres of the land and offered evidence to prove the amount of damages (260) sustained by reason of the alleged trespass.

Defendant introduced in evidence a grant to John Gray Blount for about 7,000 acres of land, purporting to be in Carteret County, bearing date in 1795, and a line of mesne conveyances from the heirs of John Gray Blount to defendant company, and proved that the descriptive lines of these deeds covered the 87½ acres of land where the cutting was done, and that there had never been any actual occupation on this portion of the land by plaintiff or those under whom he claimed. There was no evidence of any entry or possession of the defendant or any of its grantors upon the 87½ acres prior to the time of the cutting complained of. Nor do we find any available testimony of such entry or possession within the boundaries of the John Gray Blount grant prior to that time, certainly none prior to 1904, "when L. M. Baltes, superintendent of defendant company, called as a witness for plaintiff, testified on cross-examination that the first time he went on the company's land was in 1904." Upon this state of facts, we think that the trial judge properly refused to nonsuit plaintiff and correctly charged the jury as he did in substance on the question of title, "That if the jury were satisfied by the greater weight of the evidence, that plaintiff Nathan Simmons and those under whom he claimed were in possession of the land, asserting ownership under these deeds for seven consecutive years prior to defendant's entry, such occupation would mature title to the land contained in said deeds. That if such occupation and possession was for seven years or more continuously—not just before suit was brought, but continuously one after another for a period of seven years—it would mature title. And further, that if the jury find that plaintiff was in possession of any part of this land by having a house on it and cultivating that little field, that such occupation and possession would extend his claim to the outer boundaries of his deed," etc.

It is well established with us that when title is out of the State, one who enters upon a tract of land asserting ownership under a deed sufficiently defining its boundaries and constituting color of title, and continues in the exclusive possession for seven consecutive years, acquires the title, and it is not necessary that such claim and possession (261) should have been next preceding institution of a suit. *Gilchrist v. Middleton,* 107 N. C., 663; *Christenburg v. King,* 85 N. C., 230. Our decisions are also to the effect that "where one enters under a deed, constituting color of title to a tract of land contained within the boundaries of a valid grant, or coterminous with it, and occupies any portion of the tract asserting ownership of the whole, there being no adverse occupation of any part, the force and effect of such occupation

is extending to the outer boundaries of his deed, and if exclusive and continuous for seven consecutive years, will ripen into an unimpeachable title to the entire tract." The case suggested constitutes a lappage on the owner to the entire extent of the claimant's deed and brings the case under the principle so clearly stated by *Walker, J.,* in *Currie v. Gilchrist,* 147 N. C., 648, and in which it was held: "When the junior grantee claims title against the senior grantee of lands embraced in the 'lappage' caused by the description in their grants by reason of adverse possession under 'color' and has introduced evidence tending to show possession, his possession, by construction of law, extends to the boundaries of his deed or grant upon which he relies, and is not confined to so much thereof as may have been in his actual occupation and possession, if the senior grantee had no actual possession of the 'lappage.'" And the position is sustained and illustrated by many other decisions of the Court on the subject, as *Boomer v. Gibbs,* 114 N. C., 76, and others.

The principle stated is not affected by the casual entry of a mere wrongdoer. Our cases hold that one in the exclusive possession of a tract of land under color can maintain trespass *quære clausum fregit* against such a person even before title matures. *Myrick v. Bishop,* 8 N. C., 485; *Osborne v. Ballew,* 34 N. C., 373. In *Myrick's case, supra, Taylor, C. J.,* said: "The plaintiff having a deed covering the land where the trespass was committed and being in possession of a part within the boundaries of his deed, was in the actual possession of the whole." And in *Osborne v. Ballew, supra,* it was held: "That an entry under a deed into a part of a tract of land shall as against a mere wrongdoer be considered as an entry into the whole, it not appearing that any one else has possession of any part." Nor is its operation inter- (262) rupted or impaired because the deeds of some adjoining claimant, under an inferior title, may extend their description, also, over a portion of the lappage, there being, as stated, no adverse occupation of any part of the lappage on the part of such a claimant. The principle of constructive possession is never allowed to operate except in favor of the true title, and in *McLean v. Murchison,* 53 N. C., 38, to which reference was made as supporting defendant's position, it will be noted that the John Gray Blount grant, which was allowed the effect of confining the adversary claimant to his actual occupation, constituted the older and true title, and the ruling was made because such claimant did not show any occupation of the lappage on the true title. In the case at bar the John Gray Blount grant bore date in 1795 and the superior title was that under Francis Hill, whose grant was dated in 1716. Under a charge, free from error and in substantial accord with the decisions referred to, the jury have found that plaintiff and those under whom

he claims had an unimpeachable title by reason of open and exclusive possession under color and actual occupation of lappage on the true title for seven consecutive years, and that such title had ripened to the outer boundaries of plaintiff's deed covering the *locus in quo* before any entry by defendants or those under whom they claim on any part of the interference. There is

No error.

Cited: Pheeny v. Hughes, 158 N. C., 465; *Mintz v. Russ,* 161 N. C., 540; *Stewart v. McCormick, ibid.,* 627; *Ray v. Anders,* 164 N. C., 313, 314.

OSCAR WARWICK, BY HIS NEXT FRIEND, v. LUMBERTON COTTON OIL AND GINNING COMPANY.

(Filed 19 October, 1910.)

Master and Servant—Safe Place to Work—Knowledge of Servant—Evidence—Nonsuit.

It appearing that plaintiff was employed in defendant's cotton seed mill, among other things, to throw cotton seed into a hole in a conveyer running the entire length of the seed house in a straight line in its center, located about two and one-half feet above the floor, being box-shaped, within which there was a revolving screw which carried the cotton seed away, the holes in the conveyer being 12 x 18 inches, and fitted with boards for opening and closing them; that implements had been furnished with which to throw the seed in these holes, but that while plaintiff was doing this with his hands, leaning or standing on a pile of seed, the seed slipped or gave way, causing plaintiff's foot to slip within the conveyer, causing the injury complained of; and that plaintiff was permitted to do this work in his own way: *Held,* There being no special knowledge required to do the work, or complicated machinery, the doctrine that the master should have provided a safe place to work has no application, and a motion of nonsuit should have been allowed.

(263) APPEAL from *W. R. Allen, J.,* at the May Term, 1910, of ROBESON.

These issues were submitted:

1. Was the plaintiff Oscar Warwick in the employ of the defendant at the time of the injury alleged in the complaint? Answer: Yes.

2. Was the injury received by plaintiff caused by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

3. Did the plaintiff, by his own negligence, contribute to his own injury? Answer: No.

4. Did the plaintiff voluntarily assume the risk involved in feeding the conveyer by assuming a position which he knew was dangerous? Answer: No.

5. What damage, if any, is the plaintiff entitled to recover of the defendant on account of its negligence? Answer: $4,000.

From the judgment rendered the defendant appealed.

Wishart, Britt & Britt for plaintiff.
McIntyre, Lawrence & Proctor for defendant.

BROWN, J. Upon the trial below the defendant moved to nonsuit. The refusal of this motion constituted the only assignment of error necessary to consider.

The testimony tends to prove that plaintiff at the time of the injury was working in defendant's oil mill and got his foot in the conveyer whereby he was seriously injured. This conveyer consists of a wooden box, about eighteen inches square, within which is a rapidly revolving iron screw, by means whereof the cotton seed are conveyed from the seed house to the screens to be cleaned and from thence to (264) the gins to be reginned and from thence to other parts of the plant. The conveyer is located about 2½ feet above the floor and runs in a straight line through the centre of the seed house and for the entire length thereof—some hundred or more feet. At intervals of six feet along the top of the conveyer there are holes 12x18 inches, through which the seed are fed into it. When a hole is not in use, a board is fitted back over the opening and the opening closed up. It is admitted the conveyer and mill are properly constructed.

The room in which this conveyer was situated was full of heated cotton seed and the office of the conveyer is to convey them elsewhere in the mill to be crushed. These cotton seed were piled up all around the conveyer and at the time of the injury plaintiff was standing or leaning upon a pile of seed feeding the conveyer. The seed slipped or gave way and plaintiff's foot was thrown into the conveyer and injured.

It was not denied by plaintiff but that defendant furnished shovels and seed forks for use in shoveling seed into the conveyer, and it was admitted by plaintiff that at the time he received the injury he was standing upon the seed with his foot elevated two feet immediately above the opening to the conveyer, and that he was raking in the seed with his hands and not using the tools provided for that purpose. We are unable to see any evidence of negligence upon the part of the defendant.

The business required that the room be used for storing seed; the purpose of the conveyer as a labor-saving device required that the seed be

all around and about it. There is no special knowledge required to throw the seed in a hole. There was no complicated machinery committed to plaintiff's care. He had equal knowledge of the conditions with defendant, and was allowed to do his work in his own way. We have repeatedly held that while an employer of labor is required to provide for his employees a reasonably safe place to work, this rule does not apply to ordinary every-day conditions, requiring no special care, preparation or provision, where the defects are readily observable, and where there is no good reason to suppose the injury complained (265) of would result. *House v. R. R.,* 152 N. C., 398. The rule is well stated by *Mr. Justice Connor* in *Covington v. Fur. Co.,* 138 N. C., 377. "The general rule of law is that when the danger is obvious, and is of such a nature that it can be appreciated and understood by the servant as well as by the master or by any one else, and when the servant has as good an opportunity as the master or any one else of seeing what the danger is, and is permitted to do his work in his own way and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for the injuries received in consequence of the conditions of things which constituted the danger. If the servant is injured, it is from his own want of care. This rule is especially applicable when the danger does not arise from the defective condition of the permanent ways, works or machinery of the master, but from the manner in which they are used, and when the existence of the danger could not be well anticipated, but must be ascertained by observation at the time."

The plaintiff voluntarily got on the pile of seed and was throwing the seed into the conveyer with his hands. He was not directed by the defendant to assume the position he was in or to use his hands in place of the shovel provided for the purpose. It is highly probable that had the plaintiff used the tools provided he would not have been hurt. At any rate we are unable to see from plaintiff's own evidence that the defendant failed to perform any duty it owed him.

The unfortunate injury was plainly the result of an accident against which ordinary foresight could not guard. *Brookshire v. Electric Co.,* 152 N. C., 669.

The motion to nonsuit should have been allowed.

Reversed.

Cited: Simpson v. R. R., 154 N. C., 52; *Lynch v. R. R.,* 164 N. C., 252; *Mace v. Mineral Co.,* 169 N. C., 146.

FRANK R. PERRY v. W. R. PERRY.

(Filed 19 October, 1910.)

Libel—Absolute Privilege—Pleadings.

An affidavit of an executor sought personally to be taxed with cost of an action against the estate, upon the ground of bad faith in defending it, does not render him liable, in an action for libel, for stating in his affidavit to resist the motion that the testimony of the plaintiff was "false," "false in the start and fraudulent in the manner in which it was attempted to be established," as such matters are "absolutely privileged," even if shown to be false and actual malice proven.

(266)

APPEAL from *O. H. Allen, J.*, at April Term, 1910, of WAKE.

The facts are sufficiently stated in the opinion.

B. C. Beckwith for plaintiff.

Holding, Bunn & Snow, Aycock & Winston, and Peele & Maynard for defendant.

CLARK, C. J. The defendant W. R. Perry was executor of S. D. Perry, deceased. The present plaintiff Frank Perry brought an action against the executor to recover a certain amount which he claimed to be due him. At the first trial in the Superior Court the jury found against the plaintiff. A new trial was granted because of the complaint of the judge upon the plaintiff's counsel. At the second trial the jury found in favor of the plaintiff, and this judgment was affirmed by the Supreme Court. The plaintiff Frank Perry then sought to charge the executor personally with the costs of said litigation, and at the October Term, 1908, lodged a motion to this effect, supporting it by an affidavit in which he charged the executor with bad faith in defending the action. In response to this affidavit, and in order to show his good faith in defending said action, the executor filed an affidavit upon which this action for libel is brought. The motion was denied and the executor was not taxed personally with the costs.

The substance of the paragraphs in aforesaid affidavit upon which the plaintiff relies, as ground for this action for libel, is that said affidavit styles the testimony of plaintiff in the action referred to (267) as "false," "false in the start and fraudulent in the manner in which it was attempted to be established," and that plaintiff's claim was "essentially unjust, dishonest and unlawful." This is warm language, but the occasion was privileged. There was no publication of this language by the defendant in the newspapers, or otherwise, nor elsewhere. It was used only on the motion by the plaintiff to tax the

defendant, executor, personally with the costs and the judge refused the motion. The affidavit was, therefore, "absolutely privileged" and an action could not be maintained even though the charges were shown to be false and actual malice proven. *Ramsey v. Cheek,* 109 N. C., 270; 25 Cyc., 376.

In this present action the complaint avers that the said affidavit of the defendant is "false, malicious and defamatory," yet surely the defendant can not sue the plaintiff for libel in so alleging.

It looks very much like what *Pearson, C. J.,* styled, in one of his opinions, as "cross-firing with small shot."

The law has been summed up and stated, with full citation of authorities in *Nissen v. Kramer,* 104 N. C., 574, and *Ramsey v. Cheek,* 109 N. C., 270. This case falls under the head of "absolutely privileged," as defined in *Ramsey v. Cheek, supra.* The judgment of nonsuit is

Affirmed.

E. P. LOWRIE v. ALVA OXENDINE, GUARDIAN, ET AL.

(Filed 19 October, 1910.)

1. **Domestic Relations—Parent and Child—Payment for Services—Promise—Evidence Sufficient.**

   In an action brought by the plaintiff to recover for the value of his services rendered his step-grandfather, while living with him, in managing his business and taking care of him during his illness, there was evidence tending to show that the grandfather had repeatedly stated in the presence of others his intention of paying plaintiff, and that the plaintiff expected to receive compensation for them: *Held,* Not error to submit the question of compensation to the jury under a charge that the law presumed the services were rendered gratuitously, and the burden was upon plaintiff to satisfy the jury by the greater weight of the evidence that the step-grandfather promised to pay plaintiff therefor, or that the parties intended that the plaintiff should be paid for his services.

2. **Domestic Relations—Parent and Child—Emancipation Implied—Child's Compensation.**

   Evidence that the father permitted his minor son to work for himself and receive the earnings of his own labor is sufficient to go to the jury upon the question of whether the father had impliedly emancipated his own son, and assented to the son's receiving his earnings in his own right.

(268) APPEAL from *W. R. Allen, J.,* at April Term, 1910, of ROBESON.

This action was brought to recover the value of services alleged to have been rendered by the plaintiff to the intestate of the defendant.

The intestate was the step-grandfather of the plaintiff. With respect to the relationship of the parties, the court charged the jury that ordinarily when one renders services for another, in the absence of an express promise to pay for them, the law implies a promise to pay the reasonable value of such services, but this is not the rule as between a child and its parent, or one standing in the relation of a parent. In that case, the presumption is that the services were rendered gratuitously, that is, without any intention to charge for the same, and in order to recover for services thus rendered, the plaintiff must show a promise to pay for them, and consequently, in this case, the burden is upon the plaintiff to satisfy the jury by the greater weight of evidence that H. T. Oxendine, the step-grandfather of the plaintiff, promised to pay him for the services rendered. If the plaintiff had so satisfied the jury, he is entitled to recover what they find from the evidence to be the reasonable value of the services, but if the jury find that there was no promise, the plaintiff would not be entitled to recover anything. There were other instructions given to the jury, but it is not necessary that they should be set forth. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

McIntyre, Lawrence & Proctor for plaintiff. (269)
Robert E. Lee and McNeill & McNeill for defendant.

WALKER, J., after stating the case. There are many exceptions appearing in the record, but it is necessary to consider only one or two questions in order to dispose of the real matters in controversy. The court stated to the jury in its charge the correct rule applicable to cases of this kind, and there was evidence to support the instruction. The plaintiff lived with his grandfather for several years, and during that time he managed his business and took care of him during his illness. There was evidence tending to show that his grandfather repeatedly stated in the presence of others that he intended to pay him for his services, and that the plaintiff expected to receive compensation for them. It was for the jury to decide, upon the evidence, whether it was mutually understood by and agreed between the parties that the plaintiff should be remunerated for his services.

The presumption arising from the relation of the parties that services were performed by one of them for the other gratuitously, is not conclusive, but may be rebutted by evidence which tends to show that at the time the labor was performed or the services rendered, the parties contemplated and intended that compensation should be made for the same, and sufficient, therefore, to show an implied agreement to that effect. An express agreement may, of course, be shown. *Dodson v.*

McAdams, 96 N. C., 156; *Young v. Herman,* 97 N. C., 283; *Stallings v. Ellis,* 136 N. C., 69; *Dunn v. Currie,* 141 N. C., 123; *Freeman v. Brown,* 151 N. C., 113. In this case there was proof of an express contract to pay. The other objections relating to the question now under consideration are untenable.

We think there was evidence that the plaintiff had been emancipated by his father and permitted to work for himself and to receive the earnings of his labor. In *Ingram v. R. R.,* 152 N. C., 762, we held that "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," citing *Burdsall v. Wagoner,* 4 Col., 261; *Armstrong v. McDonald,* 10 Barb., 300; *Jenny v. Alden,* 12
(270) Mass., 375; *Campbell v. Campbell,* 11 N. J. Eq., 268; *Taylor v. Webb,* 36 N. Y. Supp., 592.

The general features of this case are like those of *Freeman v. Brown, supra,* and sufficiently so to bring it within the application of the principles therein stated.

No error.

Cited: Holland v. Hartley, 171 N. C., 377.

S. L. LYNCH v. S. H. LOFTIN ET AL.

(Filed 19 October, 1910.)

1. Negotiable Notes—Subsequent Endorser—Liability.

An endorser of a negotiable instrument who had paid a judgment obtained thereon in an action against him and the insolvent makers can not, nothing else appearing, recover the amount in his action therefor against a subsequent endorser. Revisal, sec. 2217.

2. Judgments—Consent—Agreement—Parties.

A consent judgment is not, strictly speaking, a judgment of the court, and when rendered without the consent of a party will be held inoperative in its entirety.

3. Negotiable Instruments—Subsequent Endorsers—Change of Liability—Pleadings.

In an action to recover upon a negotiable note by one endorser against a subsequent one, when the complaint does not distinctly allege a change in the *prima facie* order of liability, but sets out a contract relied on for this purpose which, under its interpretation, affects this change, it is sufficiently pleaded.

4. Same—Equities—Parties—Demurrer.

In order to change the *prima facie* order of the endorsers' liability on a promissory note the plaintiff alleged and set forth an executory contract between the defendant, endorser, and a third person without alleging performance thereof by the latter, through whom he must work out his rights. *Held*, There was an absence of essential connection between the matters alleged and the relief demanded; that such third person was a necessary party to the action, and that a demurrer to the complaint should be sustained.

APPEAL from *Cooke, J.*, at June Term, 1910, of LENOIR. (271)

Demurrer by the defendants to the complaint. His Honor sustained the demurrer as to one of the defendants, from which ruling no appeal was prosecuted and overruled it as to the defendants Loftin & Pollock, assignee, who appealed to this Court.

On 16 April, 1910, J. W. Lynch and L. V. Morrill executed and delivered their note for $1,500, payable sixty days after date to the plaintiff, S. L. Lynch, and the plaintiff thereafter endorsed the same in blank, and the same was delivered to S. H. Loftin. This was done before maturity, and the Merchants National Bank of Richmond, Virginia, took the same as collateral security, prior to the execution of the deed of assignment by Loftin. After the delivery of said note to Loftin and its transfer to the bank, the said S. H. Loftin made a deed of assignment, on 21 May, 1901, to the defendant Pollock and B. W. Canady, and B. W. Canady died prior to the institution of this action. At March Term, 1903, of Lenoir County Superior Court there were several civil suits pending wherein Loftin and his assignees and J. W. Lynch and the Gay Lumber Company were interested, among them being an action entitled "W. D. Pollock and B. W. Canady, assignees of S. H. Loftin, and the Merchants Bank of Richmond, Va., plaintiffs, and J. W. Lynch, L. V. Morrill and S. L. Lynch, defendants," and on 19 March, 1903, the said Loftin, Canady and Pollock and J. W. Lynch entered into an agreement for the settlement of their matters in difference, a great part of which was in litigation, the material part of which is as follows: "6. It is hereby understood and agreed that the said S. H. Loftin and W. D. Pollock and B. W. Canady, assignees, shall return to the said J. W. Lynch, free of all cost and expense to him, his certificate of stock for one hundred and fifty (150) shares in the Gay Lumber Company, and all notes and accounts held against the said J. W. Lynch and the said Gay Lumber Company." On account of said agreement, a consent judgment was entered in the suit above set forth, and said suit being upon the note sued on, as it then appeared, it was ordered in the judgment, which is set forth as "Exhibit B," that the plaintiffs should surrender to the defendants the note sued on in their action. (272)

Afterwards a suit was instituted by the Merchants National Bank of Richmond, Va., plaintiff, v. S. H. Loftin, J. W. Lynch and wife, Lorena Lynch, L. V. Morrill and S. L. Lynch, wherein it was adjudicated that there was no such bank as the "Merchants Bank of Richmond, Va.," which was the bank named in the suit, of which "Exhibit B" is the judgment, and it was adjudicated that the Merchants National Bank of Richmond, Va., which held the note sued on in the case at bar, never gave anybody authority to make it a party to "Exhibit B," and that it was not bound by any agreement made in "Exhibit A," and it thereupon collected its debt from the plaintiff, amounting to $1,875.50, J. W. Lynch and L. V. Morrill being insolvent. To recover which amount the plaintiff now sues S. H. Loftin. The defendant Loftin assigned as ground for his demurrer (1) that the complaint alleged no cause of action against him in that (*a*) the plaintiff was not a party to the agreement containing the above recital and furnished no part of the consideration; (*b*) that defendant was not a party to the action in which it was adjudged by consent that the note be surrendered to J. W. Lynch (which judgment was subsequently set aside and declared inoperative); (*c*) that the complaint does not allege performance of the conditions imposed upon J. W. Lynch by the agreement and contract sued upon; (*d*) that the note recited in the complaint was not held at the date of that agreement or ever thereafter held by S. H. Loftin or his assignees, (2) Because J. W. Lynch was not a party to this action, and that he was a necessary party.

G. V. Cowper, Y. T. Ormond, and John D. Bellamy & Son for plaintiff.

Loftin, Varser & Dawson for defendants.

MANNING, J. This case presents some unusual features. The plaintiff takes a note from J. W. Lynch and L. V. Morrill for $1,500, in the usual form. He endorses that note in blank, and it comes, before maturity, to the possession of the defendant, S. H. Loftin, who en-
(273) dorses it to the Merchants National Bank of Richmond, Va. The note being unpaid at maturity, the holder sued the endorsers and makers and recovered judgment; the plaintiff being the first endorser (the principals being insolvent), has paid the judgment amounting to $1,875.50. This amount he now seeks to recover of his subsequent endorser, S. H. Loftin. It would seem to be clear that he could not recover. Section 2217, Revisal; *Adrian v. McCaskill*, 103 N. C., 182. "As respects one another endorsers are liable *prima facie* in the order in which they endorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise." Revisal, sec. 2217. But the plain-

tiff endeavors to prevent this result by setting up an agreement made by defendant Loftin and his assignees under a deed of assignment for the benefit of his creditors with J. W. Lynch, one of the principals in the note recited. The material part of the agreement alleged by plaintiff is the paragraph set out in the preceding statement of the case. It will be observed that the plaintiff was not a party to that agreement, but he contends that he was a beneficiary thereof, and that he can insist upon its performance by the defendant; and upon his failure, that he is entitled to recover damages, to wit, the amount paid by him in satisfaction of the judgment recovered upon the note. The plaintiff further invokes to his aid a consent judgment rendered in an action brought upon the note, to which the defendant Loftin was not a party, and which judgment was subsequently rendered nugatory by another judgment of the Superior Court of Lenoir County, upon the ground that one of the parties named—the banking corporation—did not exist, and because, further, none of the parties to the pretended consent judgment had any authority to bind the real owner of the note by such a judgment. In *Vaughan v. Gooch,* 92 N. C., 524, *Smith, C. J.,* speaking for this Court to the effect and validity of a consent judgment, said: "The judgment, or, as it is termed, the decree is, by consent, the act of the parties rather than of the court, and it can only be modified or changed by the same concurring agencies that first gave it form, and whatever has been legitimately and in good faith done in carrying out its provisions must remain undisturbed. The authorities to this effect are simple and decisive among our own adjudica- (274) tions. In *Wilcox v. Wilcox,* 36 N. C., 36, *Gaston, J.,* declares a decree rendered by consent to be in truth the decree of the parties, and in such a decree, *stat pro ratione, voluntas,* their will is a sufficient reason." In *Edney v. Edney,* 81 N. C., 1, *Dillard, J.,* says that "a decree by consent, as such, must stand and operate as an entirety, or be vacated altogether, unless the parties by a like consent shall agree upon and incorporate into it an alteration or modification. If a clause be stricken out," he adds, "against the will of a party, then it is no longer a consent decree, nor is it a decree of the court, for the court never made it." Such being the law in this State, the consent judgment was properly avoided as having been rendered without the consent of one of the parties thereto. Further, the defendant Loftin was not a party to the consent judgment or the action in which it was rendered. As it can not operate as an entirety, it is altogether a nullity, and the plaintiff can derive no benefit therefrom. The facts which render it ineffective appear in the complaint. We will next consider the agreement upon which plaintiff relies to change the order of liability upon the note. If this agreement does not change this order of liability,

then the complaint states no cause of action and the demurrer should have been sustained. The complaint does not distinctly allege a change in the *prima facie* order of liability, but it sets out the contract, and if this effects this change, it would be held, under our liberal construction of pleadings, sufficiently pleaded. The contract was executory in its provisions. J. W. Lynch, a party thereto, was required to transfer certain properties, and the defendant Loftin was required to do certain acts. The plaintiff does not allege any performance by J. W. Lynch—through whom he must work out his rights—of the acts required of him by the contract. The contract is simply alleged to have been executed, and there the allegations end. Nothing is charged to have been done under it and no new relations or rights acquired. To hold the defendant Loftin to a performance, conceding that it is efficient to protect the plaintiff and vest in him an enforceable right, without alleging a performance by J. W. Lynch of the covenants and agreements imposed upon him, and especially as plaintiff rests (275) upon a performance by J. W. Lynch to entitle him to any relief, would be unwarranted by any principle of liberal construction of pleading or by any recognized principle of law or equity. There is an entire absence of essential connection between the matters alleged and the relief demanded. We think J. W. Lynch not only a proper, but a necessary party to this action. If, as a fact, J. W. Lynch performed his part of the agreement, and his performance was a discharge and payment of the note described in the complaint to S. H. Loftin, the defendant, he being a principal in the note, his payment would inure to the benefit of the plaintiff whose liability was only that of an endorser, and as between plaintiff and defendant, the defendant would be required to account to the plaintiff for the consideration received. In this way only, in our opinion, can the agreement be of any avail to the plaintiff, but even in this way it is doubtful if this note was embraced within the terms of the agreement. It was not "held" by the defendant Loftin or his assignees, as may have been known to J. W. Lynch. In any view, the demurrer should have been sustained, and the action will be dismissed unless the plaintiff shall obtain leave to make new parties and to amend his complaint and insert therein the necessary allegations to entitle him to relief. In overruling the demurrer there was

Error.

HOKE, J., not sitting.

Cited: Harrison v. Dill, 169 N. C., 545; *Belcher v. Cobb, ibid.,* 694; *Gardiner v. May,* 172 N. C., 195.

HENDERSON LIGHTING AND POWER COMPANY v. MARYLAND CASUALTY COMPANY.

(Filed 26 October, 1910.)

1. **Insurance—Indemnity—Interpretation of Contract.**

While any doubt as to the intention of an insurance contract, arising from the words in which it is expressed, should always be resolved strictly against the insurer and in favor of the insured, yet when the intention is clearly stated, it should be enforced according to the will of the parties as thus expressed, leaving thereby no room for construction.

2. **Same—Indemnity—Legal Liability.**

The plaintiff in this action was sued in a former action for damages arising from a personal injury received by its employee, and upon appeal in that action it was decided in the Supreme Court that it was not liable upon the facts presented. Thereafter this plaintiff compromised its case, and then brought this action against the defendant indemnity company to recover the amount paid by it in compromise, with costs and reasonable attorneys' fees. In the contract of indemnity the defendant agreed to defend any suit brought against the plaintiff (the assured), but therein explicitly referred to a suit "to enforce a claim for damages on account of an accident policy covered by the policy," the indemnity being against loss from liability imposed by law for damages on account of bodily injuries or death suffered while the policy was in force, by any person or persons not employed by the assured while "at or about work of the assured." It appeared that the injury was done to a trespasser, and that the plaintiff was not liable in law for the same. *Held*, (1) The injured person, under the facts of the case, was not "at or about work" of the insured when he was injured, as contemplated by the terms of the policy, and there was no causal connection between the "work" of the assured and the injury; (2) the defendant indemnity company was not bound to defend a suit for a groundless claim not within the terms of the policy, and the plaintiff (the assured) can not recover; (3) a motion to nonsuit should have been granted.

APPEAL from *D. L. Ward, J.*, at May Term, 1910, of VANCE. (276)

This action was brought on a policy of insurance to recover a loss alleged to have been sustained by the plaintiff. In October, 1907, Walter H. Briscoe was injured by falling into a sunken tub or shallow well of hot water on the land of J. H. Bridgers, in Henderson, N. C., a narrow strip of land four feet wide between the Henderson Amusement Company building or theatre and the land of the Henderson Lighting and Power Company. The well was located and placed by the amusement company for its own purposes when its theatre was erected, about one year before the accident. The well was placed touching the building and immediately under a window of the building to a room which was used as a dressing-room of the theatre. The well was under the exclusive control of the amusement company. The power company

had no concern, no duty and no responsibility in respect to it.
(277) It was not in possession of it, and did not use it for any purpose. At the time of the accident it was covered over with loose boards. There was an open space between the strip on which the well was located and the building of the power company, which open space was the property of the power company, and is about eighteen feet wide. This space is not fenced in, but opens on Spring Street. Briscoe had been upon the open space belonging to the power company before, and had been ordered off by this company.

From Spring Street, opposite said space, the machinery or boilers or furnaces of the power company are not visible. From the well, where the accident happened, none of the machinery, furnaces or boilers are visible. Briscoe, at the time of the accident, was at the well, which is directly under the window of the amusement company, peeping in at the window, and he fell in the well and was injured. There was no evidence that Briscoe was invited to go upon the land of the Henderson Lighting and Power Company, or that he was allured, attracted or induced to go there by the machinery of this company. There is no evidence that he went on the premises in order to view the machinery, and there would have been no danger to him in viewing the machinery through the door or window. Briscoe was not even a licensee; he was a trespasser at the time of the accident. The power company owed him no duty in respect to the well. He was a youth thirteen or fourteen years old, bright, intelligent and bad. The public were in the habit of using the open space between the two buildings, and this was alleged by Briscoe in his amended complaint. Briscoe brought suit against the power company to recover damages for the injury, and this Court sustained a demurrer to his complaint and held that, according to the facts, as stated in the complaint, no legal liability of the power company to Briscoe had been alleged (148 N. C., 396). Briscoe amended his complaint, and the power company again demurred. This demurrer was overruled, with leave to answer over, and an appeal taken, but not prosecuted. The power company thereupon compromised and
(278) settled Briscoe's claim by the payment of $100 and the costs, and brings this action to recover the same and $500 for counsel fees, alleging that the settlement with Briscoe was a perfectly reasonable one, and was made after the casualty company had been notified to defend the suit, and had refused to do so upon the ground that the power company had failed to give notice of the claim and to comply with the other requirements of the contract respecting suits brought against it. The $100 and the costs were paid by the power company before this action was commenced, but no counsel fees had been paid. The policy of insurance provides as follows:

1. The defendant will indemnify the plaintiff against loss from liability imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered while this policy is in force, by any person or persons not employed by the assured while at or about the work of the assured, described in the schedule, during the prosecution of the said work at the place or places described in the schedule, subject to the following conditions:

2. Upon the occurrence of an accident, the assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the company's home office or to the company's authorized agent.

3. If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the company's home office every summons or other process as soon as the same shall have been served on him, and the company, at its own cost, will defend such suit in the name and on behalf of the assured, unless the company shall elect to settle the same or to pay the assured the indemnity provided for in Condition A hereof.

4. The assured shall not voluntarily assume any liability nor shall the assured, without the written consent of the company previously given, incur any expense or settle any claim except at his own cost.

5. No action shall lie against the company to recover for any loss under this policy, unless it shall be brought by the assured for loss actually sustained and paid in money by the assured in (279) satisfaction of a judgment, after trial of the issue, nor unless such action is brought within ninety (90) days after such judgment, by a court of last resort, against the assured, has been so paid and satisfied.

The defendant moved for judgment of nonsuit upon the evidence, which was overruled and the defendant excepted. It was agreed that, subject to this exception, a jury trial should be waived, and that the court should find the facts and answer the issues in the case. This was done, and the facts, as stated herein, are selected from the findings of the court as those which are essential to a decision of the case, in the view taken of it by this Court. The Court concluded, as matters of law, that the Briscoe claim is covered by plaintiff's policy and that, by denying liability in its answer, the defendant had waived its right to notice of the Briscoe claim and to a judgment after trial in his action. Judgment for the amount of the compromise, attorney's fees and costs ($370) was rendered for the plaintiff, and the defendant appealed.

A. C. Zollicoffer and J. H. Bridgers for plaintiff.

John W. Hinsdale for defendant.

WALKER, J., after stating the case. The general rule of construction applied by the courts to all contracts of insurance is that while, like other contracts, they should be so construed as to give effect to the intention of the parties, yet where there exists any doubt as to that intention, it is always to be resolved strictly against the insurer and in favor of the insured. Vance on Insurance, 429. When, however, the intention is clearly stated, it should be enforced according to the will of the parties as thus expressed, for in such a case there is no room for construction. The terms of the policy in question are, we think, free from any doubt or ambiguity. The defendant undertook to indemnify against loss from the liability imposed by law upon the assured (the plaintiff), for damages on account of bodily injuries accidentally suffered by any person not employed by the assured, while
(280) at or about the work of the assured and during the prosecution of the said work at the place described in the schedule. We have held, after careful consideration of all the essential facts, that the power company is not liable in damages for the injuries to Walter Briscoe, resulting from his fall in the vat. *Briscoe v. Power Company,* 148 N. C., 396. The facts, as now presented to the Court, are much stronger against his right to recover than those which we formerly considered. The clause of the policy by which the defendant agreed to defend any suit brought against the assured, refers explicitly to a suit brought "to enforce a claim for damages on account of an accident covered by the policy," and in order to determine whether the casualty company was under any duty or obligation to defend the Briscoe suit, we must first ascertain whether the law imposed a liability upon the power company for the accident to him, for if it did not, his claim is plainly not covered by the policy, as it refers to a claim founded upon a liability imposed by law, and not to false or fictitious claims. The indemnity is against loss from liability, and it would be stretching, if not perverting, the meaning of the words to extend the application of them to all suits and require the casualty company to defend them, without regard to the legal liability of the assured. An accident covered by the policy is one for which the assured is liable under the law, for it is so expressly stated in the policy. If, therefore, the casualty company refused to defend the Briscoe suit for any reason, it can not be held liable for the expense of a defense or settlement made by the insured, unless in some way it is made to appear that the latter was liable to Briscoe. The question has been considered and decided in a case substantially identical with ours in all of its features. In *Cornell v. Insurance Co.,* 175 N. Y., 239, the Court, after deciding that if the injuries did not occur under such circumstances as to impose a legal liability upon the

insured therefor, they are not within the protection of the policy, thus refers to the duty of the indemnity company to defend suits: "In the next clause of the policy, the defendant became obligated to defend certain actions when brought against the plaintiff. If the defendant was bound by the contract to defend the eleven suits referred to, or any of them, there would be a legal basis (281) for a recovery in this action to the extent of the expenses incurred by the plaintiff in making a defense which the defendant had agreed to make. But the cases which the defendant was bound to defend are carefully defined and limited by the terms of the policy. That obligation is limited to 'claims made against the insured *and covered by this policy.*' The defendant did not stipulate to indemnify the plaintiff against the costs and expenses of defending himself against fictitious or groundless suits. The protection afforded to the plaintiff by the policy was against some actual legal liability directly occasioned by his business operations." And again: "If the injuries embraced in the eleven suits were not covered by the indemnity clauses of the policy, and yet the defendant had assumed the obligations to defend it must follow that it has assumed the obligation to defend suits for injuries *not covered* by the policy. That proposition must be maintained in order to hold the defendant liable for the claims in question. It can be maintained only by disregarding the plain words of the policy or adding to them some qualification that the parties did not express in words. The suits that the defendant stipulated to defend are very clearly defined in the contract. In the first place, they are defined as suits for injuries covered by the policy, and all agree that the injuries upon which the eleven suits were based are not, and none of them were, injuries of that character. On the contrary, they are admitted to be injuries not included in the policy at all, since no liability was imposed upon the insured in consequence. In the second place, they were defined as suits which the defendant should fail to settle or pay the damages claimed therein, and surely no one will claim that the defendant assumed any obligation to settle or pay false or unfounded claims. The obligation to defend is expressly limited to cases where the insured was liable upon the facts and circumstances of the accident causing the injury. If such facts and circumstances did not exist and were not susceptible of proof, then the defendant could ignore the suits, as it did." *Cornwell v. Insurance Co.* has been cited with approval in several cases. In the recent case of *Wesson v. Casualty Co.*, 201 Mass., 71, an action upon a policy similar to the one now being considered, the Court held that the principal agreement of the defendant was to indemnify the plaintiff (282) against loss from actual legal liability for damages, on account

of accidental injuries of the kind described in the policy, but the averments of the declaration tended to show that there was no such liability on the part of the plaintiff for the accident in question, and as there was no averment of the existence of such a liability, it was plain that the plaintiff could not recover. It was also held that the clause as to defending suits was inserted for the benefit of the insurer, and that if it elected not to defend, its liability under the provision for paying indemnity is not enlarged, but remains unchanged. To the same effect are *Munson v. Insurance Co.,* 145 Fed., 957, Affirmed 156 Fed., 44; *Xenos v. Fox,* L. R., 4 C. P., 665; *Lawrence v. Ass. Corporation,* 192 N. Y., 568; *Creem v. Casualty Co.,* 132 N. Y. Supp. Ct. (App. Div.), 241; *Morette v. Bostwick,* 127 App. Div. (N. Y.), 702. In *Creem v. Casualty Co., supra,* the Court decided that in an action on a policy indemnifying an employer against damages for personal injuries, the insured is not entitled to recover the expenses incurred in successfully defending an action brought by the person injured, when the policy covered only claims for which the insured was legally liable. The most recent case on the subject is *White v. Casualty Co.,* 139 N. Y. App. Div., 179, where it appears that the policy was issued by the defendant in this case, and the suit of the person injured against the insured was settled out of court. The action was brought by the insured to recover the amount of money paid in compromise and for expenses. The Court held that the insurance company was not compelled by its agreement to defend an action against the insured, unless the latter were legally liable to the plaintiff therein. The two cases are identical and the following language, taken from the opinion in that case, states succinctly the true principle applicable to them, as established by the authorities: "The contention that 'a party indemnified may hold its indemnitor for money paid for a prudent settlement' ignores the fact that a legal liability on the part of the person indemnified must exist, and the amount paid must be reasonable. A party so paying assumes the risk of being able to prove the facts upon
(283) which his liability depends, as well as the reasonableness of the amount which he pays. *Dunn v. Paving Co.,* 175 N. Y., 214, 218. This being the rule, it is necessary that facts tending to show such conditions be pleaded." A demurrer was sustained because it did not appear from the complaint that the plaintiffs were legally liable to the person injured. The decision goes beyond what it is necessary to decide in this case, for it is there held that, by the terms of the policy, the legal liability of the insurer must rest upon a judgment in the action rendered against the insured, after trial of the issues.

The plaintiff relies upon *Beef Co. v. Casualty Co.,* 201 U. S., 173, but that case is easily distinguished from this one, if the latter part

of the opinion does not directly sustain our ruling. There, as stated by *Justice Holmes,* who delivered the opinion of the Court, "the fact was that the driver was an employee of the plaintiff and the accident and damages were, therefore, covered by the policy." It was, of course, the duty of the indemnity company to defend such a suit. The sixth question asked by the lower court was as follows: "Under the terms of the policy may the liability of the assured to the injured person and the extent of that liability be litigated in the first instance in an action between the assured and the assurer, where the assurer has denied its liability under the policy and has refused to defend an action brought against the assured by the injured person?" It was answered in the affirmative, with this qualification or comment, "so far as the question is warranted by the facts set forth," evidently referring to the admitted fact that the assured was liable to the injured person as, perhaps, rendering an answer to the question unnecessary to a complete disposition of the case. The answer, though, shows that in the opinion of the Court, it is necessary, at some stage of the controversy or of the litigation between the parties, to establish the fact of such liability as a condition precedent to the insured's right of recovery against the insurer.

In Richards on Insurance section 481, the general rule is stated to be that the insured must show a liability on account of an injury covered by the policy, in order to maintain an action against the insurance company. See also *Davidson v. Casualty Co.,* 197 Mass., (284) 167; *Woodman v. Casualty Co.,* 87 Mo. App., 677; *R. R. v. Insurance Co.,* 180 Mass., 263; *Horse Car Co. v. Fidelity Co.,* 160 Pa. St., 350; *Biays v. Insurance Co.,* 7 Cranch, 415.

Even if the view suggested by the plaintiff be an equitable one, and it admits of grave doubt, we can not adopt it, as the parties have not so contracted and we can not do it for them. We have nothing to guide us but the words of a plainly expressed agreement which must be interpreted as the parties evidently intended it should be.

It is unnecessary to answer the other questions, whether the defendant waived the notice of the claim of the injured person required to be given to it, and whether the liability of the insured to such person must first be fixed by a judgment against the insured, followed by payment of the judgment, before the insured can recover of the indemnity company, or whether compliance with that provision was also waived by the company when it refused to defend.

The injury to Briscoe was not one of the kind insured against by the defendant, as he was not entitled to recover damages on account of a bodily injury accidentally suffered by him while at or about the work of the assured, during the prosecution of said work, as described in

the schedule annexed to the policy. The defendant was not, in law or in fact, responsible for the injury to him, even in the slightest degree, and he was not "at or about the work of the assured," within the evident meaning of those words, when he was injured. There was no causal connection between the "work" of the power company or its prosecution, and the injury to the boy. *Briscoe v. Power Co.*, 148 N. C., 396.

We are, therefore, of the opinion that the indemnitor; not being answerable for the principal loss in this case, can not be so for the subsequent damages, costs and expenses paid in the settlement of the suit between Briscoe and the plaintiff. The defendant was not bound to defend a suit upon a claim not within the terms of its policy, and especially so in the case of a groundless claim. If not required to defend, it can not be charged with the costs and expenses of a defense, or of a settlement made by the assured for its own benefit,
(285) however reasonable that settlement may be. To hold otherwise, would impose upon the defendant a liability which it not only has not assumed by its contract with the assured, but which, by the very terms of the policy, is excluded therefrom. The costs and expenses incurred in defending against Briscoe's claim for damages were not the result of any legal wrong done by the power company to him for which it is indemnified, but of the claim for damages pressed with commendable zeal, but misplaced confidence, by a plaintiff without a case, which would surely have judicially appeared if the power company had not settled, but defended to the end. Plaintiff was in no danger of an adverse judgment after our decision in the Briscoe case. Briscoe achieved partial success by the weakening of the plaintiff, when it should not have been dismayed by the continued prosecution of a claim, which a little more reliance upon the former decision of this Court should have convinced it was without merit.

Upon the facts found by him, the learned judge, "sitting as a jury," should have instructed himself differently as to the law and answered the second issue, "Was the said claim (of Briscoe) covered by plaintiff's policy?" in the negative, but as there is no evidence to sustain the plaintiff's cause of action, viewing the testimony in the most favorable light for him, the nonsuit should have been allowed and the action dismissed. Judgment to that effect will be entered in the court below.

Reversed.

Cited: *Lowe v. Fidelity Co.*, 170 N. C., 447.

LANCASTER AND WIFE v. SOUTHERN INSURANCE COMPANY ET AL.

(Filed 26 October, 1910.)

1. Insurance—Policy—Interpretation of Contracts.

When a person of mature years and sound mind, who can read and write, accepts a policy of insurance containing stipulations material to the risk and on breach of which the policy may be avoided, and there is nothing confusing or ambiguous in them and no representations made which are calculated or intended to deceive as to their import, the policy with the stipulations becomes the contract between the parties, to be enforced while it stands, according to its terms.

2. Same—"Riders."

The plain provisions of a "rider" attached to a fire insurance policy on a steam cotton gin will be given effect, when it is expressly thereon stated that it is attached to and made a part of the policy, and when the purpose is to better adapt its provisions to the particular kind of property, with reference to the methods and conditions of its operation, with nothing uncertain or restrictive in its terms; and it appearing by express provision in the policy itself, that it was "made and accepted under the foregoing stipulations and conditions, together with such other provisions, agreements and conditions as may be endorsed hereon." The stipulations in the body of the policy not inconsistent with the "rider" will also be given effect.

3. Insurance—Vendor's Lien—Purchase Price—Personal Property.

When a note is given for a steam cotton gin retaining title in the vendor until the purchase price is paid, and recorded, Revisal, 983, the character of the property from personal to real is not changed, though it is attached to the realty.

4. Insurance—Vendor's Lien—"Ownership"—Interpretation of Contracts.

A vendor's lien given by the vendee's note for the purchase price of a steam cotton gin, retaining the title in the vendor for security, does not avoid the vendee's right of recovery under a policy of fire insurance stipulating, in effect, that the policy would be void if the interest of the assured was other than the sole and unconditional ownership, as the vendee is obligated to pay the note in the event of loss, and the character of his ownership does not fall within the prohibition of the terms used in the policy contract.

5. Insurance—Vendor's Lien—Ownership—Mortgages—Interpretation of Contracts.

A recorded vendor's lien given for the purchase price of a steam cotton gin is, in effect, in the nature of a chattel mortgage to secure the purchase price, and avoids a policy of fire insurance thereon when violative of an express stipulation therein that the entire policy shall be void if the subject of the insurance be personal property or become encumbered by a chattel mortgage.

APPEAL from *Guion, J.*, at April Term, 1910, of EDGECOMBE.

It was shown that *feme* plaintiff, owner of a farm, "had erected
(287) a building and therein established a steam gin, the engine and boiler enclosed in brick and same was being used for farm ginning." That said plaintiff took out a policy of insurance on the gin, engine and boiler in the sum of $1,000, the contract being the ordinary standard form, with a rider attached to the face of the policy, on which was a heading, "For Gin Systems Only," and which contained certain specifications adapting the policy more fittingly, in certain features, to the kind of property insured and the operation of the same, and concluding with the statement "Attached to and forms part of Policy No. 48599," the number of policy sued on. Plaintiff "admitted that notes reserving the title to the gin outfit were given and recorded, and all of purchase price had not been paid at the time the policy was issued, and defendant admitted that the policy was issued and sent plaintiff through the mail in lieu of a policy in a company that had failed, and that no representations were made by plaintiff to get the policy." The property was destroyed by fire, proof of loss properly made and present action instituted to recover on the policy. Recovery was resisted, chiefly by reason of breach of certain stipulations contained in the body of the policy, to the effect "That this entire policy shall be void . . . if the interest of the insured be other than the unconditional and sole ownership, and, second, if the subject of the insurance be personal property and be or become encumbered by a chattel mortgage." There was the further general stipulation in the body of the policy, that the entire policy should be void "if the interest of the insured in the property be not truly stated therein." Plaintiff contended that the stipulations should not be allowed to defeat a recovery: 1. Because at the time of taking out the policy no inquiry was made as to the title or condition of the property, and that no representations were made by plaintiff concerning the same, and that her rights are unaffected, therefore, by the stipulations relied upon.

2. That the contract of insurance, by the nature of it, is confined to that portion of it contained in the "rider," and as the stipulations in question do not appear therein, but only in the body of the policy, they are not relevant to the inquiry.

3. That on the facts the property insured had become realty,
(288) and in that event there had been no breach shown, etc.

The jury, having ascertained the value of the property destroyed by the fire, the question of defendant's responsibility was referred to the court on the facts, and the court being of opinion that the policy was avoided by reason of the existence of an encumbrance for the unpaid purchase money, in the form of a mortgage or conditional sale, duly recorded, gave judgment for defendant, and plaintiff excepted and appealed.

G. M. T. Fountain & Son for plaintiff.
J. R. Gaskill and W. O. Howard for defendant.

HOKE, J., after stating the case. Our decisions are to the effect, and they are in accord with the generally prevailing doctrine, that when a person of mature years and sound mind, who can read and write, accepts a policy of insurance, containing stipulations material to the risk and on breach of which the policy is to be avoided, and there is nothing confusing or ambiguous in them and no representations made which are calculated or intended to deceive as to their import, the policy with the stipulations becomes the contract between the parties, to be enforced, while it stands, according to its terms, and the principle should not be affected because in a given case there has been no previous application or no express representation made. *Floars v. Insurance Co.*, 144 N. C., 232; *Hayes v. Insurance Co.*, 132 N. C., 702; *Lasher v. Insurance Co.*, 86 N. Y., 423; *Brown v. Insurance Co.*, 86 Ala., 189; *Crikelaire v. Insurance Co.*, 186 Ill., 309. In the present case there is no allegation or suggestion of any ambiguity nor of anything done or said to confuse or mislead the claimant and the policy with its stipulations must be taken as the contract under which the rights of these parties are to be determined.

And plaintiff's second position can not be maintained. The "rider," while headed "For Gin Systems Only," contains the express provision, "Attached to and forming part of Policy No. 48599, Southern Insurance Company, of New Orleans." And further, at the end of the entire policy, is the stipulation, "This policy is made and accepted under the foregoing stipulations and conditions, together with such other provisions, agreements and conditions as may be en- (289) dorsed hereto." The rider was inserted in and made a part of the entire policy, in order the better to adapt its provisions to this particular kind of property, and more especially in reference to the method and conditions of its operation, and there being nothing uncertain or restrictive in its terms, there is no reason why the plain and express provision, "attached to and made a part of this policy" should not be given effect. Authority also here favors defendant's position. Speaking to a similar question in *Waters v. Assurance Co.*, 144 N. C., 663-671, the Court said: "It is urged upon our attention that some of the entries, by means of which the application was made to accord with the policy and the paster, were made on the margin of the application and written longitudinally, and that such entries, so made, and even the paster itself, are presumptive evidence of a change in the contract after the application had been first signed. But neither the authorities nor the known usage in the making of such contracts are in support

of the position to the extent contended for. We know that these policies, as well as the applications, are gotten up on printed forms designed to meet the average and general demand in contracts of this nature, and frequently changes are made to meet special circumstances; that these are ordinarily noted on the margin, and a slip is then pasted on the face of the policy to express the contract as affected by these changes. In the absence, therefore, of some special circumstances tending to cast suspicion on such entries, there should be no presumption of any alteration; but the nature of the entry and its placing are simply circumstances on the general question as to whether there has been a completed contract of insurance." *Pierce v. Insurance Co.,* 138 Mass., 151; *Swinnerton v. Insurance Co.,* 37 N. Y., 174; 1 Cooley Insurance Briefs, 640-461 (1).

The third position must also be resolved against the plaintiff. That is the property had become realty and in that respect there was no such breach of stipulations shown avoiding the policy. True, we have held in this State, that when one is in possession of land under a binding contract of purchase, having given his notes for the
(290) purchase money, he is to be considered as the "sole and undivided owner" within the meaning of this stipulation in a contract of insurance, a position declared and sustained in a forcible opinion by *Brown, J.,* in the recent case of *Jordan v. Insurance Co.,* 151 N. C., 341. The same principle is discussed by *Manning, J.,* in the learned and valuable opinion of *Modlin v. Insurance Co.,* 151 N. C., 36-40. This ruling is properly placed on the well-recognized principle that equity will treat that as done which the parties are under a binding agreement to do, and in reference to insurance contracts, on the further principle that the loss in such cases, when the property is destroyed by fire, falls on the purchaser. He still owes the amount due on his notes. *Sutton v. Davis,* 143 N. C., 474. And while it is usually held that the principle referred to does not prevail in the case of personal property, where the title is withheld on the payment of the purchase money, this distinction as to personalty should not prevail in this State on the precise facts disclosed in the record. It was originally held, in the case of these conditional sales of personal property, that if the property was destroyed by fire or other adventitious cause, that the loss must fall on the vendor who had retained the title in himself, and this position still obtains in many of the States. Tiffany on Sales, 91. In North Carolina, however, it is established in a case like the present, that when a bargainor sells goods, taking notes for the purchase price, retaining the title as security for the purchase money, and delivers possession, that if the goods are destroyed by fire, the obligation to pay the notes is absolute and the loss must fall on the vendee. *Tufts v.*

Griffin, 107 N. C., 47. From this we think it follows that, by analogy to the position obtaining in case of real estate, that the vendee under the fact existent here, is the unconditional and sole owner of the goods, within the meaning of the contract and there has been no breach of same in this respect. Such a stipulation refers to the "quality of an estate, and that it is not held jointly with others." Vance on Insurance, 442.

This conclusion, however, can not avail the plaintiff by reason of another stipulation in the body of the contract, "that the same shall be void if the subject of insurance be personal property (291) and be or become encumbered by a chattel mortgage." Under our decisions, where a vendor, as here, has sold goods, taking notes for the purchase money and delivered possession, retaining title as security, and the contract has been properly registered according to the statute, Revisal, 983, the property, the subject-matter of the contract retains its character as personalty, both as between the parties and others claiming adversely to the lien. *Cox v. Lighting and Power Co.,* 151 N. C., 62. The goods, therefore, retained their character as personalty and in that aspect the claim of the vendor, in this instance, was only an encumbrance in the nature of a chattel mortgage to secure the purchase money, and, on the facts, the stipulation as to the non-existence of such an encumbrance has been violated. *Hamilton v. Highlands,* 144 N. C., 279. It is usually held that the stipulation as to sole and unconditional ownership is not violated by the existence of liens and encumbrances. 2 Cooley Insurance Briefs, 1378 (I). Vance on Insurance, 442. From this very fact, and because there may be certain conditions existent which increase the moral hazard of the risk, companies are allowed to and usually do insert these provisions as to encumbrances; to be enforced when the contract and the facts so require. We are not inadvertent to *Caples v. Insurance Co.,* 60 Minnesota, 376, and cases of like kind, in which it was held that a covenant, giving a landlord a lien for unpaid rent, did not come within the term "chattel mortgage" as it appears in these contracts and in which *Collins, J.,* delivering the opinion, said: "That the parties in using this term did not intend to include every kind of instrument which could be enforced in a court of equity, as a lien or mortgage of personalty," but in this same opinion it was also said that this stipulation should be considered "As simply guarding against the common, ordinary chattel mortgage and instruments of the same *nature, use* and *purpose.*"

Under the facts presented, as heretofore stated, this is, in effect, an encumbrance, in the nature of a chattel mortgage, to secure the purchase money, registered as such under our registration laws, and we con-

cur with his Honor in holding, for that reason, that the stipulation in the policy, against encumbrances, has been violated and no recovery thereon can be had.

No error.

Cited: *Bank v. Cox,* 171 N. C., 80; *Ins. Co. v. Reid, ibid.,* 517.

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H. C. MOFFITT AND DAVID J. LEWIS v. NARCISSA SMITH ET AL.

(Filed 26 October, 1910.)

1. Witnesses—Opinion Evidence—Experience—Weight.

One who has testified that the testatrix, in his opinion, had capacity to make the will caveated, may testify as to what he had observed as to the mental condition of another, who had suffered for many years from an attack similar to that of testatrix, when confined to the purpose of aiding the jury in considering the weight to be given his testimony; this being competent as "opinion evidence" as distinguished from "expert evidence."

2. Appeal and Error—Argument, Order of—Procedure.

The ruling of the lower court upon the right to open and conclude is not appealable by defendant when he has introduced evidence.

APPEAL by defendants from *W. R. Allen, J.,* at April Term, 1910, of COLUMBUS.

J. B. Schulken, Lyon & Greer, and I. B. Tucker for plaintiff.

D. J. Lewis for plaintiff H. C. Moffitt.

John D. Bellamy & Son, Don MacRackan, and L. V. Grady for defendants, appellants.

CLARK, C. J. On the trial of the caveat to the will, it appeared that the testatrix had been stricken with paralysis. A non-expert witness testified that he thought she had the capacity to make a will. He was then allowed, over defendant's exception, to testify as to what he had observed as to the mental condition of the witness' father when also suffering for many years from a similar attack. This evidence was admitted "to show that the witness had experience in observing persons who had been paralyzed, and it was explained to the jury that it could not be considered for any other purpose."

In *Clary v. Clary,* 24 N. C., 78, it is held that any one, though (293) not an expert, who has had an opportunity of knowing and ob-

serving a person whose sanity is impeached may give his opinion as to the sanity or insanity of such person. Certainly to give the jury information of the fact that the witness has had opportunity to observe the mental condition of another person, stricken likewise by paralysis, can not be prejudicial. The jury were instructed that the witness was testifying, not as an expert, but from his own observation, of the mental condition of the testatrix, and his observation of the condition of his father was merely to aid the jury in considering the weight to be given to his testimony. This was competent as "opinion evidence"—as distinguished from "expert evidence." *Lumber Co. v. R. R.*, 151 N. C., 221, and cases there cited.

After full and careful consideration of the other exceptions we do not find that they require discussion. The tenth exception, that the court refused the caveators the right to open and conclude, was properly abandoned in this Court. The ruling as to the right to open and conclude is not appealable in any case in which the defendant has introduced evidence. Rule 6, Superior Court, 140 N. C., 679.

No error.

H. W. STEINHILPER AND WIFE v. J. S. BASNIGHT.

(Filed 26 October, 1910.)

1. Negotiable Notes—Endorsement—Title—Due Course—Equitable Owner—Defenses.

A purchaser of a negotiable instrument, for value, before maturity, but without endorsement, becomes the holder of the equitable title only, and takes subject to any defense the maker may have against the original payee, as for one to become a purchaser in due course he must have acquired title by endorsement. Revisal, secs. 2178, 2198; and in the absence of endorsement of the note sued on in an action by the purchaser, the plaintiff is not entitled to judgment upon evidence which shows a good defense in favor of the maker against the payee.

2. Notes—Purchase Price—Equities—False Representations—Damages—Date of Credit.

In an action on a note given for the purchase price of timber, the jury found that there was a false and fraudulent representation as alleged in the answer, in regard to encumbrances on the timber, *held*, that under an issue calling merely for a general assessment of damages, it was not error for the lower court to refuse to sign a judgment reducing the amount of the note in the amount of the damages assessed, as of its date, for the amount thus found should be deducted as of the time of trial, no date for the credit having been fixed by the verdict.

(294) APPEAL from *W. R. Allen, J.*, at May Term, 1910, of CUMBERLAND.

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

Rose & Rose and C. W. Broadfoot for plaintiff.
Robinson & Lyon and W. D. McIver for defendant.

WALKER, J. This action was brought to recover the amount of three notes, made by the defendant to H. W. Steinhilper and alleged to have been sold by him to the plaintiff, who is his wife. The defendant averred that two of the notes, each for $500 and dated 26 June, 1898, were executed by mistake, having been given for lumber for which he had already paid, and the jury so found by their verdict. As to the other note, he alleged that it was given for the purchase price of timber, and that H. W. Steinhilper represented, at the time of the purchase, that the encumbrances thereon amounted to only $150, which representation was false, and the jury found this allegation to be true, and assessed the defendant's damages at $250. The jury further found that the notes had been transferred to the plaintiff for value before maturity, but it does not appear that there was any endorsement of the notes by the payee to the plaintiff. So far as the case shows, she was a purchaser for value without actual notice of the defendant's equities or defenses, but not a holder by endorsement. The plaintiff moved for judgment upon all the notes, subject to a credit of $150, which had been paid by the defendant. This motion was refused. The defendant tendered a judgment against himself for $100, which the judge refused to sign. The court thereupon rendered a judgment in favor of the plaintiff for $613.80, of which sum $350 is principal and $263.80, with interest on the principal from 2 May, 1910, and the costs. The amount
(295) of this judgment was the balance due on the third of said notes for $500, less $250, the amount of the damages assessed by the jury. Both parties appealed from the judgment.

The court properly denied the plaintiff's motion for judgment. She was not entitled to recover on the first two notes, as they were given by mistake and were without any consideration. The plaintiff was not the holder of the notes in due course, as the notes were not endorsed to her, and it can make no difference that she purchased the notes for value and without any actual notice of the defenses set up in the answer. The notes were negotiable only by endorsement. Code, sec. 41. By the transfer to her without endorsement, the plaintiff became the holder of the equitable, but not of the legal title, and she took them, therefore, subject to any legal defenses the maker may have against the original payee. *Tyson v. Joyner,* 139 N. C., 69; *Bank v. Drug Co.,* 152 N. C.,

142. This is now the law by statute. Revisal, secs. 2178, 2198. As contended by the plaintiff's counsel, every holder is deemed *prima facie* a holder in due course, but, by the very definition of a holder, he must have acquired title by endorsement. "A holder means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof, and 'bearer' is defined to be the person in possession of a bill or note which is payable to bearer." *Mayers v. McRimmon,* 140 N. C., 643, Revisal, sec. 2340. In *Mayers v. McRimmon, supra,* it appeared that the plaintiff had purchased notes by discounting them, and we held that unless it appeared that the notes had been endorsed by the payee, the plaintiff was only the equitable owner and holder of them subject to any valid defense of the maker. There was, therefore, no error in the ruling of the court to which the plaintiff excepted, and the judgment as to her is affirmed.

No error.

DEFENDANT'S APPEAL.

WALKER, J. The defendant contended that the plaintiff could recover only $100 and interest, as the jury had found that there was a false and fraudulent representation as to the amount of the encumbrance on the timber, for the purchase price of which the last of the notes was given. This is true, but the issue was so worded as (296) to call only for an assessment of the amount of damages to the defendant by reason of the false representation. It is not so framed as to permit a reduction of the amount of the note, as of its date, to one hundred dollars, or in other words, as the jury have merely assessed the damages, the amount thereof must be deducted from the amount due on the note, as of the time of the trial and not as of the date of the note. This was done by the court, and there was, therefore, no error in refusing to sign the judgment which was tendered by the defendant, nor do we find any error in the other rulings of the court.

No error.

Cited: *Woods v. Finley, post,* 500.

B. F. PENNY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 October, 1910.)

1. Carriers of Passengers—Dangerous Conditions—Passengers' Safety—Conductor's Duty.

While a common carrier is not an insurer, its servants are required to exercise the highest degree of care in the transportation, as well as the

protection, of passengers from actual impending assaults of fellow passengers and intruders; however, the carrier is not required to foresee and guard the passenger against all assaults, but only against such as from the circumstances may reasonably be expected to occur.

2. Carriers of Passengers—Employee a Passenger—Wrongful Acts.

An employee of a railroad, but in this instance but a passenger, and not engaged in the performance of a duty to his employer, must be regarded as a passenger, in an action against the railroad company for injuries to a fellow passenger inflicted by another passenger as a result of his acts, and a charge which assumes that the defendant is in any event liable for his acts is erroneous.

3. Same—Acts of Another—Intervening Cause—Evidence—"Fracas"—Causal Connection.

C., a passenger on defendant's train, being partly intoxicated, became disorderly between stations, whereupon the conductor with the assistance of the porter, the baggage man and L., another passenger, searched the disorderly passenger for arms, and entirely quieted the disturbance before the train reached the next station. There the disorderly passenger alighted, and, with the train still standing, got into a violent altercation with L., who borrowed a pistol from the baggage-master, just at the time the plaintiff, also a passenger, was alighting at the station, his destination. L. attempted to fire on C., his pistol snapping, and C. thereupon drew a pistol, fired at L. and inflicted wounds on the plaintiff. There was evidence that the conductor was in position to see the danger of plaintiff, and permitted him, without warning, to place himself, by alighting, in a place of danger: *Held*, (1) A charge to the effect that defendant would be liable if the baggage-master knew the purpose for which he loaned the pistol, is erroneous, there being no evidence of such knowledge; (2) the act of loaning the pistol was not the proximate cause of the injury resulting from the stray bullet, and there is no causal connection between them.

4. Same—Contributory Negligence—Instructions—General Terms—Specific Requests.

In an action for damages against a railroad for injuries received by plaintiff, a passenger, from a stray bullet in a fracas between two other passengers, there was evidence that the train had stopped at the station and conflicting evidence that the shooting occurred in the presence of the conductor under circumstances wherein he should have warned plaintiff in time, and of circumstances under which plaintiff himself should have seen the danger in time to have avoided the injury: *Held*, error to refuse to charge, at defendant's request, that plaintiff could not recover if he did not do what a reasonably prudent man would have done in avoiding danger; and if he did not turn out of his way and avoid the injury, which by the exercise of his senses for his own protection he could have avoided, and thus failed to do so, his contributory negligence would bar his recovery; and a charge upon the plaintiff's duty in general terms, as to his exercising his senses for his own protection, is insufficient compliance with a correct request pointing out the particular phases of the evidence.

5. Carriers of Passengers—Dangerous Conditions—Duty of Conductor—Duty of Passengers.

It is the duty of the conductor to warn the passengers of danger to them, obvious to him, when they are alighting from the train at a station, and the railroad is responsible in damages arising from his neglect of this duty when the passenger could not perceive the dangers while acting with the care of a prudent man in the exercise of his faculties.

APPEAL from *Cooke, J.*, at April Term, 1910, of NEW HAN- (298) OVER.

Action to recover damages for a personal injury. The following issues were submitted:

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

2. Did the plaintiff by his own negligence contribute to his injury? Answer: No.

3. What damage, if any, has the plaintiff sustained? Answer: $5,000.

4. Is the cause of action stated in the amendment to the complaint filed at April Term, 1910, barred by the statute of limitations? Answer: No.

From the judgment rendered the defendant appealed.

A. J. Marshall, E. K. Bryan and Bellamy & Bellamy for plaintiff.
Davis & Davis, J. D. Bellamy and George Rountree for defendant.

BROWN, J. We are of opinion that the complaint presents but one cause of action, and that is the allegation that the defendant, while the plaintiff was a passenger on its train and entitled to its protection, negligently failed to protect him while alighting at the end of the journey, in consequence of which the plaintiff was injured. The amended complaint sets out no cause of action and adds nothing to the original complaint. Therefore, the fourth issue in regard to the statute of limitations is unnecessary.

There is evidence tending to prove that on 18 September, 1898, plaintiff was a passenger on defendant's train from Wilmington to Leland, N. C., in the second-class car.

A negro passenger, Sam Calloway, partly intoxicated, became very disorderly, and after much trouble, was subdued by the conductor with the assistance of the porter, the baggage master, Van Amringe, and one LaMotte, who was a passenger on this train, although in the employment of defendant, but not on duty. The conductor then undertook to search Calloway for arms, but found none. The disturbance had been entirely quieted before train reached Leland.

Calloway jumped off train at Leland and while on the ground, (299)

seeing LaMotte, asked him if he meant to cut him; LaMotte replied, "I will cut your heart out," and then went in baggage car and asked Van Amringe, the baggage master, for his pistol, which Van Amringe gave him. LaMotte then went to the platform of the second-class car, the train being at full stop for passengers to get off. The negro Calloway was on the ground in a diagonal direction on the Leland side. LaMotte snapped pistol three times at him, but it did not fire. Just about this time plaintiff passed over from the second-class car on the platform of first-class car and down the steps of the car for the purpose of leaving the train. It was then that Calloway fired, and the bullet took effect on plaintiff, injuring him.

It is contended by the plaintiff that the conductor was standing on the car platform, knew what was going on, and permitted plaintiff unwittingly without warning to step down on car steps in a highly dangerous position, in consequence of which he was shot. This is plaintiff's only cause of action, and it is clearly stated in the complaint.

The defendant denies the alleged negligence of the conductor Carmon, and offers evidence tending to controvert plaintiff's contention. Defendant also contends that the plaintiff must have seen the disturbance, and carelessly and negligently, without necessity, exposed himself to obvious danger.

His Honor instructed the jury that if the defendant, by the exercise of the "*highest* degree of care and human forethought" could have prevented LaMotte from assaulting Calloway, and that this would have saved Penny from being injured, and defendant failed to do so, defendant would be liable, and to answer first issue, Yes.

This instruction is erroneous in two respects. 1. It assumes that the defendant is in any event liable for LaMotte's acts. He was not on duty, but was a passenger on the train, and in the consideration of this case must be regarded as such. The conductor in charge of the train was not bound to foresee that LaMotte would borrow a pistol and engage in a difficulty with Calloway after Calloway had left the train and ceased to be a passenger. The conductor could not foresee that Calloway had a pistol with which injury might be inflicted on
(300) a passenger, since he had searched Calloway and found none.

2. While the carrier is not an insurer, its servants are required to exercise the highest degree of care in the transportation, as well as the protection, of passengers from actual impending assaults of fellow passengers and intruders.

For the latter purpose it must use all available means at hand. But the carrier is not required to foresee and guard the passenger against all assaults, but only against such as from the circumstances may reasonably be expected to occur. The duty of the defendant is clearly

stated in *Britton v. R. R.*, 88 N. C., 536, by *Ruffin, J.*, as follows: "And while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his duty to provide ready help sufficient to protect the passenger against assaults from every quarter which might *reasonably* be expected to occur under the circumstances of the case and the condition of the parties." This view of the law is well sustained by authorities elsewhere. *Pounder v. R. R.*, (1892), 1 Q. B. D., 383; *Royster v. R. R.*, 67 Miss., 376; *Putman v. R. R.*, 55 N. Y., 108; *Brooks v. R. R.*, 168 Mass., 164, 168.

The court further instructed the jury: "If the jury shall find by the greater weight of the evidence that a difficulty was pending between LaMotte and Calloway and Van Amringe, the baggage master on the train, with a knowledge of the purpose for which LaMotte wanted it, handed him a pistol with which he could shoot Calloway, and that LaMotte took the pistol out on the platform, and pointing the same towards Calloway tried to shoot him, but could not discharge the pistol, and this caused the said Calloway to fire the shots at LaMotte which struck the plaintiff, then the jury should answer the first issue, Yes."

It is contended that his Honor neglected to give the correlative contention of the defendant, and that he should have told the jury that if Van Amringe gave the pistol to LaMotte without any knowledge of the purpose for which LaMotte intended to use it, then the defendant would not be liable on this ground.

In *Jarrett v. Trunk Co.*, 144 N. C., 299, it is held that if the trial judge undertakes to apply the law to the facts and gives the contention of one side, it is his duty, without being requested, (301) to give the correlative contention of the other side. But the instruction, in our opinion, is itself erroneous. 1. Because there is no evidence that Van Amringe knew or had reason to believe that LaMotte borrowed the pistol for an unlawful purpose. 2. The act of Van Amringe in lending the pistol to LaMotte was not the proximate cause of the injury to plaintiff—which was caused by a stray bullet fired from Calloway's pistol.

The accidental wounding of plaintiff did not follow in direct sequence from the act of Van Amringe, assuming for the sake of argument that the latter was guilty of negligence in lending his pistol to LaMotte. *Ramsbottom v. R. R.*, 138 N. C., 39. In this case it is held by *Mr. Justice Hoke* that the proximate cause of an injury is one that produces the result in *continuous* sequence, without which it would not occur, and which a man of ordinary prudence could reasonably be expected to foresee.

There is, in legal parlance, no direct causal connection between the act of Van Amringe in loaning the pistol and the unforeseen accidental

injury to plaintiff by Calloway. *Harton v. Telegraph Co.,* 146 N. C., 429; *McGee v. R. R.,* 147 N. C., 142; *Bowers v. R. R.,* 144 N. C., 684; 1 Street's Foundations, 120. To constitute liability there must not only be a breach of duty owing by the defendant to the plaintiff and injury to the latter, but the breach of duty must be the cause, and the proximate cause, of the injury. So far as the act of Van Amringe is concerned it is a case of *post hoc,* but not "*ergo propter hoc,*" as was said by *Manning, J.,* in *Hudson v. McArthur,* 152 N. C., 452.

In *McDowall v. R. R.* (1903), 2 K. B., 331, on page 337, *Vaughan Williams, L. J.,* says: "In those cases in which a part of the cause of action was an interference of a stranger or a third person, the defendants are not held responsible unless it is found that that which they do, or omitted to do—the negligence to perform a particular duty—is itself the effective cause of the accident."

That case is instructive upon this point. It was there held that the servants of the defendant had been guilty of negligence in not properly placing the railway van, but that it having been interfered with (302) by trespassers, the negligence of the defendant's servants was not the effective cause of the accident, and the defendant was exonerated. In *Burt v. Advertising Co.,* 154 Mass., 238, *Mr. Justice Holmes* uses this language: "Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual."

That proposition is illustrated in a great number of cases. *Cole v. German Soc.,* 124 Fed., 113; *Laidlaw v. Sage,* 158 N. Y., 73; *Leeds v. Tel. Co.,* 178 N. Y., 118; *Clark v. R. R.,* 109 N. C., 430; *Butts v. R. R.,* 110 Fed., 329; *Johnson v. Association,* 68 L. R. A., 499; *Winfall v. Jones,* 1 L. R. A. (U. S.), 201.

Upon the issue of contributory negligence the court failed to give the following requested instruction, which is assigned as error: "If the jury shall find from the evidence that Penny, the plaintiff, went out on the platform and at that time the negro had the pistol aimed towards the car where Penny was, and the danger could be as reasonably apprehended by the plaintiff as by the defendant, and the plaintiff did not turn out of his way or go back to avoid the injury, and the accident happened, he would be guilty of contributory negligence. It was the duty of the plaintiff to exercise his senses for his own protection, and if he saw the danger, or could have seen it in the exercise of the reasonable care of a prudent man and failed to do so, he would be guilty of contributory negligence, and you should answer the second issue, Yes." This is a correct proposition of law and should have been given.

This instruction points to particular phases of the evidence, and it was error to refuse it, although his Honor did tell the jury in very general terms that "it was plaintiff's duty to exercise his senses for his own protection." *Horne v. Power Co.*, 141 N. C., 50.

Recurring to the allegation of negligence, the duty which defendant owed to plaintiff is to be determined by what transpired when the train stopped at Leland and the plaintiff undertook to alight at the end of his journey. It is undoubtedly true that the conductor had (303) no power to restrain plaintiff and prevent him from leaving the train. Nevertheless, if as is charged by plaintiff, the conductor was standing on platform, when plaintiff came out of the car for the purpose of leaving, and if the conductor could then see that it was obviously dangerous for plaintiff to go down the steps at that moment, it was his duty to warn the plaintiff and apprise him of his danger.

If the conductor, having such knowledge, failed to warn plaintiff and permitted him to venture on the steps ignorantly and unwittingly in the presence of obvious danger, it would be an act of negligence upon the part of the conductor and the defendant would be liable for consequent injury.

Per contra, it is equally true, that if when plaintiff came out on the car platform, he could see for himself the "fracas" going on, it was his duty to exercise his faculties, and to act with the care of a prudent man and not venture down the steps into the midst of obvious danger. If plaintiff could see for himself the apparent danger, then he needed no warning. If then he ventured in the face of it, the consequent injury will be attributed to plaintiff's own negligence, and he can not recover.

New trial.

HOKE, J., concurring: I concur in the opinion that there should be a new trial in this case, but do not assent to some of the positions stated in the principal opinion as ground for the decision. The testimony in the record, as I view it, presents two theories on which liability of defendant may be predicated.

1. By reason of a negligent act of the conductor of the train, in failing to warn plaintiff so as to keep him out of the line of fire.

2. A negligent act, the cause of the injury, on the part of Van Amringe, the baggage master, in lending LaMotte the pistol, with which he attempted to shoot the negro.

The first view seems to have been presented to the jury without valid exception. On the second, the court charged the jury: "If the jury find from the evidence, by its greater weight, that one LaMotte called for a pistol, with which he assaulted Sam Calloway, and the defendant's servant, Van Amringe, the baggage master, in com- (304)

pliance with LaMotte's request, gave to LaMotte a pistol with which to assault Calloway, knowing, or having reasonable grounds to believe, that LaMotte was going to use the pistol for that purpose, and that after LaMotte got the pistol he did attempt to assault Calloway, by pointing the same at him and trying to shoot him, and this assault upon Calloway caused Calloway to draw his pistol and attempt to shoot LaMotte, and, in shooting at LaMotte, shot the plaintiff, Penny, then the jury should answer the first issue, Yes; and this for the reason that it was the duty of the agents and employees of defendant company to do all in their power to prevent assaults and disturbances which were likely to bring on an assault or fight, and it does not matter that Van Amringe did not personally make the assault, if he gave the pistol to LaMotte with which to make the assault, and LaMotte did make the assault, both LaMotte and Van Amringe would have been guilty of an assault with a deadly weapon, as there are no accessories before the fact in misdemeanors. And if the jury further find from the evidence, by its greater weight, that the assault would not have been made by Calloway but for the wrongful act of Van Amringe and LaMotte, then the jury should find that the plaintiff's injury was proximately caused by the neglect and wrongful conduct of the defendant, through its servants and employees." And again: "If the jury shall find by the greater weight of the evidence that a difficulty was pending between LaMotte and Calloway and Van Amringe, the baggage master on the train, with a knowledge of the purpose for which LaMotte wanted it, handed him a pistol with which he should shoot Calloway, and that LaMotte took the pistol out on the platform, and, pointing the same towards Calloway, tried to shoot him, but could not discharge the pistol, and this caused the said Calloway to fire the shots at LaMotte which struck the plaintiff, then the jury should answer the first issue, Yes."

Defendants except to this charge and assign for error what is, to my mind, a perfectly valid objection. There was testimony introduced tending to show that from the attitude and conduct of the negro, either

(305) LaMotte or Van Amringe, the baggage master, had the present right to use a pistol in the legitimate protection of the train and its passengers or themselves, and thus presenting and requiring the view that the act of Van Amringe may have been free from fault. Under certain conditions the doctrine of self-defense is available in actions of negligence, as in other cases. *Laidlaw v. Sage,* 158 N. Y., 90. Even if it is conceded that these excerpts correctly express the view tending to inculpate, the charge nowhere refers to the opposing and necessarily correlative view which tends to excuse defendant company, and to my mind the failure to present the case in this respect constitutes reversible error under the principles declared and upheld in *Jarrett v.*

Trunk Co., 144 N. C., 299, and *Meredith v. Coal Co.*, 99 N. C., 576. I am inclined to think that the charge, as given, is positively erroneous in that it fails to say that if Van Amringe, wrongfully and in breach of his duty to safeguard the passengers, supplied the pistol, etc. The portion of the principal opinion, from which I am compelled to withhold my assent, is the position maintained, as I interpret it, that there is no evidence tending to show that the act of Van Amringe, in lending the pistol to LaMotte was wrongful; or, that if it was, there is no evidence to show that such act was the proximate cause of the injury. On the first proposition, the negro, Calloway, examined as a witness for the plaintiff, testified, in respect to himself, that he was the aggrieved party throughout the occurrence. That he was wrongfully assaulted in the car by LaMotte, and the conductor without justification, shoved him down in the seat, and LaMotte, with an open knife, said "If he (the negro) breathed, he would cut his damned throat." Shortly thereafter as the train slowed for Leland witness asked them to let him get out, LaMotte holding the knife on him. That when the witness got on the ground, he asked LaMotte if he wanted to cut witness and LaMotte replied, "Yes, God damn you, I will cut your heart out," and by that time LaMotte called for a gun and witness was close to the car steps. LaMotte snapped the gun in his face, and witness began to run back and was feeling in his pocket for his gun. That LaMotte snapped the gun on witness three times before witness could draw his, (306) running backward all the time, when witness got his gun out and fired twice (the shots that caused the injury). Record, p. 45, and again p. 46.

"Q. Where did LaMotte go when he asked for a pistol? Answer: He went back to the door of the second-class car where I had just come out, and it seems time he got to the door somebody gave him a pistol and he came back. The first thing he did after he got the pistol he snapped it in my face." The testimony showed that the original difficulty occurred in one compartment of a car, divided into a baggage car and coach for second-class passengers; that the coach connected with the baggage car by a door, and the evidence tended to show that Van Amringe was cognizant of all the facts. Speaking to the question of such knowledge Van Amringe himself testified: "My attention was called to the loud talking, and when they pulled out from Navassa, I went through the partition to the baggage car door. I noticed a crowd —not a crowd, either; it seems that Captain LaMotte and Captain Carmon were talking to a negro fellow down by the stove."

"Q. Who was Captain LaMotte? A. The conductor for the Coast Line, dead-heading to Florence to bring out a train; he was not on duty at the time. They were talking to a negro. I noticed there was

going to be some trouble, and thought it best to go back in the baggage car and await developments. As we were pulling up to Leland (it is not far from Navassa to Leland, it didn't take long), when we were slowing up, I went back, opened the door and looked in as I was going in the car. Let's see—I want to get that straight—I went in the car and met Mr. LaMotte coming in there—that is the way I think. I went in the second-class car and Captain LaMotte came in at the door. I went in and got my pistol, as I expected trouble. He came in and I had my pistol in my hand. He asked for my pistol, and I gave it to him."

"Q. What occurred from the time you gave the pistol to Captain LaMotte, where did Captain LaMotte go, and where did you go, and what did you see and what was done? A. Captain LaMotte went ahead of me out of the car, and stood on the platform of the second-class car, and on the end facing Wilmington—on the rear end of the train
(307) towards Wilmington—on the second-class car. You see, when he came out of the car, he just turned around and went to the steps, he didn't go across; he went on the second-class platform to the left, and he stood up on the top step, and was aiming his pistol at the colored man, trying to shoot him, but the pistol wouldn't go off on account of having a little safety valve—it had a couple of triggers, and you had to pull both of them to make it fire; it wouldn't go off; he had it aimed at the colored man." And again:

"Q. Where was the colored man? A. He had gotten off of the train, as the train slowed up, and was standing at the edge of the swamp, about forty or fifty feet from the rear end of the second-class coach—about the same distance as that door—about forty or fifty feet—between forty and fifty feet to the right of the second-class car." And further:

"Q. Were you close enough to hear what was said by Captain Carmon and Captain LaMotte, if they had said anything? A. Yes, I reckon so. Do you mean inside the coach? Q. Right there on the platform at the time you and Captain LaMotte went out of the door of the car. A. I could have heard anything said—I was on the platform."

In the presence of this testimony, tending, as it does, to show that the conductor and LaMotte made an unlawful assault upon the negro and that LaMotte was in the wrong throughout, and Van Amringe must have known it, I think that the position assumed in the principal opinion, "that there is no evidence that Van Amringe knew or had reason to believe that LaMotte borrowed the pistol for an unlawful purpose, can not be upheld" The counsel for defendant company, as I understand their earnest and able argument before us, made no such claim and it can not, to my mind, be for one moment sustained. And the second position referred to, "that the act of Van Amringe in lending the pistol to LaMotte was not the proximate cause of the injury to

plaintiff which was caused by a stray bullet fired from Calloway's pistol," cannot be sustained as a legal proposition, assuming as it does to have any significance, that the act of Van Amringe was not lawful. The law of proximate cause as affected by the intervening acts of an independent agent was fully laid down by the Court in *Harton v. Telephone Co.*, 141 N. C., 455, *et seq.*, and in which it was held (308) among other things as follows:

"3. There may be more than one proximate cause of an injury, and when a claimant is himself free from blame and a defendant sued is responsible for one such cause of injury to plaintiff, the action will be sustained, though there may be other proximate causes concurring and contributing to the injury."

"4. The proximate cause of the event must be understood to be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event, and without which such event would not have occurred. Proximity in point of time or space, however, is no part of the definition."

"5. The test by which to determine whether the intervening act of an intelligent agent which has become the efficient cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected."

"6. Except in cases so clear that there can be no two opinions among men of fair minds, the question should be left to the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could have reasonably expected them to occur as a result of his own negligent act."

When this case was again before the Court (146 N. C., 429) on a fuller statement of the testimony, the Court was unanimously of the opinion, "that the facts showed that the original or primary negligence had been insulated by the acts and conduct of an independent, intervening agent, and recovery was therefore denied," but the general principle laid down in the first opinion was in no wise questioned or denied and under these principles, if it is established that Van Amringe wrongfully gave LaMotte a pistol, knowing, or having reason to believe he was about to project a pistol duel in a crowd or in close proximity to a train and passengers and one of them was injured, though with the adversary's pistol, this should, in my opinion, be considered the proximate cause of the injury. Certainly on this evidence there is no wrong done defendant, in submitting the question of proximate (309) cause to the jury. As I have heretofore said, there is testimony to the effect that the lending of the pistol was entirely justifiable and I

think the defendant is entitled to have this view presented to the jury under a correct charge.

CLARK, C. J., concurs in concurring opinion.

Cited: Stanley v. R. R., 160 N. C., 326; *Ward v. R. R.,* 161 N. C., 185; *Penny v. R. R., ibid.,* 524; *Brown v. R. R., ibid.,* 578; *Pruett v. R. R.,* 164 N. C., 4.

W. B. WEBSTER ET AL. v. T. E. WILLIAMS ET AL.

(Filed 26 October, 1910.)

Pleadings—Amendment—Cloud on Title—Nonsuit—Issue.

In a proceeding for partition of land, plaintiffs, by inadvertence in describing the land, included two acres in which they claimed no interest. The Court, without objection, allowed an amendment expressly excluding that part of the land from the description. Appellant, served with process only in behalf of his children who lived with him, filed an answer asserting title in himself to the two acres and asking that plaintiff's claim, which was a cloud upon his title, be removed: *Held,* proper to refuse the submission of an issue based upon the averment of the answer after the amendment had been made without objection, which left the appellant without any basis for his alleged counterclaim, he not claiming any interest in the remainder of the land: *Held further,* that the amendment was not in the nature of a nonsuit, but was intended to remove vagueness from the description of the land.

APPEAL from *O. H. Allen, J.,* at July Term, 1910, of LEE.

The facts are stated in the opinion of the Court.

H. F. Seawell and D. E. McIver for plaintiff.
Hoyle & Hoyle for defendant Williams.

WALKER, J. This is a proceeding for the partition of lands, commenced before the clerk and transferred to the Superior Court for trial.

The petitioners allege that they are tenants in common with the (310) defendant of two tracts of land, one of which is known as the Colon tract or home tract of R. B. Webster. The interests of the respective parties are therein set forth, but the name of T. E. Williams does not appear among the parties, though his children, Bertha and Annie Williams, are mentioned, and it is alleged that they are minors and reside with their father. This would tend to show that he was made a party, not, it seems as their guardian, but merely because they lived with him. Why this was done we do not know. At all events, it

appears that the petitioners did not make him a party because he had any personal interest in the land as tenant in common or otherwise. He is neither a necessary nor proper party. His name was inserted in the summons, perhaps, under the mistaken notion that, as by Revisal, sec. 440 (2), a copy of the summons is required to be left with the father, if living within the State, and if his infant child, who is a party, is under the age of 14 years, it is necessary that the summons should be directed to him. There was no intention, in this case, of making T. E. Williams a party for the purpose of requiring him to defend any personal interest he may have claimed in the land. He filed an answer in his own behalf, in which he alleges that, as to the two acres of land known as the home tract of R. B. Webster, he is the owner and is sole seized thereof, by virtue of a deed made by R. B. Webster and his wife to him, in the year 1898; that the said deed was destroyed by fire and he then alleges, on information and belief, that the petitioners and his codefendants claim an interest therein. He prays that he be declared the owner in fee simple of the said two acres. The relief he asks is, according to the argument of his counsel, that the cloud arising from the loss of his deed and the claim of the other parties, be removed from his title. The court, on motion of the petitioners, permitted them to amend the petition by excluding the two acres, described in the defendant's answer, from the description of the land as contained in their petition. The motion was allowed without objection. The defendant, T. E. Williams, asked the court to submit to a jury the issues raised by his answer, which request was refused and the cause remanded to the clerk to proceed therein with the partition of the land, except the two acres.

The defendant, T. E. Williams, excepted and appealed. He now (311) contends that his defense can be set up in this proceeding under Laws 1903, ch. 566 (Revisal, sec. 717), which changes the principle as stated in *Vance v. Vance,* 118 N. C., 864. Conceding this to be so, for the sake of argument, we still do not see any error in the ruling of the Court. It is true, as a general rule and as argued by defendant's counsel, that a plaintiff can not, by submitting to a nonsuit, or by any action equivalent thereto, deprive a defendant of the right to be heard upon a counterclaim affecting said plaintiff adversely, but we do not think the plaintiff either submitted to a nonsuit or abandoned the prosecution of his cause of action, or any part thereof, and the case, therefore, is not governed by the authorities cited in the defendant's brief. *Bynum v. Powe,* 97 N. C., 374; *Gatewood v. Leak,* 99 N. C., 363; *Wilkins v. Suttle,* 114 N. C., 550; Pell's Revisal, sec. 481, and notes. The amendment was allowed to correct a mistake of the plaintiffs in the description of the land alleged to be held by the parties in common. They had inadvertently so described the land as being the home tract which had

descended from R. B. Webster to his heirs, without expressly excepting the two acres which, it is alleged, had been conveyed to T. E. Williams by R. B. Webster, and thereby left it uncertain whether they referred in their petition to the original home tract or to so much thereof as had descended to the heirs; or, in other words, to the home tract as it was when R. B. Webster died. If the two acres were not a part of the home tract at the time of R. B. Webster's death, they did not descend and were not, therefore, embraced by the description; otherwise they were. It was to make the description clear in this respect and to remove its vagueness that the amendment was allowed, and we think properly so. The amendment did not withdraw the two acres from the description, but was merely for the purpose of showing that it was not intended to be included in the description. The counterclaim or defense was not, therefore, "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." Revisal, sec. 481. The defendant, T. E. Williams, it appears, has no interest in the other
(312) part of the land. If he has, his share will be allotted to him in the division. He may bring an independent action and assert the rights now claimed in his answer, if so advised.

No error.

IN RE HABEAS CORPUS OF MARY JANE JONES.

(Filed 26 October, 1910.)

1. Habeas Corpus—Parent and Child—Custody.

In *habeas corpus* proceedings for the possession of a nine-year-old child, the parents of the child, who are living together as lawful man and wife, have *prima facie* the right to its control and custody, and when without being divorced they are living apart, the question concerning the disposition of their offspring must be decided under the provisions of Revisal, sec. 1853.

2. Same—Illegitimate Child—Prima Facie Right.

In the case of illegitimate children, the same *prima facie* right of the parent to the custody of the offspring exists as in case of legitimacy, perhaps to a lesser degree, in the mother, where she evinces a capacity and disposition to properly care for her children.

3. Same.

It appearing from the findings of the lower court in *habeas corpus* proceedings by the mother, against her uncle and his wife for the care and custody of her nine-year-old illegitimate child, that the petitioner had lived with the uncle and wife, as one of their family, until five years

before the proceedings were brought, when she married and was living with her husband, both being desirous of its custody, both of whom were "respectable colored people, capable of rearing and providing for the child"; and that there was no abandonment by the mother, Revisal, sec. 180: *Held*, The mother had the paramount right to the custody of the child, though its physical, mental and moral welfare were properly being cared for, and the child's affections were with those who then had its custody.

APPEAL from *Cooke, J.*, heard in chambers, 1 March, 1910, from VANCE.

Petition for writ of habeas corpus.

The petition was filed by Nannie Green, mother of the child, (313) who was and has been for some time in the care and custody of respondents, Prince Jones, uncle of petitioner, and his wife Laura.

On the hearing, the court found as facts among other things, that the child was an illegitimate child of the petitioner, Nancy Green, and would be nine years of age in May, 1910; that she was being properly and well cared for by respondents, who are reputable colored people; Prince Jones, being a minister, having a church under his charge, owning about fifty acres of land which he has bought, but not fully paid for; that Laura Jones, his wife, is a reputable colored woman, and that she and her husband are capable of raising and properly providing for the child and are greatly attached to it; that the child has been and is being well and properly cared for and maintained, and she has become greatly attached to the said Prince Jones and his wife, and says she does not wish to leave them. It appears from examination of the child that she has been sent to school and to Sunday-school, and is now well advanced in her studies for one of her age and condition in life; that Nannie Jones, the mother, with her children, had been living for some time as a member of the family with Prince Jones and his wife, paying no board, but working as a member of the family until about five years ago, when she married Simon Green and went to live with him; "that Simon Green and his wife are respectable colored people and are capable of rearing and providing for the child; that they have from the date of their marriage, from time to time and repeatedly, applied to respondents to let them have the child, but they declined to do so. Upon one occasion they attempted to take the child away from them by force, and when they had the child in the buggy the child screamed, and the wife of Prince Jones took her out of the buggy."

Upon these the controlling facts relevant to the inquiry, the court entered judgment as follows:

(a) That the child is not illegally restrained of its liberty.

(b) That the welfare and interests of the child would best be promoted by permitting her to remain with respondents.

(c) And the court doth adjudge and decree that the said Prince
(314) Jones and his wife, Laura Jones, are entitled to the care and custody of said Mary Jane Jones until she attains the age of fifteen years, at which time she may select between the petitioner and the respondents; but the court doth further adjudge that petitioner and her husband shall have the right at all proper hours to visit the child, and that the child shall be permitted to visit them whenever she should so desire.

Petitioner excepted and appealed.

T. T. Hicks for petitioner.
A. C. Zollicoffer for respondents.

HOKE, J., after stating the case: In hearings of this character on *habeas corpus,* the parents of a child who are living together as lawful man and wife have *prima facie* the right to the control and custody of their infant children.

When divorced, the right to the children and their placing is more usually dealt with in the decree, and where they live apart, without being divorced, questions concerning the disposition of their offspring must be decided under the provisions of the Revisal, 1905, sec. 1853, to the effect: "The court or judge, on the return of such writ, may award the charge or custody of the child or children so brought before it either to the husband or to the wife, for such time, under such regulations, and with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary or modify the same." In the case of illegitimate children, this same *prima facie* right exists, perhaps to a lesser degree, in the mother, and has been recognized in several decisions of the court where she has evinced a capacity and disposition to properly care for her children. *Ashby v. Page,* 106 N. C., 328; *Mitchell v. Mitchell,* 67 N. C., 307. True, we have held, and the ruling is in accord with enlightened and well-considered cases in other jurisdictions, that the welfare of the child is the cardinal influence and should not infrequently be allowed as controlling. Speaking to this question in a concurring opinion in *Parker's case,* 144 N. C., 173, the writer said: "The
best interest of the child is being given more and more promi-
(315) nence in cases of this character, and on especial facts has been made the paramount and controlling feature in well-considered decisions," citing *Bryan v. Lyon,* 104 Ind., 227; *In re Welsh,* 74 N. Y., 299; *Kelsey v. Greene,* 69 Conn., 291, but while this principle may be taken as accepted, it should be applied in reference to the paramount

right of a child's parents to have the control and custody of their children, whenever, being of good character, they have the capacity and disposition to care for and rear them properly in the walk of life in which they are placed; a right growing out of the parent's duty to provide for their helpless offspring, not only enforcible as a police regulation, but grounded in the strongest and most enduring affections of the human heart; a substantial right, therefore, not to be forfeited or ignored except in some way or for some reason, established or recognized by the law of the land. A most impressive illustration of the principle and its proper application is afforded in the recent case of *Newsome v. Bunch,* 144 N. C., 15. In that case the child, on the death of its mother, and at the age of five months, had been left by the father with its grandparents and had remained with them for seven years. It had been well treated and was most advantageously placed, and the tenderest affection existed between the child and its grandparents. The father, too, was shown to be worthy, and there had been no abandonment. The child was awarded to the father and *Walker, J.,* delivering the opinion, said: "But as a general rule, and at the common law, the father has the paramount right to the control and custody of his children, as against the world; this right springing necessarily from and being incident to the father's duty to provide for their protection, maintenance and education. 21 A. & E. Enc., 1036; 1 Blackstone (Sharswood), 452, and note 10, where the authorities are collected." And further: "It appears in this case that the child is under ten years of age, and that the petitioner and the respondents are equally qualified in every respect as fit and proper persons with whom to entrust the care and custody of the child, and further it is found as a fact that the father has in no way surrendered his natural and preferred right to such custody. Under these circumstances we are unable to see why the petitioner is not entitled to have the custody of the child awarded to him, as (316) was done by order of the court below. It would seem that the case comes directly and clearly within the decision of this Court in *Latham v. Ellis,* 116 N. C., 30, if it is not also substantially covered by the provisions of Revisal, secs. 180 and 181. See also *Musgrove v. Kornegay,* 52 N. C., 71; *Harris v. Harris,* 115 N. C., 587; *Ashby v. Page,* 106 N. C., 328; *In re Lewis,* 88 N. C., 31; *Thompson v. Thompson,* 72 N. C., 32, where the law in regard to the father's right of custody in respect to his child is discussed by the Court in its different phases as presented by the facts of those cases. There is no legal duty or obligation resting upon the grandfather to support and educate his grandchild, whereas the father does rest under such an obligation. This fact should have some weight with the court in deciding a controversy between them as to the child's custody, apart from the natural claim the

father has to the first consideration, as the death of the grandparent or his refusal longer to care for the child might leave the latter without any natural guardian or protector and result in his becoming a charge upon the community. While the court, in the exercise of a sound discretion, may order the child into the custody of some person other than the father, when the facts and circumstances justify such a disposition of the child, we do not think that any such case is presented in this record as should induce us to adopt that course and except this case from the general rule. The father has done nothing by which he has incurred a forfeiture of his right to the custody of his offspring."

In the present case, the court finds that Simon Green and his wife, the petitioner and mother of the child "are respectable colored people and are capable of rearing and providing for the child."

There has been no abandonment of the child by the mother, such as would forfeit her rights under the Revisal, sec. 180, nor are there any facts found from which such abandonment could be inferred.

On this finding, therefore, the authorities cited and the reason upon which they are properly made to rest are decisive and require
(317) that the judgment of the court below be reversed and the child awarded to the petitioner.

We were referred by counsel for the respondents to the case *In re Parker,* 144 N. C., 170, as an authority for the position that a court will not determine the right to a child on *habeas corpus* proceedings. But there is nothing in the decision rendered in that case which supports such a position when the child is of such tender years that it has not the discretion or sufficient intelligence to determine for itself the question of its proper placing. In *Parker's case* the parents of the child were both dead and the question was between a guardian recently appointed and its aunt who had reared and maintained the child from its birth, and it clearly appeared that the best interest of the child required that it should remain with the aunt. In that case, too, it was shown that the child was eleven years of age and of sufficient intelligence for its wishes to be given some weight in the matter. The decisions are numerous with us, and they are in accord with accepted doctrine that the court in *habeas corpus* will consider and determine the rightful custody and proper placing of infant children. *Stokes v. Cogdell, ante,* 181; *Newsome's case, supra; In re Hugh D'Anna,* 117 N. C., 462; *Latham v. Ellis,* 116 N. C., 30; *Thompson v. Thompson,* 72 N. C., 32.

On the authorities referred to and for the reasons given, the judgment of the lower court is reversed, and the child awarded to the mother.

Reversed.

Cited: Howell v. Solomon, 167 N. C., 591; *In re Fain,* 172 N. C., 791.

I. H. DUNLAP, RECEIVER, v. S. W. WILLETT ET AL.

(Filed 26 October, 1910.)

1. Contracts—Seal—Evidence—Original Instrument—Presumptions.

Although the words "signed, sealed," etc., may appear in the face of a written obligation of guaranty, no presumption of a seal is raised when the original undertaking is in evidence, and discloses an entire absence of a seal.

2. Contracts, Interpretation—Statute of Frauds—Default of Another—Evidence—Written—Sufficiency—Seal.

When the instrument sued on is a written obligation upon the sureties for the faithful performance by another of the duties as manager, that he shall render a just and true account of all moneys, merchandise, etc., the relationship of debtor and creditor is not created, but it is sufficient to charge them, under the statute of frauds, without the seal, to answer the default of another.

3. Contracts—Written—Conditional Delivery—Evidence.

It is competent to show that a written instrument to answer for the faithful discharge of the duties of another as manager of a corporation, or to answer for his debt or default, etc., was handed by one of the signers to the obligee therein named, subject to the control of the person delivering it, or upon an agreed condition, and not as a completed instrument; and when there is evidence that the manager has delivered such instrument to the president of the corporation for which he acts, upon the understanding that it was to be delivered to the board of directors when another had signed as surety, the person to whom it was delivered is a mere depository until the condition is complied with.

APPEAL from *Peebles, J.*, at May Term, 1910, of CHATHAM. (318)

The plaintiff, as receiver of the Farmers' Alliance Exchange, sued the defendant upon the following obligation:

NORTH CAROLINA—CHATHAM COUNTY.

Know all men by these presents, that we, Stephen W. Willett, as principal, and _____, as sureties, are held and firmly bound unto Wm. P. Dark, president of board of directors of the Farmers' Alliance Exchange Company store, located at Bear Creek, in the county of Chatham, State of North Carolina, in the sum of five thousand ($5,000) dollars, to the payment of which well and truly be made, we bind ourselves, jointly and severally and firmly by these presents. Signed and sealed, this 25 August, 1907.

The condition of the foregoing obligation is such that, whereas, the above bound man, Stephen W. Willett, has been duly elected business manager of the Farmers' Alliance Exchange Store, located at Bear

Creek, in the county of Chatham, State of North Carolina, for the term of one year from the second Tuesday in August, 1907, to
(319) second Tuesday in August, 1908, and to continue in the discharge of the duties of the office of business manager until his successor is duly elected and gives his bond.

Now, therefore, if the said Stephen W. Willett shall, during his continuance in the office of business manager of the Farmers' Alliance Exchange Store, aforesaid, faithfully execute the duties thereof and render a just and true account of all money, merchandise and other property belonging to the said store company which may come into his hands as business manager, then the above obligation to be void, otherwise to remain in full force and effect. (Signed)

S. W. WILLETT, *Mgr.*
J. D. WILLETT, $1,000.
T. L. PHILLIPS, $1,500.
J. J. JOHNSON, $1,500.
W. L. GOLDSTON, $750.

W. L. Goldston makes affidavit that he is worth over and above his exemptions by law and all liabilities seven hundred and fifty dollars ($750). This 14 December, 1907. W. L. GOLDSTON.

Sworn and subscribed to before me, this 14 December, 1907.
A. W. WICKER, J. P.

He alleged that S. W. Willett had been duly appointed general manager of the corporation Farmers' Alliance Exchange, and had, during his term, so mismanaged the business of the corporation as to wreck it financially, and set forth the particular violations of his duty constituting breach of the bond. The defendants' defense is rested mainly upon the following further defense in their answer: "First. That the instrument referred to in the second paragraph, as defendants are informed and believe, was never legally executed and delivered, and that the defendants, sureties, signed the same with the express understanding that other sureties should also sign and justify to the amount of $5,000, and that the said instrument so signed by the defendants was never accepted and approved by the Farmers' Alliance Exchange." At the trial, the plaintiff examined W. P. Dark as a witness, who testified as follows: "I
(320) was chairman of the board of directors of the Farmers' Alliance Exchange. S. W. Willett gave me the bond mentioned in the pleadings to get R. H. Dixon to sign it, saying R. H. Dixon had promised to sign it to make out the $5,000. He told me to give it back to him after Dixon had signed it, so that he could present it to the board of directors. Dixon never signed it. I kept the bond until the receiver sent for it, and then I carried it to him. It was never delivered to me as a bond." At

the conclusion of the testimony of this witness, the following occurred: The plaintiff said he had no other evidence touching the delivery of the bond. Thereupon the court told the plaintiff that he would have to tell the jury that the evidence was not sufficient to show delivery of the paper-writing as a bond. In deference to this intimation, the plaintiff submitted to a nonsuit and appealed to the Supreme Court. Judgment of voluntary nonsuit entered.

Hayes & Bynum for plaintiff.
H. A. London & Son for defendants.

MANNING, J. The obligation sued upon in this action is not technically a bond, because it is not under seal. Although there appears in it the words, "Signed and sealed, this 25th day of August, 1907," the original was offered in evidence which distinctly shows that no seal or device representing a seal appears to it, and no presumption of seal can be raised in face of the fact that the original, produced and exhibited in evidence, discloses an entire absence of seal. No statute required the execution of the obligation of defendants under seal, as in case of grants from the State (*Aycock v. R. R.*, 89 N. C., 321); the undertaking of defendants was good as their obligation without seal. Nor does the instrument sued upon create the relation of debtor and creditor, as an evidence of such relationship, but it is an undertaking by the defendants to be liable for the losses sustained by the corporation for the failure of its general manager to observe the rules and directions authoritatively prescribed for the conduct and management of its own business. The evidence offered by the plaintiffs clearly shows that the instrument sued upon, when passed to the possession of Mr. Dark as president of the corporation, was not complete; and that even when completed, (321) as contemplated by the condition of its tradition to Dark, it was to be tendered by Willett, the general manager, to the board of directors of the corporation for its acceptance or rejection. It was competent for the corporation to direct the undertaking to be made to its presiding officer, for and on its behalf, and to reserve to its governing board the right to approve or disapprove its form or the solvency of the sureties thereto. The only inference to be drawn from plaintiff's evidence sustains this conclusion. The reason for the requirement that the defendant's obligation be in writing, is the statute of frauds, as the undertaking was to answer for the "default or miscarriage" of another. Being in writing, the requirement of the statute is met. And the correctness of his Honor's ruling depends upon whether the written instrument was, in law, delivered. In *Gaylord v. Gaylord*, 150 N. C., 222; *Hoke, J.*, in a learned and elaborate opinion, speaking for this Court, said: "It is a familiar principle that the question of the delivery of a deed or other

written instrument is very largely dependent on the intent of the parties at the time, and is not at all conclusively established by the manual or physical passing of the deed from the grantor to the grantee." And quoting from *Waters v. Annuity Co.*, 144 N. C., 670, it is said: "This matter of delivery is very largely one of intent, and the physical act of turning over a policy is open to explanation by parol evidence." The general principle is established by that decision and the cases cited, that where an instrument is handed by one of the signers to the obligee therein named, not as a complete instrument, but subject to the control of the person delivering it, or upon an agreed condition, then the person to whom it is handed is a mere depository and the instrument is not delivered in the technical meaning of that word. 2 Words & Phrases, 1965 and 1966. *Tarlton v. Griggs,* 131 N. C., 216. The evidence of the plaintiff conclusively negatives a *delivery* of the instrument in its technical and established meaning, and we find no error in his Honor's ruling. The judgment is, therefore,

Affirmed.

Cited: Trust Co. v. Sterchie, 169 N. C., 22.

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(322)

J. H. NOWELL v. ROYAL COTTON MILLS.

(Filed 26 October, 1910.)

Negligence—Evidence—Nonsuit.

Motion to nonsuit properly overruled in this case, there being sufficient evidence of negligence to take the case to the jury.

APPEAL by defendant from *O. H. Allen, J.,* at April Term, 1910, of WAKE.

B. C. Beckwith for plaintiff.
John W. Hinsdale for defendant.

PER CURIAM. The Court is of opinion that the testimony of the plaintiff himself was amply sufficient to justify the court below in submitting the issue of negligence to the jury, notwithstanding the contradicting evidence of defendant, however strong, and therefore the motion to nonsuit was properly overruled.

We have examined the several exceptions to the evidence and charge of the court and are of opinion that no substantial error has been committed of sufficient importance to warrant us in ordering a new trial.

We therefore hold there is no reversible error.

HENRY COLEMAN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 2 November, 1910.)

1. Railroads—Crossings—Look and Listen—Duty of Traveler—Contributory Negligence.

A railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence; and when the conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence.

2. Same—Last Clear Chance.

It is the duty of a passenger before attempting to go across a railroad track at a public crossing to both look and listen for approaching trains, and when by the exercise of ordinary prudence in this respect he could have avoided the injury complained of, he has failed to avail himself of the last clear chance, and his contributory negligence will bar his recovery.

3. Same—Place to Look.

By stopping, looking and listening before reaching a railroad right of way at a public crossing, and at a place where the view is obstructed by houses, the plaintiff has not performed his duty, or exercised the care required before crossing the track; and it appearing that the right of way extended some sixty-five feet from the track, with an unobstructed view, and that by stopping thereon before reaching the track the plaintiff could have seen, or have become aware of, the approaching train in time to have avoided the injury complained of, in failing to do so he is guilty of contributory negligence, the proximate cause of the injury, and his action is barred thereby.

APPEAL from *Ferguson, J.*, at July Term, 1910, of COLUMBUS. (323)

Motions to nonsuit were overruled and following issues submitted:

1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?

2. Did the plaintiff by his own negligence contribute to his own injury?

3. What damage is the plaintiff entitled to recover?

The jury answered the first issue "Yes," the second issue "No," and the third issue, "Four thousand dollars."

From the judgment rendered, defendant appealed.

McIntyre, Lawrence & Proctor, and David J. Lewis for plaintiff.
Junius Davis and J. B. Schulken for defendant.

BROWN, J. The plaintiff was injured while in the act of crossing defendant's track driving a horse and buggy at a public crossing at Fair Bluff, by coming in collision with a rapidly moving engine and train.

Upon his examination in chief, plaintiff, after testifying that
(324) after he had turned out from the road to the right to cross track, said, "I don't know how far I went, but I stopped, looked and listened to see if any train was coming."

Plaintiff further stated: "After I stopped, looked and listened and heard nothing, I started off in a slow walk and did not know there was a train coming until I got on the track, and when I saw it, it was in ten feet of me."

Upon cross-examination plaintiff goes more into detail and states definitely when and where he looked and listened. He says that after he got into the road that led to the crossing he stopped, looked and listened to see if any train was coming and heard nothing; that the view from where he stopped was obstructed by three or four houses, but that when he got to the right of way he could see some distance up or down the track.

Plaintiff further stated that there was nothing on the right of way to obstruct his view; that the edge of the right of way was 65 feet from the center of the track; that after he got on the right of way he could see up the track in the direction the train was coming one-quarter of a mile; he did not look for the train after he got on the right of way, for he had looked before and thought if the train was coming he could hear it; did not think he was on the right of way when he stopped, looked and listened. If he had looked after he got on the right of way he might have seen it; was riding in a buggy with the curtains buttoned down both sides and back.

N. A. McQueen testified that he heard the train blow some distance up the road, probably a mile; heard the danger signal given and heard the roar of the train.

E. R. Connor testified that the edge of the right of way was 60 or 65 feet from the track; that after Coleman got to the right of way there was nothing to prevent his seeing the train, as the view was unobstructed, and he could see the train three-quarters of a mile off; he heard the train signal; heard the train roaring and saw it coming.

Defendant introduced no evidence.

In view of the great number of uniform decisions by this Court bearing upon this question, it would seem to be plain that his Honor erred in denying defendant's motion.

(325) "Travelers upon a common highway which crosses a railroad, and the company running its trains, have mutual and reciprocal duties and obligations." Thompson on Negligence, 1604, 1605.

From its very nature, and for public convenience, the train has the right of way, but the law imposes upon the engineer the duty to give signals and to exercise vigilance in approaching crossings in order to avoid injury.

The law imposes the equal duty upon the traveler when he reaches a crossing and before attempting to go on the track to both look and listen for approaching trains, for the traveler by doing so, if there is nothing in his way, can most certainly prevent a collision and save himself from harm. When he reaches the track, it is no great hardship imposed upon the traveler to require him to exercise ordinary prudence and to cast his eye up and down the track. By so doing he has the last and most certain chance to prevent collisions and to save himself as well as the train, its crew and passengers from possible injury.

In respect to cases of collision at crossings *Judge Thompson* says: "The leading rule is that there can be no recovery of damage where the negligence of the traveler contributed proximately to the injury, although the railway company was also guilty of negligence." Negligence, sec. 1605.

A railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence, and when the conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence and will be so declared by the court.

Mr. Beach says: "In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track; and a failure to do so is contributory negligence which will bar recovery. A multitude of decisions of all the courts enforce this reasonable rule."

There are of course exceptions to this, as well as most other rules, but where the traveler "can see and won't see" he must bear the consequences of his own folly. His negligence under such conditions bars recovery because it is the proximate cause of his injury. He has the last opportunity to avoid injury and fails to take ad- (326) vantage of it.

This is the law as laid down by practically all the appellate courts in this country as well as by the Supreme Court of the United States.

R. R. v. Freeman, 174 U. S., 379, is a case "on all fours" with this. The two can not be distinguished. In that case it is said in the syllabus, "The oral testimony on the subject tended to show that Freeman neither stopped, looked nor listened before attempting to cross the track. *Held,* the testimony tending to show contributory negligence upon the part of Freeman was conclusive, and that nothing remained for the jury, and that the company was entitled to an instruction to return a verdict in its favor."

In the opinion *Mr. Justice Brown* says: "She was (under the circumstances) bound to listen and look before attempting to cross the railroad track in order to avoid an approaching train and not to walk

carelessly into a place of possible danger. Had she used her senses, she could not have failed both to hear and see the train which was coming. If she omitted to use them and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain about them. If using them she saw the train coming and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity can not be cast upon the defendant."

Further on in the opinion the learned justice comments on such conditions as tend sometimes to excuse the traveler, such as an obstructed view and the like, none of which exist in the case at bar.

The "elementary doctrine" is declared by the Supreme Court of the United States in *R. R. v. Houston,* 95 U. S., 697; *Schofield v. R. R.,* 114 U. S., 615; *Stead v. Imp. Co.,* U. S., 161, and other cases.

But why go outside our own Reports? The doctrine that such negligence bars recovery has been consistently recognized by this Court in at least thirty-five cases, beginning with *Parker v. R. R.,* 86 N. C., (327) 221, and ending with *Mitchell v. R. R., ante,* 116.

A leading case, and one in which the subject is thoroughly considered, is *Cooper v. R. R.,* 140 N. C., 212, wherein *Mr. Justice Hoke* quotes at length the rule as stated by Beach and says: "This rule is so just in itself and so generally enforced as controlling that citation of authority is hardly required."

In *Trull v. R. R.,* 151 N. C., 550, it is again said by the same learned justice that "where the view is unobstructed, a traveler who attempts to cross a railroad track under ordinary and usual conditions without first looking, when by so doing he could note the approach of a train *in time to save himself* by reasonable effort, is guilty of contributory negligence," and the judgment was that the plaintiff could not recover, although the defendant was negligent.

When must the traveler look? A writer in the Personal Injury Law Journal of July, 1910, declares that all conflicts of opinion on this subject may be avoided by adopting the common-sense rule that the traveler should look when about to enter upon the track.

"A look when about to enter the zone of danger from an approaching car is not only the most availing, but it is then that the most accurate and reliable judgment can be formed as to the safety of an attempt to cross." Personal Injury Journal, page 11; see also *Wecker v. R. R.,* 120 N. Y. Supp., 1020.

It is now well established law in New York State that an omission to look is only excusable in the situation where the precaution was shown by the circumstances to have been an unavailing one. In other

words, that the duty of looking when one approaches a street railway crossing is not adequately discharged by merely looking as the dangerous point is approached, and then when it is reached going blindly forward. *Baxter v. R. R.,* 190 N. Y., 439; *Fowler v. R. R.,* 74 Hun, 144; *Coleman v. R. R.,* 98 Am. Dec., 349; affirmed 188 N. Y., 564. See also *Cranch v. R. R.,* 186 N. Y., 310.

This is the standard of prudence fixed by *Trull v. R. R., supra,* (328) where it is held the traveler must look "in time to save himself," and by *Mitchell v. R. R., ante,* 116, *Inman's case,* 149 N. C., 125, as well as by numerous other decisions of this Court.

In *Mitchell's case* plaintiff had eleven feet unobstructed view up and down the track before reaching it. He failed to look, and it was held that his negligence was the proximate cause of his injury and that he could not recover.

In the case under consideration plaintiff's own witnesses, except himself, testify that the engineer gave the signals and they heard the whistle, and that they could see the approaching train.

Plaintiff states that the whistle did not blow and that no signal was given, but admits that when he looked for the train he was not even on right of way which extended 65 feet each way from center of the single track railroad.

When he did look his view was obstructed by houses. Plaintiff testified that from the edge of the right of way up to the track the view up and down it is clear, and that he did not look up and down the track after he passed the edge of the right of way, 65 feet from the track, when he would have had an unobstructed view. In other words, plaintiff looked when he could not see, but at the time and place when he could plainly see an approaching train in ample time to avoid a collision he did not look. He was so careless and indifferent that he did not see the train or hear it until he was on the track and the engine was within ten feet of him. The authorities are uniform that such inexcusable negligence is the proximate cause of the injury and bars recovery.

The motion to nonsuit should have been sustained.

Reversed.

Cited: Exum v. R. R., 154 N. C., 410; *Wolfe v. R. R., ibid.,* 573; *Fann v. R. R.,* 155 N. C., 144; *Johnson v. R. R.,* 163 N. C., 443; *Ward v. R. R.,* 167 N. C., 157; *Penninger v. R. R.,* 170 N. C., 476; *Davidson v. R. R.,* 171 N. C., 636.

(329)

HAROLD COPPING v. HILLSBORO CLAY MANUFACTURING COMPANY.

(Filed 2 November, 1910.)

1. Corporations—Receiver's Sale—Confirmation—Discretion of Court—Inadequacy of Price.

The question of confirming a receiver's sale of the property of an insolvent corporation rests largely in the sound discretion of the lower court; and while the inadequacy of price may at times afford good reason for refusing to confirm a sale, it is not always or necessarily allowed as controlling.

2. Same—Original Cost—Deterioration of Property—Prospects.

On appeal from the confirmation of the lower court of a receiver's sale of the property of an insolvent corporation, it appearing that the property is of a perishable nature, subject to great deterioration by further delay; that the sale had been properly advertised, duly conducted, and the highest bid had not been raised, and that the nature of the property, the corporation's past history and the prospects gave no promise of an increase of the bid: *Held*, the inadequacy of the price of the bid, as compared with the original cost of the property, was not controlling, and that the sale was properly confirmed.

APPEAL from ORANGE, March Term, 1910, from *W. J. Adams, J.*, heard at chambers at Durham, by consent, 21 March, 1910.

Action to recover judgment against an insolvent corporation, wind up its affairs and make disposition of its assets, heard on motion to confirm a sale of the plant by receiver.

The sale of the property, being a plant for the manufacture of brick and some land upon which same was situated, was made after due advertisement on 1 March, 1910. Report made to March Term, 1910, of ORANGE, and the question of confirming the sale by consent was left open to be heard at chambers in DURHAM, during the week beginning 21 March, 1910.

On affidavits presented and after full consideration, the court made an order confirming the sale in terms as follows: "This cause coming on to be heard upon the receiver's report of sale, the motion of the purchaser, S. Strudwick, through his counsel, for a confirmation of said sale and the affidavits filed for and against such motion, and it appearing that said sale was conducted fairly in all particulars, and in ac-
(330) cordance with the order of sale heretofore made in this cause, and after diligent efforts to induce possible bidders to attend the same, and that at such sale S. Strudwick became the last and highest bidder in the sum of $5,000, and has complied with the terms of the sale, and that since such sale no advance bid has been made by any one; and that

no one of the creditors of the defendant corporation, now hopelessly insolvent, object to confirmation; and that said corporation is indebted to sundry persons in a sum in excess of $40,000; that no exceptions have been filed to said report by any creditors, stockholders or other persons interested in the property, and that receiver recommends a confirmation, and there is no probability of any increased bid being put in, and there is no probability of a resale resulting in a price which would at all benefit the creditors or any of the stockholders; that the property sold is in its nature perishable and subject to great deterioration by further delay: It is, therefore, ordered, decreed and adjudged that said sale be, in all particulars, confirmed, and that said receiver convey the property so sold to the purchaser, S. Strudwick, upon payment of the purchase money. This cause is reserved for further orders. W. J. Adams, Judge."

From this order Henry N. Brown, a creditor and stockholder, appealed.

J. W. Graham and S. M. Gattis for appellant.
R. C. Strudwick for S. Strudwick, defendant.

HOKE, J. On the findings of fact embodied in the judgment, and there is ample evidence to sustain them, the Court is of the opinion that the sale was properly confirmed. It appeared that the receiver had caused notice of the sale to be published for the usual period in two newspapers of general circulation, had posted notices at the courthouse door and three other public places in the county of Orange, where the plant was situated, for thirty days and had mailed a copy of the decree, containing a notice of the time, place and terms of sale to each of the known creditors and stockholders, and had duly notified and conferred with various other parties whom he thought would likely be interested in that kind of property. The sale was fully ad- (331) vertised and fairly conducted, and while the amount bid may not have been adequate in respect to the original cost of the plant, it was shown that it was a kind of property which rapidly deteriorated in value, and neither the history of the enterprise nor its prospects gave promise that there would be any increase of the bid. Both the creditors and stockholders are entitled to have the matter adjusted and no good reason is shown for longer delay. While mere inadequacy of price may at times afford good reason for refusing to confirm a sale, it is not always or necessarily allowed as controlling. The question of confirmation rests largely in the sound legal discretion of the lower court and, on the facts stated, we are of opinion that this discretion has been properly exercised in the present case.

Our decisions are also in favor of his Honor's ruling, and the judgment confirming the sale must therefore be affirmed. *Uzzle v. Weil,* 152 N. C., 131; *Trull v. Rice,* 92 N. C., 572; *Vaughan v. Gooch,* 92 N. C., 524; *Pritchard v. Askew,* 80 N. C., 86.

Affirmed.

Cited: Thompson v. Rospigliosi, 162 N. C., 156.

R. H. BEAL v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 2 November, 1910.)

1. Telegraphs—Mental Anguish—Damages—Notice to Company—Nominal Damages.

Plaintiff while at work near G. was injured and caused a telegram to be delivered to the defendant telegraph company at G. a message to be transmitted and delivered to his father at V. reading, "Come at once. Bob hurt very bad." The plaintiff ("Bob") was immediately taken to S., and sues the defendant for damages for mental anguish for the non-delivery of the message alleged to have arisen from the consequent failure of his father to meet him at S. The father, the plaintiff's witness, testified that had he received the telegram from G. he would have gone to S. *Held,* the plaintiff failed to show that his father would have gone to S. and can only recover nominal damages, the cost of the message.

3. Same.

In an action to recover for mental anguish against a telegraph company for its failure to deliver a message plaintiff caused to be filed with its agent at G. to be transmitted and delivered to plaintiff's father at V., telling him to "come at once. Bob (plaintiff) hurt very bad," plaintiff's testimony was to the effect that the message was to have been sent to his father telling him to come there. The plaintiff sues because his father did not meet him at S. *Held,* (1) the plaintiff should have definitely telegraphed his father to go to S.; (2) the plaintiff's evidence showing that he intended the message to be sent as written, he can not fix liability on the defendant on the theory that the defendant knew he expected his father to meet him at S.

(332) APPEAL from *Lyon, J.,* at February Term, 1910, of CHATHAM.

Action to recover damages for failure to deliver a telegram. The following is a copy of the telegram as set out in the complaint:

J. W. BEAL, *Gulf, N. C.* 22 August, 1907.

Come at once. Bob hurt very bad.

A. B. JENKINS,
Vass, N. C.

The telegram it is admitted was not delivered to the sendee, and this action is brought to recover damages for alleged mental anguish. These issues were submitted to the jury.

1. Did plaintiff, within sixty days after he had learned that the message had not been delivered, present to the defendant company a claim, in writing, for damages for the alleged failure to deliver said message? Answer: Yes.

2. Did the defendant, at the time of accepting said message for transmission, have notice that it was intended that the sendee (J. W. Beal) was to proceed to Sanford for the purpose of meeting the plaintiff at Sanford? Answer: Yes.

3. Did the defendant negligently fail to deliver the message sent by A. B. Jenkins to J. W. Beal? Answer: Yes.

4. What damage, if any, is plaintiff entitled to recover? Answer: $500.

From the judgment rendered the defendant appealed.

R. H. Dixon and Hayes & Bynum for plaintiff. (333)
P. H. Busbee and W. H. Pace for defendant.

BROWN, J. The plaintiff lived with his father, the sendee in the telegram, at Gulf, N. C., but on 22 August, 1907, was residing near Lake View, Moore County, N. C., working in a saw mill, where on the above date he was seriously and painfully injured, about 8 a. m., and taken to the station at Lake View at once and carried to Sanford, reaching there about 2 p. m.

The telegram in question was sent at the request of plaintiff by his friend A. B. Jenkins from Vass, one mile from Lake View, and the nearest telegraph office. The telegram was written down by Taylor, the operator at Vass, at the request of Jenkins, who paid the twenty-five cents therefor.

The alleged grievance and ground for mental suffering is that plaintiff failed to meet his father at Sanford on arrival.

J. W. Beal, the father to whom the message was addressed, testified that if he had received the telegram in question sent from Vass he would have gone to Sanford. He would not have expected to meet his son there.

This fact, coming from plaintiff's own witness, the sendee of the telegram, will prevent a recovery of anything more than nominal damages, the price of the message.

It was incumbent upon the plaintiff to show that upon receipt of the telegram the sendee could and would come. He has proved just the contrary. *Bright v. Telegraph Co.*, 132 N. C., 325-326; *Hancock v. Telegraph Co.*, 137 N. C., 498; *Kernodle v. Telegraph Co.*, 141 N. C., 436.

But plaintiff endeavors to avoid this by an amendment to the complaint that the defendant company had notice that it was the purpose of plaintiff to go to Sanford, and that he desired to meet his father there, and in that view we presume the second issue was submitted.

If that was the purpose, then Jenkins should have definitely telegraphed the father to proceed to Sanford. But the telegram
(334) was worded and sent in accord with plaintiff's own instructions to Jenkins, as testified to by the latter, who says: "Just before I left the mill, where the accident was, he said, 'See that my father knows this, and get him *here* as quick as you can.' "

The plaintiff in his own testimony says that the instruction he gave Jenkins was to send a message to his father and inform him of the accident. Plaintiff does not claim in his evidence that he instructed Jenkins to wire his father to meet him anywhere.

In the complaint, which is verified by the oath of the plaintiff, he avers that he procured his friend to send a telegram to his father in words and figures like the one which is the basis of this action.

It was the failure to deliver that telegram, which plaintiff alleges is the telegram his friend caused to be sent for him, that was the cause of his father's failure to meet him.

We think under the well-settled decisions of this Court the plaintiff is entitled to recover nominal damages only, viz., the cost of the message.

Error.

E. F. AYDLETT v. ANDREW BROWN.

(Filed 2 November, 1910.)

1. Debtor and Creditor—Disputed Account—Check in Full—Satisfaction.

When a creditor receives and collects a check sent by his debtor upon condition that it shall be in full for a disputed account, he may not thereafter repudiate the condition annexed to the acceptance.

2. Same—Independent Accounts—Intent—Evidence—Questions for Jury.

But when there is evidence tending to show that there were two independent accounts, and after a correspondence between the creditor and debtor as to one of them containing disputed items, the latter sent the former a check "in settlement of all accounts which you may have against me to this date," it is for the jury to find the intent, upon the facts and circumstances of this case, as to whether this check was given and accepted to include the other account, now in suit, which the debtor had previously denied owing, and which, apparently, was not the subject of the correspondence, or intended to be covered by the check.

(335) APPEAL from *Ferguson, J.*, at January Term, 1910, of PASQUOTANK.

This action was brought to recover $1,000, the amount due by the defendant for professional services alleged to have been rendered by the plaintiff as his attorney. There were two accounts, one for $1,000, which was presented, and liability for the same or any part thereof denied by the defendant, and the other for $125, composed of several items, one of which was disputed. The defendant enclosed a check for $125 in a letter dated 14 January, 1910, which contained the following statement: "Your favor of the 13th inst. with enclosures as stated, received and contents noted, and I thank you for the same. I enclose check ($125) in settlement of all accounts which you have against me to this date. Kindly acknowledge receipt." At the request of the defendant, the plaintiff enclosed an itemized statement of the account for $125 in his letter of 13 January, to which the defendant's letter of the 14th was a reply, and there was no reference in the letter of the 13th to any other account. The defendant, while not pleading accord and satisfaction or payment, or referring in his answer to the account for $1,000 as having been settled, contends that the collection of the check by the plaintiff is a bar to his recovery of the $1,000, or any part thereof, in this action. The court instructed the jury to find, from all the evidence, whether the letter of 14 January, 1908, was intended by the parties to include the account for $1,000, upon which this action was brought, or only the transactions covered by the account for $125, which is made up of several items or accounts. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

J. C. B. Ehringhaus, W. M. Bond, Pruden & Pruden, J. H. (336) *Sawyer and H. S. Ward for plaintiff.*

A. O. Gaylord, W. A. Worth, and N. T. Melliss for defendant.

WALKER, J. We think, upon a consideration of the correspondence between the parties and the other evidence in the case, that this question was properly submitted to the jury. The court told them that if the account for $1,000 was within the contemplation of the parties when the check was sent and received, the action would be barred by the receipt and collection of the check, otherwise it was not. If a check is sent in full payment of a debt and the creditor receives and collects it, he is bound by the condition annexed to its acceptance. He will not be permitted to collect the check and repudiate the condition. *Kerr v. Sanders,* 122 N. C., 635; *Petit v. Woodlief,* 115 N. C., 120; *Cline v. Rudisill,* 126 N. C., 524; *Wittkowsky v. Baruch,* 127 N. C., 315; *Orr Co. v.*

Powers, 130 N. C., 152; *Armstrong v. Lonon,* 149 N. C., 434; *Drewry v. Davis,* 151 N. C., 295. In this case there were two separate and independent accounts, and there is evidence to show that the defendant, by the words of his letter, "in settlement of all accounts which you may have against me to this date," did not have in his mind, at the time, the account for $1,000, the amount the plaintiff claimed under a special contract, and liability for which the defendant had expressly denied, but only the account for $125. In *Armstrong v. Lonon, supra,* the Court said, with reference to a similar point, which arose upon facts not any stronger than those presented in this case: "The check indicated on its face that it was sent in full payment to date thereof, and while this is not, under the circumstances of this case, conclusive, yet the receipt of it by the plaintiffs, their endorsement of it, and the retention of the money, is sufficient evidence to go to the jury that it was sent and received as a full payment and discharge of all indebtedness of defendant to plaintiffs, and so intended."

The letter of 14 January, 1908, was but one in a series of letters which passed between the parties during a lengthy correspondence.

(337) Those which immediately preceded and followed it refer only to the account for $125, and make no reference to the other account for $1,000, which the plaintiff had said did not exist. In his letter to the plaintiff of 9 December, 1907, the defendant had distinctly refused to recognize the account for $1,000. He even declined to arbitrate the difference between them with reference to it, stating as his reason that there was nothing to arbitrate. In his answer he does not even suggest that there had ever been any accord and satisfaction of that account, and he avers that he had never paid anything on it or recognized it in any way. He defends by simply denying that any liability ever existed. We are not considering the question whether the answer can be amended so as to conform it to the proof, but merely the omission to plead the letter and check in bar of the action, as tending to show that the defendant did not regard the check as any satisfaction of the account for $1,000. But we need not rest our decision, even in part, upon the omission to plead payment or satisfaction of the account for $1,000, as we think the jury might well have inferred from the correspondence that the check was given to settle all disputes between the parties, as to matters which had no connection with the account for $1,000. We adhere to our former decisions that where a check is sent in full payment of an account, the creditor can not accept and appropriate the check and afterwards recover the amount of any item which was a part of the account. Having elected to take a part in satisfaction of the whole, he will be held to his agreement, but the principle of course does not apply to a transaction not embraced by the

account. Whether it is or not may often be a question of law upon admitted facts, but sometimes the evidence, as in this case, may be such as to make it a question for the jury.

A case requiring the intervention of a jury to ascertain the true intent of the parties, for the purpose of identifying the account or indebtedness to which reference is made, where a part of the amount alleged to be due is paid by check or otherwise in satisfaction of the whole, must be exceedingly rare. In the former decisions of the Court upon this subject there has apparently been no doubt as to the particular debt upon which payment of a part, in settlement of the whole, (338) was understood to be made, and each of those decisions rested upon the solution of some other question than the one now being considered. We must bear in mind that the defendant had asked by letter for a statement of the account for $125, which was itself composed of several accounts about which there was a dispute, and that the plaintiff enclosed, in his letter of 13 January, 1908, the statement called for and requested the defendant to send him a check for the amount, and in his letter of the same date to the plaintiff, the defendant agreed to send the check to pay that account when he received a copy of the judgment dismissing the Johnson suit. No mention is made of the present claim for $1,000 for other and distinct services rendered which had no connection whatever with the account for $125. It is also to be noted that the plaintiff had intimated that there might be one other charge for services added to the account for $125, and the defendant was anxious, apparently, to close up that account and prevent the addition of other items. At the time the letter of 14 January, 1908, was sent by the defendant, the parties were not negotiating for a settlement of the account for $1,000, and the plaintiff might fairly and reasonably have inferred from that letter, in view of the nature of the correspondence, that the defendant was referring only to the accounts which made up the claim for $125. No one can well read the correspondence without concluding that the letter of 14 January, 1908, referred to a series of accounts which did not embrace the present claim. If it had included that account, the general principle would apply, but to hold that plaintiff is concluded by the receipt and collection of the check, under the circumstances as they appear in this case, would be to decide contrary to the apparent intention of both parties.

The defendant alleged that the plaintiff had represented both parties to the litigation or controversy for professional services rendered to the defendant, in the settlement of which he now demands compensation. Evidence was introduced by the parties upon this question. It was fairly submitted to the jury, under proper instructions, and they decided against the defendant. (339)

There was some evidence for the jury to consider upon the other question, whether the plaintiff, at the request of the defendant, had rendered valuable services in the settlement of the litigation with W. H. Parrish and others. The motion for judgment as of nonsuit was, therefore, properly refused. There was no reversible error in the other rulings to which exceptions were filed.

No error.

Cited: Bank v. Justice, 157 N. C., 375; *Lumber Co. v. Lumber Co.,* 164 N. C., 361, 362; *Land Co. v. Bostic,* 168 N. C., 100; *Rosser v. Bynum, ibid.,* 342; *Mercer v. Lumber Co.,* 173 N. C., 54; *Moore v. Accident Assurance Corp., ibid,* 538.

GEORGE C. McLARTY v. GEORGE URQUHART.

(Filed 2 November, 1910.)

1. Superior Court—Equitable Powers.

The Superior Court still possesses all the powers and functions of a court of equity which it had prior to 1868, though the method of finding facts has been changed.

2. Same—Mortgages—Powers of Sale Specified.

A mortgagee may invoke the aid of the courts in foreclosing his equity of redemption instead of resorting to the power of sale contained in the mortgage, and irrespective of the terms therein expressed as to the method of advertisement, the court thus acquiring jurisdiction of the parties and the *res,* has full power to direct a sale of the property upon such terms as to advertisement and the like as appears best, and to make all proper orders and decrees.

3. Same—Order of Sale—Modification—Imposed Terms.

The mortgagee elected to invoke the equitable jurisdiction of the court to foreclose his mortgage, and at the sale decreed the mortgagor appeared and gave notice of a motion he would enter to set aside the order thereof, upon the ground that it was required by the terms of the power of sale, expressed in the deed, that advertisement should likewise be made in *The New York Herald.* It appeared that this additional advertisement would cost from $300 to $500, and that the property would not bring the mortgage debt: *Held,* not error for the lower court to refuse to modify the order of sale except upon condition that the mortgagor, by a certain day, pay to the commissioner a sum sufficient to pay for the additional advertisement.

(340) APPEAL from *W. R. Allen, J.,* at August Term, 1910, of UNION.

Action to foreclose a mortgage or deed in trust.

The defendant excepted to the decree of foreclosure as to certain particulars and appealed.

Adams & Armfield for plaintiff.
A. H. Price for defendant.

BROWN, J. The only question presented is, Whether an action to foreclose a mortgage of realty, containing a power of sale, the court must follow the terms contained in the power, in making an order of sale, or can the court, in the exercise of its equitable jurisdiction, determine the terms of sale and the manner of advertising in accordance with the practice and procedure of the court?

The mortgage provides, in case of default, that the mortgagee may sell after thirty days' advertisement in a newspaper published in Union County, and in the *New York Herald,* published in New York City. Instead of exercising the power of sale, the plaintiff, as mortgagee, commenced his action in the Superior Court of Union County, N. C., and served the summons by publication, and at a regular term of court took a judgment against the defendant directing a sale of the land by advertising in the *Monroe Enquirer,* a newspaper published in Union County. The defendant subsequently appeared, after being notified of the day of sale, and forbade the sale, and gave notice of a motion to set aside the order directing a sale of the land. At the hearing of his motion *Judge Allen* refused to modify the order of sale, so as to require an advertisement in the *New York Herald,* unless the defendant would, before the first of November, pay to the commissioner a sufficient amount to cover the cost of advertising the sale in the *New York Herald.* The land is not worth and will not bring on the market an amount sufficient to pay plaintiff's debt. The cost of advertising in the *Herald* will be from $300 to $500.

The Superior Court still possesses all the powers and functions of a court of equity which it possessed prior to 1868. The method of finding facts has been changed, but none of the powers of the (341) court have been abridged.

One of the important powers of a court of equity, existing almost from time immemorial, is to direct and control sales made by its order and under its authority, through a commissioner of its own appointment.

This jurisdiction exists as well for the protection of the mortgagor as for the benefit of the mortgagee.

For a long time there was no such power recognized as a power of sale in a mortgage whereby the mortgagee or trustee could foreclose the equity of redemption without the aid of a court of equity. For a time such power was looked upon with suspicion and was yielded to with much hesitation because it is an economical method of foreclosing a mortgage.

Notwithstanding the power, the mortgagee may invoke the aid of the court in foreclosing the equity of redemption instead of resorting to the power. Likewise in case of complications, the mortgagor has frequently resorted to the courts for protection and compelled foreclosure under their protection. *Capehart v. Biggs,* 77 N. C., 261; *Kornegay v. Spicer,* 76 N. C., 96; *Whitehead v. Hellen,* 76 N. C., 99; *Kidder v. McIlhenny,* 81 N. C., 131; *Manning v. Elliott,* 92 N. C., 51, are precedents in point.

This plaintiff preferred to seek aid of the court to foreclose instead of pursuing the power contained in the instrument. Had he pursued the latter he must follow its provisions substantially, but the court is not bound to follow them. Its power to foreclose is not derived from the power of sale in the mortgage. It could decree foreclosure if the instrument contained no such power.

Having by this action acquired jurisdiction of the parties and the *res,* the Superior Court had full power to direct a sale of the property upon such terms as to advertisement and the like as appeared best, and to make all proper orders and decrees, although if the mortgage stipulated for a sale for cash the court would give effect to that contract of the parties. *Manning v. Elliott,* 92 N. C.

In this last case it is said: "The court was not bound to direct a sale of the property in strict accordance with the terms prescribed
(342) in the deed. In this respect it ought to exercise a sound discretion, having due regard, under the circumstances of the case, for the rights of the debtor and creditors respectively."

It would seem that an expensive advertisement in the *New York Herald* would be of no value to either party, but if the defendant thought so, the court gave him the opportunity if he saw fit to embrace it.

The order appealed from is

Affirmed.

L. SCOTT REYNOLDS v. GREENSBORO BOILER AND MACHINE COMPANY.

(Filed 2 November, 1910.)

1. Pleadings—Filing—Time Enlarged—Answer—Nonsuit — Judgment—Excusable Neglect.

A general order for time to file pleadings has no effect upon a judgment by default for the want of an answer, rendered upon motion made before the order was entered, it appearing that several terms of the court had intervened since the action was begun and complaint filed.

2. Same—Notice—Motions—Calendar—Terms, Regular or Special.

Whether at a regular or special term of the court, Revisal, secs. 1516, 1517, a notice to the adverse party of a motion in term for judgment by default for the want of an answer is not necessary, for in legal contemplation the defendant is in court by service of summons and is charged with notice of whatever action the court takes during the pendency of the suit, irrespective of whether the cause has or has not been placed on the list of motions to be made at that term, there being no motion calendar in contemplation of law.

APPEAL from *Lyon, J.*, at August Term, 1910, of GUILFORD.

Motion to set aside judgment by default rendered in the cause at June Special Term, 1909. It is admitted that the motion was entered and notice given within twelve months from the rendition of the judgment, and that it was continued from term to term.

The judge below granted the motion and set aside the judgment. Plaintiff appealed.

Scott & McLean for plaintiff. (343)
Justice & Broadhurst for defendant.

BROWN, J. The facts are that this action was duly commenced and summons served 4 January, 1909, and a duly verified complaint filed 3 February, 1909. Five or six terms of court intervened between the filing of the complaint and the rendition of the judgment at June Special Term, 1909, without the filing of an answer. At these terms a general order for "time to file pleadings was made."

Such an order was made at close of June Special Term, 1909, but before it was made plaintiff moved for judgment by default for want of an answer.

The excusable neglect, as stated in the findings consists in the fact that at the beginning of said special term counsel for defendant looked over the motion calendar made out by the bar, and not finding this case entered in the list of motions, without any inquiry of plaintiff's counsel, did not file an answer and departed for New York on business.

We are unable to agree with the judge below that excusable neglect is shown.

It was the duty of counsel to have filed an answer. While the general orders as to enlarged time for pleading in all cases might have prevented a judgment by default prior to the special term, they could not interfere with plaintiff's right to move for judgment by default at that term. The general order made at that term will not help the defendant for the motion was made and the judgment rendered before such order was entered. Consequently it could have no effect upon this case.

The fact that the case was not on the list of motions made out at the instance of the bar did not take from the plaintiff the legal right to move for judgment.

In contemplation of law there is no motion calendar. This case was upon the summons docket awaiting the filing of an answer (344) and when that docket was called, or whether regularly called or not, plaintiff had a legal right, especially after waiting so long, to demand judgment by default. No notice of such motion was necessary. In legal contemplation the defendant was in court by the service of the summons, and is charged with notice of whatever action the court takes during the pendency of the suit. *University v. Lassiter,* 83 N. C., 41; *Coor v. Smith,* 107 N. C., 431. The fact that the judgment by default was taken at a special term makes no difference.

The statute says: "The special terms of the Superior Court, held in pursuance of this chapter, shall have all the jurisdiction and powers that regular terms of the Superior Court have." Revisal, sec. 1516.

"All persons and witnesses summoned at the regular or special terms and officers or others who may be bound to attend the special term under the same rules, forfeitures and penalties as if the term were a regular term." Revisal, sec. 1517.

The order setting aside the judgment is reversed and the cause is remanded to the Superior Court of Guilford County to be proceeded with according to law.

Reversed.

Cited: Patrick v. Dunn, 162 N. C., 20.

GEORGE W. PRITCHETT v. GREENSBORO SUPPLY COMPANY.

(Filed 2 November, 1910.)

Appeal and Error—Compulsory Reference—Exceptions—Procedure.

When there is a plea in bar, a party to the action may except to an order of reference made by the trial judge and appeal at once, or wait until there is a final judgment and then appeal.

APPEAL by defendant from *Lyon, J.,* at August Term, 1910, of GUILFORD.

The facts are sufficiently stated in the opinion.

W. P. Bynum and Taylor & Scales for plaintiff.

F. P. Hobgood, Jr., for defendant.

WALKER, J. This action was brought to recover the sum of (345) $1,319.04, alleged to be due to the plaintiff as traveling salesman of the defendant for salary, commissions and expenses. The defendant denied that it is indebted to the plaintiff except in a certain amount which it tendered, but which was less than the amount actually due according to its own contention, and much less than the amount found to be due by the jury upon the evidence and under the instructions of the court. There was a controversy as to the commissions alleged to be due for 1908, but no issue was raised as to the salary and expenses for September, 1908, or the commissions for the year 1907. The only matter at issue between the parties related to the commissions of the plaintiff for the year 1908, and as to these the defendant alleged that there was a new contract, which was a substitute for the old one, and by which it was released from liability for commissions on sales made by the plaintiff during that year in consideration of the promise of the defendant to pay him the sum of $200 per month and traveling expenses for the last half of the year. The plaintiff contended that the new contract was never consummated, but was only tentatively proposed, while the defendant alleged that it was a completed contract. The cause was referred by order of the court. Both parties excepted, but neither party appealed. The referee found for the defendant upon the material question in the case. The plaintiff excepted to the report and tendered the issue raised by the pleadings and then demanded a jury trial. The issue was submitted and found for the plaintiff and judgment rendered for him in the sum of twelve hundred and 42-100 dollars, with interest and costs. The defendant excepted and appealed and assigned as error that the court submitted the issue as to the contract of 1908 to the jury, at the request of the plaintiff.

The defendant's contention is that, while the plaintiff excepted to the order of reference, he did not appeal therefrom, and therefore was not entitled to a jury trial. But this view of the law we think was erroneous, and we have so decided. A party may object to a reference, if there is a plea in bar, and appeal at once, if he is so minded, or he may rely upon his objection by reserving his exception, and appeal from the final judgment. This is a convenient practice or procedure, because if the case goes on and the party who has excepted suc- (346) ceeds finally, by the decision of the referee or the verdict of the jury, his exception to the reference becomes immaterial, and the result shows that no appeal was really necessary to protect his right. He could appeal when the order of reference was made, but was not bound to do so at that time. The practice in this respect has been settled. *Kerr v. Hicks,* 131 N. C., 92; *Jones v. Wooten,* 137 N. C., 421; *Austin v. Stewart,* 126 N. C., 525. Why should the plaintiff have objected to

the order of reference unless he intended to reserve his right to a trial by jury of the issue raised by the defendant's plea in bar and to prevent an inference that he had assented to the order, which might make the reference, at least as to him, one by consent? *Ogden v. Land Co.*, 146 N. C., 444. Our conclusion is that if there is a reference of the case by order of the court against the objection of either party, because there is a plea in bar, he may except and appeal at once, or wait until there is a final judgment and then appeal.

No error.

CITIZENS AND MARINE BANK OF NEWPORT NEWS v. SOUTHERN RAILWAY COMPANY.

(Filed 10 November, 1910.)

1. **Carriers of Goods—"Order, Notify"—Holder for Value—Due Course—Equity—Defenses—Parties.**

It is not necessary that the holder for value and the owner of a draft for, and bill of lading of a shipment of goods to consignor's order, notify, etc., should be a holder in due course to maintain an action against the carrier for damages to the shipment, there being no equitable or other defense requiring it; nor is the question affected by the holder's taking a note from the consignor for the amount of the draft, secured by the draft and bill of lading, and without having surrendered the latter, but retaining them as collateral.

2. **Carriers of Goods—"Order, Notify"—Title—Holder—Parties.**

The consignee can not acquire title to a shipment of goods to consignor's order, notify, etc., until he pays the draft or has the bill of lading surrendered to him; and the holder of the draft for value and owner of the bill of lading may maintain his action against the carrier for damages to the consignment arising from its negligence.

3. **Carrier of Goods—Carriers—Continued Liability—Notice of Arrival.**

The liability of a railroad as a common carrier continues until written notice to the consignee is properly given of the arrival of the shipment at destination, which must be delivered personally or by leaving it at the place of business of the party entitled to notice, or by depositing it in the postoffice, as required by law and the rule of the Corporation Commission.

4. **Same—Negligence—Evidence—Questions for Jury—Warehousemen.**

In an action for damages to a shipment of a carload of corn, brought by the endorsee for value of the consignor's draft with bill of lading attached, shipped to consignor's order, notify, etc., it appeared that the car of corn was found at its destination on a side track near the place of business of the one to be notified. There was conflicting evidence as to whether the carrier duly mailed the notice of the arrival of the car to the consignee, the carrier relying in defense on its testimony that the "advice" or postal card had been duly and properly mailed. *Held*, the evidence raised an issue of fact as to the carrier's negligence for the jury to answer. The question of the railroad's liability as a warehouseman is not presented upon the facts of this case.

APPEAL from *W. J. Adams, J.*, at March Term, 1910, of (347) DURHAM.

This action was brought to recover damages for the negligent failure to transport and deliver a certain carload of corn, and for negligently failing to take proper care of the corn while in the custody of the defendant, whereby it became overheated and unfit for use. The corn was sold by the Dabney Brokerage Company of Newport News, Va., to the Carolina Roller Mills of Durham, N. C., and was shipped over the defendant's line to Durham. The brokerage company drew a draft on the roller mills for the price of the corn, with bill of lading attached, and the same was endorsed for value to the plaintiff, which is now the owner thereof. The car of corn arrived at Durham on 21 March, 1907, and, as plaintiff alleged, and there was evidence tending to prove, it was permitted to remain on a side track of the defendant until 3 April, 1907, without any notice to the roller mills of its arrival. When the car was opened the corn was found to be in such bad condi- (348) tion, owing to the high temperature at that time, that the roller mills refused to receive it. The defendant introduced evidence which tended to show that on the arrival of the car of corn at Durham, it caused to be deposited in the postoffice, properly addressed to the roller mills, a postal card notifying that company, as consignee, that the corn was at its station ready for delivery, and there was other evidence tending to show that the postal card had been received by the roller mills. With reference to this part of the case, the court charged the jury that if the postal card was mailed to the roller mills on the arrival of the car, or within a reasonable time thereafter, the law presumed that it was received, and if the jury found the fact to be that it was so mailed, there was no negligence on the part of the railway company, and it would not be liable for any damages sustained by the plaintiff, and the jury should answer the fifth issue No, but if they found that no such notice was given, and that the corn was damaged by the negligence of the railway company, their answer to the issue should be Yes. If they answered that issue Yes, they would assess the amount of damages under the next issue. The bill of lading was drawn to order of the shipper with instructions to notify the roller mills.

It appeared that the draft (with bill of lading) was sent to a bank in Durham for collection, but payment was refused upon demand, for the reason, as stated by the roller mills at the time, that the corn had not arrived. It was then returned to the plaintiff and the amount thereof was charged to the brokerage company on its books. The draft, with bill of lading, was again purchased by the plaintiff and forwarded in the same way as at first for collection and payment was refused. The plaintiff, in order to comply with some law of the State of Virginia, took the

note of the brokerage company for $1,400, which represented the amount of said draft and others of a similar tenor given by the brokerage company, and by agreement with it retained the drafts as collateral security for the payment of the note.

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

1. Did the Dabney Brokerage Company sell to the defendant
(349) Carolina Roller Mills one car of corn, as alleged in the complaint? Answer: Yes.

2. Did said Dabney Brokerage Company draw a draft on the defendant Carolina Roller Mills, with bill of lading attached for said car of corn and endorse the same to the plaintiff for value? Answer: Yes.

3. Is the plaintiff the holder of said draft in due course? Answer: No.

4. In what amount, if any, is the defendant Carolina Roller Mills indebted to the plaintiff? Answer: Nothing.

5. Was said car of corn damaged through the negligence of the defendant Southern Railway Company? Answer: Yes.

6. What damage, if any, is the plaintiff entitled to recover of the defendant Southern Railway Company? Answer: $439.97.

Judgment was rendered upon the verdict against the railway company, from which it appealed.

Foushee & Foushee for plaintiff.
Guthrie & Guthrie for defendant.

WALKER, J., after stating the case. The jury have found that the plaintiff is the holder for value and the owner of the draft and bill of lading, and we do not see why it is necessary that it should be a holder in due course, as contended by counsel, to entitle it to recover damages for injury to the corn caused by the negligence of the defendant. Hutchinson on Carriers (3 Ed.), secs. 197, 198 and 1320; Hale on Bailments and Carriers, secs. 123, 124. The carrier asserted no equity or other kind of defense against the brokerage company which required that the plaintiff should be a holder in due course in order to be protected against it, nor can the fact that plaintiff took a note from the brokerage company for the amount of its indebtedness, and retained the draft and bill of lading as collateral, affect its right to recover, as it is still the owner for value of both papers, having acquired title thereto by virtue of its purchase and the endorsement to it. *Tyson v. Joyner,* 139 N. C., 69; *Bank v. Drug Company,* 152 N. C., 142; *Thompson v. Osborne, ibid.,* 408. In *Young v. R. R.,* 80 Ala., 100,
it was held that where a vendor and shipper of goods takes the
(350) bill of lading in his own name or it is drawn to his order, he

thereby retains the title in himself, and the carrier can not rightfully deliver the goods to any other person, except on his order or by transfer of the bill of lading. In this case it appears that the title and property in the corn could not pass to the roller mills until the draft was paid and the bill of lading surrendered, and the draft has not been paid.

The decisive question in the case is whether the railway company had relieved itself of liability as carrier by giving due notice of the arrival of the goods. We held in *Poythress v. R. R.,* 148 N. C., 391, that the liability of a common carrier continues until notice of the arrival of the goods at their destination is given and a reasonable time to remove them has elapsed, and that when the carrier has complied with its duty in this respect, its liability thereafter is that of a warehouseman. The notice, as we further held in that case, need not be served personally in order to relieve the railway company of liability as carrier, but it must be in writing and delivered personally or by leaving it at the place of business of the party entitled to the notice, or by depositing it in the postoffice, as required by the rule of the Corporation Commission. The subject is ably and exhaustively discussed by *Justice Brown* in the case just cited, with a full citation of the authorities, and no elaboration of the matter is now required. There was evidence in this case that the defendant's agent had deposited a postal card, or what is sometimes called an "advice-note," in the postoffice, informing the roller mills of the arrival of the corn, and there was also evidence to the contrary, and some to the effect that after the goods had, in fact, arrived, an agent of the roller mills telephoned to the defendant's office in Durham and inquired about the corn and was informed that it had not arrived. Some time afterwards the goods were found by mere chance in a closed car of the defendant by an agent of the roller mills, on a side track, in a damaged condition and unfit for use. The question as to the defendant's negligence was fairly submitted to the jury by the court, upon the conflicting evidence and under proper instructions. It was largely a question of fact which the jury have (351) decided against the carrier.

It is not necessary that we should consider whether the defendant is liable as warehouseman, under the facts and circumstances of this case, if it had discharged its duty as carrier or its liability as such had been converted into that of a warehouseman.

We have examined the other exceptions and find no reversible error in the rulings to which they were taken.

No error.

Cited: *S. v. Fisher,* 162 N. C., 568; *Jeans v. R. R.,* 164 N. C., 237.

J. C. THOMAS v. HAMMER LUMBER COMPANY.

(Filed 10 November, 1910.)

1. **Railroad—Fire Damage—Logging Roads—Liability.**

A private steam railroad for logging purposes is liable in like manner as *quasi*-public railroad corporations, for damages by fire caused from its locomotives igniting combustible materials along its right of way, or by the negligent operation and running of its locomotives.

2. **Same—Independent Contractor—Foul Right of Way.**

A company operating a steam railroad for logging purposes is liable in damages for fires caused by its locomotives by reason of the foul condition of its right of way, so dangerous that it might reasonably have been anticipated that injury would thereby occur to adjacent owners; and the principle of independent contractor will not avail the employer in such instances.

3. **Same—Casual—Collateral Acts.**

The instance in which the employer will be held liable for damages by fire caused to adjacent landowners, arising from the filthy condition of the right of way of its steam road for logging timber, operated by an independent contractor, does not apply to such negligent acts of the employees of the independent contractor as are casual or collateral to the work contracted for as distinguished from those which the contractor agrees and is authorized by his contract to do.

4. **Railroads—Fire Damage—Negligence—Locomotives—Operation.**

The operation of a defectively equipped engine, or of a good engine not carefully managed, or managed by an unskillful engineer, is such source of danger to the adjacent landowners from fire that an employer can not relieve himself of the consequent damage under a contract with an independent contractor.

(352) APPEAL from *Lyon, J.*, at August Term, 1910, of BRUNSWICK.

This action was brought to recover damages to plaintiff's land and growing timber by fire, alleged to have been negligently set out by defendant's engine, operated on a lumber road constructed for the purpose of hauling the logs cut from plaintiff's land. The plaintiff had sold certain timber trees growing upon his land to one Hammer, who had conveyed them to the defendant company, and had sold him, Hammer, a right of way one hundred feet wide through his land in fee for the purpose of operating a railroad thereon; this right of way had also been conveyed to the defendant by Hammer. The defendant, denying all allegations of negligence and any liability to the plaintiff, offered the following evidence to show that if the alleged negligent acts were done as charged, they were caused and done by one Ellis, an independent contractor. H. C. McKeel, the general manager of defendant, testified:

"J. W. Ellis was operating road. I made contract with Ellis for company to log certain tracts of timber, contracts indefinite or until he wound up these tracts of timber. I employed Ellis to put logs to mill; was to pay so much per thousand; he was a suitable man; had been in the business ten years. Defendant had nothing to do with his teams, road or hands; he controlled them. I had nothing to do with directing hands. Defendant company furnished locomotive, iron and cars. Ellis built roads. . . . Ellis was to cut timber from lands of plaintiff, Sam Thomas and others (naming them). Ellis constructed tramroad; timber was owned by company; he contracted to deliver logs grounded at $3.25 on tram tracks; no specified time; defendant had ten years to get timber off. . . . If Ellis was to leave timber in woods I would tell him to haul it in; I am very seldom in woods." T. B. Hammer also testified: "I am secretary and treasurer of defendant company; Ellis was to deliver logs for $3.25; company to furnish engine and iron; afterwards agreed to pay Ellis 50 cents to deliver logs to mill; defendant had not control over logging business; Ellis had full control. . . . Contract was to cut timber from tracts. Engine, iron and cars owned by defendant." Upon this evidence his (353) Honor, at the request of defendant, charged the jury as follows:

"First. That if the jury shall find from the evidence and by the greater weight thereof that the defendant company employed J. W. Ellis, a competent and suitable person, to do its logging, and by the terms of the contract the defendant company furnished the rails, engine and tram cars, and the said Ellis furnished the logging tools and outfit, mules and wagon, cut the crossties, and constructed the tramroad, and was to employ at his own expense the men and pay them, and that the lumber company did not supervise the cutting and had no general control in respect to the manner of doing the work or the agents employed to do the work, and had no right to issue orders which the contractor was bound to obey, and paid the contractor three dollars and twenty-five cents for the hauling, cutting and delivering the timber to the water, and the defendant was not interested in the steps of the work as it progressed, but only in the ultimate result, then the defendant would not be liable, however much the contractor would if he be negligent."

The plaintiff excepted. The following issues were submitted to the jury: First issue: Did the defendant negligently set fire to and burn the lands and property of the plaintiff, as alleged in the complaint? Second issue: What damage, if any, has plaintiff sustained by reason of said burning? and the jury having answered the first issue, No, there was a judgment upon the verdict for the defendant and plaintiff appealed to this Court.

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

MANNING, J. It appears, without contradiction, in the evidence that the engine, at the time it was furnished Ellis by the defendant, was in good condition and properly equipped with a spark-arrester; but as to its condition at the time of the fire—some nine months thereafter—there was serious conflict in the testimony. It does not appear by whom the right of way was located, whether by defendant or Ellis, but (354) it is fully established by the evidence that it was, at its location, covered with highly inflammable matter, and continued in this foul condition up to the time of the fire. There was evidence tending to prove that the fire causing the injury, for which plaintiff seeks in this action to recover damages, originated on the right of way from the engine operated thereon, and was thence communicated to plaintiff's adjacent land. In *Craft v. Timber Co.*, 132 N. C., 151, it was held that the rule "applicable to railroad corporations, which makes them liable for fires negligently caused by igniting combustible material on the right of way, has been applied to private railroads constructed for logging purposes." *Simpson v. Lumber Co.*, 133 N. C., 95; *Hemphill v. Lumber Co.*, 141 N. C., 487; *Knott v. R. R.*, 142 N. C., 238.

In *Williams v. R. R.*, 140 N. C., 623, this Court formulated the rules of liability applicable to railroad corporations for negligently causing fires, and the second of these rules is as follows: "2. If fire escapes from an engine in proper condition, with a proper spark-arrester, and operated in a careful way by a skillful and competent engineer, but the fire catches on the right of way, which is in a foul and negligent condition, and thence spreads to the plaintiff's premises, defendant is liable. *Moore v. R. R.*, 124 N. C., 341; *Phillips v. R. R.*, 138 N. C., 12." In *Knott v. R. R.*, 142 N. C., 238, *Walker, J.*, speaking for the Court, said: "It is true he (the plaintiff) alleges that the spark-arrester was defective, but in the seventh section of the complaint he states generally that the fire was caused by a spark emitted from the engine, which ignited the combustible material on the right of way and thence spread to his standing timber, which was destroyed. But can it make any difference in the legal aspect of the case, whether the spark or live coal came from the smoke-stack or the fire-box, even assuming them to have been in the best condition, if eventually it fell upon the foul right of way and produced the conflagration? We think not, because the permitting its right of way to remain in a dangerous condition was an act of negligence, sufficient of itself to cause the damage and necessarily proximate to it, if the fire immediately and without any intervening efficient and independent cause, spread to the plain-

tiff's woods. *Aycock v. R. R.*, 89 N. C., 321; *Phillips v. R. R.*, (355) 138 N. C., 12; *R. R. v. Kellogg*, 94 U. S., 469." We consider it to be established by these authorities that it is negligence in a timber company, as well as a railroad corporation, to permit its right of way to become and remain in a foul condition; that such a condition is so dangerous that it may reasonably be anticipated that injury will occur to adjacent landowners from fires originating thereon from engines being operated on it, though such engines be in the best condition and have the best equipment.

The defendant, however, contends that it is not liable to the plaintiff because Ellis, who was operating the engine and train and doing the cutting, logging and hauling, was an independent contractor, as defined by this Court in *Craft v. Lumber Co.*, 132 N. C., 151; *Young v. Lumber Co.*, 147 N. C., 26; *Davis v. Summerfield*, 133 N. C., 325; *Gay v. R. R.*, 148 N. C., 336; *Midgette v. Mfg. Co.*, 150 N. C., 333; *Hunter v. R. R.*, 152 N. C., 682. Defining the independent contractor as contained in these cases, his Honor instructed the jury that if they found as a fact that Ellis was an independent contractor and was working under the contract creating him such at the time the injury was caused to the plaintiff, then the defendant would not be liable. We think this instruction erroneous, not because of an inaccurate definition of "independent contractor," but because, conceding Ellis to have been an independent contractor, we do not think the defendant, as his employer, is relieved of responsibility to the plaintiff for the injury of which he complains, upon the view of the evidence we are now considering. In our opinion, this case falls under one of the recognized exceptions to the rule of nonliability of employer for the acts of the independent contractor. This exception is thus stated by this Court in *Davis v. Summerfield, supra:* "And there is still another class of cases to be excepted from the exemption, and that is where the contract requires an act to be performed on the premises, which will probably be injurious to third persons if reasonable care is omitted in the course of its performance. The liability of the employer in such case rests upon the view that he can not be the author of plans and actions dangerous to the property of others without exercising due care to anticipate and prevent injurious (356) consequences." In *Bower v. Peate*, 1 Q. B. Div., 321 (1875-6), *Chief Justice Cockburn* thus states the principle upon which this exception rests: "The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to

prevent the mischief, and can not relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted." In *Hardaker v. Idle District Council,* 1 Q. B. Div., 335 (1896), *Lord Justice Smith* said, after quoting the above language of *C. J. Cockburn:* "It should be noted that in *Hughes v. Percival,* 8 App. Cas., 443, *Lord Blackburn* doubted whether that duty was not too broadly stated, for he said: 'If taken in the full sense of the words, it would seem to render a person who orders post-horses and a coachman from an inn, bound to see that the coachman, though not his servant but that of the inn-keeper, uses that skill and care which is necessary, when driving the coach, to prevent mischief to the passenbers.' It is not for me to criticise this statement of *Lord Blackburn,* but with all respect, I would point out that it seems to me that it is not, in the natural course of things, to be expected, when a man hires post-horses and a coachman from an inn-keeper, that, unless means are adopted to prevent them, injurious consequences will arise to his neighbor. In such a case, in the ordinary course of events, no injuries would occur to any one. The coachman would drive and the hirer would ride in the carriage, and, in the ordinary course, the transit would (357) come to an end without injury to any one." The doctrine of this case has not only been approved by this Court in *Davis v. Summerfield, supra,* but has been generally accepted by the American courts. *Werthimer v. Saunders,* 95 Wis., 573; *Gaslight Co. v. Norfolk,* 63 Conn., 495; *Williams v. Fresno C. & J. Co.,* 96 Cal., 14; *Woodman v. R. R.,* 149 Mass., 335; *Gorham v. Cross,* 125 Mass., 232; *Carlson v. Stocking,* 91 Wis., 432; *Pye v. Faxon,* 156 Mass., 471; *R. R. v. Kimberly,* 87 Ga., 161; *Bridge Co. v. Steinbrock,* 61 Ohio St., 215; 76 Am. St., 375. To this case, as reported in the Am. St., there has been appended an elaborate note by the editor in which a large number of cases, both English and American, has been collected, and the principles decided carefully arranged. We do not find, upon a careful examination of the decisions of this Court, any conflict with or modification of the principle stated in *Davis v. Summerfield, supra.* The difficulty to be met with is in the application of the principle to the facts of the particular case, and not in the recognition of the soundness of the principle itself. In *Young's case, supra,* the injury inflicted was done by the employees of the independent contractor in felling a tree—a work

not dangerous in itself and from which, if properly done, no injurious consequences would arise. In *Gay v. R. R.*, 148 N. C., 336, it does not appear from the reported case how the injury complained of was caused, except the statement that the action was brought to recover damages caused by fire negligently put out, but an examination of the record of that case on file, discloses that the fire doing the damage was negligently started from a mill camp established by the independent contractor, this negligence being what is termed in many of the cases casual or collateral negligence, and for injuries resulting therefrom the employer would not be liable. 76 Am. St., 388 (note). The liability for those negligent acts is thus stated at that page of the editor's note: "While the contractor alone, and not his employer, is generally liable in cases where work is carried on under an independent employment, this rule of liability is limited to those injuries which are collateral to the work to be performed, and which arise from the negligence or wrongful act of the contractor or his agents or servants. Acts 'collateral' to the work (358) contracted for are to be distinguished from those which the contractor expressly agrees and is authorized to do, and from which injury directly results." *Smith v. Builders & Traders Exchange,* 91 Wis., 360, clearly illustrates this doctrine. In that case the plaintiff was injured by the negligent act of the contractor's employees in permitting a brick to fall from an uncompleted building. The employer was held not liable. *Reedie v. R. R.,* 4 Exch., 244, and *Hilliard v. Richardson,* 3 Gray, 349, further illustrate this doctrine. In *Midgette's case, supra,* this Court ruled that the jury was warranted in finding from the evidence that the contractor was not an independent contractor, because the employer retained control and direction of the work. In the course of the opinion in that case, *Connor, J.,* says: "How far this exception to the nonliability of the owner of the property is applicable to a case like this we do not undertake to say. It is well worthy of consideration whether the owner of machinery, unsafe for use and dangerous to employees, can, by contracting with an insolvent person to operate it to do the owner's work, and by simply surrendering control of the manner of doing the work, avoid liability for injuries sustained by employees." In *Hunter's case, supra,* this Court ruled that the work there handed over to the independent contractor to be done, to wit, blasting of rock, fell well within the established exception to the rule of nonliability by reason of its dangerous character. In the present case, it does not appear whether the defendant or Ellis located the right of way, nor do we think this material, because if located by Ellis, it was done by him as agent of the defendant, as it was not within the terms of his contract with the defendant. As by the terms of the conveyance, the right of way,

when located, was to be held in fee, the presumption, perhaps, would be that its location was an act of the defendant—the grantee.

We have thus far considered the case upon the view that the fire causing the damage originated on the foul right of way, from sparks from the engine operated thereon. There are two other views suggested by the evidence: (1) That the fire did not originate on the right
(359) of way, but was caused by a spark emitted by a defectively equipped engine; (2) that it was not set out by a spark from the engine. If the jury should find this to be the fact, though the fire may have originated from some act of the employees of the independent contractor, Ellis, such act would be casual or collateral negligence, and the authorities cited are decisive that the defendant would not be liable. The doctrine of *respondeat superior* would not apply.

We will now consider the view based upon a finding that the fire was caused by a spark emitted by a defectively equipped engine, but not communicated from the right of way. Would the defendant be liable? If the defendant itself had been at the time operating the engine, its liability is governed by the third rule formulated in *Williams v. R. R.*, 140 N. C., 623, as follows: "3. If fire escapes from a defective engine, or defective spark arrester or from a good engine not operated in a careful way or not by a skillful engineer, and the fire catches off the right of way, the defendant is liable." The liability of the employer rests upon the ground that mischievous consequences will arise from the work to be done unless precautionary measures are adopted, and the duty to see that those precautionary measures are adopted rests upon the employer, and he can not escape liability by entrusting this duty to another, though he be employed as an "independent contractor" to perform it. In *Bridge Co. v. Steinbrock, supra,* the principle is thus stated: "The weight of reason and authority is to the effect that, where a party is under a duty to the public or a third person to see that work he is about to do, or have done, is carefully performed so as to avoid injury to others, he can not, by letting it to a contractor, avoid his liability in case it is negligently done to the injury of another (citing numerous authorities). The duty need not be imposed by statute, though such is frequently the case. If it be a duty imposed by law, the principle is the same as if required by statute. *Cockburn, C. J.*, in *Bower v. Peate, supra.* It arises at law in all cases where more or less danger to others is necessarily incident to the performance of the work let to contract. It is the danger to others, incident to the performance of the work let to contract, that raises the duty and which the employer can not
(360) shift from himself to another so as to avoid liability, should injury result to another from negligence in doing the work." It can not be denied that the operation of a defectively equipped engine,

or the operation of a good engine not carefully managed or managed by an unskillful engineer, is a source of great danger to property adjacent to the road on which such an engine is operated. Such danger raises the duty which the employer can not shift from himself to another. It is undoubted, however, that if the engine was properly equipped and in good condition and properly managed, even though it emitted a spark which set out fire on the adjacent property of the plaintiff off the right of way, neither the defendant nor Ellis would be liable. Rule 1. *Williams v. R. R., supra.* It is suggested that the application of the principles we have approved in this decision abrogates the law of the independent contractor. The same suggestion was made to the Court in *Bridge Co. v. Steinbrock, supra.* That Court fully met the suggestion by saying: "It still leaves abundant room for its application." We do not think the views of the law which we have expressed in this opinion were properly submitted to the jury for their guidance, and we, therefore, direct a new trial to be had.

New trial.

Cited: Beal v. Fiber Co., 154 N. C., 151; *Twiddy v. Lumber Co., ibid.,* 240; *Denny v. Burlington,* 155 N. C., 37; *Johnson v. R. R.,* 157 N. C., 383; *Arthur v. Henry, ibid.,* 402; *Harmon v. Contracting Co.,* 159 N. C., 27; *Dunlap v. R. R.,* 167 N. C., 670; *Strickland v. Lumber Co.,* 171 N. C., 755.

W. H. WILLIAMS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 November, 1910.)

1. Carriers of Passengers—Legislative Rates—Repealing Acts—Vested Rights.

In an action for damages arising from the alleged wrongful ejection of plaintiff from defendant's train, for his refusal to pay a greater rate of carriage than that provided by the Acts of 1907, ch. 216, sec. 1, it appeared that the plaintiff tendered the rate provided by the act and instituted his action before the passage of ch. 144, sec. 6, Laws 1908: *Held,* the plaintiff had acquired a vested right under the former act in a cause of action growing out of the common law, though the rate of transportation was fixed by the statute.

2. Same—"Chose in Action"—Words and Phrases—Retroactive Acts—Constitutional Law.

The term "chose in action" though ordinarily considered as arising by contract, is much broader in its significance and includes the right to recover pecuniary damages for a wrong inflicted upon the person or

property, and a suit by one wrongfully ejected from a passenger train after tendering the fare prescribed by Laws 1907, who has brought suit before the passage of Laws 1908, has acquired a vested right which the latter act can not destroy.

(361) APPEAL from *Adams, J.*, at February Term, 1910, of GUILFORD.

Judgment on demurrer to the complaint. The plaintiff alleged that on 3 August, 1907, he was a passenger on one of defendant's trains, running from Warsaw, N. C., to Goldsboro, N. C., traveling from the former to the latter station; that he tendered the conductor the fare in cash for his transportation, to wit, 68 cents, the distance between 29 miles and the legal rate per mile being 2¼ cents; that the conductor declined to receive this, demanded 85 cents, being the fare at the rate of 3 cents per mile, and upon plaintiff's refusal to pay the fare demanded, wrongfully ejected him from the train, to his damage. The defendant demurred upon the following grounds:

1st. Because it appears upon the face of the complaint that the plaintiff did not tender to the defendant the legal rate or charge fixed for passenger fares between the points alleged in the complaint.

2nd. Because it further appears upon the face of the complaint that it does not state a cause of action in this, that the cause of action, as set out in the complaint, is contrary to the statute laws of North Carolina (see section 6, ch. 144, Laws extra session 1908), and that under said statute the plaintiff can not maintain this suit against the defendant corporation.

The defendant, the Atlantic Coast Line Railroad Company, demurs to the second cause of action alleged in said complaint for the
(362) reason that it appears upon the face thereof that the plaintiff does not state a cause of action against the defendant, in that it appears upon said complaint that the plaintiff failed to tender to the defendant the proper rate of passenger fare between the two stations alleged in the complaint, and was lawfully and properly ejected from the train for failure to tender same, and that he lost his right, as a passenger upon said train, and also lost his right to return to the same after he had been properly ejected.

This action was begun on 24 September, 1907. His Honor overruled the demurrer and defendant appealed to this Court.

Stedman & Cooke for plaintiff.
Wilson & Ferguson and Rose & Rose for defendant.

MANNING, J. The General Assembly of this State, at its session in 1907, by section 1, ch. 216, provided that no railroad company doing business as a common carrier of passengers in the State of North Caro-

lina should charge, demand or receive for transporting any passenger and his or her baggage, not exceeding in weight two hundred pounds, a rate in excess of two and one-quarter cents per mile. This act applied exclusively to intrastate travel, and excepted certain classes of roads which are not pertinent to the present case. The defendant's counsel in their brief admit that, according to the rate prescribed by that act and for the distance plaintiff desired to travel, the proper fare was 65 cents; so the tender by plaintiff, by this admission, was slightly in excess of the exact amount. The defendant insists, however, that the act of 1907, referred to, was repealed by the General Assembly at the Special Session 1908, ch. 144, and that it was enacted by section 6 of the repealing act as follows: "That no railroad company or agent, servant or employee of any railroad company shall be held liable to any person or found guilty of any offense in any action, civil or criminal, whether heretofore or hereafter instituted or begun, by reason of anything done or attempted to be done in violation of said act mentioned in the preceding sections hereof, or of any provision thereof." It is urged by the defendant that this section 6 is a bar upon the plaintiff to maintain this action and is a grant of amnesty to the defendant for the private wrong done plaintiff, to recover damages for which he had (363) brought this action on 25 September, 1907, several months before the repealing act became effective, to wit, 1 April, 1908. We do not think this contention can be sustained. The wrong done plaintiff was the wrongful expulsion of him from defendant's train. Can the Legislature, by an act passed subsequently to the wrong done and subsequently to the institution of an action in the proper court to redress the wrong, destroy plaintiff's property in his cause of action? In *Duckworth v. Mull,* 143 N. C., 461, it was held by this Court that the word "property," as used in constitutions and public statutes, unless restrictive words are used, includes the value of the injury involved in the litigation. "A vested right of action is property in the same sense in which tangible things are property, and is equally protected against interference. Where it springs from contract, or from the principles of the common law, it is not competent for the Legislature to take it away." Cooley Constitutional Limitations, 517; Black Const. Law, 432. In *Dunlap v. R. R.,* 50 Mich., 470, the Court said: "There is no doubt a right in action, where it comes into existence under common law principles, and is not given by statute as a mere penalty or without equitable basis, is as much property as any tangible possession, and as much within the rules of constitutional protection." *R. R. v. Dunn,* 52 Ill., 260; *Cooney v. Lincoln,* 20 R. I., 183; *Cody v. Dempsey,* 83 N. Y. Supp., 899; *Seaman v. Clarke,* 69 N. Y. Supp., 1002; *Hein v. Davidson,* 96 N. Y., 175; *Collins v. R. R.,* 9 Heisk, 841; *Hubbard v. Brainard,* 35 Conn., 563. In

Wade on Retroactive Laws, section 172, the author says: "The right to recover for personal or other injuries resulting to one person by the torts of another, can not be tortured into rights arising in contract. These, however, are so sacred as to be considered worthy of protection. Thus, where an act of negligence produced a personal injury, for which the person suffering the same was entitled by the existing law to recover the full amount proved, it was held that a subsequent statute limiting the recovery to a less sum would not affect the rights of the injured party.

He had a vested right, not only to compensation for his injuries,
(364) but to the measure of damages fixed by the law as it existed when the cause of action accrued." *Kay v. R. R.,* 65 Pa. St., 269. The theory or principle upon which a vested cause of action sounding in damages is property, and prevented from "a taking" or destruction without due process of law, rests upon its classification as a *chose in action.* As is said by *Judge Sharswood,* in a note to a passage in 2 Black Com., 396, "there is a very large class of choses in action which arise *ex delicto.* My claim for compensation for any injury done to my person, reputation or property is as truly a chose in action, as where it is grounded on a breach of covenant or contract." In *Cincinnati v. Hafer,* 49 Ohio St., 60, the Court said: "While by a 'chose in action' is ordinarily understood a right of action for money arising under contract, the term is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a wrong inflicted either upon the person or property. It embraces demands arising out of a tort, as well as causes of action originating in the breach of a contract. . . . A thing in action, too, is to be regarded as a property right." 2 Kent, 351; *Stanton v. Tioga C. P.,* 19 Wend., 73.

There is a well-recognized and well-established distinction between cases where the cause of action is created by statute and cases where the cause of action rests upon or grows out of the principles of the common law. The former class of cases is considered by this Court in *Grocery Co. v. R. R.,* 136 N. C., 396, where it is said: "The principle governing the application of statutes creating a cause of action where none existed before have been settled in this State. Of course where the statute has been repealed, and there has been no assertion or attempted assertion of any right thereunder prior to such repeal, all right of action is necessarily destroyed. This is too well-settled to require any citation of authority and is universally recognized. Where the right has been asserted during the life of the statute, as for instance an action instituted to recover a penalty, the plaintiff acquires an inchoate right subject to

be defeated by express legislative action. *Dyer v. Ellington,* 126
(365) N. C., 941. Where the statute is simply repealed and no allusion is made to pending actions, the inchoate rights therein acquired

are not interfered with, but may be prosecuted to final recovery. Code, sec. 3764 (Revisal, 2830); *Wilmington v. Cronly,* 122 N. C., 388. Where suit is brought during the life of the statute and pending at its repeal, without having gone to judgment, the Legislature may, by express terms, take away the right of action. *Dyer v. Ellington, supra.* When the plaintiff has obtained a judgment for the penalty before the repeal of the statute, he has a vested right therein which can not be taken away by the Legislature. *Dunham v. Anders,* 128 N. C., 207; 83 Am. St. Rep., 668." In *Dyer v. Ellington, supra,* the power of the Legislature to destroy, by a repealing act, a penalty before it has become vested by a judgment, is placed upon the ground that it is a right created by statute—a favor conferred by legislative act which may be withdrawn by express provision before judgment recovered. The right resting in the plaintiff upon the alleged facts of the present case was not created by statute, though the rate of transportation was so fixed, nor was the wrong he seeks to redress, the creation of statute. Both are founded upon well-established principles of the common law, and we, therefore, hold upon the authorities cited and upon established principles that the section of the act of the Legislature of 1908 quoted above was ineffectual to destroy plaintiff's cause of action. We find no error in the order of his Honor overruling the defendant's demurrer.

Affirmed.

Cited: R. R. v. Oates, 164 N. C., 170.

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(366)

W. D. BOWEN v. JOHN L. ROPER LUMBER COMPANY.

(Filed 2 November, 1910.)

1. **Deeds and Conveyances—Description—Calls—Natural Objects—Rules of Interpretation.**

Among the rules established for the correct placing of land boundaries, and more directly pertinent to the facts of this case, are (*a*) that "none of the calls in the deed may be disregarded when they can be fulfilled by any reasonable way of running the lines, which will be deflected only when necessary to give effect to the intent of the parties as expressed in the instrument." (*b*) Natural objects called for in a patent or deed, sufficiently placed and identified, as a rule, control course and distance, and this last rule very generally obtains unless the facts and accompanying data clearly show that its application would lead to an erroneous conclusion.

2. **Same—"Islands."**

When a grant begins at A., a known and established point, and the course and calls of the same are admitted to a point F., "a pine on Beech

Island," and the last call of the grant is "N. 51, E. 1340 poles including the islands" to the beginning; and there are within the course several islands of firm land adjacent to an old shore line, which the parties evidently had in view; and in order to "include the islands" it was required to run the line N. 51, E. (54 by reason of the variation of the magnetic needle) 1060 poles and then 653 poles to A. the beginning: *Held*, this was the correct placing of the last call of the grant, though the closing line is thereby increased a distance of 375 poles. This interpretation follows the course of the grant for the first and greatest portion of the distance and includes the islands, and thus is more in accord with the two principles stated, that (1) of recognizing more of the calls of the grant; (2) taking proper regard for the natural objects, in this case, the islands.

APPEAL from *Ferguson, J.*, at January Term, 1910, of WASHINGTON.

Trespass q. c. f. It was admitted or established that the land claimed by plaintiff was embraced within a grant to Jos. Dwight, dated March, 1758, and that the eastern boundary of plaintiff's land was coterminous with the eastern boundaries of this grant. The boundary of the Jos. Dwight grant was as follows: "Beginning at a pine in the mouth of the Middle Branch; thence W. 60 poles to a white oak; thence
(367) south 45 W. 700 poles to Colo. Robt. West's corner tree; thence E. 40 poles on the said West's line south 45 W. on the said line 640 poles to the said West's corner tree; thence S. 45 E. 60 poles to a pine in the Beech Island; thence north 51 E. including the islands 1340 poles to the first station, dated 3 March, 1758." The plot, so far as required to elucidate and explain the controversy and the discussion thereon, appears on the following page.

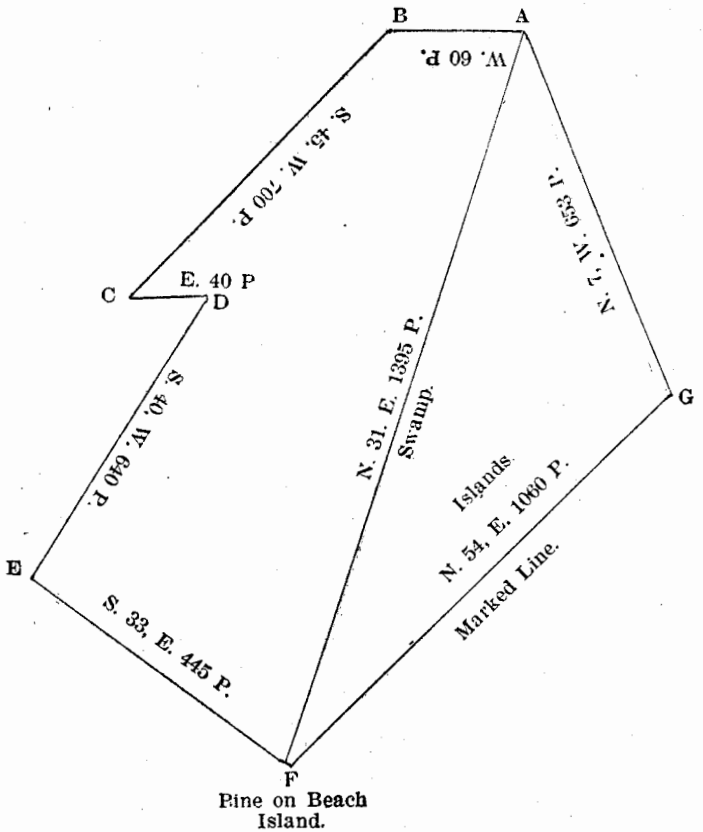
The cutting of the timber, by defendant, within the boundaries F G A was admitted, and it was submitted for decision, that if the
(368) eastern boundary, or closing line, of the Jos. Dwight grant, was the line F A, the cutting of the timber was not wrongful, but if the boundary was correctly shown by the line F G A, then the defendant had wrongfully trespassed on plaintiff and he was entitled to recover. The court being of opinion with the defendant, plaintiff excepted, submitted to a judgment of nonsuit and appealed.

W. B. Rodman and Ward & Grimes for plaintiff.

W. M. Bond, Sr., and A. O. Gaylord for defendant.

HOKE, J., after stating the case: The beginning corner of the Jos. Dwight grant, to wit, a pine tree at the mouth of "Middle Branch" (marked A on the plat), and the subsequent lines and corners were admitted or clearly established to the fifth call, "a pine on Beech Island," indicated on the map at F, and the question at issue depends, as stated, on the correct location of the closing call of the grant, "thence N. 51 E., including the islands, 1340 poles to the first station."

It was recognized, at an early period, with us, that of necessity certain modifications were required in the principles of land boundary and the evidence usually received to establish it, a necessity born chiefly of the rugged and unsettled conditions of the country and the methods frequently pursued in making the original surveys. In the notable case in our reports of *Cherry v. Slade,* 7 N. C., 82, *Taylor, C. J.,* delivering the principal opinion, refers to these conditions and the decisions of the



courts applicable to them as follows: "The decisions which have taken place in this State on questions of boundary have grown out of the peculiar situation and circumstances of the country, and have, beyond the memory of any person now alive, been moulded to meet the exigencies of men and the demands of justice, where the mode of appropriating an almost uninhabitable forest, had involved land titles in extreme confusion and uncertainty. In many cases surveys were not otherwise made

than upon paper; and in many others, when an actual survey was made, the purchasers from the lords proprietors were in danger of losing their land by an inaccurate description of them, the omission of whole lines, and the mistake of courses." The learned judge then proceeded (369) to lay down certain rules on questions of boundary and refers to them as long established and approved by the courts as best promotive of right and "effectual for the just determination of almost every case that has arisen." They are as follows:

"That whenever a natural boundary is called for in a patent or deed the line is to terminate at it, however wide of the course called for it may be, or however short or beyond the distance specified.

"2. Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed.

"3. When the lines or courses of an adjoining tract are called for in a deed or patent, the lines shall be extended to them, without regard to distance, provided those lines and courses be sufficiently established, and no other departure be permitted from the words of the patent or deed than such as necessity enforces or a true construction renders necessary.

"4. Where there are no natural boundaries called for, no marked trees or corners to be found, nor the places where they once stood ascertained and identified by evidence, or where no lines or courses of an adjacent tract are called for; in all such cases, we are of necessity confined to the courses and distances described in the patent or deed: for however fallacious such guides may be, there are none other left for the location."

These rules have been recognized as sound and applied by the Court in many cases on this subject and particularly the first as more directly relevant to the questions presented on this appeal in *Mitchell v. Welborn,* 149 N. C., 347; *Whitaker v. Cover,* 140 N. C., 280; *Redmond v. Stepp,* 100 N. C., 217; *Dickson v. Wilson,* 82 N. C., 487. A rule that is never departed from unless accompanying data and relevant facts make it perfectly clear that its application would lead to an erroneous conclusion, as in the recent case of *Lumber Company v. Hutton,* 152 N. C., 537.

Another principle, recognized as applicable to these questions of (370) boundary, is "that in determining the boundary of land none of the calls must be disregarded when they can be fulfilled by any reasonable way of running the lines which will be deflected only when necessary to give effect to the intent of the parties as expressed in the instrument." *Miller v. Bryan,* 86 N. C., 167.

In our opinion a correct application of the principles stated requires a reversal of his Honor's judgment in the present case, to wit, that the closing line should be run N. 31 E. 1395 poles to the beginning corner at

A, from F to A. If this last call contained only the words "N. 51 E. 1340 poles to the first station," the conclusion reached by his Honor would be clearly correct. The beginning corner at A, being a natural object, or being a point fixed and established, would control the course called for in the grant N. 51 E. and the line F A would therefore be the true line. But the call contains in addition a most important provision N. 51 E. *"including the islands."* It appears that this tract Long Acre, embraced within the boundary of the Jos. Dwight grant was composed of a long narrow strip of firm land evidently an old shore line and just east of it was an extensive swamp containing a lot of timber and the usual swamp growth and also several islands of firm land adjacent to this old shore line and by running the last call according to the course stated in the grant, N. 51 E., marked 54 on the plat, a change required by the variation of the magnetic needle, to G and thence to the beginning would include the islands and close the survey to the beginning as required by the grant. This method of location extends the length of the closing call about 375 poles, but it runs the course called for in the grant, and it includes the islands adjacent to the shore, evidently a purpose that the parties had in view, and this, we think, comes nearer the requirement, that all the calls of the grant must be recognized where it can be reasonably done, and is in accord with the position "that a natural object when called for (here the islands) will control course or distance." This conclusion also finds support from the fact in evidence that the surveyor found an old marked line from F to G. The case before us comes more directly within the decisions of *Clarke v. Wagner,* 76 N. C., 463; and *Long v. Long,* 73 N. C., 370. In *Clarke v.* (371) *Wagner* is was held: "Although natural boundaries control course and distance and require a straight line from one corner to another, yet where the grant has such other description by natural boundaries (as the boundary of an island) as to require a departure from a straight line, the latter will control." In *Long v. Long* it was held: "Where in a deed the land conveyed is described as follows: Beginning on the fifth corner of the last mentioned 300-acre survey, running thence a direct line to the Ramsey Ford, so, however, as to include the cleared part of *Shingle Island"*; the fifth corner, Ramsey Ford and Shingle Island are established points, and a direct line from the fifth corner to Ramsey Ford will not touch Shingle Island. *Held,* that a direct line from the fifth corner to Shingle Island, so as to include the cleared part thereof and thence to the ford, was the proper boundary of said land, and *Settle, J.,* delivering the opinion, said: "We think our decisions establish beyond doubt, that we shall go from the fifth corner in a direct line to Shingle Island, so as to include all the cleared part thereof, and thence to the ford. This construction comes nearer giving force to

all parts of the description than any other that can be adopted, and is in consonance with the general principles of our decisions. *Cherry v. Slade,* 7 N. C., 82; *Shultz v. Young,* 25 N. C., 385." These cases are, we think, decisive. For the error indicated the judgment of nonsuit is reversed and the cause will be proceeded with in accordance with law.

Reversed.

Cited: Waters v. Lumber Co., 154 N. C., 235; *Garrison v. Williams,* 159 N. C., 428; *Lumber Co. v. Hutton, ibid.,* 452; *S. c.,* 162 N. C., 517; *Fowler v. Coble, ibid.,* 502; *Lumber Co. v. Lumber Co.,* 169 N. C., 100; *Power Co. v. Savage,* 170 N. C., 629.

W. C. JONES AND ED. STEELE ET AL. v. CITY OF HIGH POINT.

(Filed 2 November, 1910.)

1. **Objections and Exceptions—Evidence—Admissibility—Appeal and Error—Procedure.**

Exceptions to the admissibility of evidence must be taken in apt time during the trial, and when the record discloses they were taken for the first time in grouping the exceptions on appeal under Rule 19 (2) they will not be considered.

2. **Appeal and Error—Verdict—Set Aside—Evidence—Procedure.**

For the Supreme Court to consider an exception to refusal of the trial court to set a verdict aside for the lack of evidence to support it, the record must show that a motion in the lower court to that effect had been made and refused, before the case was submitted to the jury.

(372) APPEAL by defendant from *W. J. Adams, J.,* at June Term, 1910, of GUILFORD.

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

King & Kimball for plaintiff.
W. P. Ragan and G. S. Bradshaw for defendant.

CLARK, C. J. The exceptions are properly grouped at the end of the case on appeal as required by rule 19 (2). The first two exceptions are for refusal to exclude certain evidence from the jury. But the case on appeal, as settled by the judge, does not show that any exception was taken to the admission of such evidence, nor that any motion was afterwards made to withdraw the evidence from the jury, nor that such motion was refused. Exceptions to the evidence must be taken during

the trial, in apt time. If not so taken, setting them out, as assignments of error, can not avail anything. *Lowe v. Elliott,* 107 N. C., 720; *Patterson v. Mills,* 121 N. C., 268; *Wilson v. Lumber Co.,* 131 N. C., 163.

The fourth exception was that the court permitted the jury to consider the above evidence, but as there was no exception to its admission, nor motion to withdraw it from the jury or any prayer for instruction in regard to it, and it not being evidence that was made incompetent by statute, the defendant can not raise this exception for the first time in his assignments of error. He seems to have been perfectly content with it, until after verdict.

The third exception is for "the refusal of the court to set aside the verdict because that it is not supported by the evidence." It does not appear that any motion to that effect was made and refused. Besides, an allegation that a verdict is against the weight of evidence is a matter not reviewable on appeal. *Edwards v. Phifer,* 120 N. C., 406, and cases cited. And an exception that there was no evidence (373) can not be considered unless a motion to that effect is made before the case is submitted to the jury. This has been held by a long line of decisions. *S. v. Wilson,* 121 N. C., 657; *S. v. Harris,* 120 N. C., 577, and numerous cases there cited. *S. v. Furr,* 121 N. C., 608; *Printing Co. v. Herbert,* 137 N. C., 319; *S. v. Holder,* 133 N. C., 712.

There being no errors upon the face of the record proper, the judgment is

Affirmed.

Cited: *Pearson v. Clay Co.,* 162 N. C., 226.

THE LEXINGTON MIRROR COMPANY v. THE PHILADELPHIA CASUALTY COMPANY.

(Filed 10 November, 1910.)

1. **Reference—Findings—Evidence.**
   If affirmed by the judge, the referee's findings are conclusive when there is any evidence tending to support them.

2. **Reference—Jury Trial—Objections and Exceptions—Waiver.**
   A mere exception to an order of reference is not sufficient to entitle the party excepting to a trial by jury upon an adverse finding of fact by the referee, and this right is waived by his not demanding the jury trial in his exceptions to the report.

APPEAL by defendant from *W. J. Adams, J.,* at August Term, 1910, of DAVIDSON.

E. E. Raper and McCrary & McCrary for plaintiff.
Walser & Walser and Max L. Arnstein for defendant.

PER CURIAM. This is an action upon a policy of credit indemnity insurance, by which defendant agreed to indemnify plaintiff against losses on sales to its customers from 25 February, 1908, to 3 August, 1909, and on accounts against solvent customers on its books, 25 February, 1908, for goods shipped since 3 April, 1907. Plaintiff seeks to recover $3,690.04 for losses on two accounts, which it claims are covered by the indemnity clause of the policy. The case was referred and the defendant excepted and demanded a jury trial.

(374) The referee reported in favor of the plaintiff except as to an account for $548.85, which he found was "outstanding on the books" 25 February, 1908, and was for goods shipped since 3 April, 1907, but was not solvent on 25 February, 1908. Plaintiff excepted to this finding and the court, upon what we deem to be competent and sufficient evidence, sustained the exception and modified the report accordingly.

The referee's findings of fact, when there is any evidence tending to support them, if affirmed by the judge, are conclusive on appeal. *Frey v. Lumber Co.,* 144 N. C., 759; *Henderson v. McLain,* 146 N. C., 329. We cannot, therefore, sustain the exceptions taken to such findings.

The defendant waived its right to a trial by jury by not demanding it when it filed exceptions to the report of the referee. It did not comply at all with the rule established by this Court in such cases. *Harris v. Shafer,* 92 N. C., 30; *Yelverton v. Coley,* 101 N. C., 248; *Driller Co. v. Worth,* 117 N. C., 515; *Wilson v. Featherstone,* 120 N. C., 446; *Roughton v. Sawyer,* 144 N. C., 766; *Ogden v. Land Co.,* 146 N. C., 443. There was a clear abdication of the right in this case, as the record shows. A mere exception to the order of reference is not sufficient, as we have often decided.

We have carefully examined the other exceptions and failed to discover any reversible error in the rulings of the court.

No error.

Cited: Jeffords v. Waterworks Co., 157 N. C., 13; *Drainage District v. Parks,* 170 N. C., 440.

LENA HALL ISLEY v. D. E. SELLARS, ADMINISTRATOR.

(Filed 10 November, 1910.)

1. **Tenants in Common—Husband and Wife—Deeds and Conveyances—Interpretation—Intent.**

When lands are granted to husband and wife, and it appears from the words of the grant that the intention was to create a joint tenancy, or a tenancy in common, they will take and hold as joint tenants or tenants in common and not as tenants of the entirety.

2. **Same—"Entirety."**

When one of two tenants in common makes a conveyance of his interest to the wife of the other, the husband and wife thereafter hold as tenants in common and not alone by entireties.

3. **Same—Mortgages.**

A husband and wife being tenants in common in land of an undivided moiety, sold a part thereof, and to secure the balance of the purchase money took a note payable to themselves secured by a mortgage on the lands: *Held*, (1) Being tenants in common of the land when it was sold, they became severally and equally interested in the purchase money; (2) the mortgage only made them the trustees of the legal title to secure the debt, because they were the owners of the note secured by it; (3) the notes being payable to them both entitled each to one-half of the amount; (4) the mortgagor having paid the note, without foreclosure, the result is the same as if no mortgage had been executed, and as the wife was entitled to one-half of the purchase money her interest was not lost by drawing the notes payable to both; (5) the husband having received more of the purchase price than his one-half interest, and died, the wife is entitled to the remainder thereof in the hands of his administrator.

4. **Tenants in Common—Husband and Wife—Entireties—Survivorship.**

In this case the husband and wife sold the lands, the wife survived the husband and sues his administrator for a balance of the purchase price paid into his hands: *Held*, if the doctrine of estates by entireties has any application to the facts, the wife is entitled to the fund by virtue of the right of survivorship, existing between husband and wife in such instances.

APPEAL by defendant from *Lyon, J.*, at September Term, (375) 1910, of ALAMANCE.

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

W. H. Carroll for plaintiff.
No counsel for defendant.

WALKER, J. This is a controversy between the plaintiff and the defendant, administrator of her deceased husband, as to their respective rights in a certain fund of twenty-five hundred dollars, which is a part

of the proceeds of the sale of land. It appears that A. A. Isley and W. C. Isley were seized, as tenants in common, share and share
(376) alike, of a tract of land, and A. A. Isley conveyed his interest, "the same being one moiety," to the plaintiff during the lifetime of her husband, W. C. Isley. Afterwards W. C. Isley and his wife sold and conveyed a part of the land to the North Carolina Trust Company. The purchaser paid a part of the purchase money and executed a mortgage on the land with a power of sale to the vendors to secure the balance. All of the purchase money, except $2,500, was paid to the husband, W. C. Isley, amounting to $7,450, and since his death the defendant, his administrator, has collected the note for $2,500, which is all that is due from the trust company. The notes were payable to "W. C. Isley and Lena H. Isley, his wife." The court held and adjudged that the plaintiff is entitled to the entire fund in the custody of the administrator, and the defendant appealed. W. C. Isley and his wife acquired their interest in the land by separate deeds, which conveyed to each of them, not an estate of the entirety nor a joint estate, but a moiety or one-half undivided interest in the same. It is said in *Fulper v. Fulper,* 54 N. J. Eq., 431, that whether a husband and wife take as tenants in common or as tenants of the entirety is to be gathered from the instrument which passes the estate to them, and when the intention appears therefrom that they should take an estate in common, it must prevail, and "such has been the rule from an early period in the history of the English law." This ruling is sustained by the clear weight of authority. 21 Cyc., 1198; *Miner v. Brown,* 133 N. Y., 308; *Hunt v. Blackburn,* 128 N. S., 464; *Hiles v. Fisher,* 144 N. Y., 306; Hopkins on Real Property, 337; 15 A. & E. Enc. (2 Ed.), 846-847. This Court has adopted this view. *Stalcup v. Stalcup,* 137 N. C., 305, in which we said: "It has been held (in many cases) that in consequence of the theoretic unity of husband and wife, lands granted to husband and wife jointly during coverture can not be held by them as tenants in common or as joint tenants, notwithstanding the terms of the grant. The prevailing doctrine in modern times, however, is that when lands are granted to husband and wife, and it appears from words of the grant that the intention was to create a joint tenancy, or a tenancy in
(377) common, they will take and hold as joint tenants or tenants in common, and not as tenants of the entirety." *Judge Sharswood,* in his exhaustive notes to 2 Black. at marg. p. 182, says: "Where an estate is conveyed to a man and woman who are not married, together, and who afterwards intermarry, as they took originally by moities, they will continue to hold by moities after the marriage. There is nothing, therefore, in the relation of husband and wife which prevents them from being tenants in common. There are great opinions in favor of

the position that husband and wife may by express words be made tenants in common by a gift to them during coverture," citing 1 Prest. on Estates, 132; 2 Preston on Abstracts, 41; 4 Kent, 363; 1 Reed's Blackstone, 470. The same principle is stated and supported by numerous authorities in 15 Cyc., 846, note 4. At the same page and note 5, the very facts we have in this case are stated and the law declared to be that "when joint tenant or tenant in common makes a conveyance of his interest to the wife of the other, the husband and wife hold thereafter as joint tenants or tenants in common," and not by the entireties. It must be noted that in our case there was no conveyance of a joint estate to W. C. Isley and his wife, but of a distinct moiety to each. They held the land, therefore, as tenants in common, and when it was sold they became severally and equally interested in the purchase money. The mortgage, it is true, was made to them, but only as trustees of the legal title to secure the debt and because they were the owners of the notes secured by it. Besides the notes were payable to both of them and this entitled each to one-half of the amount thereof. If the fund belonged to the husband, he could give his wife one-half of it, if the rights of third parties against him are not involved, and to effectuate such a purpose, he might direct the notes to be made payable to himself and his wife. But as she was entitled to one-half of the purchase money, her interest was certainly not lost by drawing the notes in that way. The mortgage really has nothing to do with the decision of the question now presented, even if under it W. C. Isley and wife acquired an estate in the entirety. The money was not collected by a sale of the land, but directly from the mortgagor, who paid in cash. He has simply paid the notes, given for the purchase money and secured by the mortgage, in money, and the result is the (378) same as if no mortgage had ever been executed.

But if the doctrine as to an estate by entireties has any application to the facts of the case, the wife, who is the plaintiff, survived her husband and for that reason would be entitled to the fund. *Motley v. Whitmore,* 19 N. C., 537; *Long v. Barnes,* 87 N. C., 329; *Bruce v. Nicholson,* 109 N. C., 204; *Ray v. Long,* 132 N. C., 891.

In any view we can take of the facts, we think the judgment was correct, the husband having received more than his share.

Affirmed.

Cited: Highsmith v. Page, 158 N. C., 229.

STONE COMPANY v. McLAMB & COMPANY, A. D. RICH ET AL.

(Filed 10 November, 1910.)

1. **Partnership—Feme Covert—Husband and Wife—Managing Agent—Free-trader—Liability.**

A married woman being a member of a firm, with another, under the name and style of M. & Co., her husband acting as general manager and agent, without posting a sign displaying her Christian name or stating the fact that she was a married woman, subjects all the firm's property to the payment of the firm's debts, whether the person dealing with the firm was aware of her being a *feme covert* or not; for she "shall for all purposes be deemed and treated as to all debts contracted by the firm as a free-trader," etc. Revisal, sec. 2118.

2. **Partnership—Managing Agent—Mortgages—Partnership Acts — Feme Covert—Execution—Liability.**

One partner may execute a valid mortgage on the partnership property to secure a partnership debt; and when the general manager of a firm composed of a *feme covert* and another executes such mortgage and has it registered, and its execution and registration are admitted by the other partner as a partnership mortgage, it will be binding upon the partnership property, whether its execution on the part of the *feme covert* was formally and correctly proven or not.

3. **Mortgages—Judgment Creditors—Junior Liens—Receivership—Equity.**

The mortgagee of partnership assets had them delivered to him by the mortgagor firm for the purpose of foreclosure, but at the sale a deputy sheriff announced that the plaintiff, a judgment creditor, had a lien thereon and that the sale should not be made. The assets were worth about $2,000, the mortgage note amounted to $1,585, and the property brought $1,450. No sale was made and the mortgagee put a new lock on the door, and by locking it retained the possession of the goods. The mortgagor, without his knowledge, broke into the store and sold and continued to sell the goods until restrained by plaintiff's action and injunction: *Held*, it was error in the lower court at the suit of one holding a junior judgment to appoint a receiver of the partnership, and seize the property, deprive the mortgagee of his right of foreclosure given him by his contract and entail upon the fund the cost of litigation, threatening to some extent the sufficiency of the security, in the absence of any allegation or suggestion of insolvency or mismanagement, or bad faith on the part of the mortgagee or any other recognized ground of equitable interference.

4. **Same—Mortgagor—Wrongful Seizure.**

In this case the rights of the mortgagee are not affected by the facts that the mortgagor tortiously broke into the store and resumed possession of the property and proceeded to sell it, such fact not being known by or assented to by the mortgagee; and the act of the mortgagor being tortious, will not be allowed to avoid or injuriously affect the legal rights of the parties.

APPEAL from *Whedbee, J.*, at August Term, 1910, of SAMPSON, (379) from judgment on motion to make permanent a preliminary order appointing a receiver of the property of McLamb & Co. On the admissions and facts in evidence his Honor entered judgment confirming the appointment of receiver and making provision for realizing on the assets of the firm, proof of claims, etc.

The defendant A. D. Rich, a creditor and claimant under a mortgage, excepted and appealed.

H. A. Grady for plaintiff.
Faison & Wright for defendant, appellant.

HOKE, J. It appeared that McLamb & Co. was a partnership, doing a mercantile business, composed of Walter McLamb and M. M. Vann, a *feme covert* the business being conducted by C. T. Vann, (380) husband of M. M. Vann, as agent and general manager, and that no sign was posted containing a notice that M. M. Vann was a married woman or disclosing her Christian name as required by the statute; that plaintiff company had sold the defendant firm goods, and on 23 July, 1910, had recovered judgment against it for the amount, to wit, $134.98, from which M. M. Vann had prayed an appeal; that on 27 July this appeal was withdrawn, and the firm, through C. T. Vann, as agent and general manager, in the firm's name, executed a mortgage on the stock of goods to secure the amount of the judgment; that defendant, appellant, A. D. Rich, was a creditor of defendant firm to the amount of $1,585.06 with some interest, evidenced by notes falling due at different times, one for $650 due 1 June, 1910, one due in August, 1910, and the third due in October, 1910, the consideration being for money advanced and goods supplied to enable defendant firm to commence business, and to secure said indebtedness said Rich held a prior mortgage on the entire stock of goods, notes, accounts and other assets of defendant firm, containing the provision that if default be made in the payment of said notes or either of them, the said A. D. Rich is authorized to take possession of the property, and after due advertisement sell the same, etc.

The mortgage purports to be executed by McLamb & Co. and its proper execution, probate and registration are admitted on the part of Chas. McLamb, but is alleged to be void as to M. M. Vann, the *feme covert,* partly on the ground that she is *feme covert* and on the further ground that as to her, there is a defective probate, in that professing to be signed by her it was as a matter of fact both signed and acknowledged for her by her husband, C. T. Vann, general manager. It was further shown that default having been made in the payment of the first note, D. A. Rich was proceeding to foreclose his mortgage and had adver-

tised a sale to take place on 25 July, 1910, and the mortgagors turned over possession of the property embraced in the mortgage to Isaac Wright, Esq., as attorney and agent of the mortgagee, who offered the goods for sale on the premises and was compelled to bid them in for the mortgagee at the price of $1,450, and recognizing this as no
(381) valid foreclosure, said I. C. Wright locked up the goods, taking the keys and holding possession of same for the mortgagee. That after Wright left, having failed to make a valid sale, owing in part no doubt to the fact that a deputy sheriff of the county holding an execution on plaintiff's judgment, announced that no valid sale of the goods should be made, the mortgagors broke into the store and resumed possession of the goods, and on 27 July, 1910, executed a second mortgage on the stock in adjustment of plaintiff's debt, payable in 60 days, which was duly registered, and thereupon plaintiff on 28 July instituted the present action to seize the goods and have same sold and proceeds distributed by a receiver under the order of the court.

The facts with reference to the chattel mortgage and of the resumption of possession by the mortgagor and the attendant circumstances are set forth by the judge in his findings as follows: "That prior to the institution of this action, and after the rendition of said justice's judgment, McLamb & Co., through their agent and general manager, C. T. Vann, executed to the plaintiff a chattel mortgage upon their entire stock of goods, etc., to secure the payment of the amount due, to wit, $136.85." Said chattel mortgage is made a part of this finding of fact, "That on 25 July, 1910, the defendants, Mrs. M. M. Vann, C. T. Vann and Walter McLamb, voluntarily surrendered possession of the goods and all the property of the McLamb Company to I. C. Wright, attorney for A. D. Rich, for said Rich mortgagee, under his mortgage above set out, and that I. C. Wright has the keys of said store now. That after the possession of said goods and property was surrendered to I. C. Wright, attorney for A. D. Rich, the Stone Company had execution issued on its judgment, which was returned 'indulged by the plaintiff,' when the chattel mortgage, referred to in the fifth finding of fact, was executed, and C. T. Vann thereupon, through D. C. McPhail, demanded of I. C. Wright the keys to said store, which demand was refused by said Wright; and thereupon C. T. Vann broke into said store, put on a new lock, and began selling goods, which state of facts continued without the knowledge of I. C. Wright or A. D. Rich until the receiver took charge under the order of this Court; that the defendant, A. D. Rich,
(382) is undertaking to sell goods under his chattel mortgage."

There is no allegation or evidence tending to show that A. D. Rich is insolvent or that he will in any way fail to account for the goods or their value except as predicated on the claim that his mortgage

is a valid lien against the partnership property notwithstanding the coverture of Mrs. Vann and notwithstanding the alleged defect in the probate as to her interest.

Upon these the controlling facts relevant to the question presented, the Court is of opinion that the order for a receiver should have been set aside and the goods restored to the mortgagee, A. D. Rich. The *feme covert* having entered into the copartnership of McLamb & Co., the firm composed of herself and Walter McLamb, and the business being conducted by her husband, C. T. Vann, as general manager and agent, and no sign having been posted displaying her Christian name or stating the fact that she was *feme covert,* her case comes directly within the provisions of our statute, Revisal, 2118, and all the property embarked in the enterprise is subject to the debts of the firm and the *feme covert* herself "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 complied with the provisions of this subchapter," etc., and this whether a person dealing with the firm was aware of her being *feme covert* or not. *Scott v. Ferguson,* 152 N. C., 348.

This being the position of Mrs. Vann in reference to the property of the firm and its obligations, she is to the extent indicated liable on the claims both of plaintiff and defendant Rich, and the mortgage held by said defendant is a valid and binding lien on the property of the firm, whether its execution on the part of Mrs. Vann was formally and correctly proven or not. This mortgage on all "fixtures, goods, wares and merchandise and also all the notes, accounts," etc., of the firm, purports to be executed by McLamb & Co. and its proper execution and registration on the part of Walter McLamb, the other member of the firm, is admitted, and it is doctrine well recognized that one partner may in the name of the firm execute a valid mortgage on partnership property to secure a partnership debt. *Odom v. Clark,* 146 N. C., (383) 550; *Pipe Co. v. Woltman,* 114 N. C., 185; 30 Cyc., 496.

We have it then that defendant A. D. Rich held a valid mortgage, with power of sale on the assets of the firm, alleged in the complaint to be worth $2,000, and which brought at the sale only $1,450, to secure a debt of $1,585 dollars for cash advanced and goods furnished to enable the firm to commence business, and that the goods had been voluntarily surrendered to him by the mortgagors for the purpose of foreclosure. In such case, we are of opinion that the courts have no right to seize this property, deprive the mortgagee of his right of foreclosure given him by his contract and entail upon the fund the cost of litigation and a receivership, threatening to some extent the sufficiency of his security, in the absence of any allegation or suggestion of insolvency or mismanagement or bad faith on the part of the mortgagee or any other recognized

ground for equitable interference. Jones on Chattel Mortgages, secs. 439, 452, 699; High on Receivers, secs. 647, 679. In Jones, sec. 439, it is said: "The appointment of a receiver of mortgaged chattels, held by a mortgagee in possession, will only be made in case of pressing necessity in order to secure the rights of the mortgagor or those claiming under him; to make appointment in any other case is to impair the obligation of the contract between the parties to the mortgage and is, therefore, beyond the constitutional power of the Court. . . ."

The view we have taken of the case is not affected by the fact that the mortgagors had broken into the store and resumed possession of the property. This was done in their own wrong, without the assent or knowledge of the mortgagee or his agent. It was a tortious act and will not be allowed to avail or injuriously affect the legal rights of the parties when they are brought before the court for adjustment. 2 Freeman on Executions, sec. 269 A; *McParland v. Read,* 93 Mass., 231; *Deyo v. Jennison,* 92 Mass., 410. In this last case *Dewey, J.,* delivering the opinion, said: "These cases declare the principle that a valid and a lawful act can not be accomplished by any unlawful means and whenever such unlawful means are resorted to, the law will interfere (384) and restore the party injured thereby to his rights."

We think that the order for a receiver was improvidently granted and that the same must be set aside and the property included in the mortgage of defendant, appellant, shall be restored to him to be dealt with in accordance with law and the stipulations and requirements of the contract.

Reversed.

Cited: Stone v. Rich, 160 N. C., 163.

M. C. WATSON, ADMINISTRATRIX, v. THE WHITEVILLE LUMBER COMPANY.

(Filed 10 November, 1910.)

1. Negligence—Independent Contractor—Damages—Master and Servant—Respondeat Superior.

The defense of an independent contractor is not available when from the contract it appears that he was to cut and haul logs on the defendant's logging road to its main line where it received them; and that plaintiff's intestate was killed on the main line through the negligent running of the locomotive, under defendant's orders, for other purposes than those embraced in the contract. In such instances the contractor acts as the agent of the employer, and a charge by the court making defendant's liability depend upon whether the intestate was killed at a point covered by the contract can not prejudice it.

2. Instructions—Evidence—Harmless Error.

In an action for damages for the negligent killing of plaintiff's intestate the admission in evidence from a witness that the intestate was kind to his family was rendered harmless by the correct instruction of the court upon the question of the measure of damages.

3. Instructions—Jury—Incorrect Arguments—Harmless Error.

Under our statute, attorneys have the right to argue both the law and facts to the jury, and an argument made by plaintiff's counsel, in an action to recover damages for the wrongful killing of his intestate, that the jury could take into consideration the value of the intestate "to his family in his care and oversight," is not reversible error when it appears that the trial judge correctly instructed the jury upon the issue as to damages.

APPEAL from *Ferguson, J.,* at July Term, 1910, of COLUMBUS.

This action is to recover damages for the alleged negligent kill- (385) ing of D. J. Watson, the intestate of plaintiff, on the night of 17 April, 1909, by being run over by a logging train operated on the line of railway of the defendant company. The line of railway was 12 to 15 miles in length, one terminus being at defendant's mill at Vineland, and the other beyond where plaintiff's intestate was killed. It had been much used by the public as a walkway for about seven years. Plaintiff's intestate was a deaf mute, about 67 years of age, and was walking on the track when killed. The train that produced his death was running in the same direction as deceased was walking; it was running from 15 to 20 miles per hour; its engine had no headlight or other light upon it; the night was dark; no one on the train had any knowledge that plaintiff's intestate had been run over, though one witness, who was on it, stated that he felt the jolt without knowing what caused it; no signal of any kind was given indicating the approach, except the noise of its movement. The deceased was industrious, able-bodied, in good health and active for his age. He was a farmer, but did other work such as cutting crossties, etc. His Honor submitted the following issues:

1. Was the intestate of the plaintiff injured by the negligence of the defendant as alleged in the complaint?

2. Did the intestate of the plaintiff, by his own negligence, contribute to any injury he may have received?

3. Notwithstanding the negligence of the plaintiff's intestate, if the jury should find he was negligent, could the defendant by the exercise of ordinary care have avoided the injury?

4. What damage, if any, is the plaintiff entitled to recover?

The jury answered the first issue, "Yes," the second issue "No," and the third issue "Yes," and the fourth issue "Two thousand dollars." Judgment was accordingly rendered for the plaintiff, from which defendant appealed to this Court.

McLean & McLean and Donald MacRacken for plaintiff.
J. B. Schulken, D. J. Lewis, and Aycock & Winston for defendant.

(386) MANNING, J. A careful examination of the record, including the charge of his Honor to the jury, which is set out *in extenso,* convinces us that the case was fairly tried and no error was committed which entitles the defendant to a new trial. The two assignments of error most earnestly insisted upon relate first to the admission of certain evidence and the remarks of counsel on the question of damages embraced in the fourth issue; and second, the refusal to give a special instruction predicated upon the evidence that at the time of the negligent killing of deceased, the train was operated by the employees of R. S. Williams, an independent contractor. This instruction was as follows: "If the jury find from the evidence that plaintiff's intestate was killed by an engine and cars, and that said engine and cars were operated by employees of R. S. Williams, and that the said R. S. Williams had control and management of said engine and cars at the time of the injury complained of under the contract put in evidence, then he would be an independent contractor and the defendant company would not be responsible for the acts of his employees, and you should answer the first issue, No." The contract between Williams and the defendant was in writing and was offered in evidence. By its terms, Williams was to cut and haul logs to defendant's main line, where they were received by defendant, the defendant furnishing the engine and cars to Williams. The overwhelming weight of the evidence fixed the place of the accident on the main line of defendant; and it was uncontradicted that the employees of Williams, at the time of the accident, were operating the train, not in hauling logs, but in returning the engine under defendant's orders for examination to defendant's mill at Vineland. So, assuming (but it is not clear that the stipulation of the contract touching the right of the defendant to direct and control Williams, especially in view of certain statements made by Williams in his testimony his obedience to directions given him by defendant as to the performance of his work, create the relationship of employer and independent contractor) that the contract created the relation of independent contractor between Williams and the defendant, his Honor would have, in our opinion, upon the evidence, been justified in instructing the jury that the contract did not embrace the work Williams was engaged in at the time of the accident—he was then but acting as the agent
(387) or servant of the defendant. However, his Honor made the defendant's liability to depend upon whether the intestate was killed at a point covered by the contract between Williams and the defendant, and in so doing we do not think the defendant has any just cause of complaint.

In the course of the trial, the defendant, by its cross-examination of plaintiff's witnesses, attempted to show that the intestate had no earning capacity; was supported by his sons, and was unable to support himself; and it inquired into the number and ages of his children. After this latitude taken by the defendant, his Honor permitted the plaintiff thereafter to ask one witness who raised the intestate's children, and if he was kind and attentive to his family. The defendant concedes that his Honor correctly instructed the jury as to the measure of damages, and in concluding this part of his charge, he said: "You allow nothing for suffering, you do not attempt to punish the railroad, but you seek to give a fair, reasonable pecuniary worth of the deceased to his family under the rule which I have laid down. You should rid yourself of all prejudice, if you have any, and of sympathy. It is not a question of sympathy; it is just a plain, practical question, and you should give a reasonable and fair verdict upon all the issues." More than once, in his charge, his Honor, referring to the argument of counsel addressed to the jury, admonished them that they must find the facts from the evidence and be guided by the law as he gave it to them. Assuming, as we must, that the jury was composed of men of intelligence and character, we can not see how they could have been misled, under the charge of his Honor and his frequent admonitions to them of their duty, by the argument of counsel. The language of plaintiff's counsel, to which objection was made at the time, was that the jury could take into consideration the value of the deceased to his estate and "his value to his family in his care and oversight." His Honor, in addition to what we have quoted from his charge, specifically instructed the jury what they could consider in determining the damages sustained, to wit: the age of the deceased, his prospects in life, his habits, his character, his industry and skill, the means he had for making money, the business in which he was engaged. With these explicit in- (388) structions, we do not perceive how men of intelligence could have been misled by an argument of counsel based upon an erroneous view of the law. It must be conceded that as counsel have, under our statute, the right to argue both the law and the facts to the jury, that it is probable that some one of the counsel may submit an argument to the jury based upon a misapprehension of the law governing the case. His Honor corrects this in his charge, and we think he did so fully in this case. We do not think his Honor violated the rule laid down in *Hopkins v. Hopkins,* 132 N. C., 29; *R. R. v. Simmons,* 105 Va., 657; *R. R. v. Ray,* 102 U. S., 451.

No error.

SEABORN R. JONES v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 10 November, 1910.)

1. Insurance Policy—Fraud or Mistake.

The pleadings in this case, brought to reform a policy of life insurance for mistake and fraud, are sufficient. *Jones v. Ins. Co.*, 151 N. C., 54, and other like cases, cited and approved.

2. Same—Waiver—Instructions—Reversible Error.

In an action for the reformation of a life insurance policy for fraud and mistake, the plaintiff's evidence tended to show that the defendant's agent had made fraudulent misrepresentations inducing the contract, that plaintiff would be repaid his premiums and interest at maturity, and the defendant contended that its agent had explained to the plaintiff that the representations were untrue and not contained in the policy, and the latter continued thereafter for years to pay his premiums without objection. The explanation by defendant's agent was denied by plaintiff, who contended that reassuring statements were made several years prior to the time fixed by the defendant's said agent: *Held*, the defendant was entitled to the charge that if the plaintiff continued to pay the premiums with knowledge of the facts he thereby waived any benefit except as provided by the policy; and it was reversible error for the court to add, "Unless you further find from the evidence that the plaintiff was lulled into security or was led to believe" otherwise, there being no evidence thereof.

3. Insurance—Fraud and Mistake—Waiver—Issue, New Trial on One.

In an action to reform a life insurance policy for fraud or mistake, the sixth issue was upon the question of plaintiff's waiving his right to rely upon the alleged false representations, and in this issue alone error was found on appeal. It being apparent that the matter involved in this issue is entirely distinct and separate from the matters involved in the others, without danger of complication, a new trial is ordered on the sixth issue only.

(389) APPEAL from *W. J. Adams, J.*, at June Term, 1910, of GUILFORD.

This is an action to reform a policy issued by the defendant on 7 September, 1896, to the plaintiff, on the ground of mistake on the part of the plaintiff and fraud on the part of the defendant. The defendant, denying the alleged fraudulent representations, alleged that in September, 1898, the plaintiff surrendered the policy issued in 1896 and accepted a new policy from it; and further that more than a year before the policy issued in 1896 matured, it being a ten-year policy, to wit, in May, 1905, an agent of defendant fully explained to plaintiff the terms of that policy and told him that the representations made to him at the time the contract was entered into, and upon which he

relied, were not true; that the policy contained no such statement, and he would receive no such settlement, to wit, the payment of what he had paid in weekly premiums and 4 per cent interest thereon at maturity, as plaintiff claimed; and that thereafter plaintiff continued to pay weekly as theretofore until the maturity of his policy in September, 1906. The plaintiff denied that he had received any such information. Upon this evidence the defendant requested the following special instruction: "The court charges you that if you find from the evidence that about two years before maturity of policy sued on, the plaintiff was told that he would not, at its maturity, receive back premiums paid, with four per cent interest, and with that knowledge he continued to pay premiums, he thereby waived any benefit except as provided by the policy, and you will answer the sixth issue, Yes." His Honor gave this instruction, but added thereto the following: "Unless (390) you further find from the evidence that the defendant, through its agents, after such knowledge was acquired by the plaintiff, lulled the plaintiff into security or led the plaintiff to believe that he would receive premiums at maturity of the policy, together with interest thereon at the rate of four per cent." The defendant excepted to this addition to its prayer, upon the ground that there was no evidence to support it. There was no contention as to the amount paid by the plaintiff, the defendant admitting that plaintiff had fully performed the contract. His Honor submitted, without objection, the following issues to the jury:

1. Did the defendant, through its agents, represent to plaintiff that it could, and would, issue to said plaintiff an insurance policy on his life, with the provision therein stipulated that at the end of ten years from date thereof the plaintiff might withdraw the whole amount of premiums paid in, with 4 per cent interest thereon?

2. If so, was such representation false?

3. If so, was such representation relied upon by the plaintiff?

4. If so, was the plaintiff induced thereby to enter into said contract of insurance?

5. Did the plaintiff surrender said policy and accept from defendant another policy, as alleged in the answer?

6. Did the plaintiff waive his right to rely upon said false representations?

7. What amount is the plaintiff entitled to recover of the defendant?

The jury answered the issues as follows: The first, second, third and fourth issues, Yes; the fifth and sixth issues, No; the seventh issue, $130 with interest from maturity. Judgment was rendered thereupon for the plaintiff for $130, with interest at 4 per cent from 7 September, 1906, and the defendant appealed to this Court.

Spencer B. Adams and Scott & McLean for plaintiff.
King & Kimball and Thomas S. Beall for defendant.

(391) MANNING, J. This case does not differ, in the false representations alleged and proven to the satisfaction of the jury, from the facts alleged in *Caldwell v. Ins. Co.,* 140 N. C., 100; *Sykes v. Ins. Co.,* 148 N. C., 13; *Stroud v. Ins. Co.,* 148 N. C., 54; *Whitehurst v. Ins. Co.,* 149 N. C., 273; *Jones v. Ins. Co.,* 151 N. C., 54. The entire evidence taken at the trial is embraced in the record and we have carefully examined it. No exception was noted to the admission or rejection of evidence offered; and the exceptions to his Honor's charge are addressed exclusively to his charge upon the sixth issue. We can find no evidence in the record to support the modification and addition to the special instruction requested by the defendant. His Honor evidently followed the instruction given by the trial judge in *Caldwell v. Ins. Co., supra,* which was approved by this Court, but in that case we held there was evidence to support it; in this case, we can find none. The only evidence of reassuring statements coming from the plaintiff was that such statements were made by a superintendent or agent, and it is not material by which made but these reassuring statements were made several years prior to the time fixed by the defendant's witness, Stone. As to Stone's testimony, the plaintiff denied that any such conversation as detailed occurred, and the issue of veracity was thus distinctly presented. The defendant was justly entitled to have the instruction predicated upon Stone's testimony presented to the jury. The addition made to the prayer was obviously prejudicial to the defendant, unless there was evidence to support it, and constitutes reversible error under many decisions of this Court. *Stewart v. Carpet Co.,* 138 N. C., 60; *Burton v. Mfg. Co.,* 132 N. C., 17; *King v. Wells,* 94 N. C., 344; *Joines v. Johnson,* 133 N. C., 487; *Hassard-Short v. Hardison,* 117 N. C., 63; *Harrison v. Tel. Co.,* 136 N. C., 381; *Bryan v. R. R.,* 134 N. C., 538. The same principle underlying it, it has been uniformly held that it is not error for the trial judge to refuse an instruction not based upon evidence.

But we think this error entitles the defendant to have only the sixth issue, the finding upon which alone was affected by the error, submitted to another jury. No exception is taken to the charge of the court upon the other issues. If the jury should, at the next trial, answer the sixth issue Yes, then the defendant will be entitled to judgment (392) for costs; if it shall be answered No, the plaintiff will be entitled to judgment. In *Holmes v. Godwin,* 71 N. C., 306, approved in *Burton v. R. R.,* 84 N. C., 192, *Bynum, J.,* declares: "The power to award a partial new trial, or an inquiry of damages when

they have been erroneously assessed without disturbing the findings which dispose of the merits of the case, is both convenient and useful, however delicate and difficult may be its application in particular cases. It certainly should not be exercised except in a clear case." In *Benton v. Collins,* 125 N. C., 83, it is said that the practice of this Court to order new trials on particular or restricted issues is supported by numerous authorities and cover a long series of years. Many of them are cited in that case. But the Court said, which admonition is quoted in *Jarrett v. Trunk Co.,* 144 N. C., 299: "Before such new trials, however, are granted, it should clearly appear that the matter involved is entirely distinct and separate from the matters involved in the other issues, and that the new trial can be had without danger of complication with other matters." It is obvious to us that the matter involved in the sixth issue submitted by his Honor is entirely distinct and separate from the matters involved in the other issues, and there can be no danger of complications with other matters by limiting the new trial to that issue alone.

Partial new trial.

Cited: Briggs v. Ins. Co., 155 N. C., 75; *Gregg v. Wilmington, ibid.,* 30; *Hughes v. Ins. Co.,* 156 N. C., 593; *Worley v. Logging Co.,* 157 N. C., 498; *Groves v. Ins. Co., ibid.,* 564; *Burroughs v. Burroughs,* 160 N. C., 519; *Craig v. Stewart,* 163 N. C., 533.

VENUS A. BARRINGER v. JOHN T. BARRINGER.

(Filed 10 November, 1910.)

1. Divorce—Issues—Brutal Conduct—Evidence Sufficient.

In this action for divorce *a mensa* there was such evidence upon the issue of the barbarous treatment of the husband, of his murderous assaults on the *feme* plaintiff, and of his brutal conduct and habitual drunkenness, as to fully warrant the jury's affirmative finding of that issue.

2. Divorce—Issues—Drunkenness—Provocation—Harmless Error.

In this case an issue was submitted to the jury upon the question of whether the defendant's habitual drunkenness was "without provocation" on the part of the wife, the plaintiff, and though erroneous as to defendant's justification, was not prejudicial to him, and harmless in this case.

APPEAL from *Biggs, J.,* at May Term, 1910, of ROWAN. (393)

Action for divorce *a mensa*. These issues were submitted and answered by the jury:

1. Were plaintiff and defendant married to each other as alleged? Answer: Yes.

2. Has the plaintiff been a resident of this State for two years prior to the commencement of this action, and the filing of the complaint? Answer: Yes.

3. Did the defendant by cruel and barbarous treatment endanger the life of the plaintiff, without provocation on her part as alleged? Answer: Yes.

4. Had the defendant become an habitual drunkard, as alleged in the complaint, without provocation on plaintiff's part? Answer: Yes.

From the judgment rendered the defendant appealed.

A. H. Price, P. S. Carlton, and R. L. Wright for plaintiff.
Hatcher & Smoot and Jerome, Maness & Sikes for defendant.

PER CURIAM. The evidence set out in the record discloses most barbarous and inhuman treatment upon the part of the defendant husband. It includes evidence of murderous assaults, continued brutal conduct and long continued habitual drunkenness, fully warranting the findings of the jury.

The issue tendered by defendant, "Is the defendant an habitual drunkard?" is immaterial, as the finding upon the third issue is amply sufficient to uphold the judgment.

We think, however, his Honor submitted the fourth issue in proper form, except as to the last part, "without provocation on plaintiff's part," and that addition did not prejudice defendant. We are not aware that the wife's provocation ever justifies or excuses the husband in becoming an habitual drunkard.

We have examined the six assignments of error and find them to be without merit.

No error.

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(394)

PAUL LINDLEY v. FRIES MANUFACTURING AND POWER COMPANY.

(Filed 10 November, 1910.)

1. Appeal and Error—Negligence—Objections and Exceptions—Presumptions.

There being no motion to nonsuit and no prayer for instruction in this case upon the issue of negligence alleged, upon appeal it will be assumed that the issue was properly found by the jury.

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

In an action brought by the plaintiff against an electric company for damages alleged to have been caused through the latter's negligence by a collision with a street car and an automobile which the plaintiff was running at the time, the usual issues of negligence and contributory negligence were found for defendant, and a third issue was submitted and found for plaintiff as to whether the defendant's agent could have avoided the injury "notwithstanding plaintiff's contributory negligence": *Held*, upon the facts presented, the plaintiff failed in his duty to slow down his machine and look and listen before crossing the track in front of defendant's street car, the poles and wires of the company being visible some distance ahead of him; the evidence was insufficient as tending to show that the defendant's motorman could have foreseen and prevented the consequence of plaintiff's negligent act in attempting to rush across the track, and the third issue was erroneously submitted.

3. Negligence—Contributory Negligence—Last Clear Chance—Verdict—Judgment.

In an action for damages, the jury having found that the defendant was negligent, and that the plaintiff was guilty of contributory negligence, and a third issue as to whether the plaintiff could have avoided the injury having been erroneously submitted upon the evidence in this case: *Held*, the defendant is entitled to a judgment in its favor upon the verdict.

APPEAL from *Lyon, J.*, at August Term, 1910, of GUILFORD.

Action to recover damages for an injury alleged to have been received by plaintiff in a collision between his automobile and defendant's electric car in the town of Waughtown, N. C.

These issues were submitted to the jury:

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

2. Did the plaintiff contribute to his injury, as alleged in the answer? Answer: Yes. (395)

3. Notwithstanding the previous negligence of the plaintiff could the defendant, by the exercise of ordinary care, have prevented the injury? Answer: Yes.

4. What damage, if any, is the plaintiff entitled to recover? Answer: $800.

The defendant in due time objected to the submission of the third issue and at the proper time tendered a judgment upon the findings upon the second issue that it go without day and recover costs.

His Honor rendered judgment for plaintiff and defendant appealed.

John A. Barringer and W. P. Bynum for plaintiff.

Watson, Buxton & Watson, Manly & Hendren, A. L. Brooks, and King & Kimball for defendant.

PER CURIAM. Upon an examination of the record we find very little if any evidence of negligence upon the part of the defendant, but as

there was no motion to nonsuit and no prayer for instruction upon the first issue, we assume that issue to be properly found.

In order to avoid the force and effect of the finding upon the second issue, the plaintiff seeks to show under the third issue that after discovering plaintiff's peril the motorman of the defendant's car failed to exercise due care in endeavoring to avoid injury.

We have examined the record and the conclusion is forced upon us from all the evidence that the proximate cause of the injury was the reckless and unlawful driving of his automobile by plaintiff through the streets of Waughtown at a dangerous rate of speed when approaching the car line tracks.

The evidence of gross contributory negligence is overwhelming and is of such character that it bars recovery.

It was the plaintiff's duty to slow down his machine when approaching the tracks, and to have it under complete control and to look and listen for an approaching car. If he did not observe the poles and trolley wires immediately in front of him it was plaintiff's fault.
(396) All the evidence as well as the photograph exhibits show they were visible some distance ahead of him. It is manifest the collision was brought about by the unwarranted attempt upon part of plaintiff to rush across the track ahead of the approaching car. The evidence is not sufficient to show that the motorman by ordinary prudence under the circumstances could have either foreseen or prevented the consequences of plaintiff's recklessness. His injury was brought about by his own fault, and the consequence of his recklessness should be borne by him and not by defendant. Upon the evidence and pleadings there was error in submitting the third issue.

Upon the findings upon the first and second issues the defendant is entitled to the judgment moved for.

The cause is remanded with instructions to enter judgment accordingly.

Reversed.

Cited: Patterson v. Power Co., 160 N. C., 579.

C. M. GILBREATH v. CITY OF GREENSBORO.

(Filed 10 November, 1910.)

1. **Cities and Towns—Streets—Acceptance—Control—Evidence.**

The evidence in this case being plenary that a city, through its proper officials, had repaired and taken control of a certain street within its corporate limits, it was for the jury to say upon all the evidence whether the city had accepted and assumed control of the street.

2. **Cities and Towns—Negligence—Streets—Defects—Notice—Evidence.**

In this action for damages against a city for its alleged negligence in permitting a defect to remain in its streets, there was ample evidence that the street overseer had actual notice of the defect, and that the defendant had permitted the defect to remain a sufficient time to have put its proper authorities upon notice, and the verdict for plaintiff will not be disturbed.

APPEAL from *W. J. Allen, J.*, at April Term, 1910, of GUILFORD.

This action is to recover damages for personal injuries alleged to have been caused him by the negligence of the defendant in (397) failing to keep in proper repair Cumberland Street.

From a judgment for plaintiff the defendant appealed.

R. C. Strudwick, Stedman & Cooke, and W. P. Bynum for plaintiff.
Shaw & Hines for defendant.

PER CURIAM. The plaintiff was injured by his wagon running into a hole on Cumberland Street in the defendant city and throwing him off and running over his leg, which necessitated its amputation.

We are of opinion that the evidence was amply sufficient to establish the fact that the defendant's authorities had, several years prior to the injury, taken charge of and treated Cumberland Street as a public street of the city of Greensboro; that the overseer of streets, an official of said city, had by direction of the street committee and its successor, the street commission of said city, repaired and taken control of that street, and that for some years it had been used as a public street of the city.

Upon such evidence the law is well stated by the leading case of *Mayor v. Sheffield,* 71 U. S., 189, where it is said: "If the authorities of a city or town have treated a place as a public street, taking charge of it and regulating it as they do other streets, and an individual is injured in consequence of the negligent and careless manner in which this is done, the corporation can not, when it is sued for such injury, throw the party upon an inquiry into the regularity of the proceedings

by which the land became a street or into the authority by which the street was originally established."

Whether the city had assumed such control of the *locus in quo* as to make it responsible, was an inference of fact to be drawn from all the testimony by the jury. The evidence in support of their finding is plenary.

There is ample evidence tending to prove that the hole had remained there long enough to put the city authorities upon notice as well as evidence of actual notice to the street overseer.

We have examined the twenty-one assignments of error and (398) find them to be without merit.

In the trial of the cause his Honor seems to have proceeded upon well-settled principles.

No error.

Cited: Jeffress v. Greenville, 154 N. C., 493.

H. G. KIME v. SOUTHERN RAILWAY COMPANY.

(Filed 10 November, 1910.)

1. Nonsuit—Evidence—How Construed.

On a motion to nonsuit, the evidence of the plaintiff must be accepted as true, and considered in the light most favorable to him.

2. Carriers of Freight—Bill of Lading—Live Stock—Damages—Stipulation—Reasonable Notice.

The purpose of the stipulation in a live stock bill of lading requiring formal written notice to be given the carrier of his loss and intention to demand compensation before removing the stock from the carrier's premises does not relieve the carrier of its liability for negligence, but is simply to give such notice as will enable it to protect itself from fraudulent or unjust claims.

3. Same—Exceptions.

The failure to give the carrier the formal written notice of claim for damage to stock through its negligence, shipped under and required by its live stock bill of lading, does not bar a recovery when it appears that the conductor had knowledge thereof while in transit; that the absence of the agent from the station at destination prevented the required notice from being given him, and the stock was removed some two hundred yards from the depot and there examined and inspected by the carrier's inspector before they were intermingled with other live stock. *Jones v. R. R.*, 148 N. C., 580, cited and approved.

APPEAL from *W. J. Adams, J.*, at May Term, 1910, of ALAMANCE. The facts are sufficiently stated in the opinion of the Court.

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

CLARK, C. J. This was an action for damages to a carload of (399) horses while in transit from Richmond, Va., to Burlington, N. C., caused by the negligence of the defendant. The jury found that the horses had been injured by the negligence of the defendant, and assessed the damages at $300. The plaintiff admits in his evidence that on the afternoon when he unloaded the said horses at Burlington, N. C., he did not give any notice to the agent of the defendant, informing him of said injuries or of his intention of making a claim for said damages. His excuse for not doing so was that the agent had left the depot, and could not be found, and the agent admits that he was not at the depot when the horses were unloaded. The evidence is uncontradicted that said stock was removed from the premises of the defendant to the stables of the plaintiff, about 200 yards away, and there kept separate and apart from other stock until both the agent at Burlington and the stock inspector for the defendant company had ample opportunity to examine and both of them did actually examine the injured stock. The conductor of the train which brought the carload of horses to Burlington admitted that he had notice of the injuries before the horses were unloaded, that he saw one horse with his legs through the slats of the car, and stopped the train at request of plaintiff, so that the leg could be extricated, but made no attempt to further ascertain the extent of the injuries sustained by said horses.

The first two assignments of error are to the failure of the court to nonsuit the plaintiff. It is well settled that on a motion to nonsuit, the evidence of the plaintiff must be accepted as true, and considered in the light most favorable to him. *Hopkins v. R. R.*, 131 N. C., 463; *Snyder v. Newell*, 132 N. C., 614. There was plenary evidence to submit the case to the jury upon the first issue whether the stock were injured by the negligence of the defendant.

The case turns upon the other two assignments of error which raise the question whether the failure of the plaintiff to give formal written notice of his loss and intention to demand compensation before removing the stock from defendant's premises is an absolute bar to his recovery if otherwise entitled. The object of such stipulation is not to relieve the carrier of its liability for negligence, but simply to give such notice as will enable it by proper investigation to protect itself from fraudulent or unjust claims. *Hinkle v. R. R.*, 126 N. C., 939. (400)

The defendant does not claim that any disadvantage has come to it for lack of such notice, for it had ample opportunity to make full investigation, and in fact did make it before the stock was intermingled with the other stock. Besides, the notice can be given orally as well as in writing. The conductor had such notice before the stock was unloaded. It was the defendant's own fault that the agent was not at the depot when the stock was unloaded, and notice both oral and written was given him as soon as he could be found, and before the stock were intermingled with the other stock.

It was held in *Wood v. R. R.,* 118 N. C., 1063, that such stipulations "are conditions in the nature of estoppels, and when enforced, operate to prevent the enforcement of the obligations of the contract. Such restrictions, when reasonable, will be sustained. But as they are restrictions upon the common law rights of the obligations of common carriers, they are not favored by the law." To same purport Lawson Carriers, 114, 115.

Here indeed the objection can not be raised of want of notice because the horses were injured while in the custody of the defendant, which had full notice thereof, through its conductor, and the complaint to him of the plaintiff before the horses were unloaded. *Jones v. R. R.,* 148 N. C., 587; *Breeding Asso. v. R. R.,* 152 N. C., 345.

We fully endorse the ruling in *Austin v. R. R.,* 151 N. C., 137, that a stipulation in a bill of lading requiring notice of a claim for damages to be given the carrier before the live stock is removed or intermingled with other live stock, is a reasonable regulation to protect carriers against false or unjust claims, by affording them an opportunity for examination. An exception to such stipulation was recognized in *Jones v. R. R.,* 148 N. C., 580, on the facts of that case. The facts in this case are still stronger, for here the company had notice through its conductor of the injuries before unloading; notice could not be given to the agent at the time because of his absence; the stock were removed only 200 yards, and notice was given to the agent as soon as he could (401) be found, and the stock were examined by him and the stock inspector before they were intermingled with other live stock.

No error.

Cited: *S. c.,* 156 N. C., 453; *S. c.,* 160 N. C., 464; *Duvall v. R. R.,* 167 N. C., 25; *Baldwin v. R. R.,* 170 N. C., 13; *Newborn v. R. R., ibid.,* 210; *Hemphill v. R. R., ibid.,* 456; *Horse Exchange v. R. R.,* 171 N. C., 73; *Schloss v. R. R., ibid.,* 352.

N. R. WOOD v. CRESSY LEWEY AND COUNTY BOARD OF EDUCATION OF GUILFORD COUNTY.

(Filed 10 November, 1910.)

1. Deeds and Conveyances—Void Acknowledgment—Registration.

A deed acknowledged before a commissioner of deeds of another State, not authorized by the laws of this State to take acknowledgments, is void, and invalidates the registration here.

2. Deeds and Conveyances—Registration—Notice.

Notice of a prior unregistered deed, however full and formal, can not supply notice by registration required by Revisal, 980.

3. Same—Fraud.

In the absence of fraud, actual notice of a prior unregistered deed or mortgage executed since 1 December, 1885, can not affect the rights of subsequent purchasers whose deed or mortgage is duly recorded.

4. Same—Evidence.

Notice of a prior unregistered deed alone is not evidence of fraud on the part of the grantee in the second and registered conveyance of the same land.

5. Same.

When a duly recorded mortgage is sought to be set aside by one who holds a prior mortgage defective in its registration, and it appears that he had procured the same from one holding an interest in the *locus in quo*, who resided in another State, and who, claiming it had been procured through misrepresentation, offered to return the purchase price, and then gave the second mortgage, which was duly acknowledged and recorded; the mere fact that the grantees knew of the first transaction is no evidence of fraud sufficient to set aside the subsequent deed, which was duly recorded.

APPEAL by plaintiff from *W. J. Adams, J.*, at April Term, 1910, of GUILFORD.

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

Spencer B. Adams, A. L. Brooks, and Scott & McLean for (402) *plaintiffs.*

Wilson & Ferguson and Stedman & Cooke for defendant.

CLARK, C. J. Rankin Lewey died about 1889, leaving a widow and five children, and a tract of 55 acres of land. In 1904 the defendant County Board of Education bought 3 1-5 acres of said tract, and erected a $4,000 school thereon. It received a deed from all the heirs at law, except the oldest daughter, Alvatine, who disappeared soon after her father's death, and whose whereabouts remained unknown until 1908,

when the plaintiff, learning that she was in New Jersey, went to see her and obtained her conveyance for her undivided interest in said 55-acre tract, and then called upon the defendant county board of education to pay for 1-5 interest in said tract of 3 1-5 acres, including the buildings which said board had placed upon the property. It turned out that the deed from said Alvatine was acknowledged in New Jersey, only before a commissioner of deeds of that State, and not before some officer authorized by the laws of this State to take such acknowledgment and privy examination. Revisal, 990. The acknowledgment being void, the registration was void, *Lance v. Tainter,* 137 N. C., 249; *Long v. Crews,* 113 N. C., 256; *Southerland v. Hunter,* 310. Registration upon a defective probate is void, *Allen v. Burch,* 142 N. C., 524; *Barrett v. Barrett,* 120 N. C., 129.

The chairman of the county board, at the instance of said board and of the mother of said Alvatine, went to New Jersey, and induced her to come to North Carolina. She alleged that the plaintiff had procured her to execute the deed by misrepresentation, and tendered him back the entire amount which he had paid her. She thereupon made a deed to her mother for her one-fifth interest in said 55-acre tract, and her mother, for a consideration, executed a deed to the County Board of Education for said interest in the 3 1-5 acres, on which the schoolhouse had been built. Subsequent to the registration of this deed, the plaintiff sent his deed back to New Jersey and had the same duly re-acknowledged, and caused it to be recorded again in Guilford, and brought this action alleging fraud in the execution and procurement of the deed from Alvatine to her mother and participation in the fraud by
(403) the county board of education and asks that he be declared the owner of one-fifth interest in said 55-acre tract.

The plaintiff relies solely upon the fact that the defendants had notice of his prior unacknowledged and unregistered deed. The proposition is too well settled against him to admit of debate. No notice, however full and formal, can supply notice by registration, as required by Revisal, 980. *Tremaine v. Williams,* 144 N. C., 114; *Collins v. Davis,* 132 N. C., 106; *Blalock v. Strain,* 122 N. C., 283; *Patterson v. Mills,* 121 N. C., 267; *Hinton v. Leigh,* 102 N. C., 28; and there are many others all to the same effect.

In the absence of fraud, actual notice of a prior unregistered deed or mortgage executed since 1 December, 1885, can not affect the rights of subsequent purchasers whose deed or mortgage is duly recorded. *Wood v. Tinsley,* 138 N. C., 507; *Maddox v. Arp,* 114 N. C., 585; *Wallace v. Cohen,* 111 N. C., 103; *Bank v. Mfg. Co.,* 96 N. C., 298. The plaintiff rests his case as to this point, upon *Austin v. Staten,* 126 N. C., 789. But that case properly construed holds with the other cases,

that taking a deed with actual notice of a prior unregistered deed is not evidence of fraud, but that there must be an actual intent to defraud; and holds that if in addition to such knowledge the grantor makes the second conveyance without any consideration or one grossly inadequate such conduct would be evidence of a combination between the second grantee and the grantor to defraud. But there is no such evidence here. On the contrary the grantor offered to refund the money paid by the first grantee, who indeed procured his own deed under circumstances not above criticism.

To hold that notice of a prior unregistered conveyance is fraud on the part of the grantee in the second conveyance would be contrary to the language and the intent of chapter 147, Laws 1885, now Revisal, 980. It would defeat the entire object of that law.

Austin v. Staten, 126 N. C., 789, has never been cited with approval on that point. If it meant what the plaintiff contends, it is in opposition to all the other cases construing that section, and they are numerous. *Austin v. Staten* has been cited four times since (as will be seen by reference to Annotated Edition of 128 N. (404) C.), *i. e.,* in *Lindsay v. Beaman,* 128 N. C., 192; *Collins v. Davis* 132 N. C., 111; *Laton v. Crowell,* 136 N. C., 380; *Janney v. Robbins,* 141 N. C., 403, 4, 5, 8, 9, all of which are upon the proposition that an unregistered deed is not color of title.

The other assignments of error do not require discussion, and are practically disposed of by what we have already said.

No error.

Cited: Shingle Mills v. Lumber Co., 171 N. C., 411; *Fertilizer Co. v. Lane,* 173 N. C., 186.

W. G. PAGE, ADMINISTRATOR OF C. W. PAGE, v. JUNIOR ORDER UNITED AMERICAN MECHANICS.

(Filed 10 November, 1910.)

1. **Insurance Orders—Policies—Rules—Dues—Arrearages—Forfeiture—Waiver.**

The certificate in an insurance order sued on expressly stipulated that the insured at the time of his death shall be a beneficial member in good standing of a subordinate council affiliating with the national council, and also a member in good standing of the funeral benefit department of the national council, in accordance with the laws of the national council and subordinate council now in force or hereafter adopted prior to his death. The charters, rules and constitutions of the order applicable, provided

that one becoming indebted to the order for weekly dues for thirteen weeks should not be entitled to the benefits until four weeks after all such arrearages had been paid, etc.: *Held*, (1) it appearing that the insured had been in arrears for current dues for more than thirteen weeks, and had paid them while in his last sickness about six days prior to his death, his administrator could not recover on the policy without such satisfactory explanation as amounted to a legal excuse; (2) the payment of the back dues, under the circumstances, was not a waiver of the forfeiture.

2. Same—Sick Benefits—Offsets.

The law will not apply the sick benefits to be derived under the policy in an insurance order to the arrearages in weekly dues owed by the assured, which otherwise would invalidate the policy, when it appears that the assured had failed to follow the prescribed methods of the policy required to entitle him to these benefits, and which upon the face of his policy, were binding upon him.

3. Same.

When it appears from the local charter of an insurance order that a designated committee "shall visit the sick or disabled brothers within six hours after being notified," and should this committee believe that the sick or disabled member was not "so sick or disabled as to render him incapable of procuring the means of subsistence, the committee may refer the matter to one or more respectable physicians," etc., and it appearing generally from both the local and the general charter that the sickness must be of this character, *Held*, to entitle a member to sick benefits he must have been disabled from earning his livelihood, and such claim can be allowed against current dues only after notice to or knowledge by the company of the sickness, and its liability fixed in some way recognized by the company, and applicable under the provisions of the policy.

(405) APPEAL from *W. J. Adams, J.*, at March Term, 1910, of DURHAM. Action to recover of defendant an amount alleged to be due upon a certificate of insurance issued by defendant to C. W. Page, deceased, the intestate.

The evidence tended to show that plaintiff had been a member, in good standing, in defendant's lodge and held a certificate of insurance therefrom, which entitled his "legal dependent" to recover $500 within 30 days from receipt of proof of death, on condition that the intestate, at the time of his death, should be a beneficial member, in good standing, of a subordinate council of said order, affiliating with the national council of said order, and also a "member, in good standing, of the funeral benefit department of the national council, in accordance with the laws of said national council, and his State and subordinate council now in force or hereafter adopted prior to his death"; that the intestate had paid his dues to 1 May, 1907, and thereafter ceased the actual payment of such dues till 5 September, 1907, when his sister, at intestate's re-

quest, paid the order $2.85, the amount of dues maturing to said date. That at the time of this payment, 5 September, the intestate was in a hospital, sick with typhoid fever and died of such disease on 11 September following. There is no evidence that the defendant lodge or its agencies or the State or local council had ever received (406) any notice of the sickness of the intestate, or that any such notice was given, or that they had any knowledge of such sickness until there had been default in payment, or that any action of the local or other council had ever been taken in reference to said sickness.

At the close of the plaintiff's testimony and of the entire testimony there was motion to nonsuit by defendant, motion overruled and exceptions noted. The jury rendered the following verdict:

1. Was the certificate of the defendant sued upon in force at the time of the death of C. W. Page, the plaintiff's intestate? Answer: Yes.

2. What amount, if any, is the defendant indebted to the plaintiff? Answer: $500.

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

Aycock & Winston and Bryant & Brogden for plaintiff.
Douglass & Lyon and R. O. Everett for defendant.

HOKE, J., after stating the case. The certificate of insurance on which this action is brought has on its face the express stipulation that, in order to a recovery, the insured at the time of his death shall be a beneficial member in good standing of a subordinate council, affiliating with the national council and also a member in good standing of the funeral benefit department of the national council, Class B, in accordance with the laws of said national council and his State and subordinate councils now in force or hereafter adopted prior to his death. These laws, appearing in the constitution and by-laws of the national, State and local councils, contain among others the following provisions bearing directly on the question presented: A rule of the national council provides, that "no member who is in arrears for dues for thirteen weeks at the time of his death or at the time he became sick or disabled can place himself in good standing or become entitled to benefits during such sickness or disability by paying up such arrearages in part or in full during the continuance of such sickness or disability."

The State constitution and by-laws, section 3, provides: "That a member of the council who is thirteen weeks or more in ar- (407) rears for dues forfeits all his rights and privileges except that of being admitted to the council chamber during its sessions."

The constitution and by-laws of the Fred Green Chapter (the local chapter), article 9, sec. 3, contains a similar provision.

Article 10, sec. 4, reads as follows: "Any brother suffering himself to become indebted to the council for weekly dues for thirteen weeks shall not be entitled to benefits until four weeks after all such arrearages have been paid; and for fifty-two weeks or over, for thirteen months after such arrearages have been paid." As the evidence shows that the intestate at the time of his death was in arrears for current dues much more than thirteen weeks, from 1st of May to the 5th of September, it would seem that no recovery could be had on the policy, certainly not unless some satisfactory explanation is offered amounting to a legal excuse. It is contended for the plaintiffs, that although no actual payment of dues was made by the intestate for the specified period, the said intestate was not in arrears, by reason of the fact that he was entitled for a portion of the time to sick benefits and to an amount more than sufficient to pay off and discharge his current dues, but the position can not be maintained. A perusal of these charters leads, we think, to the conclusion that in order to entitle a claimant to sick benefits, his sickness must be a kind that disables one having a prudent and proper regard for his own health and strength from pursuing his ordinary calling or earning his livelihood in some feasible or legitimate way. And second, that before a member can make good a claim for sick benefits as against dues, the council must have been notified of his sickness or acquired knowledge of it in some manner provided or recognized by the charter. Thus, in the charter of the local council, article 10, sec. 9, a committee is provided for, who shall "visit sick or disabled brothers within twenty-four hours after being notified" and pay them the sum specified in the by-laws. In sec. 5 it is provided: "Should the committee on relief believe that any member applying for the weekly benefits is not so sick or disabled as to render him incapable of procuring the means of subsistance for himself, the committee may refer the matter to one or more respectable physicians, whose decision, if (408) approved by the council, shall be final unless an appeal is taken to the State council." Referring to the kind of sickness contemplated, the charter of the local lodge reads: "Any *bona fide* member of this council who shall have been a member for six months if taken sick and unable to follow his usual or other occupation by which he can earn a livelihood." And in the general charter, article 10, sec. 2, "Any *bona fide* member if taken sick or is disabled and is unable to follow his usual or other occupation by which he can earn a livelihood," etc. And again, article 6, by-laws, sec. 1, "Any brother who shall be disabled by sickness or injury to his person from following his usual business, avocation or some legitimate business," etc. Article 8, sec. 1, of the general by-laws constitutes a relief committee and provides that any member knowing of a brother who is sick or in distress, shall at once report the

facts to the councilor, etc., and it is made his duty to see that the sick continue to receive, during their inability, such assistance as these by-laws require, and no member shall apply to the council for benefits either "for himself or another unless the committee refuse or neglect to make the application." From these extracts it will sufficiently appear as stated, that to entitle a member to sick benefits, he must have been disabled from earning his livelihood and that such claim can only be allowed, as against current dues, after some notice or knowledge of the sickness has been brought home to the company, in some recognized way, and on the facts in evidence neither position has been established. All the testimony tended to show that while the intestate was complaining some in July, with the exception of a short vacation of ten days to the mountains for rest, he continued to do his regular and ordinary work and to earn his wages until 25 August, when he consulted a physician. That he was then taken down with typhoid fever and removed to a hospital on 27 August and died of the disease on the 11th of September. If it should be conceded that his sickness might have been such as to make him quit work in July preceding, there is no fact in evidence tending to show that the council had any notice or knowledge of his sickness until some time after the thirteen weeks had passed and the standing of the intestate had been forfeited. Again it is contended that the forfeiture had been waived, on the part (409) of defendant, by the receipt of the back dues, on 5 September, and that the standing of the intestate was thereby restored. But this payment was just six days before the death of the intestate and can not avail the plaintiff: 1st. By reason of the rule established by the general lodge, "That the standing of a member in default shall not be restored by the payment of back dues during his sickness or disability." 2d. By reason of article 10, sec. 4, of the constitution of the local council, to the effect that any brother in arrears for thirteen weeks, shall not be entitled to benefits until four weeks after such arrears have been paid. The case is controlled by decisions of the Court in *Wilkie v. National Council,* 151 N. C., 527; *Melvin v. Insurance Co.,* 150 N. C., 398; *Hay v. Association,* 143 N. C., 256; *Lane v. Insurance Co.,* 142 N. C., 55. On the facts in evidence the motion for nonsuit should have been allowed.

Reversed.

Cited: Clifton v. Ins. Co., 168 N. C., 501.

E. C. GREEN ET AL. v. A. F. MESSICK GROCERY COMPANY.

(Filed 17 November, 1910.)

1. **Contracts—Offer—Acceptance.**

Until an acceptance is made according to the terms and conditions of an offer to lease lands, the negotiation is open and no obligations are imposed.

2. **Same—Interpretation of Contract.**

The written correspondence between the parties relating to the leasing of certain hotel property being interpreted and held not to constitute a completed contract in an action to recover $400 deposited as for money had and received: *Held*, (1) the defendant having failed to confirm by wire the plaintiff's offer contained in the letter enclosing the $400 security money, the plaintiff had the right to withdraw the offer and recover back the money with interest; (2) the defendants could not recover on their counterclaim for damages; (3) there being no contract, plaintiff could not recover damages for the breach of one.

(410) APPEAL from *Long, J.*, at the February Term, 1910, of FORSYTH. Action to recover for money had and received and damages for fraudulent representations.

These issues were submitted to the jury:

1. Did the defendant make the fraudulent representation, as alleged in the complaint, and with the intent to procure money from the plaintiffs without adequate returns, and thereby obtain four hundred dollars ($400) from the plaintiffs and cause them to incur the expenses, as alleged, in the complaint? Answer: No.

2. What amount, if anything, are the plaintiffs entitled to recover of the defendant? Answer: Nothing.

3. Are the plaintiffs indebted to the defendant for any balance due on the rents of the hotel, as alleged in the answer, and if so, in what sum? Answer: Two hundred and seventy-five ($275). The plaintiffs moved for new trial. Motion overruled—plaintiffs excepted. From the judgment rendered the plaintiffs appealed.

Louis M. Swink for plaintiffs.
Watson, Buxton & Watson for defendant.

BROWN, J. The plaintiffs seek to recover of the defendants the sum of $400, as money had and received and remitted to defendant on account of certain negotiations between plaintiffs and defendant in regard to renting a hotel.

It appears that defendant owned the Hotel Forsyth in Winston-Salem and advertised it for rent. The advertisement was answered by

plaintiffs who resided in St. Louis, and what contract, if any was entered into, is embodied in the written correspondence between the parties.

It is claimed by plaintiffs that there was no completed contract between them and defendant, and secondly, that if there was the plaintiffs were induced to enter into it by the false representations of the defendant. The court instructed the jury in his charge that the correspondence constituted a contract of rental for the period of twelve months, at the rate of $200 per month. This is assigned as (411) error.

If the plaintiffs are right in their contention that there is no completed contract made out by the correspondence, then all other questions are eliminated and the plaintiff would be entitled to recover the four hundred dollars only remitted to defendant as money had and received to their use.

The correspondence set out in the record embraces first, letter 2 January, 1909, defendant to plaintiff, describing the hotel and offering it at $200 per month for twelve months. Second, letter from plaintiffs to defendant dated St. Louis 23 January, 1909, asking for further data. Third, letter from defendant to plaintiffs 26 January, giving further data and suggesting that plaintiff send on $400 to confirm trade with further statement that "in case we shall have closed before receiving your wire then you could have it wired back; otherwise we will confirm by wire." Fourth, telegram:

A. F. MESSICK, ST. LOUIS, Mo., 29 Jan., 1909.
Winston-Salem, N. C.

Letter received after banking hours; will wire money order tomorrow. E. C. GREENE.

Fifth, telegram:

E. C. GREENE, WINSTON-SALEM, N. C., 30 Jan., 1909.
Care Wellington Hotel.
St. Louis, Mo.

Holding Hotel Forsyth for your order, as per wire of yesterday.
A. F. MESSICK GROCERY CO.

Sixth, telegram:

A. F. MESSICK, ST. LOUIS, Mo., 30 Jan., 1909.
Winston-Salem, N. C.

Mailed draft today; could not telegraph order; blizzard; letter explains. E. C. GREENE.

(412) Seventh, letter written in pursuance of last telegram:

A. F. MESSICK, ST. LOUIS, Mo., 30 Jan., 1909.
Winston-Salem, N. C.

DEAR SIR: When it came to wiring you $400 this morning, every telegraph wire leading out of St. Louis was down. We are in the midst of the worst blizzard this country ever witnessed. Wires down, railroads blocked with snow, wind blowing a gale 70 miles an hour. So, had to use my best judgment in the matter, thought this the wisest course to pursue. The $400 enclosed is the advance payment for the first two months, rent to Hotel Forsyth fully furnished in every department. From the date taking possession. On receipt of draft wire me care Wellington Hotel, St. Louis, confirming deal. Will start for Winston-Salem at once. Trusting, under the circumstances, this is satisfactory to you. Yours truly,

E. C. GREENE,
Care *The Wellington.*

The plaintiffs received no telegram confirming the deal, and it is not contended that any was ever sent. They waited in St. Louis until 2 February, and receiving no confirmation by wire they left for Winston-Salem, arriving there on 4 February, and went to Hotel Forsyth at midnight. The following day plaintiffs demanded the $400.

Nothing was said or done in Winston-Salem by plaintiffs to ratify the deal or to waive their rights from failure of defendant to confirm by wire as directed in the letter of 30 January, as well as agreed to in defendant's letter No. 3 of 26 January.

The plaintiffs had a right to demand such confirmation and in the manner required by their letter containing the remittance.

Until such confirmation was sent by wire there was no completed contract and plaintiffs had a right to demand their money back when they arrived at Winston-Salem.

As is said by the Supreme Court of the United States in *Eliason v. Henshaw,* 17 U. S., 228: "It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to (413) another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either." Clark on Contracts, 36-39; *Cozart v. Herndon,* 114 N. C., 252; 1 Wharton on Cont., 4; *Gregory v. Bullock,* 120 N. C., 263; 7 Am. & Eng., 138. We

are of opinion his Honor erred in charging the jury as set out hereinbefore and that the exception is well taken.

He should have submitted the issues tendered by the plaintiffs and have instructed the jury that there being no evidence that the defendant had accepted and confirmed by wire the proposal to lease, as required by the letter of 30 January transmitting the $400, the plaintiffs had a right to withdraw and to recover that sum and interest thereon as money had and received to their use, and that defendants were not entitled to recover on the counterclaim.

There being no contract, of course plaintiffs can recover no damages for its breach.

New trial.

Cited: *Clark v. Lumber Co.*, 158 N. C., 145; *Greene v. Grocery Co.*, 159 N. C., 119.

L. F. MOORE v. HUGH HORNE.

(Filed 17 November, 1910.)

1. **Insane Persons—Torts—Damages.**

A lunatic is liable in damages for a tort committed by him, and the measure of damages is compensation for the injury inflicted, and punitive damages are not recoverable.

2. **Same—Evidence—Punitive Damages.**

In an action brought against a lunatic for his tort committed in assaulting and injuring the plaintiff, wherein actual damages alone are sought to be recovered, evidence offered by plaintiff tending to show that defendant was sane at the time complained of is inadmissible, as such would only be competent when punitive damages are claimed.

3. **Same—Resisting Arrest—Abusive Language.**

In an action brought to recover actual damages for an injury tortiously inflicted by defendant, a lunatic, evidence that defendant resisted arrest under a warrant issued by a justice of the peace for the same criminal offense, and was abusive in his language to the officer arresting him, is incompetent for the purpose of proving the assault in the civil action. It is not harmless error, as it tends to prejudice the minds of the jury.

CLARK, C. J., dissenting on the ground of harmless error.

APPEAL from *Lyon, J.*, at April Term, 1910, of ANSON. Action (414) for damages for an assault.

These issues were submitted:

1. Was the plaintiff injured by the defendant, Hugh Horne, as alleged in the complaint? Answer: Yes.

2. What damages, if any, is the plaintiff entitled to recover? Answer: $2,500.

The court overruled motion for new trial and rendered judgment for plaintiff, from which the defendant appealed.

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

Robinson & Caudle for plaintiff.

Jas. A. Lockhart and McLendon & Thomas for defendant.

BROWN, J. The evidence tends to prove that the defendant is insane and has been so adjudged by proper proceedings and was duly confined in jail, and application made for admission in an asylum of the State. There is evidence offered tending to prove that prior thereto the defendant assaulted the plaintiff with a pistol and injured him.

The plaintiff does not claim punitive damages, but actual or compensatory damages only. A lunatic is liable in a civil action for any tort which he may commit. The proper measure of damages in an action against a lunatic for tort committed by him is compensation for the injuries sustained. It can not include punitive damages. *McIntyre v. Sholty,* 2 Am. St., 140.

In the foregoing case the lunatic shot and killed the deceased and his estate was held liable in damages. The court excluded the evidence of insanity in the case and the ruling of the trial court was affirmed.

An insane person is just as responsible for his torts as a sane (415) person. *Williams v. Hayes,* 42 Amer. Reports, 743; 28 L. R. A., 153; Cooley on Torts, (3 Ed.), 171; Sherman & Redfield on Negligence, sec. 122. Upon the same principle infants are held liable for their torts. *Crump v. McKay,* 53 N. C., 34; *Smith v. Kron,* 96 N. C., 397.

It was, therefore, erroneous to admit evidence upon part of plaintiff that defendant was sane when he committed the act, unless plaintiff sought to have the jury impose smart money or punitive damages, which is not the case.

This error may have been cured by the charge of the court in directing the jury not to allow punitive damages, but we call attention to it so as to guide the court below on another trial, to the end that all such evidence be eliminated.

His Honor, however, permitted plaintiff to prove that the defendant was arrested in a criminal proceeding for this alleged assault upon plaintiff and further permitted the following question and answer:

Q. Mr. Redfearn, did you help to arrest Horne for the shooting of Fairley Moore? A. Yes, sir.

Q. What did he do—what was his condition on that occasion? A. Well, I was outside the store and I heard scuffling, and Horne was cursing and trying to get loose, and the officer that had him had his handcuffs out and asked me to put them on him, and I did. I can't recall his language very well, but he was cursing and abusing people, and was drunk. To all of which defendant in apt time objected and noted exceptions.

The admission of such evidence was entirely irrelevant to the matters at issue in this case and was well calculated to harm the defendant, who denies in the pleadings that he committed any assault upon the plaintiff.

The fact that he was arrested on a criminal warrant charging defendant with the very assault which is made the foundation of this action is incompetent here. It is no evidence that the defendant committed the assault as alleged in the complaint.

The conduct of the defendant in resisting arrest under the warrant is wholly foreign to the matters at issue in this civil action. The introduction of such incompetent evidence was well calculated to inflame and prejudice the minds of the jurors against the (416) defendant so as to possibly influence their judgment upon both issues submitted to them.

As the case is to be tried again it is needless to discuss the other assignments of error.

New trial.

CLARK, C. J., dissenting: The defendant, in an *ex parte* proceeding, was adjudged a lunatic. The plaintiff necessarily moved to have a guardian *ad litem* appointed. This was no estoppel on the plaintiff.

The evidence left no doubt that the defendant shot the plaintiff. Certainly there was ample evidence which justified the jury in so finding.

The only proposition of law involved was, that in this action, if the defendant did the shooting he was liable for compensatory but not for punitive damages, and the judge so told the jury. The defendant on cross-examination brought out much evidence tending to show that the defendant was insane at the time of the killing, which was not controverted, and the plaintiff on re-examination went into the same matters—for what purpose, on either side, does not appear. Among other questions asked was one as to the conduct of the defendant when arrested on the criminal charge. This question was asked not to show that the defendant was arrested, but to show his conduct on that occasion, and was along the line of the cross-examination by defendant's counsel.

The real question of fact as to the defendant having done the killing

and the amount of damages and the proposition of law, which was correctly laid down by the court, as to the measure of damages, were in nowise affected by these matters brought out on the cross-examination and again worked over on the redirect. The evidence on both sides, in this respect, was irrelevant and immaterial. It could not possibly affect the result, and, therefore, was not ground for a new trial. This has been repeatedly held by this Court. *Collins v. Collins,* 125 N. C., 98; *Spruill v. Columbia, ante,* 48, and *Manufacturing Co. v. Townsend, ante,* 244; *Freeman v. Brown,* 151 N. C., 113, and cases there cited.

The wholesome doctrine that harmless error should not be the (417) ground for a new trial, even in a criminal case, has never been better stated probably than in a recent case in Oklahoma, *Byers v. Territory,* 103 Pac., 532, from which it may be well to cite at some length:

"The more we reflect upon the doctrine of harmless error the more clearly we will see that it is in strict harmony with the philosophy of the law, and that its recognition and enforcement by appellate courts is absolutely necessary for the administration of justice.

"Justice demands that in the administration of law its processes should never become a game of skill between contending counsel. There has been entirely too much of this in the past. It has resulted in the miscarriage of justice in many cases, and has bred a spirit of disgust for law and contempt for courts in the public mind. Reduced to its last analysis, the doctrines contended for by counsel, if recognized, would require this Court to hold that, where evidence is admitted during a trial, and upon appeal it is held that such evidence was improperly admitted, a reversal of the conviction must follow, regardless of the character of the evidence in the record, upon the ground that, the prosecution having offered its evidence as a part of its case, it is estopped from denying its injurious effect.

"It appears to us that this application of the doctrine of estoppel to the State, in the enforcement of its criminal law, on account of the ignorance or mistaken judgment of one of its servants, is technicality run mad. We decline to be bound by, or to follow, a line of authorities so repugnant to reason, so demoralizing to respect for law, and so destructive to justice. The habit of reversing cases upon technicalities is a very convenient one for appellate courts, for by so doing they can escape much hard labor, and all responsibility for their decisions, for a violation of some technical rule can be found in almost every closely contested case.

"We believe that appellate courts should faithfully and fearlessly do their duty, and decide every question presented with reference to the

substantial merits of the case in which it arises. In this way (418) only can justice be administered. Ignoring justice, there is not only lost to the courts the confidence and respect of the people, but it has also greatly alarmed the profession of law itself.

"No one can say the members of the American Bar Association are sensationalists, or wanting in learning or ability. It is eminently a conservative body. Yet we find them crying out against and proposing a remedy for this evil. At its last meeting at Seattle, Wash., it recommended to Congress the following amendment to the Revised Statutes of the U. S.: 'No judgment shall be set aside or a new trial granted, by any court of the United States, in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of an entire case, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. 1 U. S. Comp. Statute, 715. No writ of error shall be issued in any criminal case unless a Justice of a Supreme Court shall certify that there is probable cause to believe that the defendant was unjustly convicted. 1 U. S. Comp. St., 575.' The same recommendation was adopted by the New York State Bar Asso. at Buffalo, 28 and 29 Jan., 1909.

"The enforcement of the doctrine of harmless error will greatly improve the character of our criminal trials. Lawyers will be compelled to try cases upon the actual merits and will cease devoting so much time in attempting to force technical errors into the record. The needless waste of so much valuable time, and the expenditure of a great deal of money, will be saved, and far better results will be reached in the administration of justice, and the courts will gain the confidence and respect of the people, and acts of mob violence will cease to disgrace our State. The reversal of the just convictions of the guilty, upon purely technical questions, is the prime cause of want of confidence in the courts. This want of confidence often results in mob violence on the part of a long-suffering and outraged public."

What is said above by the Oklahoma Court, endorsing the resolutions of the two greatest bar associations in this country, is (419) but a statement in a fuller and more complete manner of what this Court has repeatedly held in a more succinct form, *i. e.*, that the presumption is that the proceedings below were correct, and that the burden is on the appellant, not only to allege and prove error committed, but it must show that this error was prejudicial.

In this case the shooting of the plaintiff is the ground of a civil, not of a criminal action, and the damages sought are not punitive, but

merely compensatory. The evidence of which the appellant complains was irrelevant, and immaterial and could not possibly have affected the result. There could be no real controversy that there was evidence, uncontradicted, from which the jury might well find that the defendant did the shooting. The proposition laid down by the court that the plaintiff sought, and could recover only compensatory damages was clearly correct. And these were the only matters in the case. Moreover, the irrelevant testimony was brought out in reply to the same kind of testimony elicited from the plaintiff's witnesses by the defendant on cross-examination.

Cited: Ballinger v. Rader, post, 489.

GEORGE W. JONES v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 17 November, 1910.)

1. **Appeal and Error—Exceptions Grouped—Supreme Court Rules—Compliance.**

Supreme Court rule 19 (2), requiring the appellant to group and number all the exceptions relied on and set them out immediately after the statement of the case, is not complied with by showing in the record the various exceptions numbered, but on different pages, when there is no assignment of errors at the end of the case, either before or after the judge's signature; and the appeal will be dismissed under rule 20 upon the failure of appellant to comply with rule 19 (2).

2. **Objections and Exceptions—Appeal and Error—Assignments of Error.**

Attention is called to the distinction between "exceptions" and "assignment of errors."

BROWN, J., dissenting; HOKE, J., concurring in the dissent.

(420) APPEAL by defendant from *W. R. Allen, J.,* at May Term, 1910, of CUMBERLAND.

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

H. L. Brothers and Sinclair & Dye for plaintiff.
Rose & Rose for defendant.

CLARK, C. J. The appellee moves to dismiss because the appellant has failed to comply with Rule 19 (2) of this Court. That rule prescribes:

"19 (2) *Exceptions grouped.*—All the exceptions relied on, grouped,

and numbered, shall be set out immediately after the statement of the case on appeal." And Rule 20 authorizes a dismissal of the case, if this rule has not been complied with.

It is immaterial whether the assignment of errors precedes or follows the judge's signature to the case on appeal. What is required is that the appellant shall go through the case on appeal, and select such exceptions as he intends to rely on, and group them at the end of case on appeal. The assignment of errors may, but most often does not, embrace all the exceptions taken on the trial. The assignment of errors are thus something distinct and separate from the exceptions taken on the trial. They embrace all the points, duly taken as exceptions, which the appellant thus notifies the appellee and the appellate court that he intends to rely upon. It thus embraces such exceptions taken during the trial, which were duly noted, and which he intends to rely upon, and also the exceptions to the charge, which are not required to be noted at the time, and in addition, if the appellant thinks proper, the exceptions that the court had no jurisdiction, and that the complaint did not state a cause of action.

The object of this rule, which was adopted, after the fullest consideration by the Court is (1) that the counsel on the other side may be notified exactly what propositions he will be called upon to (421) debate, and may prepare himself accordingly. When, as is often the case, many of the exceptions are dropped, this enables counsel on both sides to better prepare themselves to discuss the real points in controversy. (2) It enables the Court to see at a glance, by turning to the assignment of errors what propositions of law are presented, and to grasp the case much more quickly.

The rule is a most reasonable one, and the Court has repeatedly enforced it and expressed its intention to rigidly adhere to it. Nothing could be more arbitrary than a principle or rule which should be enforced against some litigants and not as to others.

In addition to Rule 19 (2) above quoted, Revisal, 591, requires the appellant to "state separately, in articles numbered, the errors alleged." Rule 27 of this Court requires that the exceptions shall be "briefly and clearly stated, and numbered." This Court in *Davis v. Wall,* 142 N. C., 450, allowed a motion to dismiss for failure to comply with the above requirements, and added: "The motion is allowed in the expectation that appellants hereafter will conform to these requirements. *Sigmon v. R. R.,* 135 N. C., 182, and cases cited. Ordinarily, hereafter, such motions will be allowed, without discussing the merits of the case, as we have done in this instance."

In *Marable v. R. R.,* 142 N. C., 564, *Walker, J.,* said: "The defendant moved in this Court to dismiss the appeal under Rule 20, for failure to

comply with requirements of Rule 19. A similar motion was made at this term, based upon substantially the same grounds, in *Davis v. Wall, ante,* 450, and we enforced the rules to the extent of dismissing the appeal in that case. We again specially direct the attention of the profession to those rules and their decision, as being very proper for their careful consideration when preparing cases on appeal."

In *Lee v. Baird,* 146 N. C., 361, the same motion was made as in this case, and *Hoke, J.,* very carefully and fully affirmed the right of the Court to prescribe rules, the necessity of the rules in question, and held, as had been repeatedly held before, that the rules of the Court were mandatory and not directory. We can add nothing to what was (422) there so clearly stated. The appeal in that case was dismissed.

In *Thompson v. R. R.,* 147 N. C., 412, the same rules 19, 19 (2), 20, 27, and Revisal, 591, were again fully discussed by *Hoke, J.,* and the appeal was dismissed.

In *Ullery v. Guthrie,* 148 N. C., 418, the same rules were discussed and the Court said, "This is a reasonable and just rule, which obtains doubtless in all appellate courts, and is the result of experience which has shown the benefit of thus indicating at a glance to opposing counsel, and the Court as well, the propositions of law which will be debated. It imposes no burden on the appellant, thus to sift out of the numerous exceptions, taken out of abundant caution on the trial, those which he will rely upon, and discuss upon appeal. We can add nothing to what has been said by this Court, in *Lee v. Baird,* 146 N. C., 362. It is indispensable in all courts that there should be some rules of practice, else there will be hopeless disorder and confusion. It is, for the same reason, not so important, what the rules are as that the rules, whatever they may be, shall be impartially applied to all, and that changes shall be prospective, by amendment to the rules, and not retroactive by granting exemption to some, which has been denied to others."

In *Smith v. Manufacturing Co.,* 151 N. C., 261, *Walker, J.,* says: "We must insist upon a strict compliance with the rule, which requires an *assignment of the errors* relied on in this Court. It is a most reasonable rule, because the appellant is thereby notified of the specific matters which will be involved in the appeal; it enables counsel to prepare their case with greater ease, eliminating all immaterial questions; and, lastly, but by no means the least of all, it places before the Court in condensed form the entire case, so that we can more readily understand the argument of counsel and consider the case more intelligently as the discussion before us progresses. But it is sufficient to say that it is the rule of this Court, which was adopted after mature consideration, and is far less drastic or exacting in its requirements than similar provisions in other appellate tribunals, where even an assignment of errors, strictly

conforming to our rule, would not be tolerated for a moment. We have more than once held, with some degree of emphasis, that this, as well as the other rules of the Court, will be enforced, reasonably (423) of course, but according to their plain intent and purpose. In this case it seems that the appellant failed to comply with the rule, which requires the errors, which were pointed out by exceptions taken during the course of the trial, to be grouped and numbered, or assigned in an orderly manner. We are, therefore, not permitted to consider the able and carefully prepared brief of appellant's counsel, or to enter upon a consideration of the case upon its merits. It is our duty, though, under the statute, to examine the record. We have done so, and find no error therein. The appellee moved to affirm the judgment, under the rule as construed by this Court, in *Davis v. Wall,* 142 N. C., 450; *Marable v. R. R., ibid.,* 564; *Lee v. Baird,* 146 N. C., 361; *Thompson v. R. R.,* 147 N. C., 412; *Ullery v. Guthrie,* 148 N. C., 417. As the case is now presented to us, we must allow the motion, and affirm the judgment."

In *Pegram v. Hester,* 152 N. C., 765, the same motion was made because "there is no assignment of errors in the record" and the Court, quoting, at length, from the opinion of *Walker, J.,* in *Smith v. Manufacturing Co.,* 151 N. C., 261, and citing other cases, affirmed the judgment on that ground. The same action has been taken *per curiam* in several other cases, including one other at this term. In the present case, in the printed record, which is somewhat more condensed than the manuscript record, exception 1 appears on page 9, exception 2 on page 15, exceptions 3 and 4 on page 16, exceptions 5, 6 and 7 on page 17, and exception 8 on page 18. There is no assignment of errors at the end of the case, either before or after the judge's signature (which would be immaterial), thus showing neither to the opposite counsel or to this Court which of the exceptions will be relied upon. Indeed counsel frankly admitted that the rule had not been complied with. It is impossible to distinguish this case from those above cited, and from the cases in which the same action has been taken by a *per curiam* decision. As was said in *Ullery v. Guthrie,* 148 N. C., 418, "It is not so important what the rules are, as that the rules, whatever they may be, shall be impartially applied to all."

As was said by *Walker, J.,* in *Smith v. Manufacturing Co.,* 151 N. C., 261, our rule, "which was adopted after mature con- (424) sideration, is far less drastic or exacting in its requirements than similar provisions in other appellate tribunals, where even an assignment of errors, strictly conforming to our rule, would not be tolerated for a moment." We have procured the rules from other courts, and upon examination of them find that this is strictly true.

In the United States Supreme Court the rule prescribes "a specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted, and intended to be urged; and in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is the admission or rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is in the charge of the court, the specification shall set out the part referred to, *totidem verbis,* whether it be instructions given or instructions refused. When the error alleged is in a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it."

Almost the same rule in the same words is required in the United States Circuit Court of Appeals at Richmond, and also in the other United States Circuit Courts of Appeals. And rules to the same effect have been found upon examination to obtain in nearly all of our sister States.

The usual rule in other States is either in the exact language or to the same purport as the following rule expressed by the Supreme Court of Connecticut. "In every writ of error there must be a *special assignment of errors,* in which the precise matters of error or defect in the proceedings in the court below, relied on as grounds for reversal, must be set forth. No others will be heard or considered by the Court."

Upon examination of the record proper, we find no error, and in accordance with the rules of this Court and the uniform action of this Court as set out in the cases above cited we must grant the motion to affirm the judgment. It admits of a mild surprise that after the above clear exposition of the rule, made in so many cases, and so (425) clearly stated, with the intention of the court so firmly expressed and so repeatedly, to enforce the rule, that any case should again be brought to this Court without an assignment of errors as required.

Affirmed.

BROWN, J., dissenting: I can not concur in the ruling of the Court dismissing the appeal, affirming the judgment and denying to the defendant a right to be heard upon the merits, for alleged failure to comply with Rule 19 (2) in respect to the assignment of errors.

It is said in the opinion of the Court in this case: "It is *immaterial whether the assignment of errors precedes or follows the judge's signature* to the case on appeal. What is required is that the appellant shall go through the case on appeal, and select such exceptions as he

intended to rely upon and group them at the end of the case on appeal."

That has been done in this case as fully and particularly as it is possible to do it.

The exceptions relied upon by the defendant as assignments of error are all grouped together on pages 17 and 18 of the record, immediately preceding the judge's signature to the case on appeal. There are only 19 pages to the entire record and page 19 is taken up exclusively with clerk's certificate to transcript of appeal and a copy of the appeal bond.

All the exceptions are taken to the charge of the court except one. That exception relates to the submission of an issue and is set out on page 9 of printed record.

This very exception is again carried over to page 18 of record and grouped with the others consecutively, one following the other and the one brought forward from page 9 constitutes the last exception or assignment of error on page 18.

There are eight in all, following consecutively, and they immediately precede the judge's signature.

The Court says if they are picked out and grouped at end of the case on appeal the fact that they precede instead of follow the judge's signature to case on appeal does not matter.

The counsel for appellant has picked out his exception taken to the issues on page 9 and brought it forward and grouped it with his other seven exceptions to the charge of the court at the (426) very end of the case on appeal.

If the quotation I have made from the principal opinion in this case is to be the guide, and is to be seriously relied upon, then measured by it, I assert with entire deference that none of my associates on this Court, with their justly recognized and eminent ability as lawyers, can summarize, group and state the exceptions relied upon as assignments of error more definitely, clearly and conveniently for the information of the Court than has been done by counsel for appellants to the end of the case on appeal.

If what immediately precedes the judge's signature had also been again copied immediately after it, there would have been merely a useless repetition, but there could have been raised no question of the sufficiency of the assignments of error. It is this useless repetition, I understand from the quotation I have made, to be held unnecessary.

In conclusion, I desire to have it understood that I gave my assent to the rule in question in good faith, but I think it should be enforced in a reasonable manner and in accord with the reasons that prompted its enactment. Its enforcement should not be based upon bare technicali-

ties, when it can be seen that the true spirit and purpose of the rule have been met and complied with. This has been more than done, I think, by appellant in this case. A fair compliance with the rule is necessary especially in large records to enable the Court to get at the points presented for its consideration. When that is fairly done we should be content, and not permit a bare technicality to deprive a litigant of his constitutional right of appeal.

The rule is intended to facilitate the hearing of appeals and is not made to hinder, delay or to get rid of them.

The rule was made as a convenience to this Court and to save much labor, which in view of the great increase in the business of the Court is a necessity. The members of the bar endeavor almost universally to comply with it, and to live up to its purpose and spirit. We should ask no more of them than that; otherwise the rule becomes oppressive and a denial of the right of appeal.

When the work has been done as intelligently as in this case,
(427) we can see at a glance what exceptions we are asked to pass on. They are all grouped at the end of the case on appeal and consecutively numbered. We do not have to ransack the record to find them. No assignments of error could possibly be made to afford us any greater help in examining the record than those in this case.

HOKE, J., concurs in this opinion.

Cited: *McDowell v. Kent, post,* 557; *Wall v. Holloman,* 156 N. C., 278; *Hobbs v. Cashwell,* 158 N. C., 597; *Wheeler v. Cole,* 164 N. C., 381; *Porter v. Lumber Co., ibid.,* 397; *Register v. Power Co.,* 165 N. C., 235; *Carter v. Reaves,* 167 N. C., 133.

TOWN OF TARBORO ET AL. v. JAMES PENDER ET AL.

(Filed 17 November, 1910.)

1. Judgments—Liens—Homestead—Limitations of Actions.

In an action against the administrator and heirs at law to sell the homestead of deceased to make assets, brought by the owner of a judgment obtained in the Superior Court, it appeared that the judgment had not been in force ten years at the death of the homesteader or at the time of the commencement of this action, excluding the time the statute was suspended by reason of the allotment of the homestead: *Held,* the lien of the judgment being in force at the time of the commencement of the action, the administrator was properly directed to pay it out of the proceeds of the sale of the homestead in its order of priority, and the statute was not in bar.

2. Same—Justice of the Peace—Superior Court—Docketings.

A judgment of a justice of the peace docketed in the Superior Court, for the purposes of the lien on the lands of the judgment debtor, becomes a judgment of the latter court; and when the time from the docketing of the judgment to the allotment of the homestead, added to the period of time elapsing since the death of the homesteader to the bringing of the action, does not exceed ten years, the statute of limitations does not bar recovery, or destroy the lien of the judgment.

3. Limitations of Actions—Suspension—Process—Summons.

When a summons issues to the administrator and heirs at law to make assets to pay a judgment debt of deceased, the statute of limitations is suspended from the issuance of the summons; and when the judgment creditor is made a party to an action of this character, by order of court, the statute is suspended, as if upon the issuance by him of a summons.

4. Judgments—Homestead—Liens—Limitation of Actions—Administrator—Assets—Distribution—Priorities—Estoppel.

A judgment creditor sued the administrator of deceased and his heirs at law to sell the homestead to make assets. S., another judgment creditor, was made a party by the order of the court: *Held*, (1) The action was not one upon judgment, or an action to foreclose the lien of a judgment; and having taken charge of the *res*, the homestead land, and ordered it to be sold, the court will direct the proceeds to be applied in the order of the priorities of the judgments; (2) one of the judgment creditors is estopped from setting up the expiration of the liens of other judgment creditors which were valid when the property was taken charge of by the administrator under the order of the Court. *Pipkin v. Adams*, 114 N. C., 201, and *Galloway v. Bradfield*, 86 N. C., 163, cited and distinguished.

5. Homestead—Assets—Administrator—Distribution—Procedure.

The administrator is the proper party to sell the homestead of deceased for distribution, and Revisal, 87 (5), directs the order in which the debts shall be paid.

6. Administrators—Judgments—Priorities—Death of Intestate—Limitation of Actions—Execution.

The priority among judgment creditors is determined as they exist at the death of the debtor, and the liens remain unaffected by the lapse of time thereafter while the creditor is debarred of his opportunity to enforce his claim by execution.

APPEAL by both parties from *Guion, J.*, at April Term, 1910, (428) of EDGECOMBE.

This was an action by plaintiff, owner of the Bruce judgment hereinafter set out, against Admr. of B. Bryan and his heirs at law, for the sale of the homestead of said Bryan, to make assets to pay the Bruce judgment; the interpleader, Shackleford, and the defendant, Fountain, declared on their judgments against Bryan.

The material facts are: Shackleford obtained two judgments before

a justice of peace against Bryan, 9 January, 1883, which were on the same day docketed in the Superior Court; Bruce obtained judgment in the Superior Court 16 April, 1888, which was docketed the same day, and plaintiff is now owner of the same; the Fountain judgment was obtained and docketed in the Superior Court 13 October,
(429) 1896. Bryan's homestead was allotted under the Bruce judgment 26 September, 1895. Bryan died 11 August, 1906, and the defendant Pender qualified as his administrator 29 September, 1908. Plaintiff commenced this action 7 October, 1908, and on 4 November, 1908, by order of court, Shackleford was made a party to this action; he filed his complaint, setting up his judgments 9 March, 1909. The court ordered the sale of the homestead land and directed the administrator to pay out of the proceeds (1) the Shackleford judgments, (2) the Bruce judgment, held by the plaintiff, and (3) the Fountain judgment. To that part of the judgment, directing the payment of the Shackleford judgments, plaintiff excepted and appealed. The plaintiff pleaded the statute of limitations and the expiration of the lien, as to the Shackleford judgments, and the administrator and the defendant Fountain pleaded the same against both the Shackleford and plaintiff's judgment, and defendant Fountain appealed from the judgment overruling the same.

W. O. Howard and F. S. Spruill for plaintiff.
Gilliam & Gilliam and H. H. Phillips for Shackleford, interpleader.
G. M. T. Fountain for defendant Fountain.

CLARK, C. J., after stating the case. The Bruce judgment had been in force 7 years, 5 months and 11 days, at the death of Bryan, and 9 years, 7 months and 7 days at the commencement of this action, excluding the time the statute was suspended, by reason of the allotment of the homestead. The lien of the judgment, being in force at the time of the commencement of this action, the administrator was properly directed to pay out of the proceeds of the sale the liens in the order of their priority.

As to the Shackleford judgments, by virtue of their docketing in the Superior Court, they became judgments of that court for the purposes of lien and execution for ten years from the date of docketing. From the date these judgments were docketed, 9 January, 1888, to the allotment of the homestead, 26 September, 1895, was 7 years, 8
(430) months and 19 days. From the date of Bryan's death, 11 August, 1906, to 4 November, 1908, when Shackleford was made a party to this action by the court was 2 years, 2 months and 24 days, making a total of 9 years, 11 months and 13 days, being less than the

10 years, which was necessary to destroy the lien. When a summons issues the statute is suspended though the service is later. So when the court made Shackleford a party, and directed notice to be issued to him, the statute was suspended just as if a summons had been issued.

This was an action in the nature of a creditors' bill to compel the administrator to sell the homestead, to make assets, to pay judgments. *Oldham v. Rieger,* 148 N. C., 548; *Hancock v. Wooten,* 107 N. C., 19. When the court took control of the property through this proceeding, the lien of the Bruce judgment was still in force, and when the court made Shackleford a party, his lien was also still valid, and the court will apply the proceeds in the order of the priority of the liens in force. This is not an action upon a judgment, neither is it an action to enforce the lien of a judgment, as in *Lilly v. West,* 97 N. C., 276. But here the court having taken charge of the *res,* the homestead land, and ordered it to be sold, will direct the proceeds to be applied in the order of their priority. By virtue of this proceeding, the plaintiff was debarred from enforcing his judgment by execution, as was also Shackleford from the date he was made a party to the proceeding, therefore, the statute did not run against him after those dates. *Adams v. Guy,* 106 N. C., 275.

The administrator is the proper party to sell the homestead land for distribution among judgment creditors. *Blythe v. Gash,* 114 N. C., 659; *Springs v. Pharr,* 131 N. C., 191. Revisal, 87 (5) directs the order in which the debts of the decedent shall be paid by his representative. In class 5, the order of payment is thus prescribed: "Judgments of every court of competent jurisdiction within this State, docketed and in force, to the extent to which they are a lien on the property of the deceased, at his death." The priority among judgment creditors is to be determined as they exist, *at the death of the debtor,* and the liens remain unaffected by the lapse of time thereafter, when, as here, the creditor is debarred of an opportunity to enforce his (431) claim by execution. *Mauney v. Holmes,* 87 N. C., 428; *Daniel v. McLaughlin, ibid.,* 433; *Galloway v. Bradfield,* 86 N. C., 163.

There is a broad distinction between the rules governing the application by a sheriff of funds raised by sale under several executions, one or more of which have become barred before the sale, *Pipkin v. Adams,* 114 N. C., 201, by the expiration of the judgment lien upon which the execution issued, and the distribution of assets by a personal representative, which, as was held in *Galloway v. Bradfield, supra,* the administrator must pay according to the priorities at date of death of debtor. The defendant Fountain is estopped from setting up the expiration of the liens, which were valid when the property was taken charge of by the administrator, under the orders of the court. Other-

wise, his mere resisting the judgment to sell would make the other liens invalid, and his own lien good. When execution issues and the lien of the judgment expires before the sale this is by operation of law and not caused by the delay resulting from the resistance of the other party.

The judgment below is

Affirmed.

APPEAL BY G. M. T. FOUNTAIN.

W. O. Howard and F. S. Spruill for plaintiff.
G. M. T. Fountain & Son for defendant.

PER CURIAM. The opinion of the court in the appeal of the Town of Tarboro in this action is decisive of the appeal of the defendant Fountain and the judgment of the Superior Court as to said Fountain, is also

Affirmed.

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(432)

L. L. STATON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 17 November, 1910.)

1. **Appeal and Error—Issue, New Trial as to One.**

A partial new trial having been granted on a former appeal in this case, restricted to the issue whether or not the defendant railroad company so used one of its spur tracks as to be a nuisance, to plaintiff's special damage, the lower court properly restricted the trial to this issue alone.

2. **Railroads—Spur Track—Nuisance—Necessary Acts—Instructions.**

In an action for special damages for the improper use of freight trains by defendant railroad company of its spur track in front of, or adjacent to, plaintiff's residence, the spur not being at a freight depot, it was error in the trial court to charge, in effect, that the acts complained of would constitute an actionable nuisance if unnecessarily done in the operation of the road, when the facts recited would constitute a nuisance in the use of a spur track for such purposes.

APPEAL by plaintiff from *Guion, J.*, at April Term, 1910, of EDGECOMBE.

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

G. M. T. Fountain & Son for plaintiff.
F. S. Spruill and J. L. Bridgers for defendant.

CLARK, C. J. The facts in this case are fully set out in the former appeal, *Staton v. R. R.*, 147 N. C., 429, and need not be repeated here.

In ordering the new trial on that appeal the Court said, "The issue and evidence will be confined to the allegation that the defendant has, within three years prior to the commencement of this action, so used the spur track and the street, in violation of its duty, as to constitute a nuisance, by which the plaintiff has sustained special damages as the owner of the dwelling and premises abutting on the street."

The Court affirmed the action below in other respects, and granted a partial new trial restricted to this issue. On this trial, the judge below submitted the following issue, "Has the defendant, within three years prior to the commencement of this action, so used the spur track and the street as to constitute a nuisance?" This is in exact conformity with the direction of this Court, and the first excep- (433) tion must be overruled.

But we think there was error as pointed out by exception 9. The plaintiff requested the court to charge: "If you shall find from the greater weight of evidence that at any time within three years before 26 September, 1906, the defendants, or either of them, shoved cars on the spur track in front of, or adjacent to, plaintiff's residence, the same not being a freight depot, to be unloaded or loaded within 90 feet of plaintiff's door, and frequently left theatrical cars to be unloaded and loaded, and left steam engines on said track during the night, so that the escaping steam, the ringing of bells, and the sounding of whistles at (unnecessarily) early hours in the morning, and the noises of employees during the night and the early morning, the loud puffing, the (unnecessary) scattering of cinders, sparks, and dust, and the screeching of the wheels on the curve of the said track break the rest of the plaintiff and his family and envelop his dwelling and premises in smoke, dirt and noxious gases, and smells to their annoyance (unnecessarily) this would constitute actionable nuisance, and you will answer the first issue, Yes."

The court gave this prayer, but modified it by inserting the words which appear above in brackets, and added at the end the following, "If not unnecessary, but required in ordinary operation, No." The state of facts above recited would constitute a nuisance on a spur track, if found to be true. It was error to modify the prayer by inserting the words "unnecessary," and "unnecessarily," and by adding at the end that such conduct would not be a nuisance if necessary in the ordinary operation of the road. Such acts, if done at the depot or yard of the defendant would not be a nuisance if necessary in the ordinary operation of the road. But this was a spur track, built to an ice plant, and was not intended for such purposes and conduct as is set out in the prayer. Such acts as occurred in the reasonable and necessary operation of said spur track would not be actionable—for instance, in

transportation to and from the ice plant and electric light plant, or for delivery and receipt of freight to and from business houses along said track and to or from the public cotton yard. But the facts (434) recited in the prayer are not those incident to the operation of the spur track. The subject is so fully discussed in *Thomason v. R. R.*, 142 N. C., 300, and *Taylor v. R. R.*, 145 N. C., 400, that we can add nothing to what is there said.

We do not deem it necessary to discuss the other exceptions.

Error.

DANIEL CHRISCO v. JOSEPH G. YOW AND J. H. REDDING.

(Filed 17 November, 1910.)

1. **Evidence—Impeaching Witness—Explanations.**

On redirect examination, the testimony of a witness explaining an answer made on the cross-examination, tending to impeach him, is competent.

2. **Evidence, Corroborative—Restrictions—Instructions—Appeal and Error.**

When the evidence is corroborative, the failure of the trial court to restrict it will not be considered on appeal unless the objecting party asks for an instruction to that effect.

3. **Declarations—Boundaries—Interest.**

Declarations of the deceased as to a disputed corner of his lands are incompetent unless made against his interest.

4. **Evidence, Newly Discovered—Procedure—New Trial.**

If possible, a motion for a new trial for newly discovered evidence must be made in the Superior Court.

5. **Same—Supreme Court—Opinion.**

If the newly discovered evidence upon a motion for a new trial in the Supreme Court is ascertained after taking an appeal, the motion will be entertained in this Court; it must be submitted without argument, and will be decided without giving a written opinion, or discussing the facts.

6. **Evidence, Newly Discovered—New Trial—Discretion.**

Whether a motion for a new trial upon newly discovered evidence is made in the Superior or Supreme Court, its allowance is a matter in the discretion of the court.

7. **Evidence, Newly Discovered—New Trial—Requirements.**

A motion for a new trial for newly discovered evidence will be denied when such evidence is merely contradictory of a witness examined at the trial, or merely discredits an opposing witness or is cumulative.

8. Evidence, Newly Discovered—New Trial—Diligence—Questions for Court.

The applicant should state the efforts he used to get the newly discovered evidence upon which a motion for a new trial is made, so that the court may determine the matter, and his statement is insufficient, that "every means had been used to find out where the witness was."

9. Evidence, Newly Discovered—New Trial—Affidavits—Reply—Matter of Right—Discretion.

Affidavits in reply to a motion made for a new trial for newly discovered evidence may be filed as a matter of right; and it is within the discretion of the court whether the appellant may file additional affidavits.

APPEAL by defendant from *Biggs, J.*, at March Term, 1910, of (435) RANDOLPH.

The facts are sufficiently stated in the opinion.

J. A. Spence for plaintiff.
J. T. Brittain and Morehead & Sapp for defendant.

CLARK, C. J. There are three exceptions in this case, all as to matters of evidence. As to the first exception, the evidence was properly admitted on redirect examination to explain the answer of witness as to matters on cross-examination, which tended to impeach her. As to the second exception the question asked was competent in corroboration, if for no other purpose. *Ratliff v. Ratliff,* 131 N. C., 431; *Burnett v. R. R.,* 120 N. C., 517. If the defendants wished the testimony restricted to that purpose it was their duty to ask the judge to do so, rule 27, 140 N. C., 662. This they failed to do, but the judge in fact did so instruct the jury.

The third and last exception is because the judge excluded the declaration of the deceased owner of the adjoining tract as to where his corner was. Declarations against interest of an adjacent owner are competent, but not those made in his own interest, and such was the nature of the excluded declaration.

The defendant moved in this Court for a new trial for newly discovered evidence. Such motion must be made and passed (436) upon in the Superior Court at the same term at which the trial is held, if possible. But if the evidence is not discovered till after the appeal is taken, such motion may be made in this Court, *Turner v. Davis,* 132 N. C., 187. When the motion is made here it must be submitted without argument, and will be decided without an opinion, because its decision rests upon matters of fact, which can never be exactly duplicated, and not upon matters of law, as to which a decision may be a precedent. *Brown v. Mitchell,* 102 N. C., 367; *Sledge v. Elliott,* 116 N. C., 717; *Crabtree v. Scheelky,* 118 N. C., 105; *Clark v.*

Riddle, ibid., 692; *Nathan v. R. R., ibid.*, 1070. Besides, whether the motion is made below or in this Court, it is a matter which rests in the discretion of the court.

The principles which govern the court in such cases are well settled, and they are that it must appear by affidavit (1) that the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is material; (4) that due diligence was used to secure the evidence. Such motions have been allowed only "in cases of manifest injustice and wrong, and when there is no other relief obtainable." *Carson v. Dellinger*, 90 N. C., 231.

Such motion will be always denied, if the new evidence merely tends to contradict a witness examined on the trial, *Brown v. Mitchell*, 102 N. C., 367; 11 Am. St., 748; or to discredit the opposing witness, *S. v. DeGraff*, 113 N. C., 688; or is merely cumulative, *S. v. Starnes*, 97 N. C., 423; and it is not sufficient to state that "every means had been used to find out where the witness was." The applicant should state what means he did use, and let the court judge. *Schehan v. Malone*, 72 N. C., 59.

The whole subject has been fully discussed in *Turner v. Davis*, 132 N. C., 187; *Simmons v. Mann*, 92 N. C., 16; *Black v. Black*, 111 N. C., 300. As was said in *Turner v. Davis, supra*, "Such applications are regarded with suspicion and examined with caution, the applicant being required to rebut the presumption that the verdict is correct, and that he has not exercised due diligence in preparing for trial," which (437) quotation was taken with approval from 14 A. & E. Pl. & Pr., 790. However, upon full examination of all the affidavits we do not think that the motion should be allowed.

The defendant in this Court insisted that the affidavits filed by the plaintiff in reply to his motion should be struck out. But we are of opinion that they should be filed as of right. The plaintiff, on the other hand, asked us to refuse to allow the defendant to file additional affidavits in reply to his own. But we think this was a matter in our discretion, and allowed them to be filed.

The motion for a new trial for newly discovered evidence is denied, and in the trial below we find

No error.

Cited: Stilley v. Planing Mills, 161 N. C., 519; *Sullivan v. Blount*, 165 N. C., 10.

LUCRETIA HARRINGTON v. COMMISSIONERS OF WADESBORO.

(Filed 17 November, 1910.)

1. Cities and Towns—Electricity — Dangerous Instrumentalities — Profit—Negligence—Liability.

Municipal corporations engaged in the business of supplying electricity at a profit are not therein exercising a governmental power conferred for the public benefit, and are liable, as other corporations are, for damages proximately caused to an individual through the negligence of its agent and employees in the conduct of such business.

2. Electricity—Dangerous Instrumentalities—Negligence—Degree of Care.

Persons, corporate or individual, engaged in operating an electric plant and supplying power from them, are held to a very high degree of care; and when an untrained and inexperienced boy takes hold of live wires improperly placed or negligently exposed, such act of the boy does not of itself ordinarily afford evidence of contributory negligence.

3. Same—Live Wires—Improper Placing—Insulation—Children—Contributory Negligence—Evidence.

The defendant town was engaged in furnishing for profit the electrical power to run a moving picture show, operated in a tent, the wires conducting the electricity passing to the tent over a path where persons were accustomed to move, and these wires were permitted to sag in easy reach of such persons. Plaintiff's intestate, an inexperienced boy of seventeen years, and who worked on a farm, living there with his mother, in passing along this path stooped under and caught hold of one of the wires, which was, at that place, permitted to remain uninsulated for the distance of about a foot, and received a shock that killed him: *Held*, (1) The defendant was negligent in permitting the wires to remain as placed and under the existing conditions, is liable for the consequent damages; (2) the act of the boy in thus catching the wire was not in itself such contributory negligence as to bar plaintiff's recovery.

4. Negligence—Killing—Action, When Brought—Evidence—Appeal and Error—Record—Presumptions.

Actions of this character for damages for negligent killing must be brought within a year under our statute, not as one of limitations, but a constituent feature of the right of action; the courts, however, will take judicial notice of relevant facts and entries of record in the suit being tried, and when therein it appears that the killing occurred in July, the summons was issued in the following January, it is proper for the appellate court to assume, in support of the verdict and judgment rendered, that a fact of this character was brought to the attention of the jury in some permissible way.

5. Evidence—Dying Declarations—Res Gestae.

In an action for damages for the negligent killing of plaintiff's intestate caused by his catching hold of defendant's live wire improperly placed and exposed, an exclamation of the intestate as he caught the wire, fell

and expired, bearing upon the question of defendant's negligence, is a part of the *res gestæ;* and the doctrine as to the admissibility of dying declarations, only in cases of homicide, is inapplicable.

6. Electricity—Negligence—Subsequent Repair—Evidence—Harmless Error—Facts Proven.

The questions in this case turning upon whether the negligent placing and improper insulation of defendant's live wire caused the death of plaintiff's intestate, the admission of a question and answer under defendant's objection, tending to show that the wire causing the death had afterwards been properly wrapped and insulated, without connecting defendant with it, is harmless; and, also, not reversible error in this case under the evidence on this question which clearly establishes the defendant's negligence therein.

7. Electricity—Negligence—Thunder Storm—Care required.

In an action for damages for the negligent killing of plaintiff's intestate through defendant's negligence in the placing of its defective live wire with improper insulation, by means of which electricity was furnished by the defendant as a motive power, it was not error for the trial court to exclude evidence of a "hard" thunder storm occurring about the time of the killing, it not appearing from the evidence that the storm was likely to have charged these wires; and the defendant in such cases being charged with the duty of observing reasonable care in protecting the citizen from atmospheric as well as artificial electricity.

8. Argument—Facts and Law—Attorneys—Application of Law.

Under our statute attorneys are allowed to argue the whole case to the jury, both as to the law and facts, and they are permitted to state the facts of the decisions relied on to the extent of applying the law of such case to the one being tried.

(439) APPEAL from *C. C. Lyon, J.,* at April Term, 1910, of ANSON.

Action to recover damages for alleged negligent killing of the intestate. Verdict and judgment for plaintiff, and defendant excepted and appealed.

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

Robinson & Caudle for plaintiff.

F. J. Coxe, J. A. Lockhart, McLendon & Thomas, W. E. Brock, and J. T. Bennett for defendant.

HOKE, J. On careful consideration of the record and the exceptions noted, we find no reversible error to defendant's prejudice. The evidence showed that on 4 July, 1908, the Bratton Amusement Company was conducting a moving picture show under a tent erected on an open and vacant lot in the town, being an exposed and public place, and the defendant, under a contract with the company, had installed the wires, and was supplying the electricity for carrying on the enterprise. That

the wire conducting the electricity to the tent passed over a path in which numbers of persons were accustomed to move, and had been negligently placed or allowed to sag so that persons going along the path could easily reach it, some of the witnesses saying it was so low that one would have to bend his body to pass under it, and just at this point the wire was uninsulated for a space of a foot or (440) more. That the intestate, an inexperienced boy of 17 years of age, living with his mother and doing work on the farm in passing along the path caught hold of the wire and received a shock that killed him. One witness who saw it, speaking to the occurrence, said: "We saw him raise up the wire as if to go under; the wire was down about where it would strike his forehead if he hadn't raised it up, and he put up his hands and raised up the wire, and he fell down against the engine, got up on his knees and fell down again. The fellow that was with him asked him if the wire did that to him, and he never spoke a word; he just lay still there on the ground.

"Q. Were the wires naked where he put his hands on it? A. Yes, sir.

"Q. About how much of it was bare? A. About a foot.

"Q. Where was the wire, with reference to the path? A. The wire was right over the path."

The town having engaged in a business enterprise, supplying electricity for a profit, can not avail itself of the position that it was at the time, in the exercise of governmental power conferred for the public benefit. Speaking to this question, in *Fisher v. New Bern,* 140 N. C., 510, *Connor, J.,* delivering the opinion, said: "Where they (cities and towns) have both governmental and business corporate powers conferred, their liability to suit for the torts of their servants or agents, depends upon the sphere of activity in which the wrong complained of is committed. In so far as municipal corporations are engaged in the discharge of the powers and duties imposed upon them by the Legislature as public agencies of the State they are not liable for breach of duty on the part of their officers. In that respect the officers are agents of the State, although selected by the municipality. When acting in their ministerial or corporate character in the management of property used for their own benefit and profit discharging powers and duties voluntarily assumed for their own advantage, they are liable to an action to persons injured by the negligence of their servants, agents and officers." And it is well established that persons, corporate or individual, engaged in operating one of these electric plants and supplying power from them are held to a very high degree of care, and it is held (441) further, that when an untrained and inexperienced boy takes hold of one of these live wires improperly placed or negligently ex-

posed, such act of itself does not ordinarily afford evidence of contributory negligence. *Haynes v. Gas Company,* 114 N. C., 204.

It was chiefly urged for error that the record did not disclose that the summons had been introduced in evidence, and the Court having held in *Gulledge v. R. R.,* 148 N. C., 567, and numerous other cases that the requirement of the statute that actions of this character should be brought within one year after the death, was not a statute of limitations, but a constituent feature of the right of action, there was a substantial failure of proof and the defendant's motion for nonsuit should have been allowed. But we can not so hold. It was clearly established, it was not controverted, that the intestate was killed on 4 July, 1908. The summons in the action was issued in the January following, and the authorities are to the effect that courts will take judicial notice of facts and entries of record in the suit being presently tried, and in support of the validity of the verdict and judgment it is proper for the appellate court to assume that a fact of this character was brought to the attention of the jury in some permissible way. *Van Hook v. Whitlock,* 7 Paige, 373; *Searles v. Knapp,* 550 Dak., 325; *Farrar v. Bates,* 55 Texas, 193; *Secrest v. Petty,* 109 Ill., 188; *S. v. Bonner,* 16 Kans., 475; *Zell v. Lane,* 41 Ark., 53.

It was further contended that his Honor below should not have admitted over defendant's objection an exclamation of the intestate as he caught hold of the wire, fell and expired, and this on the ground that dying declarations are only permissible in cases of homicide. The position is sound in the abstract. McKelvey on Evidence (2 Ed.), 326. But it obtains when the declaration in question is competent only as a dying declaration and strictly offered as such. In the present case and so far as it was relevant to the issue, the exclamation was admissible as part of the *res gestæ, Bedsole v. R. R.,* 151 N. C., 153; *S. v. Spivey,* 151 N. C., 676, and the principle which excludes dying declarations except in cases of homicide does not apply. "In such case declara-
(442) tions whether by a dying person or not, which constitute part of the *res gestæ* or come within the exception of declarations against interest or the like are admissible as in other cases." 2 Taylor on Evidence, sec. 716.

It was further objected that the court allowed a question tending to show that the wire had been wrapped and properly insulated after the killing; a line of inquiry, as a general rule, held incompetent with us, as in *Myers v. Lumber Company,* 129 N. C., 252, and other cases. We do not discover that there is any fact in evidence bringing this act home to defendant, and so the question even if erroneous turned out to be harmless; but if it were otherwise the negligence imputable to the defendant is primarily in allowing its wire to sag down across the path

where people were accustomed to move, and is so clearly established that the answer if relevant could hardly be held for reversible error.

Again it was argued that the evidence offered by defendant as to a hard thunder storm about the time of the killing was not given consideration. It does not appear that the storm was likely to have charged these wires. There was no evidence indicative that a shock was anywhere received, nor do we find that the attention of the court was called to this testimony by any prayer for instruction, and if it had been, the better rulings are to the effect that in a case of this character or on similar facts, an injured person is entitled to insist on reasonable care and protection from atmospheric as well as artificial electricity. *Garforth v. Tel. & Tel. Company,* 77 Vt., 441. Approved in Joyce on Electricity, sec. 445 F.

It was contended further that counsel for plaintiff in arguing his case to the jury was allowed to read to them the facts in *Fisher v. New Bern,* 140 N. C., 506. It is true as said in *Horah v. Knox,* 87 N. C., 483, that counsel are not permitted to read the facts of another case to the jury as evidence of their existence and as pertinent to the case being tried, but under our statute allowing attorneys to argue the whole case to the jury both of law and fact, they are permitted to state the facts of another case for the purpose of properly applying the law of such case to the one in hand. There is nothing in the record to show that this privilege was exceeded in the present instance and this (443) objection also is overruled.

We are of opinion as stated that no reversible error appears in the record.

No error.

Cited: Bank v. Duffy, 156 N. C., 86; *Hicks v. Tel. Co.,* 157 N. C., 526; *Ferrell v. Cotton Mills, ibid.,* 533; *S. v. Corpening, ibid.,* 623; *Chadwick v. Kirkman,* 159 N. C., 263; *Harrington v. Greenville, ibid.,* 636; *Betts v. Tel. Co.,* 167 N. C., 81; *Turner v. Power Co., ibid.,* 631; *Shaw v. Public Service Corporation,* 168 N. C., 618; *Cochran v. Mills Co.,* 169 N. C., 63; *Ragan v. Traction Co.,* 170 N. C., 94; *Harrell v. Lumber Co.,* 172 N. C., 827.

ARTHUR COUNCIL v. R. PRIDGEN AND F. M. WRAY.

(Filed 17 November, 1910.)

1. **Married Women—Separate Realty—Deeds and Conveyances—Privy Examination—Interpretation of Statutes—Constitutional Law.**

Article X, sec. 6, of our Constitution requiring that a married woman conveying her separate real estate shall have the "written assent of her husband," the statute laws, now embodied in Revisal, sec. 952, provides the manner in which the assent of the husband must be obtained, to wit, that the deed "must be executed by such married woman and her husband and due proof or acknowledgment thereof must be made by the wife, and her privy examination taken," etc.; and thus construed, the statutes are constitutional and valid.

2. **Deeds and Conveyances—Married Women—Joinder of Husband—Privy Examination.**

In order to convey a married woman's separate real estate or fix a charge upon it, her privy examination is required, and the husband must join in the deed, notwithstanding she is a free-trader.

3. **Same—Interpretation of Statutes.**

Revisal, sec. 2112, establishes a method by which a married woman may become a free-trader, and sec. 2113 provides that "the married woman therein mentioned shall be a free-trader and authorized to contract and deal as if she were a *feme sole*": *Held*, (1) The word "free-trader," "contract," and "deal," refer to contracts and trades in some business enterprise, and are restricted under this section to the dealings of the wife as a free-trader with reference to her contracts in the pursuit of the business she is engaged in; (2) the word "deal," taken in its legal significance, does not enlarge this meaning so as to confer upon a married woman power to convey her real estate, especially in view of the restrictive words of our statute, "that every conveyance, etc., affecting the real estate of a married woman must be executed by the husband and the wife and her privy examination must be taken and certified as provided by law."

4. **Deeds and Conveyances—Married Women—Joinder of Husband—Privy Examination—Requisites.**

A deed executed by a married woman to her separate real property, the name of the husband not appearing in the body of the deed or his signature thereto, proved on oath of a subscribing witness and registered on such probate, without her privy examination, is inoperative, and the written assent of her husband endorsed on the deed does not meet with the constitutional and statutory requirements necessary for her to make a valid conveyance.

CLARK, C. J., dissenting.

(444) APPEAL from *W. R. Allen, J.*, at February Term, 1910, of COLUMBUS.

Ejectment. It was admitted that the property in controversy had

belonged to Mrs. Sarah E. Wooten, wife of Shade Wooten, Esq., and that in June, 1893, she made a deed, purporting to convey the property. This deed, executed by herself alone was witnessed by E. W. Wooten, Jr., and was proved by the oath and examination of said witness and registered on such probate and that no privy examination of said Sarah E. Wooten was had. The name of Shade Wooten, the husband, did not appear in the body of the deed, nor did he, in any way, join therein, except that his written consent thereto, signed by himself, appeared on the back of the instrument. It further appeared that at the time said deed was made and delivered, said Sarah E. Wooten was a married woman, living with her husband, and that she was at the time a registered free-trader, according to the provisions of the statute, now Revisal, sec. 2112-2113. It was also admitted and agreed that, on the facts stated, if the deed referred to was not a valid conveyance, the plaintiff was the owner of the property; otherwise, not. The court, being of opinion that the deed in question was valid, so instructed the jury, and there was verdict for defendant. Judgment and plaintiff excepted and appealed.

J. B. Schulken for plaintiff.
Donald MacRackan and D. J. Lewis for defendant.

HOKE, J. Our Constitution, Article X, sec. 6, in reference to (445) the property of married women, provides: "The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." In the very year of its adoption, the Legislature, in the endeavor to carry out and give effect to this provision, passed an act requiring that in order to the validity of a conveyance or other instrument, affecting the "estate, right or title of any married woman in lands, tenements or hereditaments," her privy examination must be taken by the proper officer. Code, Civil Procedure, sec. 429, subsec. 6. Reënacted, with some slight modifications, Laws 1868-69, ch. 277, sec. 15. This enactment continued, in substance, through the various codes and laws on the subject, and appearing in Revisal 1905, sec. 952, is as follows: "Every conveyance, power of attorney or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments must be executed by such married woman and her husband and due proof or acknowledgment thereof

must be made as to the husband and due acknowledgment thereof must be made by the wife and her private examination, touching her voluntary assent to such instrument, shall be taken separate and apart from her husband, and such acknowledgment or proof as to the execution by the husband and such acknowledgment by the wife and her private examination shall be taken and certified as provided by law." Not long after the statute was enacted, the question was raised whether the requirement as to privy examination was not in conflict with the constitutional provision, and was finally brought before the Court, and in two cases at the same term and by unanimous decision, it was held that the act was constitutional. That it did not militate against the provision that a married woman could convey her property with the written assent of her husband, but only established a form by which this assent should be evidenced. *Southerland v. Hunter,* 93 N. C., (446) 310; *Ferguson v. Kinsland,* 93 N. C., 337. In this last case it was held: "That deeds conveying lands of *femes covert* must be jointly executed by both husband and wife," and that the requirement as to the wife's privy examination was constitutional. Speaking directly to the question, *Smith, C. J.,* delivering the opinion, said: "The only point made by the appellant's counsel, is that the Constitution, Art. X, sec. 6, which secures to a married woman all the property acquired previous to and since her marriage, as her sole and separate estate, free from her husband's debts, and confers upon her power to devise and bequeath, and, with her husband's written consent, to convey it, as if she were unmarried, sanctions this mode (the assent of the husband being on a separate paper). But it is for the General Assembly to provide the method by which this right may be exercised, as it has done heretofore when her real estate was not less her own, and when she was permitted to convey it only by observing a prescribed form. The requirement that the husband should execute the same deed with his wife was to afford her his protection against the wiles and insidious arts of others, while her separate and private examination was to secure her against coercion and undue influence from him. These have been deemed prudent safeguards to insure freedom of volition and action on her part when she is disposing of her real property, and these are none the less necessary now, when she retains her full real and personal estate." Both before and since these decisions and through all the various cases on the law concerning the property of married women, this one thing has been steadfastly adhered to, that in order to convey a married woman's separate estate or fix a charge upon it, her privy examination is required. *Bank v. Benbow,* 150 N. C., 781; *Ball v. Paquin,* 140 N. C., 83; *Smith v. Bruton,* 137 N. C., 79; *Harvey v. Johnston,* 133 N. C., 352; *Bank v Ireland,* 122 N. C., 571; *Scott v.*

Battle, 85 N. C., 185, and authorities cited. In *Bank v. Benbow* the ruling is: "For a *feme covert* to bind her realty, to the payment of a note, she must execute a formal conveyance or some paper writing which in equity may be a charge upon her separate estate, accompanied by the written assent of her husband and her privy examination."
In *Smith v. Bruton,* 137 N. C., at page 82, *Montgomery, J.,* de- (447) livering the opinion, said: "A married woman in North Carolina can be bound only in two ways, by her deed duly executed with the written assent of her husband and with her privy examination or by a decree of a court of competent jurisdiction. As to the requirements of the first method, the decisions of the Court are very numerous." These decisions too, and many others that could be noted, are to the effect that in order to a valid conveyance of a married woman's land, the assent of her husband must be included by his joining with her in the body of the deed. Such joinder is not required to charge her land, the written assent of her husband may be otherwise expressed, but to convey, the husband must join in the deed, and in both the privy examination is required. In *Ball v. Paquin,* 140 N. C., 83, *Connor, J.,* after deciding that the land of a married woman, under certain circumstances, may be charged by necessary implication, under a contract for repairs, entered into with the written consent of her husband and to which her privy examination had been taken, in reference to this last requirement, said: "It is evident that the judges were referring to the formalities with which such contracts should be executed. In *Bank v. Howell,* 118 N. C., 271, it is said that she can not charge her separate real estate 'except upon privy examination.' In *Bank v. Ireland,* 122 N. C., 571, the present *Chief Justice,* writing in that respect for a unanimous Court, referring to *Farthing v. Shields, supra,* and other cases, said: 'Those decisions do not require that the charge shall be made by mortgage.' In so far as it was intimated that no privy examination was necessary, the then *Chief Justice* and other Justices did not concur. The conclusion is irresistible that where the contract has all of the elements required by the statute and is reduced to writing, assented to by the husband, and the wife is privately examined separate and apart from her husband, it is binding upon her separate real estate."

It is not seriously controverted that the cases referred to decide the question as stated, but it is contended that the present conveyance, lacking as it does both the joinder of the husband and the privy examination of the wife, should be upheld, by reason of the fact that the wife was registered as a free-trader, under sections 2112 and 2113 (448) of Revisal, but in view of other provisions of our statute law, bearing upon this question and authoritative decisions of courts here

and elsewhere, we are of opinion that these sections in question do not have the effect contended for. Section 2112 establishes the method by which a married woman may become a registered free-trader, and section 2113 provides that "the married woman therein mentioned shall be a free-trader and authorized to 'contract and deal as if she were a *feme sole.*'" Both the words free-trader and the words "contract and deal" refer, in their ordinary acceptation, to contracts and trades in some business enterprise, and do not, primarily, include or describe conveyances of realty. It is urged that while the word "contract" might not have such significance, the word "deal" does, and the fact that this word is added necessarily shows an intent on the part of the Legislature to confer the power to convey the realty, but this we think an unwarranted deduction. Both words, as stated in their primary acceptation, refer to the ordinary bargains and trades incident to some business enterprise and these a free-trader may make. If there is a difference between the words, the term contract should be construed as referring to executory obligations, while deal would uphold her trades and bargains executed, but both, as a general rule, are terms which apply to the ordinary incidents of business. In Black's Dictionary, the word deal is said to mean, "to traffic, to transact business, to trade," etc. In 8 A. & E., 846, the same definition is given. In Cyc. it is said that deal as a noun, as applied to intercourse between parties, refers to any transaction of any kind between them, but as a verb, it means to "traffic, to transact business, to trade." Accordingly, in both of these last publications, in describing the powers to be ordinarily exercised by a statutory free-trader, reference is made to those contracts usually incident to some business enterprise, as in 21 Cyc., 1338, where it is said: "When a married woman trades by authority of a statute, as a *feme sole,* she has all the powers and liabilities incident to her business. She may buy and sell on credit, execute notes, sue and be sued, and may be adjudged a bankrupt. She may hire assistants and clerks, (449) appoint agents and even employ the service of her husband." 15 A. & E., 755, and Harris on Contract of Married Women, secs., 508-510 *et seq.* are to like effect.

So far as we have examined, in those States where a contrary ruling has been apparently made, the statute either conferred the power to convey realty, in express terms, or the powers arose by a decree of some court, fixing the married woman's status, and the decree, in terms, gave her the power to convey her land. And if a different principle was shown to obtain in other jurisdictions, it could not be allowed to prevail here, for the words to "contract and deal" are at best indefinite as to the question we are discussing and the significance contended for is not permissible in the face of the explicit declaration of our statute, "that

every conveyance, power of attorney or other instrument, affecting the estate, etc., of a married woman, must be executed by the husband, and the wife and her privy examination must be taken and certified as provided by law." There are no cases in our own Court that directly decide the question presented in this appeal, the power of a registered free-trader to convey her real property, without joinder of her husband and without her privy examination, but there has been reference to it at different times and so far as they bear upon it, their expression is against defendant's position. Thus in *Smith v. Bruton, supra,* a case in which the right of a married woman to enter into an agreement to arbitrate the question of title to her land, and in which it was decided that such agreement was not binding without joinder of her husband and her privy examination taken, *Montgomery, J.,* delivering the opinion, among other things, said: "That the plaintiff was a free-trader, can make no difference. As we have said, there are only two ways by which a married woman can dispose of her real estate, one by deed with the written assent of her husband and her privy examination, and the other by decree or judgment of a court of competent jurisdiction." And in *Wilkes v. Allen,* 131 N. C., 279, it was urged that because the married woman, plaintiff, was a registered free-trader, the statute of limitations should run against her, but the court held otherwise on the ground that her position as free-trader did not affect the explicit language of the statute as it then was, that such statute should (450) not run against a married woman. We are not inadvertent to the cases of *Vandiford v. Humphreys,* 139 N. C., 65, and *Hall v. Walker,* 118 N. C., 377, in which conveyances by married women were upheld without privy examinations, but it will be noted that both of these were cases of abandonment and are regulated and controlled by a separate and distinct section of our Revisal, *i. e.,* sec. 2117. That section, after providing that a married woman, abandoned by her husband, shall be deemed a free-trader, so far as to be competent to contract and to be contracted with and to bind her separate property, in express terms confers this power: "And she shall have power to convey her personal estate and her real estate without the assent of her husband." This additional provision is not contained in the section under which the *feme covert* acted, and the fact that in her case she was only given the power "to contract and deal," while in the case of abandonment, the power to convey real estate is expressly given, supports our conclusion that these words, "contract and deal," did not and were not intended to confer upon an ordinary free-trader the right to convey realty, except in the way provided by law.

We have been referred to several poems, sacred and profane, in which the word "deal" is given a more extended meaning than that

which obtains in this opinion, but these references, while, to some extent, persuasive, are far from convincing. It is well understood that in works of that character authors are allowed a broader sweep, in the matter of language, its use, pronunciation, and even its orthography than is ordinarily permissible, and we think it better, in construing statutes and instruments concerning the devolution and transfer of property, to follow the meaning established by tribunals charged with the duty of making authoritative deliverance on these subjects.

We are of opinion that there was error in the instructions given by his Honor, and that, on the facts established, the verdict and judgment should have been for the plaintiff.

Reversed.

(451) CLARK, C. J., dissenting: The sole question presented in this case is whether a conveyance of land by a married woman, *who is a free-trader,* and has received the purchase money, the deed being endorsed with the full written assent of her husband, and thereafter duly probated and admitted to registration, is void against the heirs—who do not tender the return of the purchase money—because her privy examination is not shown to have been taken.

If the deed is not valid, the heirs certainly should not be allowed to set it aside, and recover the land unless they should tender the return of the purchase money. This is elementary justice, and was laid down in *Burns v. McGregor,* 90 N. C., 222, citing *Scott v. Battle,* 85 N. C., 184, and other cases, and has been cited and reaffirmed often since. See cases cited in the annotated edition, 90 N. C., 226.

The point, however, as to the validity of a deed executed by a married woman who is a free-trader, executed with the written assent of her husband (which is all that the Constitution requires), but without privy examination, has never before been presented to this Court for decision. No question as to the power of married women to contract arises in this case. It is true *Montgomery, J.,* so intimates *obiter,* in *Smith v. Bruton,* 137 N. C., 83, but he immediately adds that in that case the rights of a married woman as a free-trader did not arise. Besides, his general expression, not pertinent to the case in hand, that no married woman could make a conveyance of land without a privy examination was incorrect. We know that the statute in several instances permits a married woman to make a conveyance of her land, without privy examination, even without being a free-trader, and though without her husband's assent. Revisal, 2117, 2116, 2111, 2096 and 956. Here the married woman was a free-trader, her husband's assent and joinder in the deed was expressed and she received the purchase money, and this action seeks to recover the land without repayment of the purchase money.

In *Williams v. Walker,* 111 N. C., 608, it was practically held by the whole Court that if the grantor had been a free-trader her deed would have been valid without privy examination.

The question being before this Court for the first time we are free to decide it without infringing upon any precedent. The (452) general provision in Revisal, 952, requiring the wife's privy examination is subject to the above statuory exceptions. In *S. v. Holder, post,* 606, it was held that the Revisal must be construed as a whole, and that where one section provided that "all offenses punishable by death or imprisonment in the State's prison," should be felonious, but five other sections prescribe for certain offenses, punishment in the State's prison, adding that they should be misdemeanors, the latter are exceptions to the general rule, and hence not felonies.

In Revisal, 2117, it is provided that if any husband shall abandon his wife or maliciously turn her out of doors she "shall be *deemed a free-trader*" and shall have power to convey her real estate "without the assent of her husband." This statute was held constitutional. *Hall v. Walker,* 118 N. C., 377; *Finger v. Hunter,* 130 N. C., 531; *Vandiford v. Humphreys,* 139 N. C., 67; *Brown v. Brown,* 121 N. C., 8.

Revisal, 2116, provides that if the husband is living separate from the wife either by decree of court or under deed of separation, or if he is an idiot or a lunatic, the wife "shall be a free-trader" and can "convey her real estate without the assent of her husband."

Revisal, 2111, provides that if the husband shall separate from his wife and live in adultery, she may "sell and convey her real property as if she were unmarried."

Revisal, 2096, provides that no leases of real estate by a married woman, *"not a free-trader"* shall be valid without privy examination. This shows the legislative understanding is that if she is a free-trader the conveyance is valid without privy examination. *Burwell, J.,* in *Williams v. Walker,* 111 N. C., 608.

Revisal, 959, also dispenses with privy examination where the conveyance is of the husband's land and the wife is a lunatic. The requirement of a privy examination has, therefore, many exceptions.

Revisal, 2113, prescribes that when a wife has been duly made a free-trader "she may contract and deal as if she were a *feme sole.*"

If the sole object of this statute had been to authorize the free-trader to contract as a *feme sole,* the statute would have so (453) expressed it. It would have stopped with the word "contract" which expresses the idea and power as fully and completely as possible. By adding the words *"and deal* as if she were a *feme sole,"* it was meant to give her complete and full powers as she possessed before she was married, or after she ceased to be so. The word "deal," evidently

could mean only "convey," because by the Constitution a married woman has full power to dispose of her personalty in any mode whatsoever, as if *feme sole, Vann v. Edwards,* 135 N. C., 661; and she could dispose of her realty by will, and requires only the husband's written assent as to conveyance of her realty (which she had here). The addition of the word "deal" in connection with the words "as if she were a *feme sole*" are meaningless, therefore, unless it authorizes the wife to execute a deed, when she is a free-trader, free from all requirements of any kind, save the constitutional one that she must have the written assent of her husband. What else could "deal as a *feme sole*" signify? For the statute already provides that she could contract.

Besides, the word *"deal"* is a much broader word than *"contract,"* and is, therefore, not a mere repetition of it. The word *"deal"* among its primary meanings as defined by both Webster and Worcester signifies: 1. Give, or transfer; 2. Transact. In this they are borne out by the usage of the best English writers.

"Deal thy bread to the hungry." Isaiah lxviii, 7.

"I could *deal* kingdoms to my friends and ne'er be weary." Shakespeare, Timon, Act 1, sc. 2.

"As rich men *deal* gifts." *Ibid.,* lv., 3.

"Deal damnation round the land." Pope's Universal Prayer.

"With a broken truncheon *deals* his blows." Dryden.

Certainly the word can not, therefore, be regarded as a mere duplication of the word "contract." This is true also of the second meaning above given of general transaction:

"He that *deals* between man and man." Lord Bacon.

"The Jews have no *dealings* with the Samaritans." John iv, 9.

On the authority of the lexicographers and the best writers the word "deal" has a far different meaning from the word "contract."

(454) To restrict the meaning of the word to "contract" would be to give it a signification much narrower than that which naturally belongs to it, and would uselessly duplicate a word already used. The natural meaning which should be given the words *"and deal as if she were feme sole"* is to add something beyond the power of contracting. The word "and" means "in addition," and the word "deal" evidently shows that the Legislature intended to give a free-trader in all other respects the same freedom and power of dealing with her property "as if she were a *feme sole,"* subject, of course, only to the constitutional restrictions that a married woman must have the written assent of her husband to conveyances of her realty.

What is the reason, what is the necessity, to construe the liberal words of the Legislature, which treat a free-trader "as if she were a *feme sole*" to be *not* "as if she were a *feme sole*" except as to "contracting?" The

requirement of a privy examination is of no benefit to any one and is simply a vexation and a useless expense which in the aggregate is no small sum. We have no reason to believe that the married women of North Carolina are in any wise inferior to the married women in our adjoining States, South Carolina, Georgia, Tennessee and Virginia, in all of which this useless formality has been abolished these many years, without any detriment to any one. Nor are the married women of North Carolina inferior to those of New York or in the other States of this Union, in all of which save perhaps 8 or 9 this useless formality has been abolished for many years; nor to those in England and other countries of the British Empire, in which the privy examination of a married woman has long since been relegated to the company of the feudal tenures and the refinements of special pleading. There is no reason that North Carolina should retain useless and vexatious formalities which have been discarded elsewhere.

Viewed in the light of Revisal, 2113, and giving to the words of the statute their ordinary signification, it would seem that the Legislature intended to confer upon free-traders not merely the power of contracting, but in all other respects the same freedom "as if she were a *feme sole.*" It is the natural and ordinary meaning of the words used, and there can be no reason to give them an unusual and restricted meaning; a meaning, in short, that strikes out of the (455) statute the words "and deal," if they meant no more than has already been expressed by the word "contract." But independently of the statute, the parties who paid the full purchase money for this land and received the deed of the married woman and free-trader, with the written assent of her husband endorsed, should not be deprived of it. If the grantees had received the deed from a married woman who is a *quasi*-free-trader from implied consent under Revisal, 2117, 2116, 2111, 2096 or 956, they could not be deprived of it. The deed would be admittedly valid, under the decisions of this Court, above cited. *A fortiori,* they should not be deprived both of the land and of the purchase money when they have taken the deed from a free-trader who was made such with the express consent of the husband under Revisal, 2113, and he also joined in the deed and expressed his full assent to the conveyance. In *Bell v. McJones,* 151 N. C., 85, this Court has held recently that where a married woman has received the purchase money for her tract of land she would not be allowed to profit by the fraud of her husband, who palmed off on the purchaser a deed conveying a smaller tract than the one she had contracted to sell. Here the heirs at law are seeking to deprive the purchaser not merely of a part of the land, as in *Bell v. McJones, supra,* but to take the whole of it back without restoring any part of the purchase money.

Independently of the terms of Revisal, 2113, empowering a married woman to deal "as if she were a *feme sole*," and of the equitable principle stated in *Burns v. McGregor*, 90 N. C., 222, and other cases cited by that case or which have approved it since, to the effect that a married woman can not disavow her contract and notwithstanding retain the consideration she has received therefor (an elemental principle of justice) there is this further consideration, that the Constitution, Art. X, sec. 6, provides that a married woman, "with the written assent of her husband," may convey her realty "as she were unmarried." It would seem clear, from this language that the Legislature could not add any other requirement as to conveyances by a married woman of her realty which is not exacted of unmarried women. The Conven-
(456) tion was not inadvertent to the matter of privy examination, for in the same article, sec. 8, it retained it as to a conveyance of the homestead. It therefore dispensed with the privy examination intentionally in section 6, when it provided that a married woman could *convey as if unmarried*, provided she had the written assent of her husband.

Privy examination is a substitute for a fine and a recovery, and as such is brought forward in Revisal, 952, evidently by inadvertence to the change made by the Constitution. The proper construction of Revisal, 952, to make it conform to the Constitution, is that the privy examination is only required in the instance in which the Constitution retains it. It is true that we have cases which hold contrary to this view, but there is not one, as we have seen, which holds that a privy examination is required of a free-trader who is authorized by Revisal, 2113, "to contract *and deal as if she were a feme sole.*"

In the recent case of *Ball v. Paquin*, 140 N. C., 89, this Court said, that "in the absence of controlling decisions to the contrary," it would hold otherwise than our line of decisions had held as to the right of married women to contract, and on page 96 expressed the wish that the Legislature would bring the statute law "into harmony with the best modern thought and conditions." The same was said in *Bank v. Howell*, 118 N. C., 273, and in other cases.

As to the point now presented, there has been no decision rendered heretofore. If Revisal, 2113, empowers a free-trader to convey, with the written assent of her husband, without privy examination, it conforms to the Constitution, to Revisal, 2096, and as to leases by married women, and is "in harmony with the best modern thought and conditions," *Ball v. Paquin, supra*, for, as already said, privy examination has been abolished in all other countries except possibly in 8 or 9 of our States. No evil results have followed. In these days, we no longer presume either as a matter of fact or of law that a husband will intimi-

date his wife into consenting to a conveyance or that wives will be intimidated. If it were otherwise, the intimidation would be renewed if the wife did not assent before the justice of the peace. Such ceremony certainly does not possess the protection which was afforded by fine and recovery which was had in open court, and (457) which has been abolished everywhere. There can be no reason for the retention of its ineffective substitute.

It is certainly a great hardship that these defendants shall lose the land for which full value was paid, and for which they received a deed executed by a married woman who was a free-trader, when the deed was executed with the written assent of her husband, duly adjudged, probated and registered, and under a Constitution which guaranteed to all married women the right to convey their realty, with the sole requirement that the conveyance should be with the written assent of the husband.

NOTE.—The views in the dissenting opinion were adopted by the General Assembly, Extra Session, 1913, ch. 54.

Cited: Jackson v. Beard, 162 N. C., 107; *King v. McRackan,* 168 N. C., 623; *Butler v. Butler,* 169 N. C., 596; *Warren v. Dail,* 170 N. C., 409, 416.

E. C. RUMBLEY v. SOUTHERN RAILWAY COMPANY.

(Filed 17 November, 1910.)

Negligence—Unskilled Employment—Nonsuit.

Plaintiff, a carpenter, received the injury complained of while taking down an old shed for the defendant company which he and another had been directed to do. They had been engaged in this work several days when plaintiff was injured in knocking the rafters loose while standing on the joist of the shed, which latter gave way, causing him to fall to the ground to his injury. The work was simple in its performance, well within plaintiff's experience and training, and he was left to do it in his own way: *Held,* upon the facts in evidence no breach of defendant's duty was shown, and a motion to nonsuit should have been allowed.

APPEAL from *Lyon, J.,* at May Term, 1910, of ALAMANCE.

Action to recover damages for physical injury caused by alleged negligence on the part of defendant company. In apt time there were motions of nonsuit, under the statute, overruled and defendant excepted. The jury rendered the following verdict:

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

(458) 2. Did the plaintiff contribute to his injury by his own negligence? Answer: No.

3. What damage, if any, is the plaintiff entitled to recover? Answer: $700.

Judgment on the verdict and defendant excepted and appealed.

J. A. Barringer for plaintiff.

Parker & Parker and W. B. Rodman for defendant.

HOKE, J. We fail to perceive any ground upon which this recovery can be sustained. The evidence tended to show that on 23 June, 1908, plaintiff and another carpenter were directed to tear down an old shed, near the Salisbury depot and had been engaged on the work several days, and on the day in question they were knocking the rafters loose and standing on one of the joists of the shed, which were placed horizontally beneath, at intervals of two or three feet. While plaintiff was standing on one of these joists, knocking loose the rafters above, it gave way and he fell to the ground, causing the injury complained of. The cause of the joist giving way is not very definitely described, but it seems to have been insecurely fastened at the ends. The work that plaintiff was given to do was simple in operation, well within his experience and training, and he was left to select his own methods of doing it. On the facts in evidence, there has been no breach of legal duty established on the part of defendant company and under several recent decisions of this Court, the motion for nonsuit should have been allowed. *House v. R. R.*, 152 N. C., 398; *Brookshire v. Electric Co.*, 152 N. C., 669; *Dunn v. R. R.*, 151 N. C., 313.

Reversed.

Cited: Bunn v. R. R., 169 N. C., 651, 653; *Wright v. Thompson*, 171 N. C., 91.

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(459)

G. T. TUTTLE v. SALLIE WARREN AND FRANK HILL.

(Filed 17 November, 1910.)

1. Deeds and Conveyances—Title—Adverse Possession—Possession of Another—Priority—Partition—"Color"—Evidence.

In his action for possession of lands, plaintiff, in deraigning his title, introduced a deed to W., a mortgage from R., the son and heir of W., to secure a debt to L., the land described in the mortgage being a 77-acre tract adjoining the *locus in quo* and the undivided interest of the son in his father's land; also, a contract from L. to R. agreeing to sell him the

tract containing the 77 acres and another tract of 16 acres. There was evidence of the partition of the lands of L. among his heirs at law, a part thereof, including the *locus in quo*, being assigned to his daughter, G. There was no sufficient evidence of adverse possession to ripen title to the *locus in quo* in G., or that L. was the owner of the land, but evidence tending to show the possession of R. thereof for sixteen years, and of a part thereof for thirty years: *Held*, (1) For the plaintiff to avail himself of the contract between L. and R. as evidence tending to show that the former claimed by virtue of his contract with the latter, there must be some evidence of privity between these two, of which the contract, failing to describe the *locus in quo*, is none; (2) the possession of R. can not enure to the plaintiff's benefit in claiming under G. as one of the heirs at law of L.; (3) G. had color of title to the lands under the division in partition proceedings by the heirs at law of L., but this can not enure to plaintiff's benefit for failure to show her possession thereunder; (4) evidence of possession of R., one of the heirs at law of W., under parol partition proceedings is irrelevant, and fails to show the character of the possession of R. as being adverse and under a claim of right; (5) there being no evidence tending to show the legal right of the plaintiff to claim under R. or sufficient to give him the benefit of the latter's possession of the *locus in quo*, a judgment as of nonsuit upon the evidence was properly allowed.

2. Judgments—Nonsuit—Another Action.

Upon a judgment of nonsuit upon the evidence, the plaintiff may bring another action and supply the deficiency in the evidence, if so advised.

APPEAL by plaintiff from *Long, J.*, at May Term, 1910, of STOKES.

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

N. O. Petree and J. D. Humphreys for plaintiff. (460)
Watson, Buxton & Watson and J. W. Hall for defendant.

WALKER, J. This is an action for the possession of land, the title to which was admitted to be out of the State. Plaintiff introduced a deed for the land from Hulet Blackburn to James Warren, dated 21 December, 1839, and a mortgage from Reuben Warren, son and heir of James Warren, to Edward H. Young, trustee, to secure a debt for $536.49 due to William A. Lash, dated 25 October, 1866, the land described therein being a tract of 77 acres adjoining the *locus in quo*, and the undivided interest of Reuben Warren in the land of his father. He then introduced a contract dated in 1873, between William A. Lash and Reuben Warren, by which Lash agreed to sell to Warren for $509.14 the tract containing 77 acres and another tract of 16 acres. There was evidence tending to show a partition of lands among the heirs of W. A. Lash, and that Lot No. 3 assigned to Laura Gilmer, one of the heirs, included the *locus in quo* and was conveyed to the plaintiff on 19 March, 1908. No possession of that lot by Mrs. Gilmer, or those claiming under her, sufficient to ripen her title, was shown, nor does it appear that W. A. Lash was the

owner of the land divided among his heirs in the partition proceedings. The plaintiffs contend, though, that W. A. Lash claimed the land under Reuben Warren by virtue of the contract of 1873, but we have been unable to find any sufficient proof to the effect that the land therein described embraced the *locus in quo,* and that contract is the only evidence tending to show any connection or privity between Reuben Warren and W. A. Lash. It is true that evidence was introduced to show that Reuben Warren had possession of the entire *locus in quo* for sixteen years or more prior to his death, which, it is stated, occurred seven years ago, and possession of a part of the *locus in quo* for thirty years, but his possession can not inure to the benefit of the plaintiff, claiming under Mrs. Gilmer as one of the heirs of W. A. Lash, unless some privity between the latter and Reuben Warren had been established. In this view of the case, the evidence which was offered by the plaintiff and excluded by the court, that there had been a parol partition among
(461) the heirs of James Warren, who took possession of their respective parts, was irrelevant. If the plaintiff had offered to show that Reuben Warren went into possession of what is called "his share," and continued in possession thereof, and that it included the *locus in quo,* and it had further appeared that there was such privity between him and W. A. Lash as would entitle the latter or his heirs to claim the benefit of the possession of Reuben Warren, if it was sufficient in itself, or by tacking it to the possession of W. A. Lash held for him by Reuben Warren under the contract of 1873, to confer title, the evidence might have been competent and relevant, although the oral partition was invalid, to show the character of the possession of Reuben Warren, as being adverse and under a claim of right. *Rhea v. Craig,* 141 N. C., 603. But the plaintiff, we think, has failed in his proof at the vital point of the case. He has shown no legal right to claim under Reuben Warren, or to avail himself of his possession of the *locus in quo.* In this respect, the evidence is wholly lacking, and some of the other evidence is of an indefinite nature. The allotment to Mrs. Gilmer in the partition proceedings constituted color of title (*Bynum v. Thompson,* 25 N. C., 578; *Smith v. Tew,* 127 N. C., 299), which could be ripened into a good title by adverse possession, but there is no evidence of such possession.

In the absence of the essential proof, we must sustain the judgment of nonsuit, but this does not prevent the plaintiff from bringing another action (*Tussey v. Owen,* 147 N. C., 335) and supplying the present deficiency in the evidence, if he is able to do so.

No error.

Cited: Culbreth v. R. R., 169 N. C., 727.

(462)

T. S. MYERS v. C. G. PETTY ET AL.

(Filed 23 November, 1910.)

1. Negotiable Instruments—Fraud in Procurement—Endorser.

The affirmative finding of an issue as to whether the signatures to a negotiable instrument were procured by fraud of the payee is not always decisive in an action thereon against the makers by an endorsee for value before maturity. Revisal, secs. 2151 *et seq.;* 2171.

2. Same—Requisites—Instructions.

In an action upon a negotiable instrument by the endorsee, it is necessary for him to show endorsement by the payee before maturity for him to become a holder in due course and have the benefit of the presumptions of the negotiable instrument act; and when he has introduced evidence of such endorsement, and there is no evidence in contradiction, it is proper for the trial judge to instruct the jury that if they "found the facts to be as testified to" they should regard them, with the statutory inferences therefrom, as established.

3. Negotiable Instruments—Fraud in Procurement—Endorsee—Burden of Proof.

An endorsee, claiming to be the holder in due course, for value, of a negotiable instrument purchased before its maturity, brings his action on the instrument against the makers, who defend upon the ground that their signatures to the note were procured by the fraud of the payee, and that the facts and circumstances were sufficient to put the plaintiff on notice of the fraud; and, also, that he was not a purchaser for value. Upon evidence tending to show the fraud by the payee, in the procurement and issuance of the instrument, *held*, the burden of proof was upon the plaintiff to show that he was a *bona fide* purchaser for value. Revisal, 2201; 2208.

4. Same—Questions for Jury.

In this case the burden of proof was on the plaintiff to show that he was an endorsee of the negotiable note sued on, before maturity, for value and without notice of the fraud of the payee in its procurement. There was evidence that he took the note from the payee as part payment of a "bunch" or carload of "railroad" mules, which the payee testified was full value, but which defendant's evidence tended to contradict: *Held*, in this case, under the conflicting evidence, the question as to whether the plaintiff was a holder of the note for value in due course was one for the jury.

APPEAL from *O. H. Allen, J.*, at July Term, 1910, of LEE. (463)

The plaintiff sued upon the following note:

$1,000. SANFORD, N. C., 8 July, 1907.

1 September, 1908, for value received, we jointly and severally promise to pay Bauhard Bros., of Martinsville, Ind., or order, one thousand dollars, at the Bank of Sanford, Sanford, N. C., with interest at 6 per

cent per annum, interest payable annually, with attorney's fee and without any relief whatever from valuation of appraisement laws.

C. G. PETTY (and 9 others).

It was alleged that upon the note appeared a credit of $200, dated 8 July, 1907; and that the note was endorsed before maturity and for value to plaintiff by Bauhard Bros., without recourse on them. The defendants, admitting the signing of the note, denied the payment of any amount thereon; also that plaintiff was the owner and that the note was endorsed to him, and that he was a *bona fide* purchaser for value; and further alleged that the note was fraudulently obtained and issued, in that the agent of the payees had falsely and fraudulently represented that other solvent persons had agreed to sign the same and that the note would not be issued until the signature of such persons were placed thereon; that there had been an entire failure of consideration in that the horse which was to be sold the defendants for the notes, was not as represented and was not delivered, and that the agent of the payees had secretly disappeared with the note in breach of his agreement, to have a meeting of the signees at which the horse was to be accepted and the note delivered. His Honor submitted the following issues:

1. Were the signatures to the note sued on procured by fraud?
2. Did the plaintiff purchase said note in good faith and without notice of any infirmity or defect and before maturity and for value?
3. Are the defendants indebted to the plaintiff, and if so, in what amount?

The jury answered the first issue "Yes," and the second issue (464) "No." Judgment was thereupon rendered against the plaintiff and he appealed to this Court.

R. S. McCoin and Hoyle & Hoyle for plaintiff.

D. E. McIver and A. A. F. Seawell for defendants.

MANNING, J. It may be conceded that the evidence offered by the defendants was amply sufficient to warrant the jury in making an affirmative response to the first issue; but the note being negotiable, such a finding was not decisive of plaintiff's right to recover. The note possessed all the statutory requirements of negotiability. Sec. 2151 *et seq.*, Revisal. Sec. 2172, Revisal, provides: "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value"; and sec. 2178, Revisal, provides: "An instrument is negotiable when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof." The note sued upon being made payable to Bauhard Bros., or order, endorse-

ment by them was necessary to transfer the title and give the plaintiffs, as the holder, the benefit of the presumptions of the negotiable instrument act; and proof of such endorsement by the payees was necessary. *Tyson v. Joyner,* 139 N. C., 69; *Mayers v. McRimmon,* 140 N. C., 640. The plaintiff offered proof of the endorsement to him by the payees before maturity, and that he was at the time of action begun and since then the owner of and in possession of the note. There was no evidence contradictory of these facts; and upon the evidence it was proper for the trial judge to instruct the jury that if they "found these facts to be as testified to," then to proceed with them as established and the statutory inferences therefrom to the ascertainment of the other facts required. Section 2201, Revisal, declares what constitutes a holder in due course, as follows: "A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it has previously been dishonored, if such was the fact; (3) that he took it for good faith and value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of (465) the person negotiating it." Section 2208 provides that: "Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some other person under whom he claims, acquired the title as a holder in due course." The defendants rely upon the last paragraph of the section just quoted for their relief. They contend that having shown that the title of Bauhard Bros. was defective, and that they transferred the note to the plaintiff in fraud of their rights, the burden was cast upon the plaintiff to show that he acquired the title as a holder in due course. They contend that the evidence of Bauhard was equivalent to an admission by him of knowledge of the fraud practiced upon the defendants in acquiring the note; and that the circumstances under which plaintiff acquired the note were sufficient to lead him, by proper inquiry, to discover the fraud; and that he did not pay value for the note. We are, therefore, brought to a critical examination of the evidence of the circumstances under which plaintiff acquired the note and whether he paid value for it. This evidence comes entirely from plaintiff and his witness, I. J. Bauhard. The plaintiff testified that he bought the note sued upon and another note of the same tenor and same amount, aggregating $1,600, in February, 1908, and that having a carload of 24 or 25 railroad mules, he sold them to Bauhard, receiving the two notes and $1,500 in cash therefor; that he had known Bauhard for three years and had other dealings with him; that he inquired of a man named

Harris, known to him, living in Knoxville, Tenn., where he and I. J. Bauhard also lived at the time, about the defendants; that this party had formerly lived in Henderson, N. C., and upon his statement that the defendants were solvent, he purchased the notes. I. J. Bauhard testified that while he knew that there was trouble about the note and had been notified that defendants would not pay it, he withheld the information from plaintiff, and confirmed the evidence of plaintiff as to the circumstances of the transfer of the note and of the value paid for it.

(466) On cross-examination this witness testified: "Q. What was the consideration? A. A bunch of mules for this note and the other note. The face value of the two notes was $1,600. Q. How many mules did you get for these two notes? A. I got a carload and paid him a difference. Q. How much difference? A. I forget; they were cheap mules. Q. You mean by that you transferred to Mr. Myers the two notes of $1,600 and took the mules in payment of the two notes? A. Yes, sir. Q. Did Mr. Myers pay you the difference? A. No. I paid him the difference. They were cheap railroad mules, and I do not recall the amount; we had other transactions mixed up with this one, and I owed him for two or three deals, but he took the notes in at face value, and I sold the mules."

The only testimony offered tending to impeach the transfer of the notes for value by Bauhard to the plaintiff, was the testimony of one of the defendants, who testified that he was the keeper of a livery stable at Sanford, N. C.; that he knew what a second-hand railroad mule was; that it had a definite trade meaning; that it was a mule that had been worked on a railroad until run down and was a poor mule; that he knew the value of such mules at the time of the transfer of the notes to plaintiff, and at that time such mules were worth $40 per head at Sanford, N. C., and less at Knoxville, Tenn.; that while he had not bought such mules at Knoxville, he had traded in them. While we can not say that this evidence was very convincing, it was competent to be submitted to the jury for their consideration in determining whether the plaintiff was a *bona fide* purchaser for value. The value of this witness' opinion and his interest as a defendant in the result of the trial were before the jury. If this witness correctly estimated the value of the carload of mules, and the jury believed it, then the plaintiff was not a purchaser for value. Both the plaintiff and I. J. Bauhard—one of the payees and the partner who endorsed the note of the plaintiff—were examined as to the particular carload of mules traded for the notes and the other consideration therefor, but neither of them expressed an opinion as to the value of any one of the mules or the carload taken collectively. Their answers were seemingly evasive and lacking in frankness and

(467) fullness in a matter so essentially affecting the *bona fides* of the

transfer. The burden was cast upon the plaintiff, in view of the evidence offered at the trial—that the note was fraudulently obtained and issued—to prove that he was a *bona fide* purchaser for value. This has been very clearly stated by this Court in the case of *Bank v. Fountain,* 148 N. C., 590, where *Mr. Justice Hoke,* speaking for the Court, said, in concluding the opinion: "As heretofore stated, when fraud is proved or there is evidence tending to establish it, the burden is on the plaintiff to show he is a *bona fide* purchaser for value, before maturity and without notice, and the evidence must be considered as affected by that burden. If, when all the facts attendant upon the transaction are shown, there is no fair or reasonable inference to the contrary permissible, the judge should charge the jury, if they believed the evidence, to find for plaintiff, the burden in such case having been clearly rebutted. But the issue itself and the credibility of material evidence relevant to the inquiry is for the jury, and it constitutes reversible error for the Court to decide the question and withdraw its consideration from the jury." This rule does not conflict with our negotiable instrument act, nor does it impose an unjust hardship upon the plaintiff, for as to all the circumstances attendant upon the transfer of the paper, they are peculiarly within the knowledge of the plaintiff and are, as to the defendant, *res inter alios acta.* The plaintiff has no just cause of complaint that he is required to make a full disclosure of the circumstances of notice and value attending the transfer. If he bought without notice of any infirmity or defect in the validity of the paper or the title of any prior holder and before maturity and for value, his right to recover is assured to him, both by our statute and the decisions of this Court, but it is not the purpose of the law to aid in consummating a fraud by the technical observance of mere forms. If the plaintiff's evidence failed to satisfy the jury as to either of the essentials required to perfect his title, he ought to complain only of his own lack of diligence and his own failure to observe fair dealing. As illustrating the extent to which this Court has gone in endeavoring to enforce our statutes to protect the title of those who deal honestly in the purchase of negotiable paper, it was held in *Bank v. Hatcher,* 151 N. C., 361, and in *Evans v.* (468) *Freeman,* 142 N. C., 61, that an endorsement "without recourse" does not, in law, discredit the paper or even bring it under suspicion, nor does it in any degree affect its negotiability. And in *Farthing v. Dark,* 111 N. C., 243, approved in *Bank v. Hatcher, supra; Carrington v. Waff,* 112 N. C., 121, and *Loftin v. Hill,* 131 N. C., 111, it is held that "the fact that the negotiator of the note was a stranger and sold it and others for considerably less than their face value, and the other circumstances relied upon by the defendant, was not so suspicious as to put the *onus* of further inquiry upon the purchasers." While we

think, after an examination of his Honor's charge, in view of the authoritative rulings of this Court, that he might have been more perspicuous and orderly in the arrangement of his charge to the jury, yet the essential matters were properly presented to them for their guidance and we cannot say that there was no evidence legally sufficient to support their verdict.

No error.

Cited: Woods v. Finley, post, 500; *Park v. Exum,* 156 N. C., 230; *Bank v. Branson,* 165 N. C., 349; *Bank v. Drug Co.,* 166 N. C., 100; *Smathers v. Hotel Co.,* 168 N. C., 72.

J. M. RHODES, TREASURER, v. EDGAR LOVE.

(Filed 23 November, 1910.)

1. **Office—Title—Books and Papers—Procedure—Mandamus.**

An action by mandamus, brought by one claiming to be the duly elected and qualified treasurer of a graded school committee, to compel the present occupant to deliver to him the books and papers of the office alleged to be wrongfully withheld, is not the proper remedy and the action will be dismissed, when the pleadings put the title to the office at issue, and that is the real matter in controversy.

2. **Same—Quo Warranto.**

The title to a public office in dispute between two rival claimants must be determined by an action of *quo warranto,* or by an action in the nature of a *quo warranto,* especially when the defendant is in possession of the office under a claim of right in him to hold it and exercise its functions or perform its duties; and a mandamus to compel the surrender of the books and papers, will not lie until the claimant has established the disputed title.

3. **Office—Title—Quo Warranto—Parties.**

Though the proceedings by *quo warranto,* or in the nature of *quo warranto,* may be in the name of the State upon the relation or complaint of a private party, it is personal to the parties claiming the office, and raises an issue as to the right of occupancy.

4. **Office—Title—Quo Warranto—Power of Courts—Mandamus—Process.**

The statutory remedy is by *quo warranto* to try a disputed title to a public office occupied by the defendant, and the court trying the issue has the power to issue the writ of mandamus or other necessary and proper process to effectuate its judgment and to induct the successful contestant into the office. The successful relator being refused the books and papers on his demand, the court may issue any appropriate process to enforce compliance with the demand by a refractory or contumacious defendant. Revisal, secs. 827, 841, 843.

5. Office—Title—Quo Warranto—Statutory Time—Accrual of Action.

Revisal, sec. 834, requiring a private relator, upon leave of the Attorney-General, to bring his action within ninety days after the induction of the defendant into the contested office, does not apply where the alleged intruder has occupied the office more than ninety days before the plaintiff's cause of action accrued, or where it is impossible, under the circumstances, to give the required notice.

APPEAL from *Long, J.*, at chambers, 27 August, 1910, from (469) IREDELL.

The plaintiff alleges that he is the duly elected and qualified treasurer of the "Lincolnton Graded School Committee," a corporation created by Private Laws of 1895, ch. 3, as amended by Private Laws of 1907, ch. 170; that the defendant has the books, documents and papers of the said office in his possession and has refused, after demand, to deliver them to him. The plaintiff, therefore, prays that a mandamus issue to compel the defendant to comply with said demand. The defendant, in his answer, denies the material allegations of the complaint, except as to the possession of the books and papers, and especially denies that the plaintiff has been duly elected and qualified as treasurer of said school committee, or that he now has any right to the said office (470) or the books, documents or papers belonging thereto, and he avers, on the contrary, that he is the rightful incumbent of the office and entitled to exercise its functions and perform its duties and to have the possession of said books, documents and papers. The defendant moved to dismiss the action upon the ground that the plaintiff's remedy, if he has any right to the office as alleged, is by *quo warranto* and not by *mandamus*. The court dismissed the action and the plaintiff appealed.

W. A. Self for plaintiff.

L. B. Wetmore, C. E. Childs, and Burwell & Cansler for defendant.

WALKER, J., after stating the case: We think the plaintiff has misconceived his remedy. It is evident, from the pleadings, that this is, in substance, an action between two contesting claimants to determine the title to an office and mandamus is not the proper proceeding in such a case. *Howerton v. Tate,* 66 N. C., 231; *Brown v. Turner,* 70 N. C., 93; *Ellison v. Raleigh,* 89 N. C., 125; *Burke v. Commissioners,* 148 N. C., 46. If an office is vacated and the rightful claimant seeks to be inducted into it by the body having jurisdiction of the matter, mandamus will lie to enforce his right, but where the controversy is between two rival claimants, the preferential right of the plaintiff must not only be clear, but it must be so adjudged in an action of *quo warranto,* or rather in an

action in the nature of *quo warranto,* and especially is this true where the defendant is in possession of the office under a claim of right in him to hold it and exercise its functions or perform its duties. Although the proceeding may be in the name of the State upon the relation or complaint of a private party, it is none the less personal as to the parties claiming the office, the issue between them being the right to the same. The authorities sustaining this view are abundant. 32 Cyc., 1420, and notes. The question is expressly decided in *Ellison v. Raleigh,* 89 N. C., 129, where this Court, citing and approving Dillon on Municipal Corporations, secs. 679 and 680, says: "A mandamus is appro-
(471) priate when there is no usurpation by another, and the end sought is to compel those, who ought to admit and refuse to admit the person entitled by law to fill the place, to perform their duty in this behalf; and the writ may be granted, said Mr. Willcock, 'when *quo warranto* does not lie, although the office be already full, as otherwise, in many cases, the applicant would be without remedy.' . . . 'The adjudged cases in this country agree that *quo warranto,* or an information or *proceeding in the nature of a quo warranto,* is the appropriate remedy, when not changed by charter or statute for an usurpation of a municipal franchise, as well as for unauthorized usurpations and intrusions into municipal offices'; and the author proceeds: 'If another is commissioned and in actual discharge of the duties of the office, an adverse claimant to the office is *not entitled* to a *mandamus,* but *must resort to quo warranto.*' The wrongful occupant must, however, have entered under color of authority and not be a mere usurper, in the restricted sense of that term, to put the rightful claimant to the necessity of a resort to this remedy."

It is expressly declared by our statute (Pell's Revisal, sec. 827) that "an action may be brought by the Attorney-General in the name of the State, upon his own information, or upon the complaint of any private party, against the parties offending, in the following cases: 1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State." Referring to this provision of the law, this Court, in *Ellison v. Raleigh,* said further: "The statute provides in subsequent sections for the fullest relief to the rightful claimant against an unlawful intrusion, and thereby dispenses with the need of recourse to other process, unless those required to induct, still refuse to do so, after the amotion of the intruder by the judgment of the court; and then they may be compelled to proceed in the discharge of their duties. As the statutory remedy is ample, so where it can be had and made effectual, it is the only mode of deciding the conflicting claims to office by an adjudication between the contesting

parties." It was held in *Lyon v. Commissioners,* 120 N. C., 237, that where a plaintiff seeks the recovery of an office occupied by another or, as is sometimes said, an office that is full, his remedy (472) is by civil action in the nature of *quo warranto,* and that mandamus is recognized as a peculiarly appropriate remedy for the correction of an improper amotion from an office and to restore the party who has been improperly ousted to the full enjoyment of his franchise only when the office itself is vacant. The particular language of the Court is: "When a plaintiff sues for an office occupied by another, *quo warranto* is the proper remedy, as in *Cloud v. Wilson,* 72 N. C., 155, but when the office is vacant by reason of amotion, the remedy is *mandamus,* as in *Doyle v. Raleigh,* 89 N. C., 133, and this distinction reconciles the decisions." In Moses on Mandamus (1867), p. 150, we find it stated as the settled rule that the writ of mandamus will not lie to compel the admission of a person to, or his induction into, an office already filled. The subject is so clearly treated in that standard text-book that we will refer to it more particularly: "A corporation has been defined to be an intellectual body, created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of the individuals who compose it, and which, for certain purposes, is considered as a natural person. (Angell & Ames on Corporations, 1.) There are two kinds or classes of corporations. One kind is denominated public, and is founded for public purposes, and generally has for its object the government of a portion of the State, and is therefore endowed with a portion of political powers. Towns, cities and boroughs are familiar examples of this kind of corporations. A private corporation is one created for the advancement of some private end, such, for instance, as a bank, turnpike or railroad corporation. But as their objects, to a greater or less extent, affect the whole community, and they derive their existence from the consent of the public, they in a measure partake of a public nature; so much so that they may be compelled by mandamus to perform the duties imposed upon them by law, although it is a fundamental principle that mandamus only lies in a matter of public concern . . . The law upon the right to resort to mandamus to compel a corporation to admit or restore a person to an office in such corporation is an ancient date, for in Bacon's time it was laid down as a gen- (473) eral rule 'that where a man is refused to be admitted, or wrongfully turned out of any office or franchise that concerns the public or the administration of justice, he may be admitted or restored by mandamus.' And on this foundation it had been adjudged and admitted in a variety of cases, that if a mayor, alderman, burgess, common councilman, freeman or other person, members of a corporation, having a fran-

chise or freehold therein, be refused to be admitted, or being admitted, be turned out or disfranchised without just cause, he may have his remedy by writ of mandamus. But in order to warrant the issuing of the writ to admit or to restore one to an office, it must appear that the office claimed is a public office. And it has often been a matter of controversy what shall be said to be a public office. It has, however, long since been decided that a town clerk, recorder, and clerk of the peace, a constable, and even a sexton, a parish clerk, and clerk of the city works, were officers of so public a character as to come within the rule. The writ has often been made use of, in modern practice, to admit or restore to an office; and the rule, as above laid down, seems to have been unchanged." So far he has referred to a vacant office. He then says: "But when an office is already filled by a person who has been admitted and sworn, and is in by color of right, a mandamus is never issued to admit another person. The proper remedy for the applicant is by a *quo warranto.* Moses on Mandamus, pages 148, 149 and 150. In *Hamlin v. Digman,* 41 How. Pr. (N. Y.), 132, the same rule was held to be applicable with reference to the office of collector of school taxes, who had been irregularly installed in office under a parol appointment made by the trustee of the school district, the court saying that while he was at least a *de facto* officer as to the public and third parties, his title to the office could be questioned when he is a party defendant and is sued for an act which he can only justify as an officer, but so far as the officer himself is concerned, a proceeding to try the right to the office between the government in its own name or on the relation of another claimant and the alleged intruder, must be *quo warranto.*"

(474) But our statute, as we have seen, prescribes the remedy of *quo warranto* to test the validity of the title of any person who is alleged to have usurped, intruded into, or to unlawfully hold or exercise the functions of any public office or any franchise or any office in a corporation created by the authority of the State. Pell's Revisal, sec. 827. It also provides that in any such action brought to try the title to, or right to hold, an office, the court shall have the power to issue a writ of mandamus or any other process which may be necessary and proper to carry its judgment into effect and to induct the successful contestant into the office (section 841), and that the relator, if he recovers and when he has been qualified, as provided by law, to take upon himself the execution of the office, shall demand of the intruder all the books and papers in his custody or within his power, which belong to the office from which the plaintiff had been excluded by him. (Section 843.) The court can, of course, issue any appropriate process to enforce compliance with such demand by a refractory or contumacious defendant. So

it appears that our case comes directly within the terms of the statute, as well as the general principles of the law, to which we have referred.

The provisions of section 834, that the action shall be brought within ninety days after the induction of the defendant into the office, manifestly does not apply to a case like this one, where the alleged intruder has occupied the office more than ninety days before the plaintiff's cause of action accrued. The law does not require an impossibility and it will not, therefore, bar a right to sue, by the lapse of time, upon a cause of action which did not come into existence until after the time had expired. No laches can be imputed in such a case. Revisal, sec. 360; *Coomer v. Little,* 3 N. C., 223; *Godley v. Taylor,* 14 N. C., 178; *Commissioners v. McRae,* 89 N. C., 95; 1 Womack's Digest, No. 3063, and cases cited.

This action was properly dismissed. The plaintiff, upon proper application to the Attorney-General and compliance with the law in other respects, can, with his consent, obtain relief, if entitled to it, in the mode prescribed by the statute.

We direct attention to the fact that there are imperfections in the act providing for the appointment of a treasurer for the school committee and even the election of the members of that committee, (475) to the end that they may be corrected by further legislation, if deemed advisable.

Affirmed.

Cited: Edgerton v. Kirby, 156 N. C., 350; *Johnston v. Board of Elections,* 172 N. C., 167.

L. L. KERNODLE v. J. J. WILLIAMS ET AL.

(Filed 23 November, 1910.)

1. **Contracts, Written—Parol Evidence—Admissibility.**

When the subject matter of a contract does not require that it be in writing, and it appears that it was partly written and partly oral, the oral part may be proved when the written part is in evidence, if the written part is not thereby varied, altered or contradicted.

2. **Same—Parent and Child—Bonds—Payment Upon Contingency—Advancements.**

The father sued his daughter and son-in-law to recover upon a bond given him by them in a certain sum due one day after date: *Held,* it was competent to show in defense by parol evidence that by a contemporaneous oral agreement, the defendants were to pay and did pay certain amounts upon the bond, and that the balance was only to be accounted for in

settlement with the father's estate as an advancement, and that no actual payment thereof was to be made unless needed to pay debts of the estate. Such an agreement did not contradict the terms of the bond, and thereunder the full amount should be paid upon the happening of the contingency, *i. e.*, the necessity thereof to pay the debts of the estate.

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

APPEAL by plaintiff from *W. J. Adams, J.*, at April Term, 1910, of GUILFORD.

The facts are stated in the opinion of the Court.

Long & Long, King & Kimball, and W. H. Carroll for plaintiff.

W. P. Bynum, John A. Barringer, J. S. Cook, and Parker & Parker for defendants.

(476) CLARK, C. J. This is an action brought by a father against his daughter and son-in-law to recover upon a certain bond for $915, dated 4 January, 1902, and due one day after date. The defendants in their answer admitted the execution of the bond, and set up the further agreement made at the time, that the defendants would pay certain amounts upon the bond, which have since been paid, and that the balance thereof was to be accounted for in settlement with their father's estate, as an advancement, and that no part thereof was to be paid to his executor unless needed to pay debts of the estate. There were 88 exceptions to the admission of evidence and to the charge, but they all present only one question, and that is whether it was competent to prove the cotemporaneous agreement set up in the answer. While it is true that a cotemporaneous parol agreement is not competent to vary, alter, or contradict a written agreement, still when a contract is not required to be in writing, it may be partly written, and partly oral, and in such cases when the written contract is put in evidence, it is admissible to prove the oral part thereof. *Nissen v. Mining Co.*, 104 N. C., 310. This is not varying, altering, or contradicting the written instrument, but merely showing forth the entire contract that was made. If the entire contract, as set up by the defendants, which the jury find to be true, had been made entirely in writing, or entirely oral, there would have been no difficulty in holding it valid. For instance, a mortgage on its face is a conveyance of land, with a further clause providing for a condition upon which it is a nullity, or under which the land may be sold. The latter part is not held to contradict the former, though in no event is the instrument really a conveyance. So also, with a penal bond, which is generally in a large sum, with a condition annexed by which it is of no effect unless a certain event happens and even then, the obligor is usually called on to pay a much smaller sum. There are many other instances which might be given of a like nature.

In the present case, the contract, as alleged by the defendants and found to be true by the jury, in its entirety, was that the plaintiff gave his daughter $500 absolutely, and took her note for the other $915, upon which certain payments were to be made (which are admitted to have been made) and the balance was given conditionally that it was to be accounted for with the father's executor, *i. e.*, to be required (477) only if needed for the payment of the debts of the estate. Such an agreement is not a contradiction of the terms of the bond, for the full amount would be paid, if necessary, upon the happening of the conditions stipulated for. Agreements of this nature have often been held valid.

In *Garner v. Taylor,* Tenn. Ch., 58 S. W., 758, it is said: "It may be shown by parol that a note given by a child to a parent was intended by the parties to it as a memorandum or receipt, to show that the parent had advanced that amount to the child, and that it was the intention of the parent that it should never be collected. In some of the States—Maine, Massachusetts and Vermont, for instance—their statutes prescribe what evidence is prescribed to establish the fact of an advancement. In other States where there are no statutes like those in the States mentioned, it has been held that the declarations of the parent before, after, or at any time, of the transaction are admissible in evidence to show the intention to make advancements." That case cites many others. Among numerous other cases to the same effect are *Fankboner v. Fankboner,* 20 Ind., 62; *Peabody v. Peabody,* 59 Ind., 556; *Harris v. Harris,* 69 Ind., 181; *Baum v. Palmer,* 165 Ind., 513; *Boblett v. Barlow,* Ky., 145; *Marsh v. Chrown,* 104 Iowa, 556; *Dawson v. Macknet,* 42 N. J. Eq., 633.

In *Penniman v. Alexander,* 111 N. C., 427, it is said that it is competent for the maker of a promissory note "if sued on the note by the payees, to prove that there was a collateral agreement between him and them to the effect that he should not be required to pay except upon the happening of certain events, or that the note was without consideration." In *Evans v. Freeman,* 142 N. C., 61, it is said that if an agreement is partly in writing and partly oral, evidence is competent "for the purpose of establishing the unwritten part of the contract, or even of showing the collateral agreement made cotemporaneously with the execution of the writing." The Court adds that this has been repeatedly held by this Court, and "it has been adjudged competent to show by oral evidence a collateral agreement as to how an instrument for the payment of money should, in fact, be paid, though the instrument (478) is necessarily in writing, and the promise it contains is to pay so many dollars." To same purport, *Typewriter Co. v. Hardware Co.,* 143 N. C., 97.

In *Benton v. Martin,* 52 N. Y., 570, it was held that the annexing of conditions to the delivery of a note is not an oral contradiction of the written obligation (though this were negotiable) as between the parties to it or others having notice thereof. This rule was reiterated in *Higgins v. Ridgeway,* 153 N. Y., 130. Both these cases were cited, with a restatement of the same proposition, and approved, in *Andrews v. Hess,* 20 Hun (1897), 199. In *Fennell v. Henry,* 70 Ala., 484; 45 Am. St., 91, it was held that when a father delivered certain slaves to his daughter and took from her a note bearing interest, for their estimated value, it was competent to receive parol evidence to show that the slaves were intended as an advancement. Indeed, the cases in support of the above proposition are numerous.

This principle is of most frequent application, in cases like the present. In *Brook v. Lattimer,* 44 Kan., 431; 21 Am. St., 292, it was held an absolute promise in the form of a note to pay a certain sum of money, given by a child to a parent, may be shown by parol evidence to be intended between the parties to it as a mere receipt or memorandum to show that the parent has made an advancement of that amount to his child, and that it was the intention of the parent that it should never be collected. The subject is thus summed up by Browne on Parol Ev., 252, who, quoting the last named case and many others, says, that parol evidence is competent between the original parties to show that the consideration was illegal, or to show the real consideration and purpose, or to show that it was fraudulent, or to show an additional collateral consideration, giving many instances—among them the most common being to show that a note given by a child to a parent, though absolute in terms was by parol agreement to be deemed an advancement.

No error.

MANNING, J., dissenting: I regret that I can not concur in the conclusion reached by a majority of the Court in the disposition of (479) this case. But for the importance of the question involved, I should be content to have my dissent noted. In my opinion, the conclusion of the Court, followed to its legal logical result, destroys a principle approved by the wisdom of centuries. It would seem to be well and firmly established, whether as a principle of substantive law or as a mere rule of evidence is immaterial in the consideration of the question now presented, that evidence of a contemporaneous parol agreement is not admissible to vary, add to or contradict the terms of a written contract. In Clark on Contracts (2 Ed.), p. 85, the author says, and this has been quoted by this Court in several opinions: "Where a contract does not fall within the statute (of frauds), the parties may, at their option, put their agreement in writing, or may contract orally. In

the latter case, although that which is written can not be varied by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract." *Cobb v. Clegg,* 137 N. C., 153; *Evans v. Freeman,* 142 N. C., 61; *Woodson v. Beck,* 151 N. C., 144. In *Woodson v. Beck, supra,* we said: "The limitations, however, upon the application of this principle, recognized in all cases in which this principle has been applied, is that the oral collateral agreement, or that part of the agreement not reduced to writing, can not be permitted to vary, add to or contradict the written agreement, 'but, leaving it in full force, as it has been expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out and present it in its completeness, the same as if all of it had been committed to writing.' *Evans v. Freeman,* 142 N. C., 61."

In the present case the plaintiff sued upon the following bond:

"$915.07.

One day after date we jointly promise to pay L. L. Kernodle nine hundred and fifteen dollars and seven cents value received.
This 4 January, 1902.

E. J. WILLIAMS. (Seal.)
J. J. WILLIAMS. (Seal.)"

The following credits appear on the bond and are admitted by (480) the answer: 25 December, 1902, paid $27.84; 7 April, 1903, paid $27.06; 12 July, 1904, paid $25; 1 February, 1905, paid $25; 28 May, 1906, $100; 7 October, 1907, $144.29; 1 June, 1908, $28.50. The plaintiff alleged demand and refusal to pay before suit begun. The defendants, admitting execution of the bond and the credits above stated, rested their defense upon the following averment: "These defendants aver that at the time they executed and delivered to the plaintiff the bond or note sued on, there was a contemporaneous contract and agreement made and entered into by and between the plaintiff on the one hand and these defendants on the other, under the terms of which these defendants were to pay the note or bond sued on only from funds received by the *feme* defendant, E. J. Williams, from the estate of the plaintiff, who is the father of the said *feme* defendant, and these defendants plead this contract and agreement as a bar to the plaintiff's right to collect the said note or bond in this action." It was admitted at the trial that the bond sued upon was the balance of the purchase money of a tract of land which had theretofore been conveyed by the plaintiff to the *feme* defendant. It appeared that the entire purchase price was $1,950; that the defendant had, by payment made prior to the date of the bond, reduced it to $1,415.07; that plaintiff reduced the amount of $915.07

and advanced to his daughter $500 of the said balance due and took the bond of the defendant for the amount stated. To all the evidence offered by the defendants in support of their defense, the plaintiff objected and excepted to its admission by his Honor. This evidence tended to show that plaintiff did not intend to collect the principal of the bond, but that it should evidence the further amount advanced to his daughter to be accounted for by her in the settlement of his estate, and in explanation of the payments on the bond, the defendants were permitted to testify that as a part of the contemporaneous parol agreement they were to pay interest on the bond until the plaintiff was out of debt, when they were to pay no more, interest or principal, but the bond was to stand simply as evidence of the amount advanced by the father to his daughter and to be accounted for in the settlement of his estate
(481) after his death. I do not think the evidence offered in support of the defense or in explanation of the payments on the bond was competent. The effect of it was to change an absolute promise to pay a specific sum of money into a mere receipt. In commenting upon evidence somewhat similar, this Court, in *Moffitt v. Maness,* 102 N. C., 457, said: "Here is a bond, containing an *absolute* promise to pay to the obligee a certain sum of money, and without the slightest suggestion of fraud, mistake or accident, either in the pleadings or testimony, it is proposed to show that it was not an *absolute* promise to pay a *definite* sum, but that it was agreed that it should cover whatever should be found due upon a settlement. It can not, it seems to me, be doubted that the proposed testimony materially contradicts and varies the terms of the writing." So in the present case, here is a bond, importing consideration by its seal and admittedly executed for a valuable consideration, to wit, the balance of the purchase money of land, containing an absolute promise to pay the obligee a definite sum of money at a specified time, and the obligors are permitted to show that by a parol contemporaneous promise of the obligee, they were to pay nothing, at no time or to any person, but that it was the mere written evidence of the amount advanced to the *feme* obligor, to be accounted for after the death of the obligee in the settlement of his estate between her brothers and herself, and that the plaintiff by devolution of his estate by descent to the *feme* defendant should provide her with the means to make good the note. Can it be doubted that the entire character of the writing is changed and changed in every particular? Can it be doubted that an absolute promise to pay a definite sum is directly contradicted? And this, without the slightest suggestion of fraud, mistake or accident in the pleadings or in the evidence. By this parol promise of the *obligee,* sought to be enforced against him and unsupported by any consideration moving from the obligors, a bond, based upon a valuable consideration moving from the

obligee, is converted into a mere receipt, and nothing of the writing remains; not its promise, nor the payment of a definite sum, nor to a certain obligee, nor at a fixed time. I quote again from *Moffitt v. Maness, supra,* the following words: "There is we fear, too great (482) a tendency to relax the well-settled rules of evidence against the admissibility of parol testimony, to contradict, vary or add to the terms of a written contract, and it is thought that the courts, in their anxiety to avoid probable injustice in particular cases, are gradually construing away a principle which has always been considered one of the greatest barriers against fraud and perjury." In *Russell v. Smith,* 115 Iowa, 261, the Court held: "In partition of land between heirs, evidence that a note given by one of the heirs to the decedent did not evidence a debt, but an advancement, was incompetent, as tending to contradict the terms of the note." In *Mason v. Mason,* 72 Iowa, 457, it was held: "A son purchased certain stock at a public sale held by his father and gave his note for the stock, upon the delivery of the same to him. In an action by the father on the note, the son sought to show that, at the time of the sale, his father told him that he might buy all the stock he wanted and give his note for it, and that he would hold the note simply as a receipt for so much money as advancement, and that the note was so given and received, it was held that this evidence was not admissible, under the ruling of *Dickson v. Harris,* 60 Iowa, 727, as the effect of it was to show that the note was intended for a receipt, and not that it was without consideration." In that case the Court further said: "It may be, if a parent should make an advancement to a child, and, after thus fully executing the gift, he should take a promissory note, the note would be void as being wholly without consideration. It would be a transaction independent of the gift, in that the gift was fully executed." The fact that a note sued upon was *without consideration* is undoubtedly a good defense between the parties to it and other holders, except *bona fide* purchasers for value without notice; and this is the principle upon which the better considered decisions are made to rest. Another exception to the rule excluding parol evidence is illustrated by several of the New York cases, and is applied where a note or draft is executed for accommodation and without consideration, the maker or drawer may, by parol, attach conditions to its *delivery,* and the admission of such oral conditions are not deemed violations of the general rule, but exceptions to it. This principle was applied at this term in the (483) case of *Dunlap v. Willetts.* In *Andrews v. Hess,* 20 Hun Appellate Div., 194, it is held: "This state of facts brings the case fairly within the rule that the delivery of the notes having been limited by the conditions upon which the delivery was made, the performance of those conditions was essential to the validity of the notes." In the

case of *Burton v. Martin,* 52 N. Y., 570, it was held that the annexing of conditions to the delivery of a note is not an oral contradiction of the written obligation, though the instrument be negotiable, as between the parties to it or others having notice thereof; and in *Higgins v. Ridgeway,* 153 N. Y., 130, which is the latest decision involving a consideration of this question, the rule as stated in the *Burton case* is reiterated and the precise language of the latter case is adopted. We think the fair and reasonable import of the defendant's evidence in this case is that the delivery was simply to entice Burns to prove by some tangible evidence that he had made a sale for his company; that there was practically no consideration for the notes, and that in violation of the oral agreement they were diverted from their true destination. In *Higgins v. Ridgeway,* 153 N. Y., 130, it is held that "as between the original parties to a promissory note and others having notice, a conditional delivery, as well as a want of consideration, may be shown, and parol evidence that the delivery was conditional and of the terms of the condition is not open to the objection of varying or contradicting the written contract." In *Burton v. Martin,* 52 N. Y., 374, the Court said: "Instruments *not under seal* may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions, the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it, or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which delivery is made. And so also, as between the original parties and others having notice, the want (484) of consideration may be shown." It would seem, therefore, that under the doctrine illustrated by these cases, parol evidence is admissible to show (1) that the delivery was conditional. (2) want of consideration, (3) and this is restricted to instruments not under seal. In *Marsh v. Chown,* 104 Iowa, 556, it is held that where property is given as advancement and after the gift is completely executed, a note given thereafter is without consideration, and such want of consideration is a good defense. In the present case, the question of want of consideration is not presented, for it is admitted that the bond sued upon was given for a full and adequate consideration—the balance due on the land conveyed by the plaintiff to the *feme* defendant. In Indiana, the decisions of whose highest Court are cited as holding a different doctrine, it is held in *Denman v. McMahin, Admr.,* 37 Ind., 241: "The promise of a father to give up to his son certain notes executed by the latter to the former is a promise which natural love and affection is

not a sufficient consideration to support. Nor can it be supported as an advancement of the sum for which the notes were taken from the son." And in *Fankboner v. Fankboner,* 20 Ind., 62, the Court said: "But if such defense (that the notes were intended only to show the amount advanced) can prevail, it must evidently be upon the ground that the notes were given without consideration; for if it be admitted that these notes were based upon a valuable consideration, it is clear that no parol evidence of a contemporaneous agreement or understanding could be introduced to destroy the legal effect." This case has been cited with approval many times by the Indiana Court, as late as *Baum v. Palmer,* 165 Ind., 523. In *Denman v. McMahin,* 37 Ind., 241, it is further held that "when a father loans money to his son and takes his note for the same, his oral declaration that he will not collect the same, but let his son have it at his death, does not change the transaction into advancement which the father can not recall." In *Wood v. Schæfer,* 173 Mass., 443, it is held that: "An agreement by the payee of a promissory note not to enforce the note according to its tenor, made at the time when the note is delivered, can not be proved in an action upon the note." To the same effect *Barnett v. Barnett,* 83 Va., 504; *Townes v. Lucas,* 13 Gratt., 705. In *Bank v. Moore,* 138 N. C., (485) 529, *Mr. Justice Hoke,* speaking for this Court, clearly and unequivocally expressed the same principle: "The only defense attempted amounts in substance to this: That though the defendant executed his note and received a valuable consideration for the same, there was an understanding and agreement at the time that payment should never be enforced or demanded. All the authorities are agreed that such defense is not open to the defendant." This case has been approved in *Mudge v. Varner,* 146 N. C., 147; *Rivenbark v. Teachey,* 150 N. C., 289; *Basnight v. Jobbing Co.,* 148 N. C., 350. In all the cases in which it has been held that it is competent to show by parol the conditions contemporaneously attached to the delivery of a written contract, it will be discovered, I think, that none of these written instruments were based upon a present consideration or that the maker executed them as evidence of an existing liability, but for accommodation of the payee and without consideration. But the facts of the present case do not bring this bond within either class. The principle upon which the doctrine of the admissibility of evidence of collateral oral agreements rests, as recognized by this Court, is thus stated in *Evans v. Freeman,* 142 N. C., 61, and quoted with approval in *Typewriter Co. v. Hardware Co.,* 143 N. C., 97: "It is competent to show by oral evidence a collateral agreement as to how an instrument for the payment of money should, in fact, be paid, though the instrument is necessarily in writing and the promise it contains is to pay so many dollars (citing several decisions

of our Court). Numerous other cases have been decided by this Court in which the application of the same principle has been made to various combinations of facts, all tending, though, to the same general conclusion that such evidence is competent where it does not conflict with the written part of the agreement and tends to supply its complement or to prove some collateral agreement made at the same time." The evidence admitted in the present case over the objection of plaintiff, in my opinion, goes far beyond any case yet decided by this Court and of any other Court, except perhaps, *Brook v. Latimer,* 44 Kan., 431, and *Garner v. Taylor* (Tenn.), 58 S. W., 758. It is obvious that
(486) writing the contemporaneous oral promise of the plaintiff in the bond, the bond as a promise to pay money is entirely destroyed; it is varied and contradicted in every word, and the oral agreement is utterly inconsistent with its every term; it is, in fact, reduced to a mere receipt, though it is admitted that as a fact it was executed to evidence a debt due for the balance of the purchase price of a tract of land conveyed by the plaintiff to the *feme* defendant, and on which the defendants now live. It distinctly appears that the parties knew well the difference between a debt and an advancement, for the $500—difference between the total balance of $1,415.07 due on the land and the amount of the bond, no note was taken, and that sum—$500—was an advancement in the value of the land—"an irrevocable gift in anticipation of the share of the heir in the estate"—and became the absolute property to that extent of the *feme* defendant. The cases are numerous in every jurisdiction in which the rule has been applied excluding parol evidence, the effect of which was to add to, vary or contradict the terms of the written contract, and I think that in the absence of allegations of fraud, mistake or accident, parol evidence will be heard when the suit is between the payee or holder with notice and the maker only when the note sued upon has been executed (1) without consideration, (2) and being without consideration, the obligor may attach, by parol, conditions to its delivery, which conditions it is competent for him to show, (3) that it is competent to show by parol how an instrument for the payment of money shall in fact be paid by the obligor. In *Penniman v. Alexander,* 111 N. C., 427, cited by the court, this Court said: "If he had done so, that is, had given to the plaintiff his promissory note for the amount of the order, it would have been competent for him, if sued on the note by the *payees,* to prove that there was a collateral agreement between him and them to the effect that he should not be required to pay except upon the happening of certain events, or that the note was without consideration." It may be said of that case that it goes further than any case in our reports in admitting the parol evidence offered. It goes further than the cases cited in that opinion of

Braswell v. Pope, 82 N. C., 57, or *Kerchner v. McRae,* 80 N. C., 219. It is undoubtedly true and is uniformly so held that it is competent to show by parol that the note sued upon is without con- (487) sideration. But the evidence admitted and held by this Court in that case competent is thus stated: "The defendant proposed to show that his acceptance of paper was on condition that the drawer Mooney was building some houses for defendant where brick were used, and was building same by contract, payable in installments as work progressed; that said Mooney abandoned work and gave up the contract before payments were due, and he never became indebted to said Mooney, and that he was to pay acceptance in case he became indebted to Mooney for said amounts." The acceptance by defendant of order of Mooney drawn in favor of the plaintiff was unconditional on its face. The only ground upon which I think this evidence could have been held competent was that as defendant was not bound to accept the order and as his acceptance was apparently without consideration, he had the right to annex, by parol, a condition to his acceptance and delivery of the accepted paper which would be good between him and the plaintiffs in whose favor it was drawn. This would harmonize the decision with the decisions already quoted from, but even then, I do not think it would sustain the decision in the present case. I can not think it would have been held competent in that case for the defendant to prove that the parol agreement was that the plaintiffs—the payees—were to furnish the defendant—the payer—with the money to pay his own obligation to the payee, and unless they did, the order was never to be paid. Such is the effect of the evidence in the present case. I think, therefore, there was error in the rulings of the court, and the plaintiff was entitled to judgment as prayed.

JUSTICE BROWN concurs in this opinion.

Cited: Anderson v. Corporation, 155 N. C., 133, 134; *Martin v. Mask,* 158 N. C., 444; *Palmer v. Lowder,* 167 N. C., 333.

(488)

W. A. BALLINGER, ADMINISTRATOR, v. W. P. RADER.

(Filed 30 November, 1910.)

1. Parent and Child—Insane Child—Wrongful Death—Damages—Liability of Parents—Negligence—Evidence.

The parents of an insane son are not liable in damages for his killing a person after he had been in a hospital for the insane and discharged by

the proper authorities as safe to be at large, and when there was no evidence or circumstance tending to show any subsequent change in the son or that the parents in any manner could have anticipated the homicide. Under such circumstances there is insufficient evidence to take the case to the jury. The estate of the insane son would be liable, if he had any, under the principles announced in *Moore v. Horne*, at this term.

2. Wrongful Death—Damages for Mental Anguish.

Damages for mental anguish can not be awarded in an action for damages for the wrongful killing of another.

APPEAL by plaintiff from *Webb, J.*, at May Term, 1910, of CATAWBA.

The facts are sufficiently stated in the opinion of *Mr. Chief Justice Clark.*

A. A. Whitener for plaintiff.

M. H. Yount, W. C. Feimster, and W. A. Self for defendant.

CLARK, C. J. This is an action for wrongful death against the mother and father of an insane person who committed a homicide. The action for the same matter by the plaintiff against the superintendent and directors of a hospital for the insane was before this Court, 151 N. C., 383. The demurrer as to them was sustained and the action is now prosecuted as to these defendants alone. At the close of the evidence the judge directed a nonsuit and the plaintiff appealed.

This action is brought by the administrator under Revisal, 59, 60. The judge properly disallowed the evidence offered tending to show mental anguish, or loss of services. "Such damages can be assessed only in an action brought by plaintiff in his own name, if at all." *Byrd v. Express Co.*, 139 N. C., 273.

(489) The evidence fails to show that the defendants were in any way responsible for the unfortunate killing of plaintiff's daughter by their insane son, Lonnie W. Rader. The son had been regularly discharged by the authorities of the hospital, upon whom the law imposed the duty of determining whether or not a patient was safe to be at large. These defendants had the right to rely upon the judgment of the hospital authorities, unless there had been a subsequent change in their son's condition, which is not shown. The homicide was not the natural and logical consequence of Lonnie W. Rader being at large. As was said in this case, 151 N. C., 386, "the discharge of Rader, his absence from the hospital, his presence in Catawba County, and at the church on the day of the homicide was a mere condition which accompanied, but did not cause the injury."

The evidence does not show that the defendants could have reasonably anticipated the act of Lonnie, who was at church that day, in ordinary course, and who had been invited to be there by the plaintiff.

Upon a review of the evidence we are of opinion that his Honor did not err in holding that it was not sufficient to be submitted to the jury in the support of an allegation that the homicide was caused by the negligence of the defendants.

Lonnie W. Rader was 24 years of age. Still there might have been circumstances which would have tended to show such gross negligence on the part of those in charge of him, as would have made them liable for a result which they might have reasonably anticipated. But such is not the case here. Of course, Lonnie W. Rader himself, if he has any estate, would be liable for damages sustained from any tort committed by him. *Moore v. Horne, ante,* 413.

The judgment of nonsuit is

Affirmed.

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(490)

D. L. REID AND WIFE v. SOUTHERN RAILWAY COMPANY.

(Filed 30 November, 1910.)

1. **Carriers of Freight—Refusal to Accept—Penalty Statutes—Interstate Commerce—Interpretation of Statutes.**

There being no act of Congress relating to the provisions of the Revisal, 2631, imposing a penalty on a common carrier for refusing to accept freight for shipment when tendered, this section of the Revisal is constitutional in its application to interstate shipments.

2. **Same—Through Bills of Lading—Liability of Initial Carrier.**

It appears in this case that the defendant carrier refused to receive for shipment from the plaintiff goods tendered to it, and based its right to refuse upon the ground that it was necessary for the shipment to go over lines of connecting carriers in order to reach its destination and that no joint rate had been made, or filed with the Interstate Commerce Commission, known as section 6 of the Interstate Commerce Act. The plaintiff offered to prepay the freight, and asked for a bill of lading: *Held,* (1) it was the common-law duty of the defendant, as well as its statutory duty, to accept the shipment, forward it to its connecting line; and to use reasonable means of ascertaining the rate of freight, by wire if necessary, for the issuance of a through bill of lading, which in this case it did not use; (2) it was no defense that the joint rate had not been made or filed as required by the United States statutes; (3) the mere tender of freight charges by the plaintiff and a request for a bill of lading was not a demand for a through bill of lading, so as to justify the refusal of the defendant to accept the shipment; (4) section 20 of the Interstate Commerce Act, making the initial carrier liable for the default of itself and connecting carriers to point of destination, has no application to the facts of this case.

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

REID *v.* R. R.

APPEAL from *Webb, J.*, at March Term, 1910, of MECKLENBURG.

On 17 September, 1907, the *feme* plaintiff tendered to the defendant at its freight depot in Charlotte, N. C., a lot of household goods for shipment to Davis, West Virginia, a station on the West Maryland Railroad. She offered to prepay the freight charges, and asked for bill of lading. The defendant declined to receive said goods for shipment, as requested.

Again on 18, 19, 20, 21 and 23 September, she renewed her (491) requests to the defendant to receive said freight for shipment, as above stated, but the defendant refused to accept same until 23 September, 1907, when it informed the plaintiff that the amount necessary to prepay the freight was $34.08. The plaintiff thereupon paid the same, and the defendant then accepted said freight for shipment, and issued a bill of lading therefor.

On 17 September, when the plaintiff first tendered the goods and demanded the bill of lading, the defendant's agent informed the plaintiff that there was no established rate for shipment to Davis, West Virginia, and that none had been filed or published, and that he had no authority to receive said goods. Said agent on that day wired the proper authority to obtain the freight rate and for permission to receive said shipment. On 23 September he received such information and permission, and thereupon accepted the freight and issued a bill of lading therefor. At the date of said tender, on 17 September, there was a telegraph office at Davis, West Virginia. The plaintiff remained at Charlotte from 17 September to 23 September, waiting the shipment of said household goods.

The above facts were agreed and it was further agreed that the plaintiff's damage, if she is entitled to recover any, by reason of said delay in Charlotte was $25.

Upon the facts agreed the judge rendered judgment for $250, being penalty of $50 per day for refusal to accept freight tendered for shipment on each of five different days, and $25 compensatory damages, and the cost of this action. The defendant appealed.

Stewart & McRae for plaintiff.
W. B. Rodman for defendant.

CLARK, C. J. The defendant contends that Revisal, 2631, is invalid, so far as it undertakes to impose a penalty on a common carrier for refusing to receive a shipment of freight from one State to another, but concedes that this Court has heretofore decided this point against it. In *Lumber Co. v. R. R.*, 152 N. C., 72, it is said: "We have repeatedly passed against 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 authori- (492) ties were reviewed, and the Court said: 'The defendant contends that Revisal, 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; is not a part of the act of transportation, and our penalty statute applies.'" The Court then cited *Bagg v. R. R.*, 109 N. C., 279; *Currie v. R. R.*, 135 N. C., 536, both of which had been cited and reaffirmed by *Walker, J.*, in *Walker v. R. R.*, 137 N. C., 168. In *Twitty v. R. R.*, 141 N. C., 355, *Brown, J.*, held that where the agent refused to give the bill of lading because he did not know what the freight rates were, this was a refusal to receive for transportation and the carrier was responsible for the penalty, even though he put the goods in the warehouse. In *Harrill v. R. R.*, 144 N. C., 532, *Walker, J.*, held that a penalty for failure to deliver freight, was valid though the freight was interstate. There the penalty was incurred after transportation had ceased. Here the penalty occurred before the transportation had been begun, and before the freight was received or accepted for transportation.

Reid v. R. R. was again before the Court, 150 N. C., 753, and was reaffirmed, *Hoke, J.*, citing *Morris v. Express Co.*, 146 N. C., 167, which held "The State may, in the absence of express action by Congress or by the Interstate Commerce Commission, regulate for the benefit of its citizens local matters indirectly affecting interstate commerce," and cited as sustaining that position *R. R. v. Flour Mill*, 211 U. S., 612, which laid down the same proposition in a case which involved the right of the State Court to compel a railroad company to place cars on a siding for the convenience of a flouring mill engaged in making shipments in interstate commerce.

The above decisions were followed by *Connor, J.*, in *Garrison v. R. R.*, 150 N. C., 575, 592, with a 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, which was cited and approved in *Garrison v. R. R., supra*, 582.

Interstate commerce does not begin "until the articles have (493) been shipped or started for transportation from one State to the other" was said by *Bradley, J., in Coe v. Errol*, 116 U. S., 517, (citing *In re Daniel Ball*, 10 Wall., 565), which has since been cited with approval in *Match Co. v. Ontonagon*, 188 U. S., 94. The statutory enforcement, under penalty, of the common-law duty to accept freight "whenever tendered" is not within the scope or terms of any act of Congress. It is neither an interference with nor a burden upon interstate commerce.

The second point the defendant makes is that it could not receive for shipment freight going from one State to another, until the rates of freight to such points had been filed with the Interstate Commerce Commission, as required by the United States statute. The defendant's brief concedes that this point also has been held against him by this Court. The act of Congress, the Interstate Commerce Act, sec. 6, provides: "Every common carrier, subject to the provisions of this act, shall file with the commission created by this act, print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route, and between points on its own route and points on the route of any other carrier by railroad, by pipe line or by water, *when a through route and joint rate have been established.*" If no through route and joint rate from Charlotte to Davis, West Virginia, had been established, it was not, therefore, prohibited to the defendant to receive this freight. It can not be expected that a freight rate to every railroad station in the Union from Charlotte must be established and published before the railroad can receive freight for any point outside this State, at Charlotte. The Federal statutes 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. The statute has no application to this case, where the defendant was carrying on such business, presumptively, at least, under the authority of law. *Harrill v. R. R.*, 144 N. C., 540. If, however, the defendant was in default in not having complied with the Federal
(494) statute to establish and post its rates, this would not be a defense to its other default in failing to comply with its common law duty to receive all freight when tendered, under penalty prescribed by a State statute.

Besides, there was nothing which prevented the defendant from accepting the freight to be shipped to the end of its line, there to be delivered to other carriers to be transported to Davis, West Virginia. This it actually did when it finally received this freight and gave its bill of lading therefor on 23 September. The bill of lading recites the receipt of the freight in good order, marked as destined for Davis, West Virginia, and stipulates *"which said carrier agrees to carry to its said destination, if on its own road, or otherwise to deliver to another carrier on the route to said destination."* There was no reason why the defendant could not have received this freight on the very first day it was tendered, as it was its duty to do, and have given a bill of lading in the identical words that it gave on 23 September. It could have shipped the goods and made the freight payable at destination or it could have foregone

the receipt of freight till it could have ascertained by wire the amount thereof, which could have been done while the goods were proceeding on their way. The plaintiff did not demand prepayment of freight, as the condition precedent to acceptance of the goods. She merely offered to prepay.

In *Twitty v. R. R.*, 141 N. C., 355, *Brown, J.*, says: "The fact that the agent did not know the freight rates is no excuse. It is his duty to know them. At least, he could readily have telegraphed and ascertained, and need not have refused to give a bill of lading on that account." So, here, it is no defense that the defendant had not established its rates. It was its duty to have done so. It could have received and shipped the freight and ascertained the rates while the goods were in transit. It could not plead its default to the United States government as a defense for its default in its duty to the plaintiff. *Currie v. R. R.*, 135 N. C., 537; *Bagg v. R. R.*, 109 N. C., 279; 26 Am. St., 569; 14 L. R. A., 596.

In *Tel. Co. v. James*, 162 U. S., 650, a State statute was held valid which required telegraph companies to receive and deliver promptly all telegrams, and it was held that this applied to interstate mes- (495) sages. This has been quoted and approved in *R. R. v. Flour Mills*, 211 U. S., 622. It was held in *Tel. Co. v. James* that a State statute was not void as affecting interstate commerce, unless "it necessarily affected the conduct of the carrier, and regulated him in the performance of his duties outside and beyond the limits of the State enacting the law." But the State statute is valid if it "can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other States, and would not unfavorably affect or embarrass it in the course of its employment and hence until Congress speaks upon the subject it would seem that such a statute must be valid."

In *Morris v. Express Co.*, 146 N. C., 167, this Court held valid Revisal, 2634, imposing a penalty for failure to adjust and pay in 90 days a valid claim for damages to goods shipped from points without the State. In a very recent case *Chief Justice Fuller*, in *R. R. v. Mazursky*, 216 U. S., 122, held exactly the same proposition, approving what had been said by *Mr. Justice Peckham, Tel. Co. v. James, supra.*

And finally the defendant objects that by reason of section 20 of the Interstate Commerce Act the initial carrier who issues a bill of lading is liable for the default not only of itself, but of each of the successive carriers to the point of destination, and therefore the State ought not to compel it to issue a bill of lading. It seems to question the constitutionality of the act of Congress. The act of Congress is merely declaratory of what was the common law in this respect and has been held constitutional in *Smeltzer v. R. R.*, 158 Federal, 649; *R. R. v. Crenshaw,*

15 Ga. App., 182. Defendant having held itself out as a common carrier was liable if it refused to receive and carry goods for points beyond its own line. *R. R. v. Wolcott,* 141 Ind., 280; *R. R. v. Morton,* 61 Ind., 577. But whether such act of Congress is valid or invalid does not arise in this case. If invalid, the defendant could have received the goods and asserted its liability only to the extent of damages received on its own line, as it actually did in the bill of lading which it issued when it received these goods on 23 September. But if the act is constitu-
(496) tional, the defendant could not on that account delay or decline to receive this shipment as long as it was in the business of a common carrier, and carrying goods for other shippers to be transported to points outside the State. Unless the act of Congress is constitutional "the mere designation of the destination of the goods in the contract with the first carrier will not make it a contract for through transportation, where the other terms indicate a limitation of liability to the end of the contracting carrier's line." 6 Cyc., 481; *Phillips v. R. R.,* 78 N. C., 294. This question, as already said, does not arise in this case, and if it did it would in nowise affect the duty of the defendant to receive the plaintiff's goods when tendered for shipment. The measure of responsibility, for damages if any should arise, is entirely separate and apart from the duty to accept and ship the goods.

No error.

BROWN, J., dissenting: There are two questions presented by this appeal:

1. When the plaintiff tendered her goods for shipment from Charlotte, N. C., to Davis, West Virginia, and demanded a bill of lading, was the transaction one of interstate commerce, so as to exclude the imposition of penalties under the State law?

2. Can the State penalize the defendant for refusing to give a bill of lading to Davis, West Virginia, a point beyond its own line, and to which point it had made and published no rates?

These questions are discussed in my dissenting opinion in *Burlington Lumber Co. v. R. R.,* 152 N. C., 76, and for the reasons given therein I can not concur in the judgment of this Court.

Twitty v. Southern Railway Co., 141 N. C., 356, in which I wrote the opinion of the Court, is cited as authority for the ruling in this case. In that case the shipment tendered was from Rutherfordton, N. C., to Hendersonville, N. C., points in same State and on defendant's line of railway.

I think a cursory reading of the facts of the case and the opinion of the Court will disclose that the case has no application here.

(497) *Harrill v. R. R.,* 144 N. C., 532, likewise has no application to

this case, for there the transportation had been completed and there was nothing to do but to deliver the goods. There was no regulation of commerce or anything which was calculated to embarrass or impede the railroad company in the performance of its duty as an interstate carrier. That case was governed by the decision in *Telegraph Co. v. James,* 162 U. S., 650. The company was not required to receive and carry goods beyond the State but merely to deliver those which it had brought into it. The distinction between the two cases is apparent.

MR. JUSTICE WALKER concurs in dissenting opinion.

Reversed on writ of error, 222 U. S., 424.

W. S. WOODS v. J. T. FINLEY ET AL.

(Filed 30 November, 1910.)

1. **Notes, Joint and Several—Several Liability Only—Parol Evidence.**
When a note sued on is, upon its face, joint and several, evidence is incompetent, as contradictory of the written instrument, of a contemporaneous oral agreement that the makers should only be liable each for his *pro rata* part of the note.

2. **Notes, Joint and Several—Payment in Discharge—Several Liability—Evidence.**
When the holder of a note appearing to have been jointly and severally executed by several makers, accepts and collects a check expressing upon its face to be in payment of the drawer's "share" of the note, the check is competent evidence, as tending to show that the owner agreed to receive the payment in discharge of the drawer's liability upon the note.

3. **Notes—Endorsement—Equitable Owner—Fraud—Evidence.**
Negotiation of a note payable to order is "by the endorsement of the holder and is completed by delivery," Revisal, 2178; and the introduction of the note in evidence without endorsement raises the presumption of equitable ownership and assignment, and without proof of endorsement the holder is not one in due course, and takes subject to the equities existing in favor of the maker, and in such instance fraud in its procurement by the payee may be shown.

APPEAL by defendants Finley, Brame et al. from *E. B. Jones,* (498) *J.,* at the Spring Term, 1910, of WILKES.

The facts are stated in the opinion of the Court.

Oscar C. Dancy for plaintiff.

W. W. Barber, Manly & Hendren and Finley & Hendren for defendants.

CLARK, C. J. McLaughlin Bros., of Cleveland, Ohio, through their agent, sold to certain parties in Wilkesboro, N. C., a stallion at the price of $3,000. The purchasers executed to the vendors three notes for $1,000 each, payable 1 July, 1907. These notes were signed by twelve parties and were expressed as being joint and several. At the same time the notes were executed, the vendors executed in writing a guarantee as to the quality of the horse, and that if he was not satisfactory upon his return in good condition, they would replace him with another at the same price. The vendees becoming dissatisfied with the horse, J. T. Finley and five others returned the horse and received another. The other six (Brame and five others) declined to have any part in accepting the other horse, contending that by reason of the horse not coming up to the guarantee they were released from their liability by reason of fraudulent representations which they set forth in their answer. This action is upon one of the notes for $1,000.

The plaintiff alleges in his complaint that he was a holder in due course, and took the note by assignment of the payees for value and without notice before maturity. This is denied in the answer. There was evidence, if believed, that the plaintiff became the holder of the note for value and before maturity and without notice of any equities, but there was no evidence that the note was endorsed.

FINLEY'S APPEAL.

J. T. Finley and four others alleged in their answer that they had paid their full *pro rata* part of said note, and that judgment should be taken against the other defendants alone, if any should be rendered. The plaintiff admitted the receipt by him from Finley and others of the amount claimed, but contended that such payments had been
(499) credited upon the note, and that he was entitled to judgment against all the defendants, jointly and severally, for the balance due on said note.

The note upon its face was joint and several and his Honor, therefore, properly excluded evidence offered to show an alleged contemporaneous oral agreement that each of the signers should be liable only for his *pro rata* part of the notes. This would have been to contradict the written contract. But it was error to refuse in evidence the checks given by Finley and his associates in this appeal, in making payments upon said notes. Each of these checks expressed on its face that it was to pay the drawer's "share of McLaughlin Bros. notes." These checks were accepted by the plaintiff and endorsed by him were paid by the drawee. They are competent evidence that the plaintiff agreed to receive from said parties such payments in discharge of their liability upon the note. *Petit v. Woodlief,* 115 N. C., 120; *Kerr v. Sanders,*

122 N. C., 635; *Cline v. Rudisill,* 126 N. C., 524; *Wittkowsky v. Baruch,* 127 N. C., 315; *Ore Co. v. Powers,* 130 N. C., 152; *Armstrong v. Lonon,* 149 N. C., 434; *Drewry v. Davis,* 151 N. C., 297.

It is true that if some of the other signers of the notes should be insolvent and those not so should be compelled to pay the whole of the balance due on the note, it is possible that they may set up against the plaintiff an equitable demand for relief as to so much of the note as by reason of the release of Finley and associates they are compelled to pay, on account of the insolvency of some of their associates. But this matter is not before us.

In rejecting the evidence the checks given by Finley and others there was error.

IN BRAME'S APPEAL.

It is true that the mere averment in the answer denying the endorsement does not rebut the presumption raised by law that the holder is the rightful owner of the note, *Causey v. Snow,* 120 N. C., 285. But to make the plaintiff a holder in due course of a negotiable instrument, payable to order, it is essential that the same shall be endorsed. In the absence of proof of such endorsement he holds it subject to any valid defense open to the maker and it is error to exclude evi- (500) dence tending to show fraud. *Mayers v. McRimmon,* 140 N. C., 640. That case cited with approval from *Tyson v. Joyner,* 139 N. C., 69, where *Walker, J.,* held: "In an action on a note it is error to hold that the mere introduction of the note with the name of the endorsee written on the back is evidence of its endorsement by such endorsee so as to vest the legal title in the plaintiff and cut off any defense against the endorsee, as the signatures of the endorsers, whose endorsement is required to vest the legal titles must be proved."

To constitute a holder in due course, one of the requirements is that the instrument must be negotiated to the holder, and Revisal, 2178, defines negotiation of a note payable to order as being "by the endorsement of the holder and completed by delivery." Therefore, it was said in *Tyson v. Joyner, supra,* that "the introduction of the note by the plaintiff raised the presumption that she was its owner, but only the equitable owner and assignee, and it was subject in her hands to any equities or other defenses of the maker against prior holders." And further on in the same case it is said, referring to Revisal, 2208: "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 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 endorsement to an instrument which, under the law merchant was

not required to be endorsed, but which was negotiable by delivery." The whole subject is so fully discussed and so clearly by *Walker, J.*, in that case that nothing can be added.

In *Steinhilper v. Basnight, ante,* 293, and *Myers v. Petty, ante,* 462, the above authorities were cited and affirmed. There being no evidence that the note had been endorsed by McLaughlin Bros. to the plaintiff, the judge erred in excluding evidence offered to show fraud and fraudulent representations by the payee.

In both appeals there must be a

New trial.

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(501)

BANK OF GLADE SPRINGS v. CHARLES F. PALMER AND WIFE, SUE M. PALMER.

(Filed 30 November, 1910.)

1. Parties—Judgment—Laches—Employment of Attorney.

To set aside a judgment rendered against him on the ground of excusable neglect, by reason of the inattention of counsel, the party litigant must show that he had employed counsel who regularly practiced in the court where the litigation was pending, or entitled to practice therein, and had especially engaged him to go there and attend to the case.

2. Judgments—Laches—Excusable Neglect—Process—Publication—Right of Parties.

While the motion to set aside the judgment in this cause was chiefly treated as a proceeding under Revisal, sec. 513, to afford relief on the ground of mistake, surprise or excusable neglect, it is more directly affected and controlled by section 449, the summons having been served by publication.

3. Service—Publication—Judgment—"Good Cause"—Status of Parties.

Revisal, sec. 449, among other things, provides that when service of process has been made by publication "the defendant or his representatives may, upon good cause shown, be allowed to defend after judgment," etc., or upon such terms as may be just, and a party of record bringing himself within its provisions has the right to avail himself of any objection to the validity of the judgment that he could have made, if he had been personally present and made answer.

4. Same—Notice.

When a party to the record has brought himself within the provisions of Revisal, sec. 449, by showing "good cause" he has established his legal right to have the judgment rendered against him by published summons set aside, which will not be lost from neglect unless such neglect has arisen after actual notice of the proceedings.

5. Same—Husband and wife—Agency—Authorization.

In an action to set aside a deed made by the husband to his wife on the ground that it was fraudulent as to the creditors of the former, it appeared that service of summons was made by publication, that actual notice was only given to the husband and that judgment was rendered binding upon the husband by reason of his laches in employing an attorney not authorized to practice in this State, and who failed to make defense: *Held,* upon the affidavit of the wife setting forth a valid defense, also, that she had neither knowledge nor notice of the pending suit until after judgment rendered, without legal evidence in contradiction, and that she then at once employed an attorney authorized to practice in the county to represent her, who acted promptly in his motion to set aside the judgment; and, further, there being no evidence that the husband's attorney acted for her or that she had authorized her husband to that effect: *Held,* the judgment against her will be set aside and she will be allowed to answer.

APPEAL from *Long, J.,* at Spring Term, 1910, of ASHE. (502)

Motion to vacate a judgment. The action was to set aside a deed from Chas. F. Palmer to his wife, Sue M. Palmer, on the allegation that same was fraudulent as to creditors. Summons was issued in January, 1909, and defendants being nonresidents, same was duly served by publication, verified complaint filed 11 January, 1909. At March Term, 1909, defendants failed to appear in person or by attorney and at July Term, following, judgment was duly obtained. Among the findings of fact it was made to appear "that said July Term, 1909, convened on July 12, 1909, and on said date one of the defendants, Charles F. Palmer, was in Ashe County, North Carolina, at the Bromine-Arsenic Springs, within nine miles of Jefferson, N. C., and that said Palmer wrote a letter to the plaintiff's counsel requesting said counsel to write J. I. Hurt, defendant's attorney, living at Abingdon, Va., informing him of the nature of the suit, and that plaintiff's attorney wrote him on 13 July, 1909, giving the required information. That on 14 July, 1909, the said J. I. Hurt wrote the plaintiff's attorney also requesting that the plaintiff's attorney inform him of the nature of the suit; and that plaintiff's attorney wrote him on the 17th day of July, 1909, stating the nature of the suit and also informing him that said cause was set for trial on 21 July, 1909; that said J. I. Hurt, attorney employed by defendants, is a nonresident attorney and not in regular attendance on this Court; that the defendants never employed any attorney in regular attendance on this Court until after final judgment had been rendered in said action, and until after the July Term, 1909, of this Court."

Feme defendant, Sue M. Palmer, filed an affidavit to the effect that she had bought the land in good faith at a fair price, paying cash for same and that she had neither notice nor knowledge of the pen-

(503) dency of suit or proceedings therein until after judgment was entered against her and as soon as she was informed of the action of the court, she employed a resident attorney and made application to set the judgment aside. The court refused to set aside the judgment, holding that no excusable neglect had been shown.

Defendants excepted and appealed.

T. C. Bowie for plaintiff.
G. L. Park for defendants.

HOKE, J. It has been held by this Court that a party litigant "who seeks to be excused for laches, on the ground of excusable neglect, must show that the counsel employed is one who regularly practices in the court where the litigation is pending or at least one who is entitled to practice therein and was especially engaged to go thither and attend to the case." *Manning v. R. R.*, 122 N. C., 824. A proper application of this principle would seem to deprive Charles F. Palmer of any right to relief in this case, but we are of opinion that, on the facts in evidence, no such position should prevail as to the *feme* defendant, Sue F. Palmer. While the motion has been chiefly treated as a proceeding under section 513 of the Revisal that affording relief against a judgment on the ground of "mistake, surprise or excusable neglect," the summons having been only served by publication, the rights of these parties are more directly affected and controlled by section 449, which among other things, provides that when service of process has been made by publication "the defendant or his representative may, upon good cause shown, be allowed to defend after judgment or any time within one year after notice and within five years after its rendition on such terms as may be just."

Construing this statute, it is very generally held here and elsewhere that one who can bring himself within its provisions, has the right as to the parties of record, to avail himself of any objection to the validity of the judgment that he could have made, if he had been personally present and made answer. *Rhodes v. Rhodes,* 125 N. C., 191; Black on Judgments, sec. 312. And the authorities are (504) also to the effect that where good cause is shown, this is a legal right, no longer resting in the discretion of the presiding judge and not to be lost from neglect unless such neglect has arisen after actual notice of the proceedings. *Albright v. Warkinstein,* 31 Kansas, 442; *Brown v. Conger,* 10 Neb., 236; *Fifield v. Norton,* 79 Minn., 264.

Undoubtedly the notice referred to may be proven by facts and circumstances as well as by direct evidence, but, as stated, actual notice must be in some way established before the right declared in this

statute can be forfeited by neglect alone. In a case in our own Court bearing on the question, *Turner v. Machine Co.*, 133 N. C., 381, actual notice of the suit was shown in ample time to have allowed the defendant to have been present at the hearing and it was properly held that default under such circumstances was inexcusable. Applying this principle, we are of opinion, as stated, that the judgment should be set aside and the *feme* defendant allowed to defend as provided by the statute. Her affidavit sets forth a valid defense to plaintiff's demand. She swears further that she had neither knowledge or notice of the pendency of the suit until after judgment rendered against her and there is no relevant fact or circumstance rising to the dignity of legal evidence which tends to contradict her statement. Nor is there any evidence tending to show that the attorney in Virginia was employed by her to look after this case. Even when a married woman has relied upon her husband to employ an attorney to look after her case, the Court, under certain circumstances, has extended her relief against a judgment on account of her husband's negligence. *Sikes v. Weatherly,* 110 N. C., 131; *Nicholson v. Cox,* 83 N. C., 48. But thus far there is no evidence presented to uphold the finding that the wife had employed the attorney in Virginia to look after the case or that she had consulted him on the subject either directly or through the agency of her husband, and on the facts in evidence we are of opinion that her right under the statute referred to should receive favorable consideration.

The judgment will be set aside and the *feme* defendant allowed to answer.

Reversed.

Cited: *Allen v. McPherson,* 168 N. C., 437; *Seawell v. Lumber Co.,* 172 N. C., 325.

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(505)

DORA HENDREN v. VANCE HENDREN ET AL.

(Filed 30 November, 1910.)

1. Uses and Trusts—Parol Trusts—Dower—Husband's Estate—Estate of Former Wife.

In a petition for dower of a second wife in the lands of her husband, evidence is competent, in behalf of the children of the first marriage, to show that certain of the lands were paid for by their mother and improvements made thereon with her money, and that the deed thereto was made to the husband by mistake, as such evidence, if found as a fact by the jury, would establish a trust estate in favor of the children and heirs at law of their mother, superior to the claim of dower, which must necessarily be laid off from the deceased husband's estate.

2. Uses and Trusts—Parol Trusts—Character of Evidence—Questions for Jury.

The evidence to establish a trust estate by parol must be clear, strong and convincing, but it is for the jury to find whether or not the proof is of this character, under proper instructions from the judge.

3. Uses and Trusts—Parol Trusts—Purchase Price—Locus in Quo—Identity.

In this case the objection is without merit that the proof of the payment for the lands upon which a parol trust is sought to be engrafted by defendants was not sufficiently definite as to the lands in controversy.

APPEAL from *Pell, J.*, at August Term, 1910, of WILKES.

Petition for dower, transferred to civil issue docket on answer, filed by some of the heirs at law. The court charged the jury, in effect, that if the evidence was believed, the plaintiff was entitled to dower, as claimed, in all the lands set forth and described in the petition. Verdict and judgment for plaintiff, and defendants, other than Lunday and Mattie May Hendren, excepted and appealed.

Hackett & Gilreath for plaintiff.
Finley & Hendren for defendants.

HOKE, J. The Court does not take the view of this evidence which seems to have impressed his Honor below. The heirs at law of E. B. Hendren, who were children by a former wife, admitting that the petitioner was entitled to dower in a portion of outlying land, (506) described in the petition, answered and alleged that as to certain property, situate in the town of North Wilkesboro, while the legal title thereto was in their father, E. B. Hendren, at the time of his death, the same had been bought, paid for and improved from money and funds which was the sole and separate estate of their mother. Defendants alleged further that the deed conveying title had been made to the father by mistake instead of their mother, who paid for the property. If these averments are made good, and there was evidence introduced, tending to sustain them, they would establish a trust estate in favor of the defendants, as children and heirs at law of their mother, superior to the claim for dower, which must arise, if at all, from the estate of the father. *Ray v. Long,* 128 N. C., 90; *Kirkpatrick v. Holmes,* 108 N. C., 206. True the Court has repeatedly held that in order to establish a trust of this character, in contravention of the terms of a written deed, the evidence must be clear, strong and convincing, but our decisions are also to the effect that "when the testimony is sufficient to carry the case to the jury, as on an ordinary issue, the judge can only lay this down as a proper rule to guide the jury in their deliberations and it is for them to determine whether, in a given

case, the testimony meets the requirements of the rule as to the degree of proof." *Gray v. Jenkins,* 151 N. C., 82. It was insisted, on the argument, that the proof did not connect the alleged payments with the property in controversy, but we do not so interpret the testimony. Several of the witnesses spoke of the purchase of the property and the payments on it in terms sufficiently definite to require that the issue raised should be determined by the jury. There is error, and this will be certified that a new trial may be had.

Error.

(507)

JAMES B. MINTER v. SOUTHERN EXPRESS COMPANY.

(Filed 30 November, 1910.)

Pleadings—Demurrer—Corporations—Acts of Agents—Larceny—Ratification.

A complaint in an action against a corporation for damages based upon the ground that its agent and night watchman, acting under the instruction of the night foreman, swore out a search warrant and a warrant of arrest for plaintiff charging him with larceny from the defendant, is demurrable in the absence of allegation that the corporation authorized or ratified the acts of its agents.

APPEAL from *Long, J.,* at July Term, 1910, of MECKLENBURG.

The facts are sufficiently stated in the opinion of *Mr. Justice Brown.*

Action to recover damages for an alleged wrong.

The defendant demurred to the complaint which was sustained. Plaintiff appealed.

Tillett & Guthrie for plaintiff.
Burwell & Cansler for defendant.

BROWN, J. The complaint alleges that the Southern Express Company maintained offices in the city of Charlotte at the Southern Railway station; that Kreeger was the night foreman, and Rust was the night watchman of the express company, and that they were in charge of the business and had custody and care of the property of the express company; that Rust, agent and night watchman of the express company, charged the plaintiff with stealing a keg of whiskey from the express company; that Rust, agent and night watchman of the express company, swore out and caused to be issued a warrant for the arrest of the plaintiff, charging the larceny from the express company of the whiskey; and that he also swore out and caused to be issued a search warrant

for the search of the plaintiff's premises for the whiskey; that in swearing out the warrant of arrest and the search warrant, Rust was acting under the orders or instructions of Kreeger, foreman, and was (508) also acting as the employee of the express company; that under the said warrants Rust went with two policemen to the sleeping room of the plaintiff and made search for the whiskey. The defendant demurred on the ground that it is not alleged in the complaint that the express company authorized or ratified the acts of its agents and employees.

We deem it unnecessary to do more than to refer to the elaborate discussion of this question by *Mr. Justice Walker* in *Daniel v. R. R.*, 136 N. C., 517, and to the very apt quotation therein from the opinion of *Justice Blackburn* in *Allen v. R. R.*, L. R. 6 Q. B., 65.

In sustaining the demurrer, his Honor followed well established precedents.

Affirmed.

Cited: *Berry v. R. R.*, 155 N. C., 289.

DAISY A. LONG v. JAMES A. AUSTIN.

(Filed 30 November, 1910.)

1. **Malpractice—Physicians and Surgeons—Examinations—Test—Care.**

An attending physician and surgeon is not confined to any special test in his examination of his patient to discover whether or not the latter's shoulder joint had been injured by a fall; but in regard to the examination and treatment, he is required to exercise that reasonable skill and care which a prudent member of his profession should use under the circumstances.

2. **Same—Instructions.**

In plaintiff's action for damages against an attending physician and surgeon for malpractice, in failing to discover an injury to her shoulder blade, received in consequence of a fall, and in his failure to use the proper treatment, a prayer for special instruction is improper which confines the inquiry of the jury to the kinds of test used, leaving out of consideration the degree of care and skill which is required of the physician and surgeon.

3. **Malpractice—Physicians and Surgeons—Examinations—Test—Proficiency.**

The application alone of the ordinary tests by a surgeon to discover the extent of an injury received by his patient would be an insufficient defense in an action to recover damages resulting from his failure to

ascertain the extent of the injury received. He is required to possess the knowledge and skill ordinarily had among men of his profession, with the understanding of the symptoms disclosed, and the ability to apply the proper remedy.

4. Same—Instructions.

In this action against a surgeon to recover damages for his alleged malpractice, it was correct for the judge to charge the jury upon the evidence "that the defendant owed to the plaintiff that degree of care and skill which is ordinarily practiced and possessed by the average of his profession, and not the highest known to his profession; and where a physician exercises ordinary skill and diligence, he is not liable for a mere mistake of judgment."

APPEAL from *Webb, J.*, at March Term, 1910, of MECKLEN- (509) BURG.

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

E. T. Cansler and Hugh W. Harris for plaintiff.

Osborne, Lucas & Cocke, J. E. Little, Tillett & Guthrie, and R. E. Austin for defendant.

WALKER, J. Plaintiff brought this action to recover damages of the defendant, who is a physician and surgeon, for malpractice in the treatment of an injury to her shoulder joint, which she alleges had become dislocated by a fall. The particular allegation is that the defendant failed, upon examination, to discover the dislocation and to apply such remedies as were necessary to restore her injured shoulder to its normal condition, which could have been done by the exercise of ordinary care and skill. The evidence is somewhat voluminous and it is conflicting upon the main issue as to whether proper care and skill were used under the circumstances. It is not required that we should reproduce it here or even to state the substance of it, as we can deal with the question presented sufficiently without doing so. Issues were submitted to the jury, which, with the answers thereto, are as follows: 1. Was the plaintiff, Daisy A. Long, injured by the negligence or want of skill of the defendant, as alleged in the complaint? Yes. 2. What damage, if any, is the plaintiff entitled to recover? ($1,000.00) One Thousand Dollars.

The principal errors assigned in this Court relate to the refusal of the trial court to give the following instructions re- (510) quested by the defendant: "1. Even if the jury should find that the plaintiff's arm was dislocated before the February visit, still if the defendant by using such tests as an ordinarily skillful and prudent physician would use, failed to discover such dislocation, they will answer the first issue 'No.' 2. If the jury should find that the defendant used

the following tests; laid her right arm across her chest, placing her right hand on her left shoulder and pressing her right elbow against her chest; then placing her right hand on top or back of her head; and measuring both arms from the shoulder to the elbow and comparing the measurements, then the defendant would have used the proper tests, and if these tests failed to disclose the dislocation of the arm, the jury will answer the first issue 'No.' 3. If the jury find from the evidence that the defendant made a mistake or error of judgment only in his treatment of the plaintiff, they will answer the first issue 'No.'" The charge of the court was very full and accurate and stated to the jury with perfect fairness to both parties the law applicable to every view of the case. The first instruction requested by the defendant was substantially given by the court, with such modification as to the degree of care and skill in making the examination by the usual and ordinary tests, as was proper in order to prevent a decision of the case upon fragmentary portions of the evidence and a too narrow view of the law by which the liability of the defendant should be determined. The mere use of approved tests, or those which have been found to be the best for the discovery of a dislocation or fracture or any other abnormal condition of the human body, is not all that is required of a surgeon or physician, in the care and treatment of his patient. He must exercise that reasonable skill, care and proficiency in making the tests and in ascertaining from them the presence of any injury and generally in the treatment of his patient which a member of his profession of ordinary care and prudence should use under the circumstances. He is not bound or confined to any special treatment, but to an ordinarily careful and skillful one. The rule is well stated in *Van Skike v. Potter*, 53 Neb., 28:

"The law does not require of a physician or surgeon absolute
(511) accuracy, either in his practice or in his judgment. The law does not hold physicians and surgeons to the standard of infallibility, nor does it require of them the utmost degree of care and skill of which the human mind is capable, but that, while in the practice of their vocation, they shall exercise that degree of knowledge and skill ordinarily possessed by members of their profession." We approved substantially the same principle in *McCracken v. Smathers*, 122 N. C., 800, where it is said: "The degree of care and skill required is that possessed and exercised by the ordinary members of his profession. It need not be the highest skill and knowledge known to the profession, but it must be such as is ordinarily possessed by the average member of the profession. . . . Whether this malpractice, found by the jury, arose from the want of ordinary knowledge or skill, or the want of reasonable care, on the part of the defendant, is immaterial, as both are impliedly guaranteed by one offering his services to the public." When

a physician consents to treat a patient, "it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge. The law holds him liable for any injury to his patient resulting from want of the requisite knowledge and skill, or the omission to exercise reasonable care, or the failure to use his best judgment." *Pike v. Honsinger,* 155 N. Y., 201. Numerous decisions recognize the rule of law in such cases to be as we have stated it, as will appear by reference to the authorities cited herein.

The court property refused to adopt the language of the second prayer and to give the instruction as requested. The defendant's application of a test, even the ordinary and usual one, was not, by itself, a full compliance with the duty he owed to his patient. The prayer omits any reference to the care and skill the law requires him as a surgeon to bring to the use of the test and the general treatment of the case. If he made the test and failed in other respects to exercise ordinary care, skill and diligence, he is just as liable for a consequent injury as if he had not applied the test at all. The prayer is also deficient in not requiring the jury to find what was the proper test, (512) especially as the evidence upon this question was not all one way.

A hypothetical question should contain all the facts essential to the expression of an intelligent opinion by the expert and of which there is evidence, and not a partial statement of the facts which could not present the entire matter to the witness so as to enable him to give such an opinion as the law permits to be considered by the jury. The application of the ordinary test would be evidence upon the question as to whether the defendant had exercised the care and skill required of him, but would not be plenary or conclusive proof or be fully determinative of the fact. He may not have applied the test properly or, if he did, he may not have possessed requisite knowledge and skill to understand the symptoms which it disclosed, or to apply the proper remedy. It was for the jury to decide, upon the evidence and under the instruction of the court, whether the defendant possessed the requisite knowledge and skill and had carefully applied them in behalf of his patient. 22 A. & E. Enc. (2 Ed.), 802; *Woodward v. Hancock,* 52 N. C., 384; *Boon v. Murphy,* 108 N. C., 187; *McCracken v. Smathers,* 122 N. C., 799; *Pike v. Honsinger, supra; Van Huron v. Burghoff,* 90 Mo., 487. The court correctly instructed the jury as to the use of the test and the measure of the defendant's duty in the general treatment of the plaintiff.

The instruction contained in the last prayer was substantially given by the presiding judge, with proper qualification, for he told the jury "that the defendant owed to the plaintiff that degree of care and skill

which is ordinarily practiced and possessed by the average of his profession, and not the highest known to his profession. Where a physician exercises ordinary skill and diligence, he is not liable for a mere mistake of judgment." The instruction, as requested, is faulty in that it leaves out of consideration the material question as to the care and skill required of a physician when treating his patient. *West v. Martin,* 80 Am. Dec., 107; *Jackson v. Burnham,* 39 Pac. Rep., 579. In the last case cited, it is said: "While it is true that physicians are not responsible for the errors of an enlightened judgment where good judgments may differ, . . . they will be charged with error, or (513) should be, only where such errors could not have arisen except from want of reasonable skill and diligence." The doctrine is thus stated in *Staloch v. Holm,* 100 Minn., 276. "To the ordinary rule that the exercise of defendant's best judgment is no defense in an action for damages caused by his negligence, a general exception is recognized with respect to cases involving matters of opinion and judgment only. A physician entitled to practice his profession, possessing the requisite qualifications, and applying his skill and judgment with due care, is not ordinarily liable for damages consequent upon an honest mistake or an error of judgment in making a diagnosis, in prescribing treatment, or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved, or as to what should have been done in accordance with recognized authority and current practice." The law does not excuse an error of judgment if it occurs by reason of the surgeon's lack of that knowledge which he should possess in order to qualify him for the practice of his profession, or the failure to exercise the requisite skill and diligence.

A careful examination of the case does not disclose any error in the rulings of the judge upon the law at the trial.

No error.

EMMA J. STOUT, ADMINISTRATRIX OF W. A. STOUT, v. VALLE CRUCIS, SHAWNEEHAW, AND ELK PARK TURNPIKE COMPANY.

(Filed 30 November, 1910.)

1. Causeway—Public Turnpike—Bridges—Handrail—Negligence.

The defendant had built upon its public turnpike road across a hollow or gulch between two ridges a straight causeway forty feet long constructed of logs, rocks, and earth, with stringers on either side to prevent wagons from running off it. At the highest part the causeway was thirteen and one-half feet high, and sloped out to a grade on either end. In an action for damages, for the death of plaintiff's intestate, caused by his inadver-

tently riding off the bridge on a dark night: *Held*, the failure of the defendant to provide handrails on the sides of the causeway was negligence *per se*.

2. Same—Proximate Cause.

In this case it appearing that the defendant had negligently failed to provide handrails for its causeway over a hollow or gulch on its public roadway, and that plaintiff's intestate was killed on a dark night by the horse he was riding going over its side, the question of the proximate cause of his death should be submitted to the jury under evidence tending to show that there was an electrical storm raging, and at the time of the occurrence the horse was frightened by lightning to such an extent that a handrail would not in all probability have been sufficient to avoid the fatality.

APPEAL from *Webb, J.*, at Spring Term, 1910, of WATAUGA. (514)

Action to recover for the negligent killing of plaintiff's intestate.

These issues were submitted:

1. Was the death of plaintiff's intestate caused by the negligence of the defendant? Answer: Yes.

2. What damage is plaintiff entitled to recover by reason of such negligence? Answer: $4,000.

The court rendered judgment for plaintiff and defendant appealed.

The facts are stated fully in the opinion of *Mr. Justice Brown.*

T. A. Love and F. A. Linney for plaintiff.

Edmund Jones and L. D. Lowe for defendant.

BROWN, J. The defendant is a resident corporation created under the laws of the State of North Carolina (Private Laws 1891, ch. 291), and was operating a turnpike road with toll gates over the road and collecting tolls from the patrons of said road between the towns of Valle Crucis, in the county of Watauga, and Elk Park, in the county of Mitchell.

It appears that at the point on defendant's road where the plaintiff's intestate was injured the roadbed was a solid causeway built up across a hollow or gulch between two ridges, and that such causeway was constructed of logs, rocks and earth. That it was straight and without any curvature and about forty or forty-five feet in (515) length. That at the highest part it was 13½ feet high and sloped out to grade at either end. That the road was smooth and in good condition and was of the width required for such roads by the law in force, and that it had on either side stringers about ten inches in diameter to prevent wagons from running off of the causeway, but that there were no handrails along the causeway, nor had ever been; and that the road was in all respects as it had been for many years. That

the night of the injury to plaintiff's intestate was intensely dark, and that a wild tempest of thunder, lightning and rain was prevailing at the time of the accident. That plaintiff's intestate was riding a horse over said causeway about twelve o'clock at night, and that the injury was caused by the horse going over the edge of the road with the intestate on him.

1. The first question presented by the assignments of error relates to the duty of the defendant to construct and maintain handrails along both sides of this causeway of proper height and strength for the protection of its patrons passing over it.

We are of opinion that the character of this particular structure is such that it is negligence not to maintain handrails along both sides of it. The guard logs on each side placed there to prevent vehicles running off do not meet the requirements of a reasonable prudence. The structure is really a bridge across a gully forty feet in width.

In fact the witnesses speak of it as a bridge. It is as dangerous in every respect without handrails as if it were built on piling and crossed a running stream.

We could not hesitate to hold it to be *per se* negligence to fail to provide railing on both sides of an open bridge of that length across an ordinary stream. In *Titus v. New Scotland,* 11 N. Y., 226, the plaintiff's intestate was driving over a narrower bridge on a very dark night, so dark in fact that he could not see his way and had to trust to the instinct of his horses to follow a beaten trail. In that case the bridge was ten or twelve feet in width and the planks constituting the floor of the bridge were of unequal lengths and there were no guard rails or banistering on either side of said bridge; the teamster (516) drove off said bridge and was killed; the Supreme Court sustained a verdict and judgment in favor of the plaintiff, holding the negligent failure to provide safe guard rails or banistering was the proximate cause of the injury. One traveling at night has the same rights as one traveling by day to assume that the highway is safe. 15 A. & E. Enc., 472, subsection F, and authorities cited thereunder.

Quinn v. Semproilus, 33 N. Y., is very similar to the case at bar, the imputed negligence consisting of the failure of the defendant to construct handrails over a long bridge, whereby the plaintiff's team was precipitated and injured, the Court held a good cause of action was alleged and the plaintiff was entitled to recover such damage sustained. *Augusta v. Hudson,* 94 Ga., 135; *Atlanta v. Wilson,* 59 Ga., 544; *Georgia R. R. Co. v. Mayo,* 92 Ga., 223.

We do not think there is anything in defendant's charter or in section 14, Acts 1899, ch. 286, which relieves the defendant from the duty of placing hand or guard rails on what is practically a bridge forty feet long.

2. We think, however, the trial judge erred in determining as matter of law that the absence of handrails was the proximate cause of the injury. Under ordinary circumstances where man or beast falls off a bridge for lack of proper guard rails the failure to provide them would be adjudged as matter of law the proximate cause of the injury, but in this case there are exceptional circumstances which require that question to be determined by a jury.

It appears in the evidence that the deceased was riding the horse of Witness McGuire, who was walking four or five feet ahead; that there was at the time a very violent thunder storm raging and that just at time the horse and rider disappeared there was a terrific peal of thunder accompanied by lightning.

It is contended by the defendant with much force that if there had been a handrail along the side of the bridge or causeway, it would not in all probability have saved the intestate; that the horse was crazed by fright and would have jumped the handrail or easily have broken it down when he rushed against it.

This is a reasonable inference which a jury would be warranted in drawing from the evidence and can not be ignored. If (517) the horse, badly frightened by the thunder and lightning, rushed off the bridge under circumstances when no ordinary guard rail would in all probability have prevented the catastrophe, the death of the intestate would be attributed to causes for which defendant was not responsible and not to the absence of the guard rail.

In other words under such circumstances the failure to provide a guard rail would not be the proximate cause of the intestate's death and plaintiff could not recover.

This contention of the defendant should have been presented to the jury with appropriate instructions.

New trial.

Cited: *S. c.*, 157 N. C., 367; *Kearney v. R. R.*, 158 N. C., 548.

W. L. JONES v. JAMES M. SCHULL ET AL.

(Filed 30 November, 1910.)

1. Tax Deeds—Unlisted Lands—Record Evidence—Notice—Ex-sheriff—Interpretation of Statutes.

In an action to try the title to certain lands in the possession of the defendant claiming as purchaser under a tax deed made under chapter 119, Laws 1895, which the plaintiff, showing paper title in himself, seeks to

impeach: *Held,* (1) evidence on behalf of defendant is competent to show that the lands were not listed for the years 1893-4, and that the chairman of the board of county commissioners had for those years caused the property to be listed in the name of the supposed owners, charging against the property double the ordinary charges (sec. 29, ch. 296, Laws 1893); (2) the Laws 1897, prescribing that notice be given the owners, is prospective by its terms, and as it was effective only one month before the time for redemption had expired, the three months notice could not have been given, and its provision is inapplicable to this case; (3) the tax deed was made in the statutory time, and the fact that it was made by an ex-sheriff does not affect its recitals, Revisal, sec. 950; (4) the right of the owner to redeem his land sold for taxes exists only in conformity with the statutory provisions.

2. Tax Deeds—Infants—Redemption—Interpretation of Statutes.

Section 60, ch. 119, Acts of 1895, providing that infants, etc., may redeem their lands sold under a tax sale within "one year after the expiration of the disability on like terms as if the redemption had been made within one year from the date of the sale," etc., is not available to such minors who make no offer to redeem within the time given them by the statute after reaching their majority or for several years thereafter.

3. Tax Deeds—Recitals—Evidence—Presumptions.

On the conclusiveness of a tax deed made in 1895 as evidence of certain facts, and presumptive evidence of others.

APPEAL from *Webb, J.,* at Spring Term, 1910, of WATAUGA.

This action was brought to try the title to certain lands described in the complaint and in the possession of the defendants, Schull and Gragg. During the trial a voluntary nonsuit was taken as to all the defendants except the two above mentioned. The plaintiffs, after making the usual allegations of title and right of possession in them as the heirs at law of W. C. Jones, whom it is alleged died in 1894 seized and possessed of the land, further allege that the defendants claim title under a tax deed executed to them by the sheriff of Watauga County and allege that the said deed is invalid (1) because the land was not listed for taxes and was not assessed for the year for which it was sold, (2) that no notice of sale was served upon plaintiffs or upon any one representing them, (3) that no advertisement of said land was made, (4) that no notice to redeem was given or served upon the plaintiffs or any one on their behalf, (5) that several years elapsed between the date of the sale and the date of the deed, (6) that the sheriff making the sale was not the sheriff at the time the deed was made, (7) that the plaintiffs, heirs at law of W. C. Jones, were at the time of the sale and the date of the sheriff's deed *femes covert* or minors. The defendants denied the allegations of title in the plaintiffs and averred the regularity and validity of the sheriff's deed to the defendant Schull—the other defendant claiming under him. The plaintiff offered a grant from the State, dated 10 August, 1883,

to W. C. Jones and Robert Munday covering the land in controversy; a deed from Munday to Jones for his share in the land; (519) the death in 1894 of Jones and that the *feme* plaintiffs were his heirs at law. The defendants offered the deed from D. F. Baird, ex-sheriff of Watauga County, to J. M. Schull, dated 10 March, 1899; this deed recited the assessment of taxes on the land, describing it; the nonpayment of the taxes assessed; the levy on the land for unpaid taxes; the return of the list of levies to the clerk of the Superior Court; the advertisement and notice of sale as required by law; the sale at the courthouse door on 6 April, 1896, and the purchase by Schull, the payment of the amount by him and the failure to redeem. The minutes of the Board of Commissioners of Watauga County at their regular meeting on 7 October, 1893, were offered, showing that the property of a number of persons, including the land in controversy, was listed and double taxes assessed against it for failure of the owners to list, and order passed directing the sheriff to collect the double taxes; also a similar order made 5 October, 1894, which his Honor excluded, and defendant excepted. The defendants offered D. F. Baird, ex-sheriff, who testified, among other things, that the order of the commissioners was delivered to him by the register of deeds; that he advertised and sold the land as recited in his deed to Schull, having pursued the legal requirements, that certificate of sale was dated 6 April, 1896, and was offered in evidence; that he notified the husband of one of the plaintiffs, in whose name for all of them the land was assessed, of the nonpayment of taxes, that the land had been sold and that unless it was redeemed, he would make the deed to Schull. The defendant Schull testified that he wrote one of the heirs at law that the land had been sold for taxes and he had bought it. At the conclusion of the evidence, his Honor stated that he would hold as a matter of law that the deed from D. F. Baird, ex-sheriff, was invalid and did not divest the title of plaintiffs, and accordingly instructed the jury that if they believed the evidence, to answer the issue of title in favor of the plaintiffs. The defendants excepted, and from the judgment rendered, appealed to this Court.

No counsel for plaintiffs.
L. D. Love and F. A. Linney for defendants.

MANNING, J. We think the ruling of his Honor was erroneous. (520) It was competent to show that the land in controversy had not been listed by the owners for the tax years 1893 and 1894, and that the chairman of the board of commissioners had inserted in the list such property as had not been listed by the owners, with the names of the persons supposed to be liable, and to charge against such property double

the tax with which it would otherwise be chargeable. The orders of the board of commissioners entered on the first Mondays of October, 1893 and 1894, were, therefore, competent, and it became the duty of the sheriff to collect the taxes assessed against the land in controversy—the legal tax embracing the double charge for failure to list. Section 29, ch. 296, Public Laws 1893. It was error to exclude this evidence. It appears that two of the plaintiffs were minors at the death of their father, W. C. Jones, in 1894, and that they were still minors at the date of the sale and deed by the sheriff. Section 60, ch. 119, Acts 1895, the act in force at the time the sale for taxes was made provides: "Infants, idiots and insane persons may redeem any land belonging to them from such sale within one year (after the expiration of such disability on like terms as if the redemption had been made within one year) from the date of said sale," etc. But it appears from the evidence that these two minors did not avail themselves of this provision in their favor, for no offer to redeem was made within the year after they attained their majority; nor for several years thereafter, and only in the complaint filed in this action. In *McMillan v. Hogan,* 129 N. C., 314, this Court said: "In the United States Supreme Court (*Keeley v. Sanders,* 99 U. S., 441, 445), it is held that the right of redemption from tax sales, although it is to be regarded favorably, does not exist, except as permitted by statute. The same is held in *Levi v. Newman,* 130 N. Y., 11; *Smith v. Macon,* 20 Ark., 17; *McGee v. Bailey,* 86 Iowa, 513; *Metz v. Hipps,* 96 Pa. St., 15." Cooley on Taxation (1 Ed.), 364, cited by the Court, is to the same effect, the author saying the right to redeem "is to be asserted only in the cases and under the circumstances which are there prescribed." All the plaintiffs, therefore, are on the same footing and their rights are to be determined alike. The tax sale and deed, the validity of which (521) is impeached in this action, were made under provisions of Laws 1895, ch. 119. In *King v. Cooper,* 128 N. C., 347, this Court said: "In the original act of 1887, which is very nearly a copy from the reformed system prescribed for tax sales in Nebraska, there was a salutary provision (section 69) which required that the purchaser of lands at tax sales, or his assigns, should three months before the expiration of the time of redemption, serve a written or printed notice of his purchase on the person in actual possession of the land, and also on the person in whose name the land was assessed. This provision was omitted in the acts regulating the sale of land for taxes in 1889, 1891, 1893 and 1895. Attention having been called to the omission by this Court in *Sanders v. Earp,* 118 N. C., 275, this clause was reinserted by chapter 169 of the Act of 1897, in which it constitutes sections 64 and 65." And it is further held in that decision that where such written or printed notice is required to be proven, it must be proven by the purchaser as a condition

precedent, and there is no presumption arising from any provision of the law that such notice was given as required. This case has been expressly approved in *Matthews v. Fry,* 141 N. C., 582; *Eames v. Armstrong,* 146 N. C., 1; *Warren v. Williford,* 148 N. C., 474. Conceding there was no evidence that such notice was given as required by section 64, ch. 169, Laws 1897, no such notice was required by the act of 1895, and the section of the act of 1897 was, by its terms, prospective only. But as the act went into effect only one month before the time for redemption had expired, even if the act were not exclusively prospective in its operation, the purchaser—the defendant Schull—could not have complied with its provisions; he could not have given the prescribed *three* months notice before the time of redemption had expired. The statute must be construed to be prospective in its operation unless the contrary intention be clearly expressed therein. *Woodly v. Bond,* 66 N. C., 396; *S. v. Littlefield,* 93 N. C., 614; *Green v. Asheville,* 114 N. C., 678; *Lowe v. Harris,* 112 N. C., 472; *Morrison v. McDonald,* 113 N. C., 327. The execution of the deed by Baird as ex-sheriff does not affect its validity or the effect of its recitals, the deed having been made in the statutory time. Revisal, sec. 950; *Curlee v. Smith,* 91 N. C., 172; *Mfg. Co. v. Rosey,* 144 N. C., 370. The other questions presented (522) have been so fully considered and determined by this Court in several decisions, no further discussion of them is required; the citation of the cases is sufficient. *Eames v. Armstrong,* 146 N. C., 1; *Matthews v. Fry, supra; King v. Cooper, supra,* and cases cited. It will appear from those cases and from the act in force that the tax deed was conclusive evidence of certain facts and presumptive evidence of others. His Honor should have so instructed the jury. In the instruction given, there was error, for which a new trial must be had.

New trial.

Cited: Rexford v. Phillips, 159 N. C., 221.

C. P. COX ET AL. v. C. V. S. BOYDEN, ADMINISTRATRIX.

(Filed 30 November, 1910.)

1. Judgments—Process—Execution.

The Laws of 1905, ch. 412 (Revisal, sec. 622), providing that "no execution shall issue from the Superior Court upon any judgment until such judgment shall be docketed in the county to which the execution shall be issued," do not apply to executions issued prior to the enactment of said chapter 412.

2. Same—Homestead—Different County.

Prior to the Laws 1905, it was not necessary to the validity of proceedings to lay off the homestead of the judgment debtor under execution issued from another county, that the judgment of that county be first docketed in the county of the *locus in quo.*

3. Same—Estoppel.

When the homestead of a judgment debtor has been laid off under execution, issued prior to the enactment of chapter 412, Laws 1905, Revisal, sec. 622, and recognized both by the debtor and creditor for a long period of time, in this case thirty years, it is not open to the debtor, his personal representatives or heirs to dispute the validity of the proceedings by which the homestead was allotted, upon the ground that the execution had issued under a judgment obtained in a different county and not docketed in the proper county at the time the proceedings were had.

4. Same—Equity—Procedure—Pleadings.

The defendant contracted to convey to the plaintiff for $4,300 a certain tract of land chiefly valuable for its timber. The plaintiff paid $3,900 on a prior mortgage debt on the land defendant owed to another, and gave his note to defendant for $400, the balance of the purchase price. He then purchased several judgments against the defendant constituting a prior lien on the land, and brings a successful action in behalf of himself and all other creditors, etc., asking that the contract, the deed and his note be canceled, and that he be subrogated to the rights of the mortgagee: *Held,* (1) defendant's evidence was competent tending to show as an offset that plaintiff entered into possession under his deed and cut, sold and received the price for a part of the standing timber; under the application of the doctrine that "he who asks equity must do equity"; (2) it being an equitable right, growing out of the alleged cause of action, it was unnecessary to assert it by way of answer; (3) the various priorities and liens should be established, and a balance struck between plaintiff and defendant before ordering a sale of the land.

(523) APPEAL from *Long, J.,* at April Term, 1910, of SURRY.

Among other allegations contained in the complaint, it is alleged that C. P. Cox, the intestate of the plaintiffs, purchased from C. V. S. Boyden, as administratrix or N. A. Boyden and individually as his heir at law, 337 acres of land in Surry County belonging to N. A. Boyden, for the sum of $4,300, of which $3,900 was paid to the First National Bank of Mount Airy, N. C., on a bond secured by a duly registered deed of trust on said land, and a note of $400 for the balance was executed to the administratrix of N. A. Boyden. The purchaser, Cox, finding that there were unsatisfied docketed judgments against N. A. Boyden, under one of which his homestead had been allotted, purchased several of said judgments, and brought this action in behalf of himself and all other creditors, to have the land allotted as his homestead sold and also to have the deed to him declared void, his note for $400 surrendered and canceled, and himself subrogated to the rights of

the bank, under the deed of trust, to whom he had paid $3,900 of the purchase price and for a reference to ascertain the validity and liens of the judgments. C. P. Cox, the purchaser, died pending the action and the plaintiffs, as his administrators, were made parties. The defendant answered some of the allegations and denying others, pleaded the statute of limitations to the judgments; denied that the homestead of N. A. Boyden had been properly allotted, it having been allotted in October, 1877, on an execution issued from the Superior Court (524) of Rowan County, but not docketed in Surry County, though the return was filed in the office of the clerk of the Superior Court of Surry County. The defendant denied the right to have the note of $400 canceled. The action was referred to on. R. A. Doughton, who heard the evidence offered on 4 and 5 August, 1909. At the hearing the defendant offered to show that C. P. Cox, after the date of the deed to him, entered upon the land, moved a sawmill upon it and cut down and removed timber of the value of more than $2,000. This evidence was rejected by the referee. The defendant excepted to this ruling, and upon his Honor's sustaining the ruling of the referee, again excepted and assigned these rulings as error. The referee sustained the allotment of the homestead of N. A. Boyden under the Susan Coghill execution issued from Rowan County in 1877, though the allotment was not recorded in the office of the register of deeds of Surry County and the judgment not docketed at that time in said county; ascertained the validity and priority of lien of the judgments against N. A. Boyden; that he was indebted otherwise than by judgment at the date of his death; declared the deed void as made within two years after administration upon his estate; that C. P. Cox was entitled to be subrogated to the rights of the Mount Airy Bank to the extent of $3,900 paid by him on that debt, and ordered a cancellation of the note of $400. The defendant filed exceptions to these several findings of the referee, and his Honor having approved the findings and conclusions of law, the defendants again excepted. His Honor directed the tracts of land to be sold separately by the commissioners appointed, but directed the proceeds to be held to await the further report of the referee on the validity of the two alleged debts therein reported by him. From the judgment, the defendant appealed.

Lindsay Patterson for plaintiffs.

W. L. Reece, Benbow & Hall, Watson, Buxton & Watson, and J. E. Alexander for defendant.

MANNING, J. The rulings of his Honor and the referee as to the validity of the allotment of the homestead of N. A. Boyden under

(525) execution issued on the Susan Coghill judgment from the Superior Court of Rowan County, though at the time that judgment was not docketed in Surry County, are, in our opinion, sustained by the former decisions of this Court. It was held in *Bevan v. Ellis,* 121 N. C., 224, that it was not necessary to have the appraisers' return of the homestead registered in the office of the register of deeds of the county in which the homestead is situated in order to make the judgment lien valid and binding on the homestead, until the exemption from sale of the land so allotted as a homestead shall determine. It would seem clear, upon another principle declared by this Court in *Spoon v. Reid,* 78 N. C., 244; *Whitehead v. Spivey,* 103 N. C., 66, and *Oates v. Munday,* 127 N. C., 439, that it would not now be open, after an acquiescence of more than thirty years in the allotment of the homestead, as made, by both creditor and debtor, for the debtor or his personal representative or heir at law to dispute the fact of the allotment. "The homestead, as a matter of fact, was laid off by well-defined lines, whether regularly or irregularly, and no objection was made to it by exception or appeal. The debtor accepted the assignment and has enjoyed the benefit thereof for more than twenty years, and the creditors have submitted to it for the same time. Both parties are estopped from denying an accomplished fact, so long recognized by them." It has also been held by this Court that a sale under execution, though the judgment is not docketed in the county in which the land lies, is not necessarily invalid. In *Lytle v. Lytle,* 94 N. C., 683, *Smith, C. J.,* in speaking for the Court, said: "The docketing of a judgment is not an essential condition of its efficacy, nor a precedent requisite to an enforcement by final process. It is only necessary to create and prolong the lien thus acquired, for the benefit of the creditor against subsequent liens, encumbrances and conveyances of the same property." In *Holman v. Miller,* 103 N. C., 118, it is said: "Under the present system, no lien is acquired upon land in the absence of an execution and levy, until the judgment has been docketed." To the same effect is *Bernhardt v. Brown,* 122 N. C., 587; *Evans v. Aldridge,* 133 N. C., 378, where the cases are cited. But these decisions are not authority to sustain such acts since the (526) Laws 1905, ch. 412, which act provided that: "No execution shall issue from the Superior Court upon any judgment until such judgment shall be docketed in the county to which the execution shall be issued." See Revisal, sec. 622. The validity of the proceedings we are now considering must, however, be determined by the law as it was held at that time—to wit: prior to the act 1905, in 1877. In our opinion, it must, therefore, follow that if a valid sale of land could be had under an execution and levy, issued on a judgment obtained in the county in which the land is located, then the homestead of the judg-

ment debtor could be properly laid off, and after acquiescing in such allotment, the judgment debtor and his heir at law and personal representative can not dispute its validity. We find no errors in these rulings of the referee and his Honor.

We think that both the referee and his Honor erred in not receiving the evidence offered as to the value of the timber cut and removed from the land by the purchaser, Cox, and the rents and profits received by him, if any. One of the main equities asserted by the plaintiffs—and the theory upon which the plaintiffs proceeded—was the rescission of the contract of sale, the cancellation of the deed and note given for the balance of the purchase money, and the subrogation of Cox, the purchaser, to the rights of the bank to the extent of $3,900, paid by him out of the purchase money in discharge *pro tanto* of its lien on this land; and the referee concluded that the plaintiffs were entitled to have the contract rescinded, and this finding was approved by his Honor. Conceding that the title conveyed by the defendant, as administratrix of N. A. Boyden and by her as his heir at law, was defective and subject to be avoided at the suit of creditors of N. A. Boyden, because made within two years from the grant of letters of administration upon his estate under section 70, Revisal, the purchaser, Cox, entered upon the land described in the deed and under the deed, and cut large quantities of timber therefrom to the value, as offered to be shown, of more than $2,000. It appears that this land was valuable for its timber. It would be inequitable to decree a cancellation of the obligation of Cox and rescind the contract as to the burden imposed by it upon him, and not require him to account for the benefits received by him. "He who seeks equity must do equity." The principal relief to be (527) effected by cancellation or rescission is to place the parties in the same condition as if there had been no change of their condition by the attempted contract—to put them in *statu quo*. This is universally recognized. *Reed v. Exum,* 84 N. C., 430; *Wood v. Wheeler,* 106 N. C., 512; *Odom v. Riddick,* 104 N. C., 515; *Sprinkle v. Wellborn,* 140 N. C., 163 (these last two cases of cancellation on the ground of mental incapacity); *Neblett v. MacFarland,* 92 U. S., 101; *Barbour v. Morris,* 45 Ky., 120; *R. R. v. Simpson,* 23 Fed., 214; *Goodrich v. Lathrop,* 28 Am. St., 91; *Gatling v. Newell,* 9 Ind., 572; *Worthington v. Collins,* 39 W. Va., 406; *Adams v. Kibler,* 7 S. C., 47; *Edmunds v. Myers,* 16 Ill., 207; *R. R. v. Steinfield,* 42 Ohio St., 449; 6 Cyc., 306. The value of the timber cut by plaintiff's intestate, as well as whatever else of value he received, or whatever the possession under the deed was worth to him, should be accounted for by him, as the judgment allows him to be subrogated to the rights of the mortgage creditor, as of the date of the payment by him of the $3,900, with interest from that date, and directs the

surrender and cancellation of his note. As he is allowed interest, he should be charged with interest. In our opinion, the ruling of the referee in rejecting the evidence offered was erroneous. It is suggested that this ruling was based upon the fact that there was no such allegation in the answer; but as we have seen, the equity of rescission and cancellation, invoked by the plaintiffs, essentially involves the liability of the plaintiffs to restore as far as possible the *status quo;* and as the Court has administered equity for the plaintiffs, it should have compelled them to do equity to the defendant. In our opinion, there should be no order of sale until all the debts are ascertained and their respective priorities and liens determined, and the balance struck between plaintiffs and defendant, unless the property is deteriorating in value. The cause must be re-referred to the referee, in accordance with this opinion, and the order of sale vacated until his report is made and passed upon.

Error.

(528)

CHARLES ZEIGER v. Q. A. STEPHENSON AND GOLD PLACER MINING COMPANY ET AL.

(Filed 7 December, 1910.)

Injunction—Shares of Stock—Issuance—Insolvency of Shareholder—Pleadings.

When, in an action to compel a corporation and others to issue certain shares of stock to the plaintiff and to enjoin the transfer of the shares to another on the books of the corporation, the complaint sufficiently alleges plaintiff's ownership, the insolvency of one of the defendants to whom the certificates were issued, and other facts tending to show that the transfer of the stock would be to plaintiff's irreparable loss, a restraining order should be granted to the hearing.

APPEAL from an order dissolving a restraining order of *Webb, J.*, made at chambers 25 July, 1910. From BURKE.

The facts are sufficiently stated in the opinion of *Justice Walker.*

John T. Perkins for plaintiff.
No counsel for defendants.

WALKER, J. This is an action to compel the Gold Placer Mining Company and the other defendants to issue to the plaintiff certain shares of the capital stock of the mining company, valued at $7,500, and for an injunction against the transfer thereof. It is alleged that the stock was issued to one of the defendants, who is insolvent, and that if it is

transferred by him the plaintiff's loss will be irreparable. In 1 Spelling on Injunctions (2 Ed.), sec. 540, we find the general rule thus stated: "Since certificates of stock in a private corporation, though not strictly speaking commercial paper, are usually transferable by assignment and delivery, and since a *bona fide* transferee is not bound by any mere equities which exist between the transferee and the corporation, or between the holder and an equitable owner, an injunction often becomes proper, upon one or more of the equitable grounds before stated in connection with negotiable paper, to restrain the transfer of such certificates. The power of courts of equity to interfere in such (529) cases is well established." The plaintiff, therefore, is entitled to an injunction to restrain a transfer of the stock in violation of his rights as, at least, the equitable owner, provided the state of the pleadings is such as to bring his case within the principle and procedures applicable to injunctions of this kind. We need not set forth even the substance of the pleadings. It is enough to state that the complaint alleges facts sufficient to entitle the plaintiff to relief he demands, and while many of the material allegations are denied in the answer, there are statements to be found therein which tend to show that the plaintiff may have some right or interest in the stock which should be protected *pendente lite.* The denials and averments of the answer are not sufficient to destroy the plaintiff's case, but from the pleadings it appears that there is a serious controversy between the parties as to the plaintiff's ownership of the stock he claims, and it further appears probable that he may recover. Is is, therefore, reasonably necessary to protect his rights until the final hearing by injunction. "In the case of special injunctions the rule is not to dissolve upon the coming in of the answer, even though it may deny the equity, but to continue the injunction to the hearing if there is probable cause for supposing that the plaintiff will be able to maintain his primary equity and there is a reasonable apprehension of irreparable loss unless it remains in force, or if in the opinion of the Court it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined. It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right *in statu quo* until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon the merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case. The principles we have attempted to state are, we think, well supported by the authorities

(530) upon this subject. 1 High on Injunctions (3 Ed.), sec. 6; *Jarman v. Saunders,* 64 N. C., 367; *Heilig v. Stokes,* 63 N. C., 612; *Tobacco Co. v. McElwee,* 94 N. C., 425; *Purnell v. Daniel,* 43 N. C., 9; Bispham Eq. (6 Ed.), sec. 405. *Marshall v. Comrs.,* 89 N. C., 104; *Lowe v. Comrs.,* 70 N. C., 532, and *Capehart v. Mhoon,* 45 N. C., 30, would seem to be directly in point. In the first of these cases the Court says: 'The injunctive relief sought in this action is not merely auxiliary to the principal relief demanded, but it is *the* relief, and perpetual injunction is demanded. To dissolve the injunction, therefore, would be practically to deny the relief sought and terminate the action. This the Court will never do where it may be that possibly the plaintiff is entitled to the relief demanded. In such cases it will not determine the matter upon a preliminary hearing upon the the pleadings and *ex parte* affidavits; but it will preserve the matter intact until the action can be regularly heard upon its merits. Any other course would defeat the end to be attained by the action.'" *Cobb v. Clegg,* 137 N. C., 153. In *Troy v. Norment,* 55 N. C., 318, the rule is thus stated by *Nash, J.*: "In applications for special injunctions (and this is such a one), the bill is read as an affidavit to contradict the answer, and where they are in conflict, and the injury to the plaintiff will be irreparable if the relief be not granted, the injunction will not be dissolved on motion, but will be continued to the hearing to enable the parties to support by proof their respective allegations. Justice demands this course. When there is nothing before the Court but oath against oath, how can the Chancellor's conscience be satisfactorily enlightened?" To the same effect is *Purnell v. Daniel, supra.* This case resembles so much an application for a special injunction, though not strictly and technically of that kind, as to be governed by the foregoing principles. If the stock is transferred to an innocent purchaser, the plaintiff's loss may be irreparable, especially in view of defendant's insolvency.

Without passing upon the disputed facts, we conclude from what has been said, that in the present state of the pleadings there was error in the ruling of the judge. An injunction to the hearing should have been granted. *Parker v. Grammer,* 62 N. C., 28; *Jones v. Buxton,* 121 N. C., 285.

Error.

Cited: Person v. Person, 154 N. C., 454, 455; *Yount v. Setzer,* 155 N. C., 219.

(531)

GEORGE W. FULP, ADMINISTRATOR, C. T. A., OF WILLIAM BROWN, DECEASED, v. MARY A. BROWN.

(Filed 7 December, 1910.)

1. **Homestead—Widow—Constitutional Law—Creditors.**

The Revisal, sec. 707, was enacted for the enforcement of the provisions of Article X, sec. 5, of the Constitution, and construed together it is, among other things, required of the personal representatives of the deceased husband to have the homestead in the lands of the deceased allotted by metes and bounds to his widow, in an action to sell lands to make assets to pay debts when there were no children, where the deceased had had no homestead laid off in the lands and the wife had no homestead of her own.

2. **Homestead—Exemption Right—Estate—Interpretation of Statutes—Constitutional Law—Sales.**

Our Constitution and laws relating to the homestead do not create or confer any new property rights, but only an "exemption right" operating on the creditors and the agencies provided by law for the collection of claims requiring, in the instance of real estate, that the exemption be given effect before a valid sale can be made.

3. **Same—Widow—Will—Election.**

When a widow is entitled to her homestead in the lands of her deceased husband under the provisions of Article X, sec. 5, of our Constitution and of Revisal, sec. 707, she is not put to her election to take under the will, as in this case, a life estate in the lands or to dissent from the will, in order to receive the benefits of the homestead conferred by the law; and she is not barred of her right, by entering upon and enjoying the lands devised to her.

4. **Homestead—Interpretation of Statutes—Constitutional Law—Creditors—Sales—Parties.**

A widow having the right to a homestead in the lands of her deceased husband, Constitution, Art. X, sec. 5; Revisal, sec. 707, is not required to take action for the preservation of this right; and before the land can be validly sold by the personal representatives to make assets for the payment of the debts of the deceased the homestead must first be assigned.

APPEAL from *Long, J.*, at February Term, 1910, of FORSYTH.

Petition to sell land for assets transferred from clerk to the civil docket on issues raised. On the hearing it appeared that in "April, 1907, William Brown died leaving a last will and testa- (532) ment, and on 27 May, 1907, George V. Fulp was appointed administrator *c. t. a.* of William Brown, by the clerk of the court of Forsyth County, and at once entered upon the administration of the said estate. At the time of the death of the said William Brown, he was seized in fee simple of a tract of land consisting of seventy-six acres

and personal estate amounting to eighty dollars. This $80 has been applied by the administrator to pay debts of William Brown, deceased, and there are still outstanding debts against the estate amounting to about $300 which the administrator is unable to pay, unless a part of the land be sold. 10 December, 1908, more than eighteen months after the will had been probated, the administrator filed a petition before the clerk of the Superior Court of Forsyth County to sell a part of the said lands to make assets to pay debts, and on 12 January, 1909, Mary Brown, widow of William Brown, deceased, filed an answer claiming that she was entitled to homestead in the lands of her husband."

It further appeared, by admission of parties, "that William Brown died in April, 1907, without children, and without a homestead having been allotted to him, leaving the said Mary A. Brown, defendant, his widow. The said Mary A. Brown has continued a widow, and no homestead has been allotted to her in her own right. It is admitted by the defendant that the widow of the testator Mary A. Brown has not dissented from the will." The will devised the land to the widow for life, etc. Upon the foregoing evidence and admissions, the court being of opinion that the period of time having expired wherein the widow could dissent from the will and she having elected to take under the will, she is not now entitled to have a homestead allotted. Judgment was thereupon entered that the land be sold to make assets and the widow Mary A. Brown excepted and appealed.

G. H. Hastings for plaintiff.
Lindsay Patterson and Clem G. Wright for defendant.

HOKE, J. Article X of our Constitution on homesteads and exemptions contains the provision, section 5, that if the owner of a homestead die leaving a widow, but no children, the same shall be
(533) exempt from the debts of her husband, and the rents and profits thereof shall enure to her benefit during her widowhood unless she be the owner of a homestead in her own right. In enforcement of this provision the Legislature has enacted Revisal 1905, sec. 707, that if one entitled to a homestead die without having had the same allotted, his widow, if he leave no children, may "proceed to have the homestead laid off to her by petition, and if she shall fail to have the same set apart in that manner, then and in such event it shall be the duty, in an action brought by the personal representative of such decedent, to subject the realty of such decedent or intestate to the payment of debts and charges of administration, of the court, to appoint three disinterested freeholders, to set apart the homestead by metes and bounds," etc.

While our decisions have not been in entire accord as to the exact

nature of the homestead interest referred to in these provisions, it has come now to be accepted doctrine that they do not create a new estate or confer any new property rights in an old one but only an "exemption right," a "determinable exemption" as it has been called in some of the cases, operating on the creditor and the agencies provided for the collection of the debt by law and requiring in the case of real estate certainly that the exemption be given effect before a valid sale can be made. *Sash Co. v. Parker, ante,* 130; *Bruton v. McRae,* 125 N. C., 207; *Bank v. Green,* 78 N. C., 247; *Lambert v. Kinnery,* 74 N. C., 348. We have been referred to several decisions in our own and other courts, notably *Tripp v. Nobles,* 136 N. C., 99, to the effect that a widow who qualifies as executrix or administratrix with will annexed, is estopped to claim title except under the will, but these decisions and the principle of election which they uphold have no place in view of the constitutional provision and statutes in enforcement of same, which forbid that a sale of a debtor's land be made, unless and until the exemption provided by law be given effect. The power to sell lands for the payment of debts is a right created by law, and when the statute conferring or regulating the right expressly enacts that no officer having final process against a living debtor shall make a sale thereunder, and no court shall order such sale in any action for the purpose by the representative of the testator or intestate, until the exemption provided for (534) by the Constitution shall be first set apart, these requirements operate and are effective on the creditor and no valid sale can be made until they are complied with. *Bruton v. McRae, supra; Bank v. Green, supra.* The same policy has been enacted into law in reference to the widow's dower interest, Revisal, sec. 3082, and has been applied in *Ex Parte Avery,* 64 N. C., 113, and in other cases. This last statute contains the express provision, "Although she has not dissented from her husband's will." This was no doubt for the reason that dower being a recognized estate in the widow to be ascertained and set apart usually at her instance, such a provision was necessary to prevent the operation of the principle of election and estoppel, referred to and approved in *Tripp v. Nobles, supra,* but in case of the homestead exemption no action on the part of the widow is required. On the facts of this case the law makes her a necessary party, and the statute passed to carry out the constitutional provision forbids any court or officer from bringing a debtor's land to sale for debt until the exemption allowed by law has been properly set apart. Our attention has been called to one or two cases in other States in which a widow was deprived of her homestead exemption by reason of the fact that she had elected to take under her husband's will. It would serve no good purpose to enter on a critical examination and comparison of the Constitution and laws of those States

to ascertain if any valid distinction might be made. In the cases to which we were especially referred, *Watson v. Christian* and *Same v. Skillman,* 75 Ky., 524, the principle contended for by petitioner was established by a divided Court, and in our view the dissenting judge takes the stronger position. Certainly the principles of the decision may not be allowed to prevail in this jurisdiction, being as it is in contravention of our constitutional provision and a statute explicit in terms and plain of meaning expressly enacted to give the same effect. On the admissions and facts in evidence, we are of opinion that the widow is entitled to her homestead exemption, and this will be certified, to the end that the same be allotted to her according to the statute.

Reversed.

Cited: Davenport v. Fleming, 154 N. C., 293; *Rose v. Bryan,* 157 N. C., 174; *Watters v. Hedgpeth,* 172 N. C., 312; *Kirkwood v. Peden,* 173 N. C., 462.

(535)

J. C. HORNER v. OXFORD WATER AND ELECTRIC COMPANY.

(Filed 7 December, 1910.)

1. **Corporations—Electricity—Public Service—Municipal Control—Authorized Maximum Rates—Power of Courts.**

A public-service electric company operated in a town is subject to reasonable regulation and control for the public benefit by the municipal public agencies properly designated, with the power in the municipality to fix upon a maximum reasonable indiscriminative charge between citizens receiving the same kind and degree of service, having due regard to the reasonable profits of the electric company; and in the absence of specific legislative regulation the rates may, under some circumstances, be made the subject of judicial scrutiny and control.

2. **Same—Ordinance—Alternate Powers—Option.**

When a valid and accepted ordinance of a municipality authorizes a public-service electric company to make a certain maximum charge for furnishing electricity to its citizens by meter rate and a certain maximum charge by flat rate, the accepted ordinance being the contract under which the complaining citizen alleges his right to change from a meter rate to a flat rate, the right being granted to the defendant in the alternative, gives to the electric company the option to furnish at a reasonable charge electricity to the citizen upon either the flat or meter basis.

3. **Corporations—Public Service—Ordinance—Acceptance—Contracts—Maximum Rates—Parol Evidence.**

When a citizen bases his cause of action upon the right to demand of a public-service electrical corporation that it furnish him electricity upon a flat rate basis and the company claims the right to furnish him with it

upon either a flat rate or a meter basis, under the terms of an accepted municipal ordinance, regarded as a contract, which by a construction of its terms makes it optional with the company, it can not be shown by parol evidence in contradiction of the ordinance that the lessor of the defendant had orally agreed that the option should be with the plaintiff.

4. Corporations—Public Service—Maximum Rates—Reasonableness—Discrimination—Evidence.

In the present case it appeared that the defendant electric company furnished the plaintiff electricity in accordance with a reasonable and fair meter rate basis correctly measured; that the company, with a desire to benefit the public, had changed from a twelve to a twenty-four hour service and had ceased to supply electricity upon a flat rate basis; that an accepted ordinance of the town authorized the company to make a maximum charge either upon a flat or meter rate; and that plaintiff, a large consumer of electricity, demanded to have it furnished upon a flat rate basis and brought his action to that effect and to restrain the defendant from cutting off, as threatened, the electricity for his lights: *Held*, no evidence of discrimination against the plaintiff; and as under the ordinance the defendant was given the option to supply the current of electricity upon either basis, and as it was making plaintiff a proper charge for electricity for the amount actually used by him, the restraining order was properly dissolved.

APPEAL from *Lyon, J.*, at August Term, 1910, of GRANVILLE. (536)

Heard on exceptions to report of referee. The action was instituted by plaintiff, head and proprietor of a prominent and successful boarding school for boys, to restrain defendant company from shutting off the current of electricity supplying lights for said school. The matter in dispute was referred, by order of court, and on the hearing before the referee it was made to appear that defendant company, as assignee of one Millner, was engaged in operating an electric plant and supplying lights for the citizens of Oxford under an ordinance which had been duly ratified by a vote of the electors of the town, and in which it was, among other things, provided, in section 6: "That said H. L. Millner, his successors and assigns, may charge and collect the following maximum rates for light and power furnished by them," and further, that the flat rates may be collected monthly and quarterly, in advance, and the metered rates monthly, after service. Then followed specifications for light for flat rates, making a difference between the charges for domestic and commercial purposes and also maximum rates for meter charges; that shortly after the performance of the contract was entered on, plaintiff having had his house wired and proper appliances installed, entered into a contract, obtaining electricity at the meter rate, and same was furnished and used for some time at meter rate; that plaintiff having become dissatisfied with the charges made against him, chiefly by reason of alleged irregularities as to amount, notified the company

that he would no longer accept lights at the meter rate and tendered the amount due for schedule for flat rates. Defendant declined to
(537) enter into this arrangement and threatened to shut off the light supplied the school unless the charges for meter rate were paid according to the contract stipulations. The reason for this refusal is set forth in a separate finding, as follows: "In reply to said statement, said Robert Foster Carbutt, superintendent of Oxford Water and Electric Company, informed plaintiff that 'We could not give him a flat rate running twenty-four hours, and that we wanted to keep up the twenty-four hour service and it would be impossible for us to give flat rates under continuous service,' " it appearing that when the ordinance was passed and service entered on, electricity was only supplied for twelve hours.

It appeared further in evidence, on the part of plaintiff, that prior to the notice given by plaintiff the charges per month were very irregular and had greatly increased in amount without just or satisfactory reason. Defendant offered evidence tending to show that the first meter put in was inaccurate, but that this meter had soon been taken out and a new and correct meter installed; that all charges in difference affecting this litigation were estimated by the correct meter.

Second. That the amount of electricity consumed at the school was increased by reason of the larger number of students and the greater number of hours lights were kept burning. There was further testimony offered and set out in case on appeal as follows: "It was in evidence on the part of defendant that the first meter which was installed and which was taken out in May, 1907, ran too slow. It was also in evidence on the part of the defendant that the meter which was installed in September, 1907, and which has remained there ever since, was correct.

It was also in evidence that since May, 1907, no flat rate contract has been made, and that since June, 1908, no one has been furnished with electric lights except by meter rates, but that before this action was commenced the defendant was furnishing the hotel and other private parties at flat rates. There was evidence that it would bankrupt the company to be compelled to furnish all of its customers at flat rates. There was evidence that no company in North Carolina now furnishes electricity by flat rates, and that the meter rate is the only fair and equitable method of furnishing electricity, and that it has been
(538) generally adopted all over the country. It further appeared in evidence that the plaintiff was burning his lights on an average of from three to five hours a night (Mr. Horner testified, three and one-half hours on an average during the nine months school), while an ordinary dwelling house burned its lights on an average from one-half to three-quarters of an hour each, per night."

It was found by the referee that the charge against plaintiff was according to specifications of the ordinance as to meter rates and was a reasonable charge for electricity consumed. The referee held that under the franchise the plaintiff had the right at his election to change from the meter to the flat rate, and that the charge should be estimated against plaintiff as for commercial purposes, and that the injunction should be made perpetual forbidding defendant from shutting off light for nonpayment of the meter rate. On the hearing before the lower court the ruling was reversed as to the right of plaintiff to make the change, the court holding that defendant company had the option to charge its patrons either for flat or meter rates, and entered judgment that the injunction be dissolved, and plaintiff excepted and appealed.

Graham & Devin and B. S. Royster for plaintiff.
John W. Hinsdale for defendant.

HOKE, J. We are of opinion that the judge below has correctly construed the contract or ordinance and that the rights of the parties thereunder have been properly determined. The defendant company having dedicated its property to the public service, it thereby became the subject of reasonable regulation and control for the public benefit and by the public agencies properly designated for the purpose. Subject to this principle the municipal corporation had the power to fix upon a maximum charge reasonable in its terms and which defendant would have no right to disregard. Even with such maximum rates properly established, our decisions are to the effect that the charges must be reasonable and without discriminations as between citizens receiving the same kind and degree of service, and that in the absence of more specific legislative regulation the rates may under some circumstances be made the subject of judicial scrutiny and control. *Griffin v. Water Co.* (539) 122 N. C., 206; *Rushville v. Gas Co.*, 132 Ind., 5. It is shown that the charge made against plaintiff in this instance according to meter rates is reasonable. So far as appears then from the findings of fact or the proof the ordinance is a valid regulation fixing the maximum rates stated and requiring defendant company to supply electricity within the rate to all persons living within the corporation who should apply for it, but we agree with his Honor in holding that as to the method of rating, the said ordinance not improperly left and referred this question to be determined by the contract of the parties. This not only appears from a perusal of the ordinance by which "H. L. Millner, his successors and assigns, are authorized to charge and collect the following maximum rates for light and power furnished by them, etc., specifying the flat and meter rates," but in so far as the ordinance

expresses a contract between the company and the municipality, and both parties to this controversy seem to have so treated it, the same is subject to the principle of interpretation generally applicable, "That when a promise is in the alternative, as to do a thing one way or another, the right of election is with the promisor in the absence of an express provision to the contrary." 7 A. & E. (2 Ed.), 125; *Homesly v. Elias,* 75 N. C., 573; *Exchange and Building Co.,* 90 Va., 83; *Powell v. Duluth,* 91 Minn., 53; Paige on Contracts, sec. 1391; 1 Farnham Waters, sec. 163. We find no evidence in the record supporting the suggestion made that defendant's assignor, as an inducement, had given assurance that he would furnish electricity according to the method of rating selected by the householder or purchaser, and if there had been, it should not in our opinion be allowed to affect the plain and explicit terms of the ordinance. Nor do we think that the action of the company should be held to discriminate unjustly against the plaintiff in view of the facts in evidence; that the charge made against the plaintiff is a fair and reasonable charge for the electricity actually consumed and correctly measured; that the company is endeavoring to furnish a full service of twenty-four hours, a change made from the original method of
(540) half time with the desire and intent to benefit the entire public, and that the flat rate originally provided for under this measure of service would speedily bankrupt the company; that no flat rate contract had been made since May, 1907, and since June, 1908, no one had been furnished electricity except by meter rates. In *Powell v. Duluth, supra,* on facts not dissimilar to those presented here, the Court said: "The only ground upon which appellants can assail the act of the commissioners in refusing to place them upon the flat rate basis is that it resulted in a discrimination between them and other consumers who pay at flat rates or that the meter rates were unreasonable; but according to the evidence and the findings, the meter rates were reasonable. If it appeared that other consumers, upon the flat rate system, had an advantage and were enjoying a privilege not accorded those using meters, and that the commissioners were arbitrarily making such discrimination, there might be some ground for complaint. But such is not the case. On the contrary, the evidence and findings are to the effect that a large majority of those using meters save money by so doing. The fact that according to appellant's experience with a meter prior to the time it was taken out showed their water bills to be more than the flat rate, does not establish discrimination, nor prove that the rate by the meter is unreasonable. It is found by the court that all consumers situated as appellants have been similarly treated, and it does not appear that the method adopted by the board to gradually bring consumers upon the meter basis is illegal or arbitrary, or that it resulted in discrimination."

Upholding as we do the decision of the judge below that under the ordinance and the facts in evidence, the plaintiff may be lawfully subjected to the meter rate, we further concur in the position of his Honor that the question whether plaintiff could be charged under the flat rate as domestic or commercial, is no longer material, and for that reason is not considered or passed upon.

We are of opinion that there was no error in dissolving the injunction, and the judgment to that effect is

Affirmed.

CLARK, C. J., dissenting: The commissioners of Oxford made a (541) contract with the defendant company to furnish water and lights to said town and its citizens. The contract was in the shape of an ordinance which was submitted to the voters at the ballot box and approved by them. This ordinance specified the rates, both flat and meter, in separate columns, at which the defendant should furnish both light and water. This table of rates was not intended to confer any option upon the defendant, but was a restriction upon the defendant company and a guarantee to the town and the citizens that they would be furnished lights and water at prices not exceeding those rates, and by the flat or meter system at the option of the consumer.

The ordinance and the table were not required to confer any option upon the defendant. Without them, the company had full choice whether it would furnish upon a light or flat meter rate, and as to the price it would charge. It was not to confer an option upon the company, but for the exactly opposite purpose of restricting the powers of a monopoly, and to confer upon the consumer the option that the ordinance was adopted.

This will more clearly appear by reference to the provision as to the water rate, which specifically provides that upon the expiration of any contract with a citizen as to the furnishing of water upon a flat rate, the company should have the right to substitute a meter rate. There is no provision reserving such right to the company to substitute a meter rate for a flat rate in furnishing lights.

It is true that the flat rate for lights was based upon a twelve-hour service. Of course, the plaintiff can not require a longer service upon a flat rate than that which existed at the date of the adoption of the ordinance and it seems that the plaintiff does not claim it. In my judgment, the court below should have adopted in all respects the report of Gov. Stedman, the very careful and able referee in this case.

Cited: *S. c.*, 156 N. C., 495; *Telephone Co. v. Telephone Co.*, 159 N. C., 14; *Woodley v. Telephone Co.*, 163 N. C., 286; *Winborne v. Cotton Mills*, 171 N. C., 64.

(542)

C. C. HARRIS v. THE NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 7 December, 1910.)

1. Water and Watercourses—Upper Riparian Owner—Material Impairment.

Water flowing in its natural channel is not subject to ownership, and may be used by the upper riparian owner in such reasonable quantities, taking into consideration the size and character of the stream, as not to materially or substantially impair the lower riparian owner in its legitimate use.

2. Same—Railroads—Lower Riparian Owner—Damages.

A railroad company has the right, as an upper riparian owner, where its bridge crosses a natural watercourse, to the use of so much of the water as is necessary for the running of its locomotives, and a lower riparian owner can not recover damages, on that account, in the operation of his water mill, when the use of the water by the railroad company does not materially or substantially diminish its natural flow; and upon conflicting evidence, the question is one for the jury.

APPEAL from *Lyon, J.*, at August Term, 1910, of PERSON.

Action by the owner of a water mill on a running stream, to recover damages of the defendant railway company for consumption of water taken from plaintiff's pond to supply defendant's locomotives with water in the necessary operation of defendant's trains which are operated along and upon defendant's railroad track and right of way, which crosses said stream above the plaintiff's dam.

These issues were submitted:

1. Is the plaintiff the owner in fee of the land mentioned and described in the complaint; if so, when did he become the owner thereof? Answer: Yes; 7 April, 1902.

2. When did the defendant erect its water tank and pumping apparatus and begin to take and appropriate the water from the stream mentioned and described in the complaint? Answer: 27 September, 1900.

3. When did the plaintiff erect his mill and begin to take and appropriate the water from the stream mentioned and described in the complaint? Answer: January, 1903.

(543) 4. Has the defendant unlawfully and wrongfully diverted and used the water from plaintiff's mill pond as alleged in the complaint? Answer: No.

5. Did the plaintiff commence this action against the defendant within three years next ensuing from and after the time when the defendant erected its water tank and pumping station and first began the use of the water from the stream on which plaintiff's mill and pond are situated? Answer: No.

6. Did plaintiff commence this action against the defendant within five years next ensuing from and after the time when the defendant erected its water tank and pumping station and first began the use of the water from the stream on which plaintiff's mill and pond are situated? Answer: No.

7. Is the plaintiff's alleged claim for damages barred by the statutes of limitation? Answer: ———

8. What amount of permanent damages, if any, is plaintiff entitled to recover of the defendant? Answer: ———

9. What damage has plaintiff sustained, if any, by reason of the use and diversion of water by defendant for three years next before the bringing of this action?

Upon the finding of the jury in favor of the defendant upon the fourth issue, the court rendered judgment that the plaintiff take nothing by his writ, and that defendant go without day and recover costs. From this judgment plaintiff appealed.

The facts are stated in the opinion of the Court.

J. F. Cothran, R. P. Reade, V. S. Bryant, and H. A. Foushee for plaintiff.

Guthrie & Guthrie for defendant.

BROWN, J. The evidence discloses that the plaintiff is the owner of a tract of land, known as Burton's old mill, situated on Flat River, upon which plaintiff has a water mill. The mill gets its flowage of water from both the north and south forks of Flat River. It is two miles by the river from the mill tract to the defendant's bridge across the south fork. The north fork and south fork come together between the mill and the bridge. Defendant has a water tank at its bridge across south fork, from which it supplies its engines with water pumped from the (544) stream.

It is claimed by the plaintiff that the taking of the water by the defendant is unlawful and wrongful, in that it materially lowers the stream, to the injury of plaintiff's mill. This is denied by the defendant, which contends that the quantity of water taken is so small that it does not appreciably affect the flowage of the stream. Both parties introduced evidence.

The only assignment of error relied upon on argument or presented in plaintiff's brief is to the refusal of the court to give the following instruction asked by plaintiff: "If the jury believe the evidence they will answer fourth issue Yes."

There being no exceptions, except this, the charge of the court is not sent up.

It is well settled that riparian proprietors, in the absence of specific

limitation upon their rights, are entitled to have the stream which washes their lands flow as it is wont by nature, without *material* diminution.

The proprietors of lands along streams have no property in the flowing water, which is indivisible and not the subject of riparian ownership. They may use the water for any purpose to which it can be beneficially applied, but in doing so they have no right to inflict *material* or substantial injury upon those below them. *Williamson v. Canal Co.*, 78 N. C., 157; Gould on Waters, pp. 394-395; Angell on Waters, pp. 96-97, (7 Ed.).

What, then, gives to the lower riparian proprietor the right to complain? Not the mere taking of the water by the upper proprietor, because the water itself is not the subject of ownership as it flows in nature's course. The right of action accrues from the taking it in such unreasonable quantity as to materially, substantially injure the lower proprietor in some legitimate use he is making of the water. As Mr. Farnham expresses it: "Since the right to make use of the stream is common to all who own property upon its shores, there would *prima facie* seem to be no cause of complaint on the part of one for any use made by another unless he was actually injured by such use." 2 Waters and Water Rights, p. 1584, sec. 468.

It seems to be generally conceded that the size and character of the stream has much to do with the quantity of water which may be withdrawn from it, and that where there has been no *appreciable,*
(545) *perceptible* diminution of the volume of the stream, by the upper proprietor, the lower has no cause of action. *Elliott v. R. R.*, 57 Am. Dec., 86; *Newhall v. Ireson*, 54 Am. Dec., 790.

It is generally held that a railroad company, being a riparian proprietor, may take a reasonable amount of water from a stream for the purpose of supplying its locomotives. Mr. Farnham says: "Therefore, the water can not be taken from the stream for use in locomotive engines so as to interfere with the rights of the riparian owner in the stream. But if the water can be taken for such purpose without interfering with other rights on the stream it may be done." 2 Waters and Water Rights, p. 1583. In England it is held that a railroad company, which crosses a river, may take a reasonable quantity of water for the supply of its engines from the river, and "the quantity will not be held unreasonable if it does no injury in wet weather and never shortens the working hours of mills lower down the stream more than a few minutes a day at any time." *Sandwich v. R. R.*, L. R., 10 Chan. Div., 27.

The English courts also hold that equity will not restrain the taking of water from a stream by a railroad company for its locomotives when

the quantity taken deprives the lower riparian owner of but eleven-twelfths of one horse power. *Graham v. R. R.*, 10 Grant Ch.(U. S.), 529.

In this country it seems well settled that a railroad company crossing a stream may take water for its locomotives, provided the quantity taken does not materially, appreciably, perceptibly or sensibly (some authorities use one word and some the other) reduce the volume of water flowing down the stream. If it materially lowers the stream, it is liable to a lower proprietor who suffers a substantial injury thereby. 2 Elliott on R. R., sec. 977 and notes; *Elliott v. R. R.*, 10 Cush. Mass., 191; 57 Am. Dec., 86, a case in which *Chief Justice Shaw* discusses the subject with his usual thoroughness. *Fay v. R. R.*, 111 Mass., 27; *R. R. v. Miller*, 112 Pa. St., 34.

In this case *Mr. Justice Paxson* closes a learned discussion of the matter with these words: "As before observed, the railroad company may use this water by virtue of its rights as riparian owner; (546) but such use must be such as not to *sensibly* diminish the stream to the riparian owner below. The water belongs to both, and if the former wants more than its share it must take it under its right of eminent domain and pay for it."

In *Garwood v. R. R.*, 83 N. Y., 400, the right of the defendant as riparian owner to take water for its locomotives is recognized, but the jury having found that the quantity taken was sufficient to "*materially* reduce or diminish the grinding power of plaintiff's mill" and "to *perceptibly* reduce the volume of water in the stream," the Court held the taking wrongful and unlawful and that the defendant was liable for the damage sustained.

But a diminution of the stream which is not sensible, appreciable, perceptible, is not actionable. Gould on Waters, sec. 410, and cases cited in notes; *Wadsworth v. Tillotson*, 15 Conn., 366; *Ford v. R. R.*, 40 Mo. App., 433.

Although the charge of the court—there being no exceptions to it—is not before us, yet we can perceive from the character of the evidence and examination of witnesses on both sides that the case was properly tried and upon the true theory of liability.

It requires only a cursory perusal of the evidence to bring us to the conclusion that the court committed no error in refusing plaintiff's prayer upon the fourth issue.

The plaintiff's evidence tends to prove that at times the water taken by defendant from the South Fork materially lowers the water in the stream and inflicts substantial damage upon plaintiff by compelling him to shut down his mill.

The defendant introduced a number of witnesses who testified that plaintiff's mill was not damaged by the water taken by defendant, and

that it does not perceptibly decrease the volume of the stream; that water runs over plaintiff's dam when he is grinding, and that the lowest water some witnesses have seen is a foot from the top of the dam. Defendant also proves by a civil engineer that he measured the stream and calculated its volume; that he made surveys and calculations at different times; that the flow of the stream in twenty-four hours is two hundred and ninety-three million gallons, and that the quantity taken out during that time by the railroad company is only 26,000 (547) gallons, or about one-fiftieth part of one per cent of the total flowage. The civil engineer further testified that "the pumping of 26,000 gallons of water out of the stream of South Fork every twenty-four hours with the total flowage of the stream would not be appreciable. It would be about three two-hundredths (3-200) of one part of one per cent. A person standing on the bank of the river could not see any difference at all. To the eye it would show no difference."

In view of the conflicting character of the evidence his Honor properly submitted the question to the jury and denied the plaintiff's prayer. As the jury found there had been no unlawful and wrongful taking and usage of the water by the defendant, the issues in regard to the statute of limitations and damages were properly left unanswered.

No error.

Cited: *R. R. v. Light & Power Co.*, 169 N. C., 481; *R. R. v. Power Co.*, 171 N. C., 323.

MAUD M. BARRETT ET AL. v. FRANK BREWER ET AL.

(Filed 7 December, 1910.)

1. **Deeds and Conveyances—"Color"—Ancestor—Possession—Continuity.**

Those in adverse possession of land claiming "color of title" under a deed made to their ancestor, must show that the ancestor entered into possession under his deed, and continuity of that possession in themselves, in order to ripen their title.

2. **Deeds and Conveyances—"Color"—Possession—Interpretation of Statutes.**

Title to lands by adverse possession under "color" is by virtue of our statute, Revisal, sec. 382, and it is necessary thereunder to show possession and not merely a claim of title.

3. **Same—Ancestor—Continuity—Heirs.**

"Color of title" can not descend to the heirs unless the ancestor entered into the possession of the lands, and to be available to the former it must come by continuity to them. Hence the heirs can not be advantaged by the color of title of an ancestor who had not entered into the possession of the lands.

4. Deeds and Conveyances—"Color"—Possession—"Privity."

The term "privity" when used in connection with "color of title" means privity of possession, and not privity of blood, and the latter occupant must enter possession under that of the prior one when his claim of "color" is relied upon.

APPEAL from *Biggs, J.*, at April Term, 1910, of MONTGOMERY. (548)

Ejectment. At the conclusion of the evidence, his Honor being of opinion that the plaintiffs had failed to make out title, sustained a motion to nonsuit and dismissed the action. The plaintiffs excepted and appealed.

This controversy was before this Court at another term and is reported in 143 N. C., 88, and is there referred to for the general statement of facts.

U. L. Spence for plaintiffs.

R. T. Poole and J. A. Spence for defendants.

BROWN, J. Plaintiffs introduced a grant to defendants from the State dated 15 October, 1891, covering the land in controversy, thereby proving that the legal title was in defendants at that time. Plaintiffs attempted to show that they have acquired title since then by adverse possession under color of title for seven years. For this purpose they introduce a deed from G. R. Bryant to Josephine Barrett dated 5 February, 1870, and recorded 13 May, 1896, covering the same land.

This deed was good color as to the grantee herself had she entered upon and taken possession of the land under it. The evidence is that Josephine Barrett died in 1872, when she was eight years old; that the deed was made to her about two years before she died, and that neither she nor any one for her ever entered upon the land and claimed it for her under this deed. The land was woodsland entirely, and Josephine resided fourteen miles from it. She was born in 1864 and died eight years later. The plaintiffs claim that they have shown seven years adverse possession since the date of the grant to defendants, and the "color" they offer is the deed to Josephine Barrett, who was their sister, and whose heirs at law they are.

Inasmuch as their ancestor had no legal title to the land, never (549) was in possession of it and never claimed it, nor did any one for her, can these plaintiffs be permitted, many years after her death, to enter upon the land without title and offer the deed to their ancestor as good color for their unlawful entry?

As to what constitutes "color of title" and "claim of title" the courts differ in the different States because it largely depends upon the language of the different statutes. As said by *Judge Henderson* in *Tate*

v. Southard, 10 N. C., 120, color of title is evidently the production of our own country.

The term "color of title" is not synonymous with "claim of title" as used in the statutes of some States. To constitute color of title there must be a paper title to give color to the adverse possession, whereas a claim of title may be constituted wholly by parol. *Hamilton v. Wright,* 30 Iowa, 480.

Our statute does not recognize a mere claim of title. It enacts that "when the person in possession of any real property, or those under whom he claims, shall have been possessed of the same, under known and visible lines and boundaries and under colorable title for seven years, no entry shall be made or action sustained," etc. Rev., sec. 382.

It has long been settled in this State that the colorable title required by the statute must be "a writing upon its face professing to bear title, but which does not do it, either from want of title in the person making it, or the defective mode of conveyance that is used." *Tate v. Southard, supra; Williams v. Scott,* 122 N. C., 550.

In this last case it is said: "The defendants insist further that the possession of the *feme* defendant, the heir at law of the bankrupt, since his death in 1878, is color of title by descent. Counsel cited us some authorities from other States to that effect, but upon examination it is found that that has been made so by statute. Whatever the law may be elsewhere, there can be no such thing in North Carolina as color of title without some paper writing attempting to convey title." It is plain, therefore, that plaintiffs can not set up a "claim of title" under our statute.

This brings us to the inquiry, Is the deed to the ancestor, under which she made no entry or claim to the land, or no one for her, good
(550) color for an entry made more than twenty years after her death by her heirs at law, and after the State had granted the lands to defendants.

The reason usually given to support the doctrine of maturing title by adverse possession under color of title is that where one, in the exercise of ordinary care is induced to enter upon and improve land because he has some written evidence of title that would naturally induce a "layman" to believe that it vested in him what is professed to pass, it would be unjust to enforce the right of another who brings no action till the end of the statutory period. Wood on Lim., sec. 159; *Avent v. Arrington,* 105 N. C., 387.

In the opinion in that case many cases are cited and quoted from, which seem to indicate that the entry must be made by the person to whom the colorable instrument is made.

In view of the fact that the ancestor to whom the colorable title was

made never asserted any claim to the land under it, and these plaintiffs do not take by purchase, they evidently do not come within the reason of the rule, as stated by Mr. Wood, and approved by this Court in *Avent v. Arrington.* When they entered they knew and admit their ancestor had never entered upon the land and had never perfected his colorable title. It is different when the ancestor enters and takes possession under colorable title. At his death the possession is cast by descent upon his heirs, who may continue the possession in good faith in himself, and tack it to that of his ancestor's so as to complete the necessary statutory period. *Atwell v. Shook,* 133 N. C., 391; *Alexander v. Gibbons,* 118 N. C., 796. It is the continuity of possession which gives to the heir the benefit of the entry under color made by his ancestor.

We fail to find any authority for the position that long after the ancestor's death his heir can avail himself of a colorable title consisting of a paper writing made to his ancestor when the latter either refused or failed to claim any rights under it himself. It would seem more consistent with reason and authority that the entry should be made and claim of title first asserted by the person to whom the colorable instrument was made, and that if he did not see fit to do so in his lifetime, no one can do it after his death under his color. (551)

The grantee in the deed takes by purchase. Her heirs took no interest under the deed. They take by descent from her, therefore, they must show a "descent cast." As their ancestor had no real title to descend they can only show it by proving her possession and that at her death it was cast upon them, for, as against one showing no title in himself, possession is title. *Sherin v. Brackett,* 36 Minn., 152; Sedg. & W. Title to Land, secs. 717-718.

"A descent cast, *where an ancestor is in possession,* gives color of title." 3 Wash. Real Prop., 168.

It must be admitted that an heir can not inherit a color of title, for that is not a muniment of title. It is a mere shadow, a pretense of a title. Muniments of title follow the real title and descend to the heir as an incident to the estate. If there is no estate to descend, there can be no muniments. It is the descent of the possession which gives vitality to the colorable title and which, when continued long enough, constitutes it a muniment of a real title. Without the possession the colorable instrument is but worthless paper.

It has been said that color of title must purport to convey title to the claimant thereunder or to those with whom he is in privity. 1 Cyc., 1085.

This term "privity," when used in connection with color of title, does not mean privity in blood, for a privy in blood is defined to be one who derives his title to the property in question by descent. 6 Words and

Phrases, 5608. That refers to a real title which can descend, and not to a mere colorable title, for until the ancestor enters and takes possession under his color he has nothing to descend, neither title nor possession. Therefore, it is held in treating of color of title that "the privity spoken of exists between two successive *holders* when the latter takes under the earlier, as by descent (as, for instance, a widow under her husband, or a child under its parent) or by will or grant, as by voluntary transfer of possession." *Sherin v. Brackett, supra; Hamilton v. Wright,* 30 Iowa, 480; *Jackson v. Moore,* 7 Am. Dec., 398; Sedg. & Waite Title to Land, secs. 747-748; Wood on Lim., sec. 271. The term privity, when
(552) used in connection with a colorable, or sham title, and not a real title, evidently means "privity of possession."

To show privity of possession, the latter occupant must enter under the prior one; *must obtain his possession* either by purchase or descent from him. Words and Phrases, 5609; *Shuffleton v. Nelson,* 22 Fed. Cases, 45-47; Sedg. & Waite, sec. 747.

Warvelle on Vendors, sec. 8, p. 54, states the law very clearly as follows: "Possession under color of title for the period of the statutory limitation confers upon the holders a perfect title in law; and where one takes possession under a deed giving color of title his possession may be transferred to subsequent parties, and the possession of the different holders may be united so as to make up the statutory period. Titles acquired in this manner must, however, show connected possession and a privity of grant or descent."

Bond v. Beverly, 152 N. C., 60, relied upon by the plaintiffs, supports the position we have taken. In that case the plaintiff claimed the land by virtue of sale in 1870 under an execution against Lawrence Askew, the owner of the land. The defendant Beverly claimed under a deed from Harrill who claimed under a deed from the executors of Lawrence Askew. It was claimed that Beverly's deed was void for lack of sufficient description and was not color of title. This Court, in a very lucid opinion by *Mr. Justice Manning,* in which the facts are fully stated, held that the deed to Harrill was good color of title and that Beverly, *having been put in possession* by Harrill, could take the benefit of such color. In other words Beverly was privy in possession with Harrill. The learned *Justice* says: "This adverse entry occurred on 22 December, 1890, when Harrill put Beverly, the ancestor of defendants, and one Young in possession of the land and they took possession of it," and he cites a number of cases wherein privity of possession is held to exist between successive holders. It is manifest from the opinion that, if there had been no privity of possession between Harrill and Beverly, the latter could not have availed himself of the former's deed from the executors as color of title.

Another case pressed upon our attention by the learned counsel (553) for plaintiffs is *Miller v. Davis,* 106 Mich., 303, which appears upon examination to be based upon a construction of the Michigan statutes.

Joseph St. Andre was the legal owner of the land by patent from the government. He seems to have abandoned the land and others took adverse possession of it. Louis St. Andre, an heir of Joseph, afterwards reëntered upon the land, and the judge, writing the opinion, says "he could not be said to have entered without color of title."

This was purely *obiter,* and we think not an apt expression, for when Louis St. Andre reëntered he held the legal title in his person and his entry was not under color of a spurious title but under the protection of the original patent, which he had inherited from his ancestor.

We are of opinion that his Honor did not err in sustaining the motion to nonsuit and his judgment is

Affirmed.

HOKE, J., dissenting: Impressed as I am with the learned discussion of the subject in the opinion of the Court, I cannot bring my mind to the conclusion, made the basis of the decision, that in order to make a deed available as color of title, it is always necessary that there should be an actual entry thereunder by the original grantee. To constitute color of title in this State, it is required that there should be a paper writing purporting to convey or contract for the title to land, sufficiently defining its boundaries and an entry thereunder asserting ownership with a certain degree of good faith. Subject to these requirements the question of color of title is very largely one of intent and there is no reason occurring to me why an heir should not be allowed to acquire title when he enters under a deed to the ancestor and remains in the exclusive possession for the required length of time, asserting ownership under the deed. The position chiefly relied upon in the Court's opinion that there should be an entry by the ancestor grantee, under the deed, and descent cast before the heir can avail himself of the deed as color, is a doctrine asserted and applied by the courts to cases where it was necessary to join or "tack" the possession of the ancestor to that of the heir in order to make out the length of occupation required (554) The courts were giving a reason for allowing one wrongdoer or disseizor to avail himself of the occupation by another and this is what the text books mean when they lay such apparent stress upon possession by the ancestor, as in the citation from Warvelle, appearing in the principal opinion, "that possession under a deed, giving color may be transferred to other parties, but in order to do this they must be purely of grant or descent." In our case, however, there was evidence to the

effect that the heirs had entered, and themselves had occupied the property adversely for the required length of time, asserting ownership under the deed to their ancestor, and to my mind there is nothing to prevent the operation of the principles of color of title, a paper writing purporting to convey same and an entry thereunder asserting ownership in good faith. Such a claim of ownership would not be allowed to an absolute stranger, but by reason of privity it should be allowed to the heir. The principle contended for seems to have been applied in *Miller v. Davis,* 106 Mich., 300, and was directly recognized by this Court in *Bond v. Beverly,* 152 N. C., 57. In that well considered case, it appeared that the executors of a claimant, under order of court, had sold the land in controversy to one Harrill and made a deed to Harrill, properly and sufficiently defining the boundaries. Harrill conveyed to Beverly, the ancestor of defendant, who entered and he and those under whom he claimed occupied for sufficient length of time to mature the title, asserting ownership under these deeds. The deed from the executors to Harrill was a good and sufficient deed. That from Harrill to Beverly was void for lack of sufficient description. There was no entry on the land under this claim until Beverly, the ancestor of defendants, entered. The title of defendants by adverse occupation was established and allowed to prevail. This was not, as insisted, an application of the recognized principle that a lessor may ripen his own title by the occupation of his lessee or even his licensee, under and by virtue of the deed to Harrill, the grantee of the executors, although there had never been any entry by Harrill or any one under whom he claimed, Beverly, who claimed under Harrill, was allowed to avail himself of his
(555) grantor's deed as color, though the grantee himself had not entered. On the facts presented he was not an absolute stranger, but a claimant asserting ownership in good faith. While we recognize and treat claims of this character as beginning in a disseizin we know that many of them, as a matter of fact, represent the true title, the evidence of which has been lost, from accident or inattention, under the lax methods that formerly prevailed when land was cheaper and more readily obtained. Many thousands of titles in this State could not now be strictly established by a line of registered deeds. Fifty or sixty years back it would be difficult to show the character or circumstances of an original entry, by oral testimony. One hundred years back it would be impossible and to my mind it is an unsound principle and one fraught with much danger that deprives an heir of the privilege of availing himself of his ancestor's deed as color. I am of opinion that on the facts in evidence the cause should have been submitted to the jury.

Cited: Vanderbilt v. Chapman, 172 N. C., 813, 814.

SARAH L. McDOWELL v. J. S. KENT COMPANY.

(Filed 7 December, 1910.)

1. **Appeal and Error—Assignments—Notice—Appellee's Counsel.**

To meet the requirement of rule 19 (2), the assignments of error should be grouped and numbered and come up as part of the record on appeal, placed either just before or more properly after the signature of the judge. When filed in the Supreme Court only on the day before the case is called for argument, this does not give appellee's attorney time to prepare and present his brief upon the points relied upon on appeal.

2. **Appeal and Error—Assignments of Error—Requisites.**

In the assignments of error required by rule 19 (2), the court desires that *bona fide* exceptions relating to points determinative of the appeal be clearly and intelligently stated, with so much of the evidence, or of the charge, or other matter or circumstance as shall clearly present the matter to be debated.

3. **Appeal and Error—Reinstate—Properly Dismissed—Assignments of Error.**

A motion to reinstate a case on appeal must be denied when based on the same grounds upon which it was properly dismissed, in this case, the failure of appellant to set out the assignments of error required by rule 19 (2).

APPEAL by defendant from *Councill, J.*, at June Term, 1910, (556) of YANCEY.

The facts are sufficiently stated in the opinion of *Mr. Chief Justice Clark.*

J. Bis Ray, Gardner & Gardner, and Adams & Adams for plaintiff.
Watson, Hudgins & Watson and J. T. Perkins for defendant.

CLARK, C. J. This is a motion to affirm the judgment in this case because of a failure to observe the rule which requires an assignment of errors to come up in the record in each case. Rule 19 (2) and rule 21, 140 N. C., 660. The appellant resisted the motion on the ground that he had filed the assignments of error the day before the beginning of the call of the docket of the district, to wit, on Monday of that week. This defense loses sight of one of the chief objects of the rule, which is that the appellee's counsel may have notice of the points upon which he must prepare his brief.

Though this matter has been often called to the attention of the profession and our determination expressed to enforce the rule, such cases as this occasionally occur. It is of the utmost importance that any rule shall be impartially applied. It would be the greatest injustice to apply it in some cases and not in all.

There is a clear-cut distinction between exceptions and assignments of error. Exceptions must be taken during the trial, and be entered at the time—except exceptions to the charge which may be filed within ten days after the trial, and that the complaint does not state a cause of action, or that the court has no jurisdiction (which last two may be taken at any time, even in this Court, and *ore tenus*). Exceptions if not taken at the proper time are waived. Hence, in the hurry and stress of a trial, numerous exceptions are taken out of abundant caution. The record must show that they were taken in apt time.

(557) When, however, the appellant makes up his case on appeal, it is his duty to go over the record and select out all the exceptions upon which he intends to rely on the discussion in this Court, adding so much of the evidence or other matter which is necessary to "point" the assignment of error. These assignments of error are then required to be placed at the end of the case on appeal before, or more properly just after the judge's signature.

This requirement of an assignment of errors is universal in appellate courts. In *Jones v. R. R., ante,* 419, we reviewed in this particular the rules in other jurisdictions, showing that they were much more stringent than ours. But for this requirement, the appellate court would be required to go through the entire record and examine the exceptions one by one, even though the appellant himself had ceased to rely upon some of them. By selecting the exceptions which the appellant has collected from the record and grouped at the end of the case the Court can much more speedily grasp the case, and the points to be debated. There is the further object, that the appellee's counsel, in the same manner may know exactly what points the discussion will be restricted to and prepare his argument and brief to meet them. Otherwise he might spend much of his time and incur expense in printing a brief to meet exceptions which the appellant will wisely discard in presenting his case. The assignments of error therefore must come up in the record on appeal. If by any accident, without negligence on the part of the appellant, the assignment of errors is omitted, the appellant can by prompt action apply to this Court, upon notice to the appellee, for a *certiorari* to send up the omitted assignment of errors. But the appellant certainly can not thus amend his record as was here attempted, by his own action in causing the assignment to be sent up. Nor could he get a *certiorari* from the court by application therefor at so late a day as in this case, unless under very exceptional circumstances. It would be unfair to the appellee to thus force him into a trial without an opportunity to prepare a brief directed to the points in controversy or to ask for six months delay because of the carelessness of the appellant.

(558) In *Jones v. R. R., ante,* 419, we have gone very fully into this

matter and have shown the necessity for this rule and cited the cases in which we have repeatedly enforced it. In that case the exceptions were all properly taken and were scattered along through the record, but there was no assignment of errors at the end of the case, which gathered up and grouped the exceptions which were intended to be relied upon.

In *Thompson v. R. R.*, 147 N. C., 412, there is a very clear discussion of the requirements as to assignments of errors, and of the method in which they must be set forth. The Court will not accept a mere colorable compliance such (as in that case) as entering the "first exception is the first assignment of error," etc. This would give no information whatever to the Court, for it would necessitate turning back to the record to see what the exception was. What the Court desires, and indeed the least that any appellate court requires, is that the exceptions which are *bona fide* be presented to the Court for a decision, as the points determinative of the appeal, shall be stated clearly and intelligibly by the assignment of errors and not by referring to the record, and therewith shall be set out so much of the evidence or of the charge or other matter or circumstance (as the case may be) as shall be necessary to present clearly the matter to be debated.

This requirement of the Court is not arbitrary but has been dictated by its experience and from a desire to expedite the public business by our being enabled to grasp more quickly the case before us and thus more intelligently follow the argument of counsel. In this practice we have followed what has long been adopted by other courts.

This Court is decidedly averse to deciding any case upon a technicality or disposing of any appeal otherwise than upon its merits. But having adopted this rule from a sense of its necessity, and having put it in force only after repeated notice, and having uniformly applied it in every case since we began to do so, it is absolutely necessary that we observe it impartially in every case.

That the rule has not been difficult to observe, and that the profession have loyally observed it, is shown by the fact that on an average our records show that the failure to do so does not exceed two (559) appeals in a thousand. We trust that there will be none hereafter.

The appellant moved to reinstate, but as the motion is based upon the same facts, as before, it must be denied, and there being no error upon the face of the record proper, and no assignment of errors, the judgment below is

Affirmed.

Cited: Wheeler v. Cole, 164 N. C., 381; *Porter v. Lumber Co., ibid.,* 398; *Carter v. Reaves,* 167 N. C., 132; *Rogers v. Jones,* 172 N. C., 157.

STATE EX REL. NORTH CAROLINA CORPORATION COMMISSION AND F. R. PENN TOBACCO COMPANY ET AL. v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 7 December, 1910.)

1. Corporation Commission—Powers—Eminent Domain—Side Tracks—Res Judicata.

The Corporation Commission can not confer the power of eminent domain, Revisal, 1097 (5), and when the Legislature has not conferred such power upon a nonresident railroad company respecting the construction of a side track over the lands of others, an order of the Commission for the railroad to build such a track is void. *Semble*, this matter is *res judicata*. *Butler v. Tobacco Co.*, 152 N. C., 416.

2. Same—Industrial Sidings—Tender of Right of Way.

Semble, that the Corporation Commission can require a railroad company to build a side track to an industrial plant only upon the company's right of way or when the right of way is tendered. Revisal, 1097 (5).

3. Corporation Commission—Side Tracks—Interpretation of Statutes—Limitations of Power.

The power conferred upon the Corporation Commission to order a railroad company to build a side track, Revisal, 1097 (5), is with the restriction that the revenue from such side track shall be "sufficient within five years to pay the expenses of construction"; and the lower court having denied the authority of the Commission in this action, the presumption is in favor of its judgment, and it will be affirmed in the absence of evidence tending to show that the revenue will be sufficient according to the terms of the statute. From the facts in this case it appears that the revenue would be insufficient.

4. Corporation Commission—Side Tracks—Interstate Commerce—Constitutional Law.

Requiring a nonresident railroad, operating in this State and doing an interstate business, to construct an industrial siding or side track here, with the proper legislative authority to make the order, is not a burden nor an interference with interstate commerce, and it is constitutional.

(560) ACTION brought in ROCKINGHAM, and appealed from judgment of *Biggs, J.*, rendered at chambers in Winston, 12 October, 1910.

The facts are sufficiently stated in the opinion of *Chief Justice Clark*.

Justice & Glidewell and Brooks & Lane for plaintiff.
Manly & Hendren for Railway Company.
W. P. Bynum and R. C. Strudwick for Butler, intervener.

CLARK, C. J. The subject matter of this action, laying down a side track by the defendant railroad in a street of Reidsville, outside the

railroad right of way, to the plant of the Penn Tobacco Co., was before us in *Butler v. Tobacco Co.*, 152 N. C., 416, where the facts are fully set out together with a plat of the locality. In that case, Butler, who is intervener in this case, was the plaintiff seeking to enjoin the defendant railroad and the tobacco company from laying down such track in derogation of the plaintiff's right as a property owner on said street. In that case we held that the commissioners of Reidsville could not authorize the laying down of the side track outside of the right of way without express legislative power, and that the then plaintiff Butler was entitled to an injunction to prevent such action, although his property was not immediately adjacent.

This action was then begun by the Penn Company against the railroad company before the Corporation Commission to compel the railroad to lay down said side track to the Penn Company's plant, and off the right of way, the very act which the railroad had been enjoined against doing. The former plaintiff, Butler, now appears as intervener. The Corporation Commission granted the order asked for and on appeal to the judge of the district, his Honor refused to affirm the order. The Penn Company thereupon appealed to this Court. (561)

Since our former opinion there has been no legislative action authorizing the defendant railroad to use any part of the street outside its right of way, nor authorizing the town of Reidsville to grant such permission. It would seem, therefore, that the matter is *res judicata.* The plaintiff contends that it is not because under Revisal, 1097 (5), the Corporation Commission has directed the siding to be put in. For more reasons than one we think that this view can not be sustained. Revisal, 1097 (5), authorizes the Corporation Commission "to require the construction of side tracks by any railroad company to industries already established: Provided, it is shown that the proportion of such revenue accruing to such side track is sufficient within five years to pay the expenses of its construction." This is a very important provision of the law and was fully sustained by this Court in the *Industrial Siding case,* 140 N. C., 239, which has been cited since with approval in *Dewey v. R. R.,* 142 N. C., 399, and in other cases, and which again we now reaffirm in every particular. But it has no application here because:

1. The power is conferred on the Corporation Commission not absolutely but with restrictions, one of which is that the revenue from such side track shall be "sufficient within five years to pay the expenses of its construction." This does not appear, and as every presumption is in favor of the correctness of the judgment below, this would be sufficient of itself to affirm the judgment. Besides it is reasonably apparent that after payment of damages to every citizen of Reidsville who may re-

cover damages for appropriation of this street for railroad purposes the sum will exceed five years additional revenue to be derived from such siding.

2. The Corporation Commission can not confer the power of eminent domain. The defendant, the Southern Railway Company, being a nonresident corporation, does not possess the power of eminent domain, and the Legislature has not conferred it upon that company, save to the extent of authorizing it to lay a double track upon the right of way, which it has leased.

3. The Court has already held in *Butler v. Tobacco Co.,* 152 (562) N. C., 416, that without express legislative authority the streets of a city can not be taken for railroad purposes even with the consent of the town authorities. 27 A. & E. (2 Ed.), 170, and cases cited. In *Griffin v. R. R.,* 150 N. C., 312, the railroad was ordered to lay its track along a street by the Corporation Commission to make connection at a union depot, but there was express legislative authority and the board of aldermen also granted their permission under authority conferred upon them in the city charter. See also *Dewey v. R. R.,* 142 N. C., 392.

4. It is by no means clear, though we do not find it now necessary to decide the point, that the Corporation Commission under Revisal, 1097 (5), can require or authorize any railroad company to condemn a right of way for a side track to an industrial plant. As there is no reference to the exercise of the right of eminent domain in that section it would seem that the Corporation Commission can require a railroad company to lay down a side track to an industrial plant only upon the railroad's right of way or when the right of way is tendered by the industrial company that petitions for a siding. In Revisal, 1097 (3), which authorizes the Corporation Commission to require the establishment of union depots, it is expressly provided that "the railroad so ordered to construct union depots shall have power to condemn land for such purpose, as in case of locating and constructing a line of railroad." The absence of such provision in Revisal, 1097 (5), seems to indicate clearly that industrial sidings can be ordered only when laid upon the railroad's own right of way or when the petitioner has tendered the right of way. In *Commissioners v. Bonner, ante,* 66, where the county commissioners were authorized in cases where the public road ran along the bank of a stream to establish "a public landing," it was held that this did not confer the right to condemn land for that purpose; and that where the statute is silent it is to be presumed that the Legislature intended that the property should be obtained by contract; and this is especially so when the statute makes no provision for compensation.

It is proper, however, that we should say that we do not assent to the contention of the defendant railroad that inasmuch as the side track, if established, would be largely used in interstate commerce that, therefore, the Corporation Commission could not (563) order its establishment, because the cost of establishing it would be a burden upon interstate commerce. This point was raised and decided against the railroad company in *R. R. v. Kansas*, 216 U. S., 262, where that Court held "the fact that a railroad company is chartered by another State and has projected its lines through several States does not make all of its business interstate commerce, and render unconstitutional, as an interference with, and burden upon interstate commerce, reasonable regulations of State railroad commissions applicable to portions of the lines wholly within, and which are valid under, the laws of that State." The establishment of an industrial siding under the authority of the Corporation Commission, within the provisions of Revisal, 1097 (5), is no more an interference with interstate commerce than the establishment of a new depot, nor of a union depot, under the orders of the Corporation Commission. From such new station, and union depot, both freight and passenger traffic will originate part of which will pass beyond the State line.

While it is true that the siding is sought by the industrial plant for the purpose of facilitating its shipments, none the less the function which the defendant railroad company is required to exercise in laying and operating the siding is a public use, and a part of its duty as a common carrier. This is expressly held in *Hairston v. R. R.*, 208 U. S., 608, where the Court says: "The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost." We would not be understood as having intimated anything contrary to this in what was said in *Butler v. Tobacco Co.*, 152 N. C., 416.

The judgment below is

Affirmed.

(564)

J. C. BUSHNELL v. J. R. BERTOLETT AND WIFE, MAMIE T. BERTOLETT.

(Filed 7 December, 1910.)

Married Women—Executory Contracts—Separate Realty—Charge—Husband's Written Consent.

A married woman's separate real estate is not responsible for damages arising from the breach of her written agreement of purchase of personal property, though the husband had given his written consent.

BUSHNELL *v.* BERTOLETT.

APPEAL from *Councill, J.*, at May Term, 1910, of HENDERSON.

The defendant demurred to the complaint. This was overruled and defendant appealed.

The facts are sufficiently stated in the opinion of *Justice Brown.*

Smith & Schenck for plaintiff.
Charles F. Toms for defendants.

BROWN, J. This action is brought for the purpose of charging the estate of the *feme* defendant with the sum of $330.75 for a breach of contract in refusing to take and pay for a lot of apple trees. The defendant accepted and paid for $40.00 worth of trees and refused to accept and pay for the others. The following is the alleged contract or order for the trees.

"Memo. of Apple Trees—Season 1907-8.

800 Delicious apple trees.
600 Stamen winesaps.
600 Grimes golden.
450 Rome Beauties.
5 Jonathan.
5 Senators.
5 Benoni.
5 Livland Raspberry.
5 Jeffries.

MRS. J. R. BERTOLETT."

Assuming for the sake of argument that the husband consented in writing to the above order, yet the contract is one that can not be enforced against the *feme* defendant and his Honor should have (565) sustained the demurrer.

This is in conformity with a uniform line of decisions, many in number, beginning with *Harris v. Jenkins,* 72 N. C., 183, and ending with *Bank v. Benbow,* 150 N. C., 782.

Reversed.

CLARK, C. J., dissenting: This Court held in *Brinkley v. Ballance,* 126 N. C., 396: "An examination of the Constitution, Art. 10, sec. 6, and of the statute, Code, 1826, shows no foundation for the 'charging' of the wife's property as laid down in some decisions of a former Court." It was further said: "The wife admits she got the goods and of the value charged. She got them on an order written by husband as agent, and he signs his name." The Court proceeds to intimate that this was the husband's written consent under Code, 1826, and hence "the contract is valid and binding on the wife, and in holding that no recovery could be had against her, nor against either her personal or real

property, there was error." This is direct authority for the action of the judge below.

It is true that there are numerous authorities to the contrary, but the most diligent research has not yet found any statute which authorizes or requires that a wife "charge her property in equity." The result of this "judicial legislation" has been the complicated status of our law as to married women which requires four pages of fine print in Professor Mordecai's Table set out in 128 N. C., 431-434.

In *Ball v. Paquin,* 140 N. C., 89, *Judge Connor* says: "In the absence of controlling decisions to the contrary, we should unanimously hold that she (the wife) could make all manner of contracts with the written assent of her husband, and that for breach of them her property was liable as if she were a *feme sole.* The cases which came to this Court during the years 1868-1876 clearly indicate that such was the construction of the statute by the profession and laymen." And in the same case, on page 96, he said: "We hope that the subject of the powers and rights of married women in respect to their property and contracts, may attract the attention of the General Assembly and be brought into harmony with the best modern thought and conditions."

In *Vann v. Edwards,* 135 N. C., 661, *Walker, J.,* in a very full and clearly expressed opinion holds that under our Consti- (566) tution a "married woman may dispose of her property by gift or otherwise without the assent of her husband except in a conveyance of the realty." As the power to contract is much less than that of disposing of property, it is an anomaly that there should be any restriction upon a married woman's right to contract. The statute, however, Revisal, 2094, does not require the husband's assent in some cases, but dispenses with it in many others.

But there is no statute to be found, which, in any case whatever, restricts a married woman from contracting *with* the assent of her husband nor which requires her to "charge her property in equity." As the Court said in *Ball v. Paquin, supra,* we would hold, unanimously, that these are not required, but for the decisions which have been rendered to the contrary. In *Ball v. Paquin, supra,* in *Bank v. Howell,* 118 N. C., 273, and in other cases, this Court has suggested that the Legislature bring the status of the law as to married women into conformity with the spirit and the letter of the Constitution of 1868. After a lapse of 42 years, it is to be hoped that this will be done, in view of the anomalous condition of the law on the subject and the repeated suggestions of the Court.

NOTE.—The "Martin Act," 1911, ch. 109; has now provided that married women can contract as if unmarried, in all cases. *Warren v. Dail,* 170 N. C., 406; *Everett v. Ballard,* 174 N. C., 16.

(567)

THOMAS HARVEY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 7 December, 1910.)

1. **Carriers of Passengers—Mileage Books—Contracts of Carriage—Stipulations—Breach—Ejection from Train.**

A railroad mileage book is a contract of carriage with the purchaser or lawful holder, subject to certain restrictive stipulations, for the wrongful breach of which the holder may be expelled from the company's train.

2. **Carriers of Passengers—Mileage Books—Ticket—Exchange—Reasonable Facilities.**

While the stipulation in a railroad mileage book ordinarily requires the holder to present it at the ticket office of the carrier and procure an "exchange mileage ticket," it is apparent from the general purport of the contract therein contained and the express stipulations therein that the carrier on its part shall afford reasonable and proper facilities for such exchange.

3. **Same—Contract of Carriage.**

Where, by the wrong or fault of the carrier, a lawful holder of a mileage book is prevented from making the exchange of mileage for a ticket at the ticket office of the carrier, such holder is relieved of the conditions contained in the book, requiring the exchange, and his book becomes a complete contract of carriage, unaffected by the restrictions relating to making the exchange.

4. **Same—Ejecting Passenger—Humiliation—Damages.**

The plaintiff was the owner of the defendant carrier's mileage book, which required ordinarily an exchange of mileage for a ticket at its station. There was evidence tending to show that there was an unusual number of passengers for the train plaintiff desired to take; that he got in line at the ticket window, eventually presented his mileage book for an exchange ticket, was deferred by the agent, stood at the window, was again deferred, and it being nearly train time went to check his baggage and finished just in time to catch his train; that the agent had the right to detain the train thirty minutes under the circumstances, but plaintiff was unaware of this. Plaintiff related the circumstances to the conductor while traveling on the train and offered his mileage, which the conductor refused and put him off the train, also refusing to let him get on again upon his offer to pay the money for his transportation: *Held*, sufficient to go to the jury upon the question of whether the plaintiff had wrongfully been ejected, and that of actual damages for humiliation suffered, etc.

5. **Appeal and Error—Excessive Verdict—Constitutional Law.**

Under our Constitution, Art. IV, sec. 8, the Supreme Court is given "jurisdiction to review upon appeal any matter of law or legal inference," and this Court is without power to act directly on verdicts of juries, or to set aside a verdict for damages because excessive, such being exclusively within the discretion of the trial judge, unless it appears that he had manifestly committed a gross abuse of his discretion in failing to set the verdict aside, and in this case it does not so appear.

6. Torts—Damages—Acts of Avoidance—Actionable Wrong—Anticipation.

Where one has been injured by the wrongful conduct of another, he must do what he can to avoid or lessen the effects of the wrong; but this principle does not obtain until a contract has been broken or a tort has been committed, for a person is not required to anticipate that another will persist in misdoing till an actionable wrong has been committed, or to shape his course beforehand so as to avoid its results; he may stand upon his legal rights and hold the other for the legal damages which may ensue.

7. Same—Carriers of Passengers—Ejection from Train—Evidence.

Therefore, when a passenger being entitled thereto has tendered the proper coupons from a mileage book for his fare, and the same having been refused, he is wrongfully expelled from the train, the fact that he might have avoided the result by paying his fare in money wrongfully required of him, is not a relevant circumstance on the issue as to the amount of damages.

CLARK, C. J., concurring; BROWN, J., concurring in part, and dissenting as to not setting aside the verdict in this case as excessive; WALKER, J., concurring in the opinion of BROWN, J.

APPEAL from *W. R. Allen, J.*, at October Term, 1909, of (568) WAYNE.

The facts in evidence are set out in the case on appeal as follows: "There was evidence tending to show that plaintiff was a commercial traveler, and desired to take passage from Wilson to Goldsboro, North Carolina, over the defendant's road, and he had in his possession a mileage book, good over the defendant's road, with sufficient mileage therein unused to carry him from Wilson to Goldsboro. There was evidence which tended to prove that plaintiff went into defendant's ticket office in Wilson; that there was a great crowd purchasing tickets; that plaintiff got in line in the proper place and waited his turn until he at last reached the ticket window and presented his mileage and demanded a ticket, which the agent refused to give him, telling him to wait until he got through with the others; that plaintiff (569) stood in his position and saw the agent wait on several others, and again handed in his mileage book and demanded a ticket, and was again refused; that he did this two or three times; that he stayed in his position at the ticket window until about time for the arrival of his train, when he had to leave for the purpose of getting his baggage checked; that the baggage agent checked his baggage on his mileage, and after getting the same checked he barely had time to catch his train, and did not have time to return to the ticket office again to seek to get his ticket; that the plaintiff entered the train, and, when the conductor called for his ticket, made a statement of the foregoing facts to the conductor, and the defendant's conductor, without any rude-

ness and without any unnecessary force, when the train stopped at Black Creek, put the plaintiff off and refused to him the privilege of getting back on the train, although he then offered to pay his fare. There was evidence also tending to show that the crowd in the station on the day in question was unusually large; that a religious convention had been in session in Wilson for several days, and had adjourned on this occasion, and that the defendant's agents knew in advance when it would adjourn, and that there would be a large crowd. There was evidence tending to show that the agent of the company knew that he could hold the train on which plaintiff wanted to go as long as thirty minutes for the purpose of furnishing all passengers with tickets, but there was no evidence that the plaintiff knew this, or that the agent communicated the fact to him. Plaintiff had purchased from the proper person and was the owner of a mileage book, good for his passage over the defendant's road, and had enough mileage in it to more than cover the distance to Goldsboro. Defendant relied upon the conditions printed on the back of said mileage book, as follows:

"Item 6. Coupons from this book will not be honored on train or steamer, nor in checking baggage (except from non-agency stations and agency stations not open for sale of tickets), but must be presented at ticket office and there exchanged for continuous passage tickets, which continuous passage tickets will be honored in checking baggage, and for passage, when presented in connection with this mileage book. (570) This book is subject to the exceptions, rules and regulations of each line over which it reads, with which exceptions, rules and regulations purchaser herein must acquaint himself."

"Item 7. No agent or employee of any line has power to alter, modify or waive any conditions of this contract or any stipulation printed hereon."

"Item 14. The cover of this book shall be surrendered to conductor or train auditor who detaches last mileage strip or who lifts final coupon issued by agent in exchange for last mileage strip. In consideration of the reduced rate at which this book was sold I, the original purchaser, hereby accept and agree to be governed by all of the conditions printed on this book and on tickets issued in exchange for coupons from this book, and acknowledge that the description furnished herein correctly indicates my personal appearance according to the terms used."

This contract was signed by the plaintiff and the agent of the defendant. The mileage book in question was sold to the plaintiff for $20, or at the rate of two cents a mile. The price for an ordinary ticket over the defendant's road was and is two and one-half cents per mile. There was evidence tending to show that the plaintiff had money with

him sufficient to enable him to pay his fare to Goldsboro, and that the conductor asked him to do so. The jury rendered the following verdict:

The jury answered the issues as follows:

1. Did the defendant wrongfully eject the plaintiff from its train? Answer: Yes.

2. If so, what damage, if any, has the plaintiff sustained thereby? Answer: $5,000.

The defendant moves to set aside the verdict as being excessive. The judge, in the exercise of his discretion, refused to set aside the verdict. With the consent of the plaintiff, the judge reduced the verdict to $2,500 and rendered judgment accordingly, from which ruling and judgment the defendant appealed to the Supreme Court. The defendant allowed thirty days in which to make out a case on appeal, and the plaintiff allowed thirty days thereafter to file countercase. Appeal bond fixed at $25.

Aycock & Winston, W. T. Dortch, and Loftin, Varser & Daw- (571) *son for plaintiff.*

W. C. Monroe and Rose & Rose for defendant.

HOKE, J., after stating the case: It was earnestly insisted before us that no recovery should have been allowed in this case, and this chiefly for the reason that on the facts in evidence the mileage book was not a contract of carriage, but only a binding agreement to supply a ticket, and the plaintiff having failed to procure the ticket and refused to pay fare, the conductor had a right to expel him from the train, but we do not think such a position can be maintained. The book purports throughout to be a contract of carriage. It is labeled a mileage ticket and begins with a stipulation that this "ticket" will be "honored," etc., and on the time limit that "This ticket expires," and so on, and containing an express provision that "undetached coupons will be honored on trains for transportation of passenger and baggage from a non-agency station or from an agency station that is not open for the sale of tickets," etc. A perusal of this mileage book and its various provisions leads necessarily to the conclusion that it is a contract of carriage with the purchaser and holder, subject to certain restrictive stipulations for a wrongful breach of which defendant company may under given conditions expel such holder from its trains, but while the contract requires that at agency stations the holder shall ordinarily present his mileage book at the office and procure an "exchange mileage ticket," it clearly contemplates that the company on its part shall afford reasonable and proper facilities for such exchange. This is not only apparent from the general purport of the contract, but it is included,

we think, within express provision that "Coupons undetached will be received for passage from non-agency stations and agency stations not open for sale of tickets." And from this it follows that where by the wrong and fault of the company, a lawful holder of a mileage book is prevented from making the exchange required, such holder is relieved of the conditions and his book becomes a complete contract of carriage, unaffected by the restrictions referred to. There are several well considered cases holding these mileage books to be contracts of carriage,
(572) notably: *R. R. v. Lenhart,* 120 Fed., 61; *R. R. v. Sheet,* 26 Ind. App., 224. And these and other authorities on contracts of similar import are to the effect that when a carrier has wrongfully failed to afford reasonable and proper facilities for complying with these and similar restrictive stipulations the holder is thereby relieved from this feature of the obligation and his expulsion from the train on the part of the defendant's agents may become an actionable wrong. *Cherry v. R. R.,* 191 Mo., 489; *R. R. v. Payne,* 99 Tex., 46; *R. R. v. Sheet, supra.* In the last case it was held that: "Where plaintiff presented an interchangeable mileage ticket to defendant railroad company's ticket agent, purchased of a passenger association of which defendant was a member, and demanded an exchange ticket, and was informed by the agent that the supply of tickets was exhausted, he was not required to pay the regular fare and then sue the company for failure to carry him on his mileage book, but had the right to be carried on his mileage, and, if ejected, bring suit for damages." In *R. R. v. Payne* the passenger had a return ticket requiring that it be presented and endorsed by the agent at the destination of a shipment which he was accompanying. The agent in question having refused to endorse the ticket, the passenger on the return trip, having presented the ticket and refused to pay his fare, was ejected from the train at an intermediate station. It was held the passenger was entitled to recover damages "not only for the value of the transportation and the expenses occasioned by such ejection, but also for the humiliation, etc., caused thereby."

The principle upon which these cases are made to rest has been upheld in a well considered decision of our Court. *Ammons v. R. R.,* 138 N. C., 555, and in which it was held as follows:

"1. A regulation of a carrier is reasonable which requires passengers to procure tickets before entering the car, and where this requirement is duly made known and reasonable opportunities are afforded for complying with it, it may be enforced either by expulsion from the
(573) train or by requiring the payment of a higher rate than the ticket fare.

"2. If, without having afforded a reasonable opportunity to the pas-

senger to provide himself with a ticket, the carrier should eject him upon his refusal to pay the additional charge for carriage without a ticket, when he is ready and offers to pay his fare at the ticket rate, his expulsion will be illegal, and he may recover damage for the trespass, and his right of recovery can not be made to depend upon the conductor's knowledge or ignorance of the fact that the agent had no tickets for sale."

Walker, J., delivering the opinion, quotes with approval from Fetter on Carriers, sec. 269, as follows: "By the overwhelming weight of authority, the furnishing of proper facilities to enable a passenger to purchase a ticket is a prerequisite to the right to demand a train fare at a higher rate than the ticket fare; and, if such facilities are not furnished, a passenger who without fault on his part boards a train without such a ticket will, on tender of the ticket fare, be entitled to all the rights and privileges that a ticket would afford him. If he is rightfully on the train without a ticket, it is his right to complete his journey by paying the ticket rate for his fare. So, it has been held that the fact that the company agrees to refund the excess of train fare on presentation of the conductor's receipt or check at a regular station, does not authorize the higher train charge, if no reasonable opportunity is given the passenger to purchase a ticket in the first instance. It can not be justly said that it is reasonable to require the passenger to pay more than a regular rate on the train, even though a process is created by which he may at some future time get back the excess, unless the passenger has first had an opportunity to purchase a ticket at the station from which he starts." And the same general principle was recognized and applied to a different state of facts in the recent case of *Mace v. R. R.*, 151 N. C., 404.

We were urged on the argument to direct that the verdict be set aside and a new trial granted by reason of an excessive award of damages on the part of the jury, but such a ruling may not be made here; certainly not in the form as suggested. Under our Constitution, Art. IV, sec. 8, this Court is given "jurisdiction to review upon appeal any decision of the court below upon any matter of *law* or *legal inference*," and so far as relevant to the question presented this (574) is the extent of it, and we have no power to act directly on the verdict of juries. Ever since the amendment to the Constitution conferring jurisdiction over "issues of fact and questions of fact to the same extent as exercised prior to the Constitution of 1868," the construction of the amendment, in several well considered cases, has been that it does not embrace or apply to common law actions such as this, but only to suits which were exclusively cognizable in a court of equity, and to them only when the entire proof is written or documentary, and

in all respects the same as it was when the court below passed upon it. *Runnion v. Ramsey,* 93 N. C., 411; *Worthy v. Shields,* 90 N. C., 192; *Greensboro v. Scott,* 84 N. C., 184; *Foushee v. Pattershall,* 67 N. C., 453. Under our system of procedure, the power we are now invited to exercise is primarily vested in our Superior Court judges, who preside at the trial of causes. Being in a position to note the appearance and conduct of parties, the demeanor of witnesses and the existence of conditions bearing upon the trial, they are much better qualified to supervise the conduct of juries and deal with their verdicts than an appellate court can possibly be. Undoubtedly, when it is clear that a jury, in disregard of the testimony, has rendered a verdict under the influence of passion or prejudice, a presiding judge should be prompt to set the same aside, but the matter is necessarily left largely to his discretion and to such an extent that in many of our cases expressions will be found to the effect that this discretion is final, and so it is in so far as the direct supervision of verdicts is concerned. *Boney v. R. R.,* 145 N. C., 248; *Slocum v. Construction Co.,* 142 N. C., 349; *Brown v. Power Co.,* 140 N. C., 349; *Norton v. R. R.,* 122 N. C., 937. Our Supreme Court can only influence verdicts indirectly by considering, in the exercise of its appellate power, the action of the presiding judge in reference to them. If verdicts are so clearly contrary to the evidence as to make it perfectly clear, as stated, that a jury must have acted in total disregard of the testimony and to such an extent that the presiding judge had manifestly committed a gross abuse of his discretion in failing to set it aside, this would amount to the denial of a (575) legal right and bring the case within the appellate jurisdiction of this Court. The correct position is well stated by *Brown, J.,* in a recent case of *Freeman v. Bell,* 150 N. C., 149, as follows: "It may be, as contended, that the damages awarded are excessive, but we can not review the judge of the Superior Court, upon a matter within his sound discretion, unless it appears that there has been a gross abuse of such discretion." And the same position is recognized in another case at the same term of *Billings v. Observer,* 150 N. C., 543. Applying the principle, as stated, we can not hold that the action of the lower court in dealing with this verdict is such an abuse of discretion as to raise a question of law or legal inference, and the position must be resolved against the defendant. *Brown v. Power Co.,* 140 N. C., 349.

It was further contended that there was error in allowing substantial damages for the wrong done defendant for the reason that plaintiff might have prevented or avoided his chief grievance by paying the small amount of money demanded for his fare, but no such position can be allowed to prevail in this jurisdiction. The Court held, in

several recent cases, that when one has been injured by the wrongful conduct of another he must do what can be reasonably done to avoid or lessen the effects of the wrong. This was held in the case of torts in *Bowen v. King,* 146 N. C., 391; *R. R. v. Hardware Co.,* 143 N. C., 54, and recognized in a case of contract in *Tillinghast v. Cotton Mills,* 143 N. C., 268, but the principle which obtained in those cases does not arise or apply until after a tort has been committed or contract has been broken. A person is not required to anticipate that another will persist in misdoing till an actionable wrong has been committed, nor to shape his course beforehand so as to avoid its result. On the contrary, he may assume to the last that the wrongdoer will turn from his way or in any event he may stand upon his legal rights and hold the other for the legal damages which may ensue. *Cherry v. R. R.,* 191 Mo., 489; *Pennsylvania Co. v. Lenhart,* 120 Fed., 63. In this last case, speaking to this question, the Court said: "Lenhart paid for and presented a legal ticket. To the proposition that he could not stand upon his rights, but was compelled, for the sake of saving the company from the consequences of its threatened breach of contract, to (576) pay his fare again in cash, if he had it, and then sue for its recovery, we do not yield our assent. After a breach of contract has been committed, the injured party is not allowed to aggravate his damages, and is required to use reasonable diligence to minimize them. But beforehand one is not forced to abandon his legal right under a contract, and waive the damages that may arise from its breach, in order to induce his adversary not to proceed as he wrongfully claims is his right." We find no reversible error in the record and the judgment below must be affirmed.

No error.

CLARK, C. J., concurring: The defendant issued its mileage books containing a contract that there should be a legal tender to any agent for a ticket for transportation at 2 cents per mile, and that if there was no agent the holder could ride upon his mileage. When the plaintiff tendered his mileage book, the agent had no more right to reject it or to postpone the holder thereof than if he had tendered the cash. The rights of the holder were therefore exactly the same as if the agent had refused him a ticket when he tendered the full amount of transportation in cash. If the defendant's agent can thus postpone the holder of a mileage book to those tendering cash the result is to utterly discredit mileage so that no one will wish to buy.

This Court has never set aside a verdict because excessive. This is a matter left to the sound judgment of the presiding judge. This Court does not pass upon the conduct of the jury, but only upon the

conduct of the judge, and we have held in a recent opinion, *Freeman v. Bell,* 150 N. C., 146, that we will only pass upon the question whether the judge grossly abused his discretion in refusing to set aside a verdict. As the plaintiff does not appeal, there is no allegation against the conduct of the judge in reducing the verdict to $2,500. The only question before us is whether it was gross abuse of discretion on the part of *Judge Allen* in not reducing it below $2,500. Speaking for myself,

I do not think that it would have been a gross abuse of discretion
(577) if the presiding judge had allowed the verdict to stand as rendered by the jury. The plaintiff was wrongfully expelled from the car, as this Court holds, and for that wrong and humiliation he was entitled to compensation of which the jury, under our laws, are the judges. It is true, as suggested by defendant's counsel, that if he had paid a further amount which was illegally demanded he might have retained a seat on the car. If our ancestors had been willing to pay a petty sum illegally demanded as a stamp tax, or a small illegal duty upon tea, we might have avoided the great seven years' struggle and have been still an appanage of Great Britain. The plaintiff was not only asserting his legal rights at a great disadvantage, against a powerful corporation, but in doing so he was asserting the rights of every traveler, for transportation over a common carrier, upon tender of the proper sum, is a valuable legal right conferred by the sovereign when it created the corporation. It is not by the grace and favor of the common carrier, but as a legal right that one is entitled to use its cars upon tender of the legal fare. The liability of defendant for punitive damages is not raised by the complaint and that point is not before us.

I not only concur in the opinion of the Court, but further, upon a point as to which it was not found necessary for the Court to express itself, I am of opinion that the requirement that the holder of a mileage book shall present it and obtain a ticket thereon is an unreasonable regulation and therefore void.

By chapter 216, Laws 1907, the General Assembly prescribed 2¼ cents per mile as a maximum legal rate for transportation over the railroads in this State. Thereupon, as is usual, one of the said railroads applied to the Federal Court to defeat the execution of the will of the people of this State. That matter came before this Court in *State v. R. R.,* 145 N. C., 495, where many phases of this subject were discussed. An account was ordered by the Federal Court to be taken to ascertain whether the reduction of rate by the General Assembly was confiscatory. The result was that it was ascertained that the judgment of the public in exercising its right to regulate these corporations had not only not been unjust, but that the earnings of the railroads

had been greatly increased thereby. The railroad officials then addressed a letter to the Executive of this State in which they (578) proposed that if the State would change the rate to 2½ cents per mile they would issue mileage books good on their lines within and without the State and good on all the railroads in the State at the rate of 2 cents per mile. Thereupon, the special session of 1908 was called which enacted the 2½ cents per mile rate. Nothing was said in the statute as to the mileage book, as that was an offer on the part of the railroads. Every one thought that of course the mileage books would be such as had always been issued over the roads in this State, and that holders thereof would be saved the trouble of getting tickets. Such had always been the case with mileage and no one had heard till then of a mileage book in North Carolina which was not good upon the train, but which was required to be first presented to the agent and a ticket obtained.

The distinguished counsel who argued this case before us on the part of the plaintiff contended that this change was made through spite on the part of the railroad companies because they had been compelled to yield to the expressed will of the people, and that it was a deliberate plan also on their part to discourage the public from availing themselves of the privilege of using mileage by making it more troublesome than the purchase of tickets, instead of a convenience as formerly. We need not discuss motives. It would seem clear from the history of the transaction that the change is a breach of good faith. It was not what the public understood, or had a right to understand, the railroads to offer.

The learned counsel for the plaintiff earnestly contended in their brief that the regulation requiring the purchase of a ticket in exchange for mileage is in itself unreasonable. If so, the regulation is void. *Ammons v. R. R.*, 138 N. C., 555. Counsel then set out *seriatim* the reasons which the defendant has given for exacting such requirement of the traveling public: (a) That it is a check upon the dishonesty of conductors. In reply to that they justly assert the excellent character of the railroad conductors in this State, and maintain that as a body they are honest, faithful and courteous, and that if one can be found that is not so, inasmuch as the railroad company selects these officers, and can discharge them at will, it is not reasonable to (579) impose this vast amount of inconvenience upon the traveling public, which has not been required heretofore. They add that the railroad companies still allow conductors to collect cash fares. Indeed this defendant requires the mileage book to be presented to the conductors as well as the ticket. Why then require the ticket at all?

(b) As to the second contention that there may be loss by reason

of conductors losing the mileage that they take up, counsel point out that they are no more liable to lose mileage than tickets or cash, and that such excuse was never heard of before, and is not now heard of over the great systems elsewhere in this Union over which mileage books are still used as heretofore.

(c) As to the third contention, that baggage can be fraudulently checked by those riding on mileage books, plaintiff's counsel assert that it is easy for the baggagemaster to punch the mileage book to the point to which the baggage is checked as it is to punch the ticket that is received in exchange for it, and that such requirement to prevent fraud was not needed heretofore in this State and is but rarely used on the railroads in this country, except in this immediate section, notwithstanding the vastly greater quantity of baggage which is carried elsewhere.

The plaintiff's brief further asserts that it takes from three to five times as long to issue a ticket in exchange for mileage as for one issued for cash, and that the result is a congestion and a wholly unnecessary delay, not only to the holders of the mileage book, but to the entire traveling public as well, and that such delay is vexatious and the regulation is unreasonable and without any good cause.

The reason heretofore given, during all these long years here, and which is still given elsewhere, for the issuance of mileage books at reduced rates is that it expedites the issuance of tickets to others and saves clerical hire to the road, besides the use by the carrier of the money thus paid in advance. But if as now under this regulation it requires from three to five times as long to issue tickets in exchange for mileage as for cash, there is no reason why the Legislature should not relieve the railroads of this burden, and the traveling public of this great inconvenience by requiring the railroads to sell the tickets straight at 2 cents for cash, instead of buying mileage at 2 cents and exchanging it for tickets. In addition to the reason so well given by the distinguished counsel showing that this regulation is unreasonable and void, there is this further consideration, derived from the reports of the Interstate Commerce Commission and of the North Carolina Corporation Commission:

(580)

1. That mileage books are still used on the trains without being exchanged for tickets, in Alabama, Arizona, Arkansas, Colorado, Connecticut, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Texas, Vermont, Wisconsin, and on some railroads in this State. There are some railroads in Indiana, Louisiana and Ohio which require tickets in exchange for mileage.

Practically it seems that the annoying and vexatious system which has been put in force here is almost unknown outside the territory covered by the three great railroad systems in this and adjacent States. It can not be reasonable in any view to subject our people longer to this annoyance, and I think the Court might well hold it unreasonable and void in this case and relieve the public of being further subjected thereto.

A flat 2 cents a mile rate is the law in Arkansas, Connecticut, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, Oklahoma, Pennsylvania, Rhode Island, South Dakota, West Virginia, and Wisconsin, and there are other States which have a 2 cent mileage rate. On the great Pennsylvania system, with its thousands of miles of subsidiary roads, not only is a mileage book accepted by the conductor on the train without the previous purchase of a ticket, but it is good not only for the holder thereof, but for every other person traveling with him at the time, whom he shall designate. There can be no reason why this should not be universally the case. Every other business in the world considers the convenience and wishes of its patrons. Those railroads who do not think this their duty also should recall that their charters are granted by the public to the end that they may be operated for the greatest comfort and convenience of the public (581) and subject to public regulations, provided only that their owners are allowed a reasonable profit upon the true value of their property.

BROWN, J. I concur in the conclusion of the Court that the owner of a mileage book similar to the one in evidence in this case is compelled under the terms of the contract to present it at an agency station and receive a ticket in exchange for the mileage strip. If the traveler fails to do this he is not entitled to transportation and may be lawfully ejected from the train.

But where the traveler complies with the contract on his part and the company fails to give him the requisite ticket in exchange for the mileage strip, then the company, being at fault, may not lawfully repudiate the mileage contract and eject the passenger.

For this reason, upon the evidence and findings in this case, I think the plaintiff is entitled to recover actual or compensatory damages.

But I am of opinion that the verdict of five thousand dollars should have been set aside by the trial judge and that this Court has the power to review his ruling in refusing to set it aside.

1. It is contended by the defendant that there is no evidence whatever to support a verdict for $5,000 compensatory damages and that it

is perfectly manifest that the jury awarded punitive or vindictive damages in direct disobedience of his Honor's instructions.

I think this contention is well founded and that the ruling below involves a matter of law and legal inference which this Court has the right to review. It is admitted that upon all the authorities from *Holmes v. R. R.,* 94 N. C., 319, down to the present the plaintiff has laid no foundation for punitive damages. Then what is there in the evidence to support a verdict for $5,000?

The case on appeal contains no evidence whatever upon the issue of damage except these words: "That the plaintiff entered the train, and, when the conductor called for his ticket, made a statement of the foregoing facts to the conductor, and the defendant's conductor, without any rudeness and without any unnecessary force, when the train (582) stopped at Black Creek, put the plaintiff off and refused him the privilege of getting back on the train, although he then offered to pay his fare."

The plaintiff took the next train for Goldsboro, his place of destination, only a few miles distant. The plaintiff does not testify that he suffered any humiliation, or mental distress or any personal inconvenience even. In mental anguish cases the plaintiff is required to testify at least that he suffered mental anguish before he can recover, except in the cases of relationship so close that mental anguish may be presumed. In this case there is nothing to found a presumption upon, and no testimony upon which actual damage can be fairly estimated. It is a bald case of inflicting smart money or punitive damages directly in violation of his Honor's charge and of the laws of the State.

2. It is also contended by the defendant that the verdict is so grossly excessive, so obviously disproportionate to the injury inflicted that it shows conclusively that the jury were influenced by passion, partiality and prejudice, and that his Honor erred in not setting it aside on that ground.

I agree that the primary duty of guarding against an excessive verdict rests with the trial court and that ordinarily this Court will not review the action of the lower court.

But in furtherance of justice and right it is the rule in all appellate courts to set aside the judgment and order a new trial where the damages are so excessive as, in the language of *Chief Justice* and *Chancellor Kent,* "to strike mankind at first blush as being beyond all measure unreasonable and outrageous and such as manifestly show the jury to have been actuated by passion, partiality or prejudice." *Coleman v. Southwick,* 9 Johns. N. Y., 45; 6 Am. Dec., 253, and cases cited in notes. Where the damages are so utterly disproportionate to the injury as to induce a well grounded belief that they must have been the result

of passion and prejudice all appellate courts interfere, and that this is so, we have only to turn to 16 Am. & Eng. Annotated Cases, where the decisions from all the courts of this country and Great Britain are collected.

In his valuable article on Appeal and Error, 3 Cyc., 381, the author, the *Hon. Walter Clark,* the present *Chief Justice* of (583) this Court, says: "A verdict will not be disturbed, as excessive unless it is so grossly disproportionate to the measure of damages or so palpably against the evidence as to shock the conscience and raise an irresistible inference that it was influenced by passion, prejudice, or corruption, and especially so after the trial court has refused to set it aside."

In support of his text the learned author cites cases from every appellate court in this Union, except this Court, which he puts down as the only exception to the rule. I do not think this Court has ever passed upon this question. We have generally held that we would not ordinarily review the court below in dealing with excessive verdicts, but nowhere has this Court admitted its impotence to deal with a verdict so grossly excessive as to shock our sense of justice and propriety.

Such case is now presented for the first time, and we should follow the precedents of all other appellate courts, for they are founded in reason and justice. In 8 A. & E. Ency., 629-630 such excess in a verdict is treated as valid ground for the appellate court to set aside a verdict.

In support of this doctrine the author cites opinions from the Federal Court and from the courts of the following States: Alabama, California, Georgia, Illinois, Indian Territory, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Missouri, New York, Ohio, Oklahoma, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin.

11 Current Law, 997, says: "Verdicts for damages will be interfered with only where they show willful disregard of the evidence or are so grossly disproportionate to the actual damages shown as to indicate passion or prejudice," and cites decisions from a great many States in support of this position.

That the verdict rendered in this case is so grossly excessive as to manifest prejudice, and a wanton disregard of all the evidence and the charge of the court, is shown by all the precedents. I will cite only a few: *Olson v. R. R.,* 49 *Washington,* 626; *R. R. v. Hull,* 113 Kentucky, 561; *R. R. v. Watson,* 117 Ky., 374. (584)

In *Olson v. R. R., supra,* the plantiff was wrongfully ejected from the train, but without any unnecessary force or rudeness, and he was given a verdict for $800. This verdict was set aside by the Supreme

Court of Washington on the ground that excessive damages were allowed under the influence of passion or prejudice.

The Court says: "The verdict in this case is out of all reason. There was no financial loss; there was no injury to the person; there was a naked violation of a technical right which would entitle the respondent to little more than nominal damages. He was a man of mature years. There were but two or three other passengers on the train, and if they saw what transpired it could in no manner reflect on the respondent, as a mistake of some kind was apparent. The claim of the respondent that he was or might be taken for a hobo stealing a fifteen-cent ride, with his compass, maps and grip, is fanciful, to say the least. Mistakes will occur to the most careful and the most competent; and if every mistake in the business world were to be followed by such consequences as this, the transaction of ordinary business would become exceedingly hazardous. Had the like mistake occurred between private individuals, followed by the same inconvenience and annoyance, the jury would grudgingly allow nominal damages, if they suffered a recovery at all. The fact that the appellant is a railway company should not weigh with the jury, and does not weigh with this Court."

In *Davis v. R. R.*, 35 Wash., 203, 66 L. R. A., 802, the wrongs suffered by the plaintiff were greater than those disclosed by the record before us, yet this Court set aside a verdict of $750, saying that the evidence showed little more than a bare violation of a technical legal right, which caused a momentary annoyance to the plaintiff.

In *Cunningham v. Electric R. R.*, 3 Wash., 471, and *Shannon v. R. R.*, 44 Wash., 321, recoveries were reduced to $500, and the wrong and humiliation to which the plaintiff in each case was subjected were incomparably greater than in this case.

(585) In *R. R. v. Jordan*, 112 Ky., 473, a young girl, eight years old, was wrongfully put off the train and was entertained during the interval between that train and another at the home of the station policeman. The jury rendered a verdict for $250. The Court of Appeals set aside the verdict as grossly excessive.

In *Sloan v. R. R.*, 32 L. R. A., 193, the Supreme Court of California set aside a verdict of $1,400 as grossly excessive, where a woman was wrongfully put off a train and obliged to walk a mile and suffered during the night from insomnia. The Court wisely says: "While the amount of damages that may be awarded in a case like the present is in the discretion of the jury, it must be a reasonable and not an unlimited discretion, and must be exercised intelligently and in harmony with the testimony before them. We think that the jury in the present case must have been influenced by other considerations than the testimony before them in arriving at the amount of their verdict."

In *R. R. v. Wilsey,* 66 S. W. Rep. (Ky.), held a verdict of $2,500 grossly excessive and indicative of prejudice and partiality, where the passenger was wrongfully ejected and had to walk two miles to a depot. 5 L. R. A., 855.

In *R. R. v. Turner,* 43 L. R. A., 140, the Tennessee Supreme Court pronounced a verdict for $300 grossly excessive under circumstances very similar to this case.

The fact that the court remitted one-half of the verdict will not correct the vice in the verdict itself. In setting aside a grossly excessive verdict the Court of Appeals of Illinois says in *R. R. v. Charters,* 123 Ill. App., 327: "We, however, believe that no case can be found in which a judgment, based upon a *remittitur,* although approved by the trial judge, has been allowed to stand where the reviewing tribunal is satisfied from the record that the verdict rendered was based upon passion or prejudice, or was founded upon a misconception of the evidence. In such a case the infirmity pervades the entire verdict, and the remission of the one-half or of any other part of the whole amount does not free the remaining part from the taint. The courts will not take money or other property from one and give it to another, except upon a fair trial in accordance with the forms of law. This (586) principle is illustrated by the following cases: *R. R. v. Cummings,* 20 Ill. App., 147; *R. R. v. Binkopski,* 72 Ill. App., 31; *Sterling H. Co. v. Calt,* 81 Ill. App., 602; *Lockwood v. Onion,* 56 Ill., 512; *Loewenthal v. Streng,* 90 Ill., 74."

I believe that this Court has the inherent power to set aside a grossly excessive verdict which manifests that it is the result of prejudice and passion and a wanton disregard of the evidence as well as the charge of the court.

That this is a case where the power should be exercised is to my mind perfectly plain, for the amount of the verdict must strike any one as being an enormity, when it is admitted that the plaintiff suffered no substantial damage, physical or mental, or in his business. No such verdict as this upon such state of facts would ever have been rendered between individuals or against any defendant except a railroad corporation.

The owners of railways are compelled to operate them with employees and agents. Some of these will be negligent and make mistakes. It is not in human nature never to err. While the company is properly held responsible for such negligence and mistakes it should be dealt with fairly and justly and not be made to pay a sum vastly disproportionate to any injury inflicted by its servants.

The masses of the people are interested in maintaining the railway systems of the country in a high degree of efficiency, but if these great

instrumentalities of commerce are to be mulcted in such extraordinary and unwarranted damages as in this case, where no real injury has been inflicted, they will soon be bankrupt, and the country will be the sufferer, as well as the owners of the property.

The reasons which prompted the railroad companies to adopt this mileage book regulation is commented on in a concurring opinion in this case, otherwise I would not deem it necessary to notice them, as they are not discussed in the opinion of the Court. I have never heard it contended that the regulation in question was adopted by the railways to prevent dishonesty upon the part of the conductors or other employees.

(587) It is perfectly patent that the regulation has no bearing upon conductors or other employees, for whether the conductor takes up a ticket or mileage book coupons from the passenger, he handles no money, as that in either case is taken in by the ticket agent.

I have heard that the regulation was adopted to prevent imposition upon the railways, and also to greatly facilitate settlements between different railroad systems, who issue interchangeable books. However that may be, it is a matter of common knowledge that the regulation in question was thoroughly investigated by the last General Assembly and that body declined to interfere with it.

The reasonableness of the regulation has been upheld by every court that has passed upon it and in a case as late as 22 October, 1910, the Supreme Court of South Carolina in an elaborate opinion unanimously hold that the regulation in question is valid and binding upon a passenger who elects to use mileage books. But that Court holds, as we now hold, that the company must furnish the facilities for exchanging the coupons for a ticket, and in case the company fails and neglects to do so when the traveler applies, then he has the legal right under the mileage book contract to tender his book to the conductor for his fare. *Des Portes v. R. R.*, 87 S. C., 160.

MR. JUSTICE WALKER concurs in this opinion.

Cited: Dorsett v. R. R., 156 N. C., 441; *Mason v. R. R.*, 159 N. C., 187, 193; *Norman v. R. R.*, 161 N. C., 339; *Herbst v. Power Co., ibid.*, 459; *Hallman v. R. R.*, 169 N. C., 131, 132; *Sawyer v. R. R.*, 171 N. C., 16; *Woodard v. Stieff, ibid.*, 83; *Power Co. v. Power Co., ibid.*, 257; *McNairy v. R. R.*, 172 N. C., 510.

STATE v. J. H. WEDDELL.

(Filed 21 September, 1910.)

Contracts—Public Officers—Interest—Interpretation of Statutes.

Upon the facts found by the special verdict in this case, there is not sufficient evidence of guilt for conviction, as the meaning of the statute, Revisal, 3572, does not extend to contracts between a city and those having as an employee a city alderman.

APPEAL from *Ferguson, J.*, from CRAVEN.

The defendant was indicted under section 3572 of the Revisal of 1905, which reads as follows: "If any person appointed or elected a commissioner or director to discharge any trust wherein the (588) State or any county, city or town may be in any manner interested shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor." The jury returned a special verdict as follows:

SPECIAL VERDICT.

"1. That Bowe & Page, a copartnership of Charleston, S. C., on about 29 January, 1909, by competitive bidding were awarded a contract for laying brick pavement on the streets of the city of New Bern, to an amount of about $50,000.

"2. That on about 1 March, 1909, said Bowe & Page, through their agent, one Finch, employed the defendant, J. H. Weddell, as timekeeper and office man in the performance of the said contract.

"3. That at the regular election, the Tuesday after the first Monday in May, 1909, being 4 May, the defendant, J. H. Weddell was elected an alderman of the city of New Bern, from the second ward; that pursuant to the charter, on Friday, 7 May, 1909, the said vote was canvassed and the said J. H. Weddell was declared elected and entered upon the discharge of his duties as an alderman of the city of New Bern, and has been a member of the board up to the present time.

"4. That in May, 1909 (Alsop & Pierce, contractors to lay sidewalks in the city of New Bern, having refused to complete the same), by order of the board of aldermen, advertisement was made for sealed bids for the making of one thousand (1,000) square yards, more or less, of concrete sidewalk, which consisted of a few short pavements on the sidewalks, and the balance consisting of short ends leading from the corners of the regular sidewalks to the curbing at corners of the various streets.

"5. That pursuant to the said advertisement, at the meeting of the board of aldermen in June, 1909, bids were offered by three parties, being sealed and delivered to the clerk of the board, and not being (589) opened until the board was in session, and that when opened the bid of Bowe & Page was at the rate of one dollar ($1.00) per square yard, and the next lowest bid was ($1.12½) one dollar and twelve and a half cents per square yard.

"6. That during said meeting the defendant, J. H. Weddell, as alderman, made a motion that the lowest bid be accepted, the said Bowe & Page being the lowest bidders, and said motion was adopted by the board.

"7. That pursuant to the said contract, Bowe & Page proceeded to do the work as advertised and were paid therefor by the city.

"8. That while Bowe & Page were performing the said contract, the defendant, J. H. Weddell, continued as office man and time-keeper for said Bowe & Page, without any new contract after March, 1909, having been paid a regular wage of twenty ($20.00) dollars per week from the beginning of his employment to its close; that in said employment the said J. H. Weddell had no supervision of the work being done, the material used or the manner in which it was done; that the said J. H. Weddell, as alderman, was not a member of the committee of the board of aldermen, whose duty it was to supervise the said work.

"9. That the said J. H. Weddell had no interest in the profit or losses of Bowe & Page on the said contract, but he received his wages of $20.00 per week as set out in paragraph 8, and his employment was not limited to their work in the city of New Bern, but at their directions he was sent elsewhere to perform same duties as those for which he was employed in the city of New Bern.

"If upon the foregoing facts the court is of the opinion that the defendant is guilty, then we, the jury, find him guilty; if upon the foregoing facts the court is of the opinion that the defendant is not guilty, then we find him not guilty."

Upon the foregoing verdict, the court being of opinion that the defendant is not guilty, it is therefore considered and adjudged that the defendant is not guilty, and that he be discharged. The solicitor for the State excepts and appeals to the Supreme Court. Notice of (590) appeal given and accepted in open court. The record proper, together with the special verdict, constitutes case on appeal.

G. S. FERGUSON.

Upon a trial at February Term, 1910, of CRAVEN, *Ferguson, J.*, the defendant was adjudged not guilty and the State appealed.

Attorney-General and George L. Jones for State.

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

BROWN, J. Upon the special verdict we concur with the court below that the defendant is not guilty, and with the candid admission of the Attorney-General at the close of his brief that "the conduct of the defendant does not come within the terms of the statute, and there is no suggestion that it comes within its spirit."

Affirmed.

CLARK, C. J., concurring: The defendant was an alderman of the city, and at the same time was holding an important post as employee in the service of a party making a contract with the city. While this does not fall within the terms of the statute, it is not altogether seemly, nor to be commended, that one who holds employment in the service of a contractor with the city should, as an alderman, sit on the board, when passing upon a contract between his employer and the city.

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(591)

STATE v. WILL NORMAN.

(Filed 21 September, 1910.)

Evidence Corroborative—"Bloodhounds."

In order to render competent the action and conduct of a bloodhound in trailing a person from the place where a crime has been committed, there must exist certain conditions or circumstances which tend to establish the guilt of which the action of the bloodhound is indicative; and where there is a want of evidence tending to show that the bloodhound was put upon the trail of the one who committed the offense, or that the hound was one of experience in following a trail, or that the hound gave indication that the accused was the one whose trail it had apparently followed, and there was evidence only that a store had been robbed of a pistol the accused had in pawn there, and none that the accused had the pistol in his possession thereafter: *Held*, that there was no legal proof of the defendant's guilt.

APPEAL from *Ferguson, J.*, at Spring Term, 1910, of CAMDEN.

The facts are stated in the opinion of the Court.

The defendant was indicted in the court below for breaking and entering the store house of W. S. Berry, with the unlawful and felonious intent of stealing, taking and carrying away the goods and chattels of the said Berry. The evidence tended to show that there were several persons in the store on Saturday night, 5 March, 1910, W. S. Berry went to his store Monday morning, 7 March, by 8:30, and found that it had

been entered and that a few articles were lying on the counter and floor. They had been taken from the show-case and the shelves. The money drawer had been tampered with. He left a pistol in the drawer on Saturday night, which belonged to the defendant and was pawned by him to secure a loan of two dollars. The pistol was the only thing that was taken from the store. He telephoned to Mr. J. W. Shores and requested him to bring his bloodhound with him to the store, so that they could trail the thief. Shores came with the bloodhound. The dog scented several articles and started the trail just as he scented the money drawer. He left the store and ran down the track of the railroad to a public crossing, and then down the public road for some distance, and
(592) thence across a field to the house of a widow, where Berry and Shores saw the defendant and the woman standing in the door. The dog did not recognize the defendant, although he stood near him. Several other persons had stayed in the house the night before with the defendant. The defendant lived about a mile from the house, at his father's home. There were no tracks around the store, and, as stated by the prosecuting witness, there was "nothing to identify the defendant as the person who had entered the house." The tracks of several persons were found on the public road near the railroad crossing, some of which seemed to correspond with the shoes worn by the defendant, though afterwards a comparison was made and it was found that, while the track was made by a blunt-toed shoe, the defendant did not wear such a shoe. There were no tracks for the dog to follow. The only tracks found were those near the crossing. The owner of the hound testified that he was a young dog and had been on but three trails, the results of which were not stated. He further testified that he was not regularly in the business of training bloodhounds and trailing criminals, but was, by trade, a painter. The dog was a bloodhound of good strain.

The defendant's counsel requested the court to charge the jury that there was no evidence of the defendant's guilt, which the court refused to do, and charged the jury that they must consider all the circumstances, and while they could not convict upon the evidence alone as to the actions or conduct of the dog, if they found beyond a reasonable doubt, from all of the evidence, that the defendant was guilty, they should return a verdict accordingly, and if not, they should return a verdict of not guilty. The defendant excepted. The jury returned a verdict of guilty, and judgment being rendered thereon, the defendant appealed.

Attorney-General Bickett for the State.
Thos. J. Markham and W. L. Cohoon for defendant.

WALKER, J., after stating the case: We think the court should have given the instruction requested by the defendant. We have decided in

several cases that the action and conduct of a bloodhound in trailing a person from the place where a crime has been com- (593) mitted is competent evidence under certain circumstances. The conditions which must exist in order to render such evidence competent are stated in the case of *Pedego v. Com.*, 103 Ky., 41. It is there said: "That in order to make such testimony (the trailing of a track by a dog) competent, even where it is shown that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party has been, or upon a track which such circumstances indicated to have been made by him. When so indicated, testimony as to trailing by the bloodhound may be permitted to go to the jury for what it is worth, as one of the circumstances which may tend to connect the defendant with the crime of which he is accused. When not so indicated, the trial court should exclude the entire testimony in that regard from the jury." This Court, in *S. v. Moore,* 129 N. C., 494, adopted the rule of evidence as stated in that case, and when applying it to the facts of the *Moore case,* said: "In this case, there is no evidence to connect the circumstances of the baying of the two defendants, or either of them, with the making of the tracks at the time the larceny was committed; nor is there any evidence that the dog scented any that were then made by either of the defendants; nor is there any way to ascertain that fact. The evidence admitted failing to become a circumstance to connect the defendants with the crime, and failing to become a circumstance in corroboration of Rountree's testimony, there was error in admitting it." Evidence as to the conduct of the bloodhound in pursuing the track of a human being was admitted in *S. v. Hunter,* 143 N. C., 607, and *S. v. Freeman,* 146 N. C., 615, but it will be found on an examination of those (594) two cases, that there were facts and circumstances which made the evidence reliable and therefore competent. Where such facts and circumstances do not exist, as in our case, the evidence is conjectural in its nature and barely raises a well-grounded suspicion as to the guilt of the party. In this case, there were no tracks at the store, and as stated by the prosecutor in his testimony, there was nothing about the premises which tended to connect the prisoner with the commission of the crime. There were no tracks between the store and the railroad crossing, and there were none in the field between the public road and the house where

the defendant was found. How can it be said, with any degree of certainty, that he committed the offense? It is true that the pistol was missing from the money drawer, but it was not found in the possession of the defendant, and the mere fact that he owned the pistol was not evidence of his guilt, as any other person who may have entered the store could have taken it as well as he. While the dog ran from the store to the house where the defendant was found, it is stated in the case that he did not "recognize" the defendant, nor did he give any indication by his conduct, which is usual in such cases, that the defendant was the man whose trail he had been pursuing. The rule is that if there be no evidence, or if it be so slight as not reasonably to warrant an inference of the fact in issue, or if it furnish no more than material for mere conjecture, the court will not submit the issue to the jury. *Brown v. Kinsey,* 81 N. C., 245. In *S. v. Vinson,* 63 N. C., 335, it was held that evidence which "merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it is so, is an insufficient foundation for a verdict and should not be left to the jury." So in *Byrd v. Express Company,* 139 N. C., 273, it was said: "It all comes to this, that there must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it. The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further and offer, at least, some evidence which reasonably tends to prove every fact essential to his success." There is nothing in this case to indicate that the defendant committed the crime of breaking and entering the store house, except the
(595) conduct of the dog, and what he did is so uncertain and unreliable in its character as to be insufficient of itself to legally establish the defendant's guilt. It was not shown that the defendant was at the store on Saturday night, or that his tracks were seen at or near the store, or that he was in possession of any property which was stolen, or, as we have said, that the dog indicated by his conduct that he was the thief. It is impossible to understand how the dog could have trailed the defendant across the field when it appears that no tracks were found there. A careful analysis and consideration of the evidence convinces us that there was no proof of the defendant's guilt, and he was, therefore, entitled to the instruction which was requested by his counsel.

In his argument before us, the Attorney-General, with his usual frankness, stated that the evidence in the case does not "create a just suspicion against the defendant and the jury should have been instructed to return a verdict of not guilty."

In this view of the facts, we have concurred with him.

New trial.

Cited: S. v. Wiggins, 171 N. C., 816.

STATE v. EUGENE WILLIAMS.

(Filed 21 September, 1910.)

1. **Cities and Towns—Commissioners—Public Policy—Contracts—Conflicting Interests.**

It is not necessary to show moral turpitude to convict a commissioner or alderman of a city under Revisal, sec. 3572, of entering into a contract with the city wherein he was personally benefited or interested in the manner prohibited by the section.

2. **Same—Corporations—Officers—Acts—Knowledge.**

The prohibition of Revisal, sec. 3572, extends to an officer of a corporation in making contracts between the corporation and the city of which he is a commissioner or an alderman; and includes a president and director of a corporation, who was the manager of the mechanical department, though he excused himself, as alderman, from voting on the resolution of payment which had been approved and was unanimously passed; and whether he had actual knowledge of the making of the contract is immaterial.

APPEAL from *Ferguson, J.*, at March Special Term, 1910, of (596) CRAVEN.

This is an indictment under section 3572 of Revisal as follows: "If any person, appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor." There was a special verdict at March Term, 1910, of the Superior Court of Craven County, his Honor, *Judge Ferguson*, presiding.

SPECIAL VERDICT.

The jurors being duly sworn and empaneled to try the issue between the State and defendant, Eugene Williams, find the following special verdict, to wit:

1. At the times hereinafter named, the defendant, Eugene Williams, was a member of the board of aldermen of the city of New Bern.

2. At said times H. P. Willis was the practical engineer in charge of the machinery supplying electric light and water to the city of New Bern, which plant was owned by the city of New Bern.

3. That Thomas F. McCarthy was at said times the chairman of the committee of the board of aldermen of the city of New Bern having supervision of said electric light and water plant.

4. That during the month of July said H. P. Willis, by authority of said Thomas F. McCarthy, sent an order to the New Bern Iron Works, Inc., for supplies necessary for the operation of said plant amounting to $75.63, a portion of which manufactured to order and could be manufactured and supplied by no other concern in or near the city of New Bern except by the New Bern Iron Works, Inc.

5. That at the times hereinafter mentioned said Eugene Williams had purchased of W. A. McIntosh stock in the New Bern Iron Works,
(597) Inc., on credit and had hypothecated said stock to W. A. McIntosh for the purchase money thereof, but received profits whenever any were declared and that in said bill furnished the city a profit was charged.

6. That said Eugene Williams was a director and president of the company, but his duties in connection with the company were simply to act as head of the mechanical department of the shop.

7. That W. A. McIntosh owned part of the stock of said corporation and held all the balance of the stock as collateral security and was the general manager of the company, and had full control and direction of its business, and C. M. Kehoe was bookkeeper of said company, and was under the direction and control of W. A. McIntosh.

8. That at the August meeting, 1909, of the board of aldermen of the city of New Bern, C. M. Kehoe, said bookkeeper by the direction of W. A. McIntosh, presented said bill for supplies to the clerk of the board, who passed the same, which had already been approved by Thomas F. McCarthy, chairman of the water and light committee, to H. M. Groves, chairman of the finance committee, and said H. M. Groves approved the same.

9. That said bill so approved was presented to the board of aldermen, and said Eugene Williams being present at the meeting requested the board to excuse him from voting, and he was excused by the board, and the remaining members of the board approved the bill and issued an order therefor which has not yet been paid.

10. That said Eugene Williams has had nothing else to do with the transaction except as hereinbefore set out, neither as an officer or stockholder of the New Bern Iron Works, Inc., nor as an alderman of the city of New Bern, and he has had no corrupt intention in connection with the matter.

If upon the foregoing facts the court is of the opinion that the defendant is guilty, the jury finds him guilty; and if upon said facts the court is of the opinion that the defendant is not guilty, the jury finds him not guilty.

The court being of opinion upon special verdict so found by
(598) the jury that the defendant is guilty and so adjudges, thereupon

it is considered by the court that the defendant pay a fine of one dollar and costs of the prosecution.

G. S. FERGUSON, *Judge Presiding.*

From judgment of guilty the defendant appealed.

Attorney-General and George L. Jones for State.
W. D. McIver, Simmons, Ward & Allen for defendant.

BROWN, J., after stating the case: This section of the Revisal is substantially the same as the act of 1825, which has been in force since that time, but so far as we have been able to learn this Court has never been called upon to construe its provisions. Whether the law has been scrupulously obeyed or has gone into "innocuous desuetude" is a matter of conjecture. The defendant contends that the proper construction of the act requires that the defendant must have been appointed or elected a commissioner or director to discharge a public trust, and then in the course of such public authority have made a contract for his own benefit; that, according to the verdict, the defendant took no part in the making of the contract, either as alderman, in behalf of the city, or in paying for the work done, nor did he take any part in the making of the contract in behalf of the New Bern Iron Works and Supply Company, of which company he was a stockholder and president; that the defendant could not control the business of the corporation, and that his entire duty in the management of the corporation was to act as head of the mechanical department of the shops.

While we are glad to concede that there is no evidence of moral turpitude upon the part of the defendant we can not concur with his counsel that a finding to that effect is necessary to conviction, and that the act does not extend to an officer of a corporation, when the dealing is between the corporation and the municipality.

It is true that in *People v. Mayer,* 84 N. Y. Supp., 817, the Supreme Court of New York City sustained the last contention, in consequence of which decision the General Assembly of New York amended the law of that State so as to include dealings between corpora- (599) tions whose officers, directors or stockholders were municipal officers.

The judgment was rendered at special term of the Supreme Court, a *nisi prius* court, by *Judge Bischaff,* and not by the appellate division or by a court of last resort.

We are not impressed with the reasoning of the opinion, and do not regard it as a very persuasive authority.

This law was enacted to enforce a well-recognized and salutary principle, both of the moral law and of public policy, that he who is entrusted

with the business of others can not be allowed to make such business an object of pecuniary profit to himself.

This rule has its foundation in scriptural teaching, that no man can serve two masters, and is recognized and enforced in nearly all well-governed countries. As is said by *Judge Dillon:* "The application of the rule may in some instances appear to bear hard upon individuals who have committed no moral wrong; but it is essential to the keeping of all parties filling a fiduciary character to their duty, to preserve the rule in its integrity, and to apply it to every case which justly falls within its principle." Dillon Municipal Corporations, (4 Ed.), sec. 444.

We are not prepared now to hold, nor is it necessary to decide, that the statute would cover the case of a mere stockholder in a corporation, that sold goods or did work for a municipality of which he was an officer, when the stockholder had no knowledge whatever of the transaction and possibly could not prevent it, but we are of opinion that it is broad enough to include within its scope this defendant under the facts found.

He was more than a mere stockholder who had no part in the management of the corporation. He was its president and director, and acted as the head and manager of the "mechanical department of the shop."

It was this department that must have manufactured that portion of the articles which could be manufactured and supplied by no other concern in New Bern.

Whether the defendant had actual knowledge of the transaction (600) is immaterial. Occupying the official positions he held in the corporate body and in its working department, the law will hold him to a knowledge of its transactions with the city of which he was an alderman. The fact that he retired from the meeting when the board of aldermen audited and paid the bill does not change the character of the transaction.

Nor is it necessary to show that defendant directly profited by the contract. In *Doll v. State,* 45 Ohio St., 445, it is held that: "To become so interested in the contract, it is not necessary that he make profits on the same. But it is sufficient if, while acting as such officer, he sell the property to the city for its use, or is personally interested in the proceeds of the contract of sale, and received the same, or part thereof, or has some pecuniary interest or share in the contract."

A case directly in point is *Com. v. De Camp,* 177 Pa. St., 112, where it is held: "The secretary, who is a stockholder of a corporation having a contract for the lighting of a city, is within the prohibition of Crimes Act, 1860, sec. 66, prohibiting any councilman from being interested in any contract with the city, though he was elected councilman after the execution of the contract." Upon the special verdict the defendant was properly adjudged guilty.

Affirmed.

STATE v. WALTER MAY.

(Filed 29 September, 1910.)

1. **Affray—Verdict Directing—Evidence.**

Upon a trial for an affray it is not error for the trial judge to refuse, upon motion of the defendant first named in the indictment, to direct a verdict in his favor upon the State's having introduced one witness and rested.

2. **Affray—Evidence—Codefendant—Rebuttal.**

After the State has introduced evidence and rested its case against the first defendant named in a bill of indictment for an affray, and his codefendant has testified to matters tending to incriminate him, he has the same right to introduce evidence in rebuttal as if his codefendant had been a State's witness against him.

APPEAL from *Peebles, J.*, at August Term, 1910, of FRANKLIN. (601) The facts are stated in the opinion.

Attorney-General for State.
W. M. Person and W. H. Yarborough, Jr., for defendant.

CLARK, C. J. This was an indictment for an affray, and the defendant May alone was found guilty, and appeals.

The State introduced one witness and rested. The defendant May, whose name appeared first in the bill of indictment, without introducing evidence, moved the court to direct a verdict of not guilty. This was refused, the court saying that the evidence was not all in. In this there was no error.

The defendant Jackson then produced evidence, much of which tended to incriminate May. When Jackson rested, the defendant May offered himself and others as witnesses in rebuttal of the evidence offered for Jackson. The court was of an opinion that he had no right to do so, and refused to allow said May to testify himself or put on other witnesses. In charging the jury the court said, "The State further contends that you should believe that part of the evidence offered by Jackson in which the witnesses testified that May struck Jackson with his stick willingly, and that you should be satisfied beyond reasonable doubt from that evidence that the defendant May is guilty," and further, "If you find from all the evidence, beyond a reasonable doubt, that either or both of the prisoners are guilty, you should say so."

If the evidence offered by Jackson had been used only to acquit him the defendant May would have no ground to complain. But Jackson's evidence was competent against May, and was so used by the prosecution and was submitted to the jury by the judge to be considered against him.

It was therefore error not to permit May to reply to this evidence. He had not been "confronted" with these witnesses. It is true that as to new matter brought out by May, the defendant Jackson in turn would have been entitled to a reply. But this anomaly is due to the fact that the testimony of the defendants in an affray is usually hostile to each other. Indeed, in trials for an affray, the solicitor usually relies
(602) upon the testimony of the defendants to convict each other.

The conduct of a trial is largely left to the discretion of the presiding judge. But when the State relied upon the evidence offered by the defendant Jackson to convict May, the latter had a right to offer evidence in reply to evidence with which he had not been confronted when the State rested. When the defendant May rested, no evidence which he cared to impeach had been introduced against him, and there was nothing which he cared to contradict. Hence he rested and waited for further evidence. "Where, on the trial of four defendants indicted for an affray, three of them testified, and the fourth, their antagonist, was called in his own behalf, the other defendants had the same right to impeach him on cross-examination as if he had been a witness instead of a codefendant." *S. v. Goff*, 117 N. C., 755.

Error.

STATE v. M. L. WINNER.

(Filed 6 October, 1910.)

1. Spirituous Liquors—Secret Sale—Devices—Notice—Corroborative Evidence.

By aiding in the sale of spirituous, etc., liquors in prohibited territory, a person is as guilty as the principal; and evidence tending to show that certain devices for the secret traffic in spirituous liquors, etc., were constructed in defendant's place of business and of such character as he would naturally be aware, is competent in corroboration.

2. Objections and Exceptions—Improper Remarks.

Exceptions to remarks made by the solicitor to the jury as improper, relating to the defendant's not testifying, etc., are governed by *Weddington's case*, 103 N. C., 364.

APPEAL by defendant from *Cooke, J.*, at April Term, 1910, of NEW HANOVER.

From a verdict of guilty and the judgment pronounced thereon the defendant appealed to this Court.

(603) *Attorney-General Bickett and G. L. Jones for the State.*
L. Clayton Grant for defendant.

MANNING, J. The defendant was indicted and convicted for selling whiskey without license in the city of Wilmington. The prosecuting witness testified to the sale to him and described minutely the circumstances under which he purchased, to wit: that he bought the whiskey in the defendant's place of business, in a cut-off compartment and by a dumb waiter. He made known his presence and his thirst; a tin cup appeared in a hole in the wall; he put in the money; the cup disappeared, and a bottle of whiskey appeared in a few seconds. Another witness for the State was permitted, over defendant's objection, to testify in corroboration that he had bought in the same place and by means of the same device, prior to the purchase by the prosecuting witness, to whom the particular sale was charged in the indictment to have been made. We do not see why this evidence was not competent. It was restricted by his Honor to the purpose of corroboration. Its purpose was definitely to fix upon the defendant the knowledge that the illicit traffic was being carried on in his place of business. It is inconceivable that such device could be arranged in defendant's place of business without his knowledge and aid, and if he aided in the commission of this offense—a misdemeanor by the law—he was guilty as a principal. *S. v. Kittelle,* 110 N. C., 560; *S. v. McMinn,* 83 N. C., 668. The other exception argued by the learned counsel of the defendant is directed to the failure of his Honor to properly correct the effect of certain comments of the solicitor in his argument to the jury. The remarks complained of are similar to those of the counsel for the State in *S. v. Weddington,* 103 N. C., 364, and which this Court held were permissible to the prosecuting attorney. There was no attempt to use the failure of the defendant himself to testify in his own behalf to his prejudice, nor was such failure commented upon by the solicitor. We think his Honor's instruction upon the matter sufficient. In our opinion, the defendant has no just cause of complaint of his Honor's rulings.

No error.

Cited: S. v. Colonial Club, 154 N. C., 194.

(604)

STATE v. JOSEPH STEVENS.

(Filed 6 October, 1910.)

Murder—Self-defense—Evidence—Questions for Jury.

Upon a trial for murder, it is error for the trial judge to charge the jury that in no view of the evidence could the prisoner be acquitted upon

the ground of self-defense, the testimony of the prisoner tending to show that deceased without provocation cursed and violently assaulted him, a much weaker man, over a dispute they theretofore that day had had, giving in detail an account of an assault which would reasonably make him apprehensive of great bodily harm or of his life, and that the fatal shot was fired when he was unable to get away and in the power of deceased.

APPEAL by defendant from *O. H. Allen, J.*, at September Term, 1909, of NEW HANOVER.

The facts are sufficiently stated in the opinion.

Indictment for murder of one Shields.

The prisoner was convicted of murder in first degree, and from the judgment of death appeals to the Supreme Court.

Attorney-General and G. L. Jones for State.
Herbert McClammy and John D. Bellamy for defendant.

BROWN, J. There are seventy-eight exceptions noted in the voluminous record in the case. The Attorney-General, with characteristic candor, which may well be emulated by all public prosecutors, admits that at least seven of the exceptions are material and well taken, and that the prisoner is entitled to a new trial.

While the opinion of the State's attorney has much weight with us, it is our practice to examine the record carefully ourselves before setting aside a conviction for crime and directing another trial.

We find that many exceptions as to material matters of proof were well taken, but as those errors may not occur on another trial, it is unnecessary to discuss them.

The principal error committed by the judge below was in holding that in no view of the evidence could the prisoner be acquitted
(605) upon the ground of self-defense and in excluding pertinent evidence competent to support that plea.

The evidence of the prisoner himself is sufficient to entitle him to have that plea submitted to the jury under proper instructions. The prisoner testified substantially that he and deceased had a slight dispute in the morning and met again in the afternoon; that he said "good morning" to deceased, who at once, without provocation, cursed prisoner and attacked him; pushed his head violently against corner of shed; hit him four times, three times in eye causing excruciating pain and blinding him; that prisoner resisted as best he could, but that deceased weighed 200 pounds, was six feet high and was a far more powerful man than prisoner and capable of doing him serious bodily harm; that deceased had prisoner by the neck, and his nose and mouth jammed against deceased's stomach, and was beating him so severely that prisoner was

afraid of his life, and that in such condition, unable to get away, he drew his pistol and shot deceased.

In the prisoner's version of the affair he did not enter the fight willingly, and is not debarred from the plea of self-defense on that ground. He was seized by the deceased, who, the prisoner testifies, was a powerful and desperate man, capable of doing him great bodily harm, and who proceeded to beat the prisoner most unmercifully, attempting to knock out his eyes.

Under such circumstances, whether the prisoner used excessive force in repelling the assault with his pistol was one peculiarly for the jury.

The innocence of the prisoner depends upon whether, from the whole testimony, or from that of any witness, including himself, at the time of the killing, he himself was without fault and then had a reasonable ground to believe the attempt of the deceased was with the design to take his life or to do him great bodily harm.

The reasonableness of prisoner's apprehensions was not a question to be decided by the prisoner or by the court, but by the jury to whom it should have been submitted with proper instructions. *S. v. Harris,* 46 N. C., 190; *S. v. Dixon,* 75 N. C., 277.

New trial.

(606)

STATE v. WILLIAM HOLDER, JUNE GUNTER AND OSCAR BAUGH.

(Filed 12 October, 1910.)

1. **Rocking Trains—Indictments—Joint Defendants—Motion to Quash—Discretion—Procedure.**

A motion to quash a bill of indictment against several defendants for throwing stones at a train, Revisal, 3763, must be made on the face of the bill, and may be disallowed by the judge, in his sound discretion, except in cases of gross abuse.

2. **Conspiracy—Proof—Rocking Train—Participation—Evidence.**

Proof of conspiracy is necessary only to fix liability upon members of a crowd or mob present at the time the offense was committed, but not shown to have committed the illegal act, and upon trial for throwing stones at a train, Revisal, sec. 3763, it is not necessary to show a conspiracy, it appearing that the several defendants were not only thus present, but threw stones at different coaches of the same train.

3. **Indictments—Rocking Trains—Vagueness—Bill of Particulars—Procedure.**

Upon a trial for throwing stones at a train prohibited by Revisal, 3763, a charge in the bill that it was done "from one station to another"

follows the form set out in the statute, and is not void for vagueness and uncertainty. The remedy of defendant was by motion made to the court for a bill of particulars. Revisal, 3244.

4. Evidence Impeaching—Record Evidence.

A question asked the defendant in a criminal action, "if he had not theretofore been convicted of an offense and served a sentence upon the roads," is not objectionable upon the ground that the record was the best evidence.

5. Indictment—Statutory Language—Legislative Powers—Defining Crime—Interpretation of Statutes.

Revisal, 3763, prescribes a form of indictment for throwing stones at a train, and makes such acts a misdemeanor, punishable "by a fine or imprisonment in the county jail or State's Prison in the discretion of the court"; and a motion in arrest of judgment will be denied if made merely upon the ground that the indictment did not contain the word "feloniously," secs. 3595, 3612, 3615, 3694, 3763, being an exception to the provisions of sec. 3291, when construed together. *S. v. Ferguson,* 108 N. C., 770, cited and distinguished.

(607) APPEAL by defendants from *Cooke, J.,* at July Term, 1910, of WAKE.

The facts are sufficiently stated in the opinion.

Attorney-General and George L. Jones for the State.
J. C. L. Harris for defendant.

CLARK, C. J. The defendants were indicted for throwing stones at a train, under Rev., 3763. Motion was made to quash the bill because the offense charged was not a joint one, and each defendant was entitled to a separate trial. The court, in its discretion, overruled the motion. This was a matter clearly within its sound discretion and will not be reviewed by this Court except in cases of gross abuse. *S. v. Carrawan,* 142 N. C., 575; *S. v. Barrett, ibid.,* 565; *S. v. Moore,* 120 N. C., 570; *S. v. Finley,* 118 N. C., 1161; *S. v. Oxendine,* 107 N. C., 783; *S. v. Gooch,* 94 N. C., 987; *S. v. Underwood,* 77 N. C., 502; *S. v. Collins,* 70 N. C., 241. Such motion must be made on the face of the bill and not upon the evidence. In fact, however, the "rocking" was done at the same time and place, though some of the defendants threw stones at one car and some at another. It was not necessary to show a conspiracy, any more than when several persons in a mob are shown to have done illegal acts of the same nature at the same time and place. They are each liable. The proof of conspiracy is necessary only to fix liability upon members of a crowd or mob who are present but not shown to have committed the illegal act. In such case, if the common design or conspiracy is shown, all parties are liable. It does not appear that the

defendants here suffered any prejudice from the refusal to sever, and it was in the interest of the administration of justice, in such case, to try them together.

There was also a motion to quash on the ground that the bill was vague and uncertain in the charge "from one station to another." The bill followed the statute and as a rule that is all that is necessary. "In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, in its discretion, require the solicitor to furnish a bill of particulars of such matters." Rev., 3244.

One of the defendants, being on the stand in his own behalf, (608) was asked if he had theretofore been convicted and served a sentence upon the roads. The defendants objected to the question on the ground that the record was the best evidence. The question was for the purpose of impeaching, and was clearly competent. *S. v. Lawhorn,* 88 N. C., 637.

After verdict, the defendants moved in arrest of judgment because the bill of indictment did not contain the word "feloniously." The court denied the motion and defendants excepted. Indictments for felony must contain the word "feloniously," *S. v. Shaw,* 117 N. C., 764; *S. v. Purdie,* 67 N. C., 26, not that it is of any aid or benefit to a defendant, but because it is of long usage, coming down from a remote past, when there was a reason for its use which has long ago ceased. Prior to chapter 205, Laws 1891, now Revisal, 3291, the line between felonies and misdemeanors was an arbitrary one, having no reference to the punishment. For instance, perjury and forgery, though both punishable by imprisonment in the State's prison, were misdemeanors. By that act, it was provided, that any "crime which is, or may be, punishable either by death or imprisonment in the State's prison" is a felony, and all others are misdemeanors. But in the Revisal there are five sections, 3595, 3613, 3615, 3754 and 3763 (under which last this bill is found), which provide that any person violating them "shall be guilty of a misdemeanor and punished by fine or imprisonment in the county jail or State's prison at the discretion of the court." The Revisal must be construed together as one statute, and these sections must therefore be deemed specific exceptions to the general rule laid down in Revisal, 3291. Doubtless, it was an inadvertence in the commissioners not to revise these five sections to conform to Revisal, 3291, which was intended to remove such incongruities. But the court must take the law as it is written. The Legislature is sole judge of what crimes shall be styled felonies, and what are to be termed misdemeanors.

This is an entirely different proposition from that presented in *S. v. Fesperman,* 108 N. C., 770. There it was held that the Constitution

determined the jurisdiction of a justice of the peace by the *quantum* of the punishment that might be imposed and hence that the Leg-
(609) islature could not transfer the jurisdiction of an offense to the court of a justice of a peace if it left the punishment which might be inflicted in excess of that which, under the Constitution, such officer could impose. But this present case is not one of jurisdiction, and it rests with the Legislature to style any offense a misdemeanor, notwithstanding, it is punishable in the State's prison. This offense occupies, in this respect, the same status that perjury and forgery did prior to the act of 1891.

A case exactly in point is *S. v. Harris,* 145 N. C., 456. In that case the defendant was indicted for perjury, and appealed on the ground that the word "feloniously" was not used in the indictment. Rev., 3247, prescribed a form of indictment for perjury, and left out the word "feloniously." This Court held it unnecessary for the word to appear, *Mr. Justice Hoke,* for the Court, saying: "It is chiefly urged against the validity of this conviction and sentence that the word 'feloniously' is not used in the indictment. The question is distinctly and properly raised, both by motion to quash and in arrest of judgment, but we are of opinion that the position cannot be sustained. It has been frequently held with us that in indictments for felonies, the word 'feloniously' must appear as descriptive of the offense, and that no other or equivalent term will suffice. This principle, however, does not obtain where the Legislature otherwise expressly provides, and so it is here. Rev., 3247, establishes a form of indictment for perjury and enacts in express terms that the form shall be sufficient. The statute does not make the word 'feloniously' a part of the bill, and it does not appear in the form set out, and the same is therefore no longer required. The General Assembly has the undoubted right to enact legislation of this character, to modify old forms of bills of indictment, or establish new ones, provided the form established is sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged. 'To be informed of the accusation against him' is the requirement of our bill of rights, and unless such legislation is in violation of this principle or in contravention of some express constitutional provision, it should and must be upheld by the courts."

(610) If the word "feloniously" can be dispensed with in perjury, though still a felony, certainly it is not required in this offense which the Legislature has made a misdemeanor.

No error.

Cited: Council v. Pridgen, ante, 452; *S. v. Hyman,* 164 N. C., 414.

STATE v. THE ROWLAND LUMBER COMPANY.

(Filed 12 October, 1910.)

1. **Corporations—Evidence—Indictment—Tenants — Removing Tenements, Etc.**

The intent being an ingredient of the offense, a corporation is indictable for the acts of its officers and agents under Revisal, 3686, when the corporation is a tenant, etc., for injuring or damaging tenement houses, etc.; and the corporate existence may be shown, though not charged in the bill.

2. **Indictments—Words and Phrases—Tenants—Removing Tenements—Interpretation of Statutes.**

Upon a trial for violating Revisal, 3686, the indictment reading, that defendant corporation, with the three other defendants "with force and arms did willfully and unlawfully demolish, pull down and remove from said lands . . . the above-mentioned walled-in enclosure, stables, feed room or barn," etc.: *Held*, (1) that nothing is charged in the bill to come within the meaning of a "tenement" or "outhouse," the former word referring to a dwelling or place of habitation, and the latter being in some respect a parcel of such dwelling and within the curtilage; (2) the words of the statute do not include "stables," a *casus omissus* for the Legislature and not for the courts; (3) "a walled-in enclosure" falls within the meaning of "a wall or other enclosure."

3. **Indictments—Misdemeanors—Accessories—Principals.**

A charge in an indictment against a corporation and other defendants, for violating the provisions of Revisal, 3686, that all the defendants, except the corporation, were present assisting in doing the act, makes those present principals in the second degree, not accessories; if they were accessories, the result in this case would be the same, for in misdemeanors all aiders, abettors and accessories, whether before or after the fact, are principals.

4. **Indictment—Quash—Informalities, Etc.**

An indictment under Revisal, 3686, may not be quashed or judgment arrested "by reason of any informality or refinement." Revisal, 3254.

5. **Indictments—Sufficiency—Tenants—Removing Tenements—"Willfully"—"Belief."**

In order to convict a tenant under the provisions of Revisal, 3683, for willfully and unlawfully demolishing, etc., any tenement house, etc., it is necessary to prove that the act was done "willfully and unlawfully"; and it was error to refuse a prayer for instruction, that the defendants would not be guilty of "willfully" removing, etc., if the jury shall find from the evidence that the defendants did reasonably and *bona fide* believe they had the right to do so.

APPEAL from *Cooke, J.*, at May Term, 1910, of SAMPSON. (611)

The facts are sufficiently stated in the opinion.

Attorney-General and G. L. Jones for plaintiff.
A. McL. Graham and H. A. Grady for defendants.

CLARK, C. J. The defendant lumber company and three of its employees were convicted for tearing down and removing a stable and fence in violation of Rev., 3686. That section provides: "If any tenant shall, during his term or after its expiration, willfully and unlawfully demolish, destroy, injure or damage any tenement house, uninhabited house, or other outhouse, belonging to his landlord or upon his premises, by removing parts thereof or by burning or in any other manner, or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall, or other enclosure, or any part thereof, built or standing upon the premises of such landlord, or shall willfully and unlawfully cut down or destroy any timber, fruit, shade or ornamental tree belonging to said landlord, he shall be guilty of a misdemeanor."

The indictment alleges that defendant, Rowland Lumber Company, has recently been a tenant of the prosecuting witnesses; that it, said Rowland Lumber Company, Hardy Hare, Ed. Odom and Thomas Hefty, "with force and arms did willfully and unlawfully demolish, pull down, injure and remove from the said lands and premises of the said Mr. and Mrs. P. M. Smith, the said above-mentioned walled-in enclosures, stables, feed-room or barn," etc.

The defendants moved to quash the bill and also in arrest of judgment because—

(612) 1. A corporation is not liable to indictment under section 3686 of the Revisal;

2. The bill of indictment does not charge any offense within the terms of said act; and

3. There being no offense charged of which the principal could be convicted, the other defendants could not be lawfully convicted as aiders and abettors.

The first ground that corporations can not be convicted of an offense where the intent is an ingredient is no longer tenable. They are as fully liable in such cases as individuals. They are liable for libel, assaults and battery, etc. Corporate existence can be shown, though not charged in the bill. *S. v. Shaw,* 92 N. C., 768.

As to the second ground: The section in question, upon analysis, reads: "If any tenant (1) shall, during his term or after its expiration, willfully and unlawfully, demolish, destroy, deface, injure or damage (*a*) any tenement house, (*b*) uninhabited house, or (*c*) other outhouse, belonging to his landlord, or upon his premises by removing part thereof, or by burning or in any other manner; or (2) shall unlawfully and willfully, burn, destroy, pull down, injure or remove (*a*) any fence, (*b*)

wall, or (*c*) other enclosure or any part thereof built or standing upon the premises of such landlord; or (3) shall unlawfully and willfully cut down or destroy any (*a*) timber, (*b*) fruit, (*c*) shade, or (*d*) ornamental tree belonging to said landlord he shall be guilty of a misdemeanor."

It is charged in both the first and second counts of the bill that the defendant Rowland Lumber Company was a tenant of "certain stables, feed-room, barn, walled-in enclosure, fences"; but in neither of these counts is it charged that the defendants removed or tore down any fences, the averments as to removal being confined to "walled-in enclosure, stables, feed-room or barn buildings."

While the word "tenement" has a wide significance, the statute uses the word "tenement house," which is defined to be "a dwelling house, a building for a habitation." Webster's International Dict. "A tenement house is defined to be a dwelling house, or an apartment in a building used by one family; often, in modern usage, an inferior dwelling house, rented to poor persons, or a dwelling erected for the pur- (613) pose of being rented." 28 A. & E. Enc. (2 Ed.), 44, 45.

An uninhabited house "is a house that is fitted for habitation, but is unoccupied at the time." *S. v. Clark,* 52 N. C., 167.

"An outhouse has a technical meaning. . . . An outhouse is one that belongs to a dwelling, and is in some respects parcel of such dwelling house, and situated within the curtilage." *S. v. Roper,* 88 N. C., 656.

The words of the statute do not include stables, or any word that would embrace them. It is a *casus omissus,* which the Legislature, not the courts, must cure.

The word "fence" is in the statute and its removal is here charged but only in the third count. In that count all the defendants, except the lumber company, are charged as being present assisting in doing the act. This makes them principals in the second degree, not accessories. *S. v. Whitt,* 113 N. C., 719. But even if they had been charged as accessories the result is the same, for in misdemeanors all aiders, abettors and accessories, whether before or after the fact, are principals. *S. v. DeBoy,* 117 N. C., 702. Nor are we prepared to hold that the charge in the first and second counts of removing, pulling down, etc., a "walled-in enclosure" does not fall within the terms used in the statutes "a wall or other enclosure."

But although the indictment is sufficient, especially under Rev., 3254 (formerly Code, 1183), which forbids an indictment to be quashed or judgment arrested "by reason of any informality or refinement" and admitting the State's contention that the said Rowland Lumber Company had surrendered the buildings, etc., to the prosecutors, and taken a new lease for the same, still the defendants could not be guilty unless

the act was done unlawfully and willfully, which implies the doing of the act purposely and deliberately in violation of law. The court, therefore, erred in refusing the defendant's first prayer which was to that effect. *S. v. Roseman,* 66 N. C., 634; *S. v. Whitener,* 93 N. C., 590; *S. v. Godwin,* 138 N. C., 582; *S. v. Clifton,* 152 N. C., 800. It was also error to refuse the second prayer which was a corollary to the first, *i. e.,*

"If the jury shall find from the evidence that the defendants did (614) reasonably and *bona fide* believe they had the right to remove the buildings, etc., they could not be guilty of removing them 'willfully' so as to bring their act within the meaning of Rev., 3686." In such case the defendants would be liable civilly, if they in fact had no right to remove, but not criminally, under this section.

Error.

Cited: S. v. Ice Co., 166 N. C., 367.

STATE v. LONNIE STONE ET AL.

(Filed 26 October, 1910.)

1. Criminal Actions—Prosecutor—Costs—Power of Court—Interpretation of Statutes.

The powers conferred upon the courts to determine the question of responsibility and to tax costs against the one adjudged to be the prosecutor, extends to "all criminal actions where the defendant is acquitted, a *nolle pros.* entered, judgment arrested, or if the defendant shall be discharged from arrest for the want of probable cause," and exists at any stage of the criminal proceedings, before or after the finding of the bill or defendant acquitted.

2. Same—Trespass—Title Arbitration.

When, in a trial under indictment for forcible trespass, the question depended upon a civil issue as to title, which by consent of the parties was referred to arbitration by the trial judge, and one of the claimants is spoken of in the order of arbitration as prosecutor, the order providing that if the question of title be found against him, he shall pay the costs as on *nolle pros.* by the solicitor, which resulted in a judgment taxing the costs against him: *Held,* there being nothing restrictive in the terms of the judgment, it was not error in the trial court to find the appellant, upon further investigation, had advised the prosecution, actively participated therein, and enter judgment making him a prosecutor of record and also taxing him with the costs, and this disposition of the case is not precluded by the prior judgment referring the question of title to arbitration.

STATE *v.* STONE.

APPEAL from *C. C. Long, J.*, by Green Scoggins, at April Term, 1910, of LEE.

On notice duly issued and served, Green Scoggins, a witness for the State and so named on bill, was marked as prosecutor and adjudged to pay the costs, according to the provisions of the statute.

Said witness excepted and appealed.

Attorney-General and G. L. Jones for State. (615)
Hoyle & Hoyle for defendant.

HOKE, J. The powers conferred upon our courts to determine the question of responsibility and to tax the costs against one adjudged to be the prosecutor, extends to all "criminal actions where the defendant is acquitted, a *nolle pros.* entered, judgment arrested, or if a defendant shall be discharged from arrest for want of probable cause." The statute on the subject, Revisal, sec. 1295, is very broad in its terms, providing the power exists: "Whatever the judge, court or justice shall be of opinion there was not reasonable ground for the prosecution, or that it was not required by the public interest. And every judge, court or justice is hereby fully authorized to determine who the prosecutor is at any stage of a criminal proceeding, whether before or after the bill of indictment shall have been found, or the defendant acquitted; provided, that no person shall be made a prosecutor after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecutor of record." Section 1297 enacts further that such prosecutor may be imprisoned for nonpayment of costs taxed against him when the prosecution is adjudged frivolous or malicious. This statute has been construed and applied in *S. v. Hamilton* and *S. v. Roberts,* 106 N. C., pp. 660-662, and many other cases on the facts presented fully uphold the ruling of his Honor below in the decision that the witness Green Scoggins be marked as prosecutor and taxed with the stipulated costs. This was an indictment against Lonnie Stone and others for forcible trespass on the property of one O. M. Stokes, he being present forbidding, etc. The bill was found a true bill, July Term, 1908, the names of O. M. Stokes and Green Scoggins appearing as witnesses on the bill. At said term, the trial was entered on and a juror was withdrawn and the cause by consent was referred to an arbitrator to determine and report on the question of title to the property. The order of arbitration signed by the judge, among other things, providing: "That if this award be against the prosecutor, O. M. Stokes, he shall be adjudged to pay the costs as in case of *nolle pros.* of this action by the solicitor."

At November Term, 1909, report was made by the arbitrator to the effect that the title to the property in dispute was in defend- (616)

ants. The award and report was duly confirmed and it was thereupon adjudged that notice issue to O. M. Stokes and Green Scoggins to show cause at April Term, 1910, why they should not be marked as prosecutors. Notice was duly served and at said term in April, the matter was fully heard and the court, among other things, found the following facts: "That there was not reasonable ground for the prosecution and that it was not required by the public interest; that Green Scoggins advised the prosecution, went with the prosecuting witness to have the warrant sworn out, helped to employ and pay counsel and actively participated in the prosecution; and entered judgment: 'The court finds as a fact that Green Scoggins was prosecutor of the case and orders that he be marked prosecutor of record, and that he be taxed with the costs of the case. The judgment already rendered taxes the prosecutor, O. M. Stokes, with the cost, and this shall not relieve him from liability therefor.' "

The appellant concedes that on these facts the action of the court as a rule would be within the power conferred by the statute, but he insists that this disposition of the case is precluded by the judgment referring the question of title to the arbitrator, signed by his Honor, *Long, J.*, at the November Term, 1909, but we do not so understand or interpret the order made by *Judge Long*. The trial of the cause having been entered upon it was evidently disclosed that the question between the parties was a civil issue as to the title to the premises and his Honor in a commendable disposition to aid the parties to an adjustment by consent referred the question of title to an arbitrator. In this order O. M. Stokes, one of the claimants, is spoken of as prosecutor, and it is provided that if the question of title be found against him, he shall pay the costs as on *nolle pros.* by the solicitor, but there was nothing restrictive in the terms of the judgment and nothing to prevent the court at a later term from further investigation and determining on the facts disclosed that appellant was also a prosecutor. These facts clearly establish that the appellant was a prosecutor and the case having gone off on a *nolle pros.* we are of opinion that he was not improperly taxed with the costs as provided by the statute.

Affirmed.

(617)

STATE v. JACK COFFEY.

(Filed 26 October, 1910.)

The evidence in this case is of sufficient probative force to take the case to the jury.

APPEAL by defendant from *Lyon, J.*, at March Term, 1910, of UNION.
Indictment for burning a barn tried.

Attorney-General and G. L. Jones for State.
J. C. M. Vann and Williams, Lemmond & Love for defendant.

PER CURIAM. We have examined the exceptions in the record and find them to be untenable.

The evidence in the case consisting of circumstances and declarations of the defendant in our opinion is sufficient in probative force to justify the court in submitting the case to the jury.

No error.

STATE v. CHARLIE HUNTLEY.

(Filed 26 October, 1910.)

1. **Murder—Justice's Warrant of Arrest—Evidence.**

Upon this trial for murder, the refusal to permit the introduction in evidence of the warrant of the justice of the peace under which the prisoner was arrested was not erroneous.

2. **Instructions—Modification—Record—Appeal and Error.**

The trial judge not having been requested to put his charge in writing, and there being no exception on that account, an exception to the modification of a requested prayer for instruction will not be considered on appeal when it does not appear in what respect the modification was made or how it may have affected the prayer refused.

APPEAL from *W. J. Adams, J.*, at Fall Term, 1910, of ANSON.
Indictment for murder.

The defendant was tried for murder in second degree and con- (618) victed of manslaughter. From the judgment of the court defendant appeals.

Attorney-General and G. L. Jones for State.
J. A. Lockhart and T. L. Caudle for defendant.

PER CURIAM. The only exception to the evidence is to the refusal of the court to permit the introduction of the warrant of the justice of the peace under which the defendant was arrested. We see no error in this, as it is not shown to be prejudicial.

The sixteenth and seventeenth exceptions relate to a prayer of the defendant, marked "modified and given."

It does not appear in the record here in what respect the prayer was modified. It does not appear that the court was requested to put the charge in writing and no exception is taken on that account. The case on appeal was not made up by the judge but by the solicitor and appellant's counsel and signed by them.

It was appellant's duty to set out the modification. Not being before us we can not pass upon its correctness.

The only other exception relied upon in the brief is the 22d and that we think is without merit.

The charge of the court followed well settled precedents of this Court and fully and fairly presented every phase of the case to the jury. The evidence well warranted the verdict rendered.

No error.

STATE v. A. P. THOMPSON.

(Filed 2 November, 1910.)

1. **Murder—Range of Bullet—Expert Evidence.**

On a trial for murder committed by shots from a pistol, a question asked a nonexpert witness, "whether from the course of the ball after it struck the body, could the shot have been made when both parties were standing," was not improperly excluded, no prejudice being shown.

2. **Murder, Second Degree—Range of Bullet—Evidence Germane—Premeditation.**

Prisoner admitted the killing, with a pistol, of his former wife, from whom he had been divorced, in a struggle for the possession of their young child, and testified that in the struggle the child was turning black in the face because he held to it, and the mother, who was holding to it, continued to do so after she had fallen. There was evidence that he fired at the woman just before she fell, and then again while she was on the floor. It was not clear which shot was the fatal one, and the prisoner further testified that the second shot was to scare her so that she would release the child. There was no suggestion of self-defense: *Held*, a question relating to the range of the bullets to show the position of the parties, was not germane to the issue, and the prisoner having admitted the killing with a deadly weapon, no excuse appearing, he was at least guilty of murder in the second degree, and the exclusion of the question by the court was proper.

3. Murder, Second Degree—Deadly Weapon—Purpose—Evidence.

The prisoner upon trial for the murder of his wife from whom he had been divorced and who had married again, attempted to show that on a former occasion the present husband had tried to carry away two children of the former marriage who were with him, the divorced husband, and he had drawn a pistol on the prisoner, and that on this occasion, when the prisoner went to his former wife's home to get his young child which had been carried there, he did not intend to use the pistol he was carrying unless necessary: *Held*, the testimony was properly excluded: (1) the trial of prisoner was not for the shooting of the husband; (2) the prisoner was acquitted of murder in the first degree, and the question could only have been competent, in any event, upon the question of deliberation and premeditation.

4. Murder—Defense—Insanity—Expert Witness—Incompetent Questions.

Upon plea of insanity as a defense to a charge of murder, the answer of an expert, to be competent, must be to a question presenting all the vital facts in the case, for otherwise his opinion could not have any value upon the query whether the prisoner had sufficient mind at the time to understand what he was doing, and to know whether he was doing right or wrong.

5. Murder—Defense—Insanity—Expert Witness—Evidence—Basis.

In order for an expert to testify upon the insanity of the prisoner, in his defense to a charge of murder, there must be some evidence that the prisoner's mind had been diseased or that there had been insanity in his family; and the mere fact that the witness is an expert does not give latitude to his expression of opinion.

6. Murder—Defense—Life of Another—Justification.

It appearing that the prisoner twice shot his wife from whom he had been divorced, while struggling for the possession of their young child, both shots taking effect, and fired at such close range as to scorch her clothes, he is not entitled to a charge to the effect that he had the right to use such force as was necessary to save the life of the child, even though it was necessary to kill the deceased, it further appearing that the deceased had been fleeing from him, and that by releasing his hold upon the child any danger to it would have been avoided.

Semble, that where the punishment imposed by the court is less than the maximum allowed on a conviction for manslaughter, the prisoner can not complain that the verdict was for murder in the second degree instead of manslaughter.

APPEAL by defendant from *Ward, J.*, at Fall Term, 1910, of (620) DAVIE.

Attorney-General and G. L. Jones for State.

B. G. Crisp, Aydlett & Ehringhaus, and W. M. Bond for defendant.

CLARK, C. J. The prisoner was convicted of murder in the second degree of Eunola Seamon. The prisoner had been convicted of bigamy in marrying the deceased and was sentenced to the Virginia peniten-

tiary. On his return after being pardoned, he found that his wife had obtained a divorce. He then offered to remarry Eunola, which she declined, and subsequently married Seamon. The two children of his marriage with Eunola were in his custody. The prisoner fiercely resented the marriage of the deceased to Seamon, and on several occasions avowed his intention to kill one or both of them. In August, 1909, the deceased went to the house of one Lane, where the prisoner lived, and took one of her children, about two and one-half years old, and carried it to the place where she lived, one-half mile away. Upon hearing this, the prisoner procured a pistol and saying he did not intend to use it unless it was absolutely necessary, put it in his breast pocket. On arriving at Toleson's house where the deceased lived, he went around to the back porch, where he found Seamon, the husband of the deceased, whom he shot twice; the deceased grabbed up the child with her left arm, followed by the prisoner, who was on her
(621) right side. He fired at her once; she fell. She held to the child which he attempted to take from her, but she still clung to it, whereupon he fired upon her a second time while down on the floor.

The first exception was because the court ruled out a question by the prisoner to the coroner, whether from the course of the ball after it struck the body could the shot have been made while the parties were both standing. The witness was not an expert, and the question was properly excluded. Besides, the prisoner admits that he killed the woman with a deadly weapon. There is no suggestion that he shot in self-defense, and if he shot in defense of the child it does not appear that the position of the parties could have any bearing upon the case. The suggestion that he had a right to slay the mother because she would not surrender her child is an aggravation and not a defense. He testified that he told her to turn loose the child; that she said that she did not intend to do so; and that he fired to make her release the child. He says that the child was turning black in the face, and that the mother was holding to the child when she fell. The second shot was fired while she was on the floor, and he said he did not intend to hit her, but to frighten her so that she would release the child. It is not clear which ball was fatal, though both struck her, the pistol being so close to her body that the clothing was scorched. The prisoner having admitted that the killing was done with a deadly weapon, and no excuse appearing, he was guilty at least of murder in the second degree. *S. v. Fowler,* 151 N. C., 731.

The second exception is to the refusal of court to allow the prisoner to testify that he carried a pistol that day because on a former occasion, when the deceased and Seamon started to carry away the children, that

Seamon drew a pistol on him, and that he did not intend to use a pistol on this occasion unless necessary. The testimony was properly excluded, because: 1. The prisoner was not on trial for shooting Seamon. 2. The procuring of the pistol was prejudicial only if it tended to show deliberation and premeditation, and the prisoner has been acquitted of murder in the first degree.

The third exception is disposed of by what is said in regard to the second exception. As to the fourth exception the question as to the expert was properly excluded because it did not present to (622) the expert all the vital facts in the case, in the absence of which his opinion could not have any value upon the query whether the prisoner had sufficient mind at the time to understand what he was doing and to know whether he was doing right or wrong. The question did not recite that in July before, the prisoner had said that the deceased could not see so much pleasure and that he was going to kill her; that two weeks before the killing he said if she ever came back to Roanoke Island he would kill her; that on Sunday before the shooting he repeated the declaration; that on Wednesday before the shooting he said he was going to Elizabeth City to kill the deceased and Seamon; that when he got the pistol he said he was not going to use it if he could possibly avoid doing so; that he said he put the pistol in his vest pocket because he was afraid it would fall out of his hip pocket while he was running; that he said he shot Seamon because the latter put his hand to his hip pocket, and made a break at him; and that he had just testified on the witness stand that he shot the woman, not intending to kill her, but because he wanted to make her release the child. All these were vital facts and the expert could not give an opinion of any value as to the mental condition of the prisoner, at the time of the killing, upon a hypothetical recital of facts, which omitted these material circumstances. The hypothetical question must be so framed as to fairly reflect the material facts, either admitted or proved. Lawson Expert Ev., Rule 42 (2). As is well said by Chitty Med. Jur., "The opinion of an expert on half the facts of the case on which the jury are to decide must be utterly worthless, for it may well be that the same witness with all the facts before him would pronounce a very different opinion." In *Burgo v. State,* 26 Neb., 642, the Court says: "The necessity that the question shall fairly reflect the facts proved or admitted, where it is sought to show insanity as an excuse for crime, is apparent. The plea is in the nature of confession and avoidance. The avoidance—the insanity—is to be shown by the testimony. How can an expert give an intelligible opinion upon that point, or one that the jury would be justified in acting upon, unless the inquiry reflects the proof on that question? There must be a fair statement of

(623) the case to render the answer of any value whatever, as a partial statement or one founded on mere fiction, could not fail to mislead the jury, and probably cause a miscarriage of justice."

Besides, there was no evidence before the court of any fact or condition about which an expert could be expected to know any more than a man of average intelligence on the jury. The mere fact that the witness is an expert does not open the door for any and all opinions that he may care to express. Here there was not a scintilla of evidence that the prisoner's mind was ever diseased nor any suggestion of insanity in his family. There is no ground for the hypothetical question at all.

The exceptions to the charge can not be sustained. The judge properly told the jury that in no view of the evidence could they render a verdict of not guilty. There was no evidence tending to show self-defense. The judge did not err in instructing the jury that if the prisoner shot the deceased and killed her, and they were not satisfied beyond reasonable doubt, that the shooting and killing were the result of willful premeditation and deliberation, then the defendant was guilty of murder in the second degree. The prayers for the prisoner, which the court refused, were to the effect that "if the prisoner believed that the deceased was killing the child by choking the life out of it, he had the right to use such force as was necessary to save the life of the child, even if it was necessary to kill the deceased." As she was clinging to the child merely to prevent the prisoner from taking it from her, he could have secured the release of the child simply by desisting, and the prayer was properly refused. Though the prisoner testified that he did not intend to hit the deceased, he did not contradict the evidence that his pistol was so close that her clothes were scorched.

The jury might well have convicted of murder in the first degree. His Honor was also lenient in sentencing the prisoner to nine years in the State's prison. There was no prayer to present the phase of manslaughter to the jury, nor was there any exception for failure to do so. It was not raised by any phase of the evidence, nor could the defendant have received any prejudice, for the punishment imposed by the (624) court was less than half of that which could have been imposed upon a conviction for manslaughter. The case is notable for its abhorrent details, which present no justification for slaying, without provocation, a defenseless and fleeing woman, who had been the prisoner's wife.

No error.

STATE v. W. O. SANDERS.

(Filed 10 November, 1910.)

1. Judgment Suspended—Recognizance—Forfeiture—Evidence—Procedure.

Judgment having been suspended against the defendant, he being required to enter into bond conditioned that he appear at each term of court for two years and show he has kept the peace toward C. and W. and all other good citizens, and to further show that he had refrained from libel or slander, etc.: *Held,* (1) conviction of publishing, etc., indecent literature is not a violation of the bond; (2) conviction of an affray is a violation of its terms, and it was error in the trial court to hold it had no power to declare the bond forfeited.

2. Same—Record—Questions for Jury.

When the forfeiture of a recognizance is moved for, based upon matters appearing of record, the judge decides without the intervention of a jury; but upon issues of fact the defendant has a right to a jury trial thereof.

3. Same.

While Revisal, sec. 3216, provides that when evidence of conviction shall be produced in the court in which the recognizance is tried, it shall be the duty of the court to order the recognizance to be prosecuted, etc., yet though the proceedings are of a civil nature, they should be in the cause in which the recognizance is filed. When the facts are denied, an issue for the jury thereon is raised, and when conviction of an offense constituting a breach of the bond is alleged and denied, the proof to be submitted is the conviction in a court of competent jurisdiction; and the judgment should be entered in the court in which the recognizance was filed.

APPEAL by the State from *Ferguson, J.,* at March Term, 1910, of PASQUOTANK.

Attorney-General for the State. (625)
A. O. Gaylord for defendant.

CLARK, C. J. The defendant had been convicted at Spring Term, 1909, on two separate bills of indictment, one for libel of Cohoon and one for libel upon Wilson. Judgment was suspended upon payment of costs, and he was required to enter into bond in the sum of $500 conditioned that he appear at each term of the court for two years and show that he had kept the peace towards the said Cohoon and Wilson and all other good citizens of the State and to further show that he had refrained from libel or slander of said Cohoon and Wilson, or any other good citizen of the State.

On 4 September, 1909, the solicitor caused to be served upon the defendant and his sureties notice that he would move at the next term of

court for judgment and execution upon the verdict rendered at Spring Term, 1909, because of failure to comply with the conditions of his bond, and for affirmative violation of the conditions upon which judgment had been suspended. He filed an affidavit setting out the grounds upon which he contended his obligations had been violated. The judge declined to pronounce judgment upon the defendant.

The solicitor then moved the court to declare said bond forfeited. The defendant and his sureties filed a motion to dismiss the motion of the solicitor which was denied and judgment *nisi* was entered against the defendant and his sureties, who were ordered to appear at the next term, and show cause why judgment should not be made absolute.

At March Term, 1910, the judge found as a fact that the defendants under oath had denied the breach of the bond, admitting the publication of the matter alleged in the solicitor's motion and affidavit but denying that the same was libelous. The court further found as a fact that it did not appear that an indictment or civil action had been prosecuted against the defendant, and hence held that it was of the opinion that it had no power to declare the condition of the bond had been broken.

(626) The motion, therefore, for judgment was denied, and the cause retained to the end that if such matters were libelous, prosecution in either criminal or civil action might be had. From this order the solicitor appealed.

The record further sets forth the proceedings in three prosecutions against the defendant Sanders before a trial justice, all bearing date subsequent to date of bond; two for publishing, selling or having in his possession obscene and indecent literature, and one for an affray with one Harry Sheep. In all these cases the defendant had been adjudged guilty.

The judge might have pronounced judgment upon the suspended judgment but he did not choose to do so, and that matter is not before us. As to the motion for forfeiture of the bond, the two convictions for publishing, selling and having in possession obscene and indecent literature could not be a violation of a bond to keep the peace towards Cohoon and Wilson, and other good citizens. The conviction of an affray with Sheep is a matter of record, and is a violation of the terms of the bond. His Honor erred therefore in holding that he had no power to declare the bond forfeited.

When the forfeiture of a recognizance is moved for, if all the matters are of record, the judge decides without the intervention of a jury. But when the answer raises an issue of fact, the defendant is entitled to have the matter passed upon by a jury. The matter was fully discussed by *Pearson, J.*, in *Whitley v. Gaylord,* 48 N. C., 286. This was

cited and approved by *Buchanan v. McKenzie,* 53 N. C., 91; *S. v. Carroll,* 51 N. C., 458; *Purvis v. Robinson,* 49 N. C., 98.

His Honor also erred in holding that the matter must be settled by an independent proceeding. It is true that Revisal, 3216, provides "Whenever evidence of such conviction shall be produced in the court in which the recognizance was tried, it shall be the duty of such court to order the recognizance to be prosecuted, and the solicitor shall cause the proper proceedings to be thereupon taken." But such proceedings, to forfeit a recognizance which are civil in their nature should be taken in the cause in which the recognizance is filed. If the facts are not denied or are matters of record, the judge then and there decides the question. If the facts are denied the jury must be impaneled to pass upon them. If one of the facts alleged is that the defendant has been guilty of a criminal offense that is a breach of (627) the condition of his bond, and if this is denied then the proof that must be submitted to the court is the record of his conviction therefor in a court of competent jurisdiction. But the judgment that the recognizance has been forfeited must be entered in the court, and in the cause, in which said recognizance was filed. It is not required that the prosecution for the forfeiture of such recognizance shall be taken by an independent proceeding. This was held as far back as *Brown v. Frazier,* 5 N. C., 421, which was cited and approved in *Whitley v. Gaylord,* 48 N. C., 290, where *Pearson, J.,* says: "If the court may stop the proceeding and direct an action to be brought (which conflicts with *Brown v. Frazier,* 5 N. C., 421), that would necessarily cause delay, and defeat the intention to give a summary remedy."

In the respects above stated we find

Error.

Cited: S. v. Everett, 164 N. C., 406, 407; *S. v. Greer,* 173 N. C., 760.

STATE v. DAVE WHITFIELD, TOM WATSON, AND SAPP HOGAN.

(Filed 10 November, 1910.)

1. **Appeal and Error—Evidence—Sufficiency—Instructions.**

An assignment of error that the evidence was not sufficient to be submitted to the jury will not be considered on appeal in the absence of a prayer for special instruction to that effect, presented at the close of the evidence.

2. Secret Assault—Dynamite—Dwelling—Threats—Intent—Evidence Sufficient.

Evidence of a secret assault charged to have been made by three defendants by dynamiting a house in which one H. and his family were sleeping is sufficient to go to the jury which tends to show that H. had been employed by the chief of police of the town as a special detective to assist in executing the law against selling spirituous liquor, and had given information upon which the defendants had been indicted; the defendants had endeavored to induce H. to have the warrants withdrawn; the defendants were close friends and had made threats against H.; one of them shortly before the explosion making threats against his life, the other saying he would like to go to his funeral; two of them concurred in getting dynamite that same evening, and directed it to be placed under the house of H.; two called at the house shortly before the explosion and inquired for H., and the other was present immediately thereafter.

(628) APPEAL by defendants from *W. J. Adams, J.*, at June Term, 1910, of GUILFORD.

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

Attorney-General and G. L. Jones for the State.

Wilson & Ferguson, Morehead & Sapp, and John A. Barringer for defendants.

CLARK, C. J. The defendants, Hogan, Whitfield, Watson and Colwell, were indicted for secret assault upon Everett Hamilton, by dynamiting the house where Hamilton and his family were sleeping on the night of 12 June, 1910. They were all found guilty, and all but Colwell appealed.

The first assignment of error that the evidence was not sufficient to be submitted to the jury could not be considered, unless there was a prayer to that effect, presented at the close of the evidence. *S. v. Harris,* 120 N. C., 577, and cases there cited, and the annotations to that case in the Annotated Edition. However, as it is not entirely clear from the record whether such prayer was submitted, we will consider the error alleged.

The evidence is that Hamilton operated a small store in Greensboro, attached to which were three or four rooms in the rear which were used as a dwelling. This part of the house was blown up by dynamite on the night of 12 June, 1910, and the inmates narrowly escaped death. Soon after the explosion, the defendant Colwell was there and asked Hamilton if he had any idea who did it. A few moments before, some one stepped on the porch and said: "We want to stay all night; we are from Salisbury." At Hamilton's request, his wife replied that he was asleep, and she would not wake him, and besides, they had no room in the house, and they could not stay. Hamilton testified that

he recognized the voice as that of defendant, Hogan. The parties then left, and in a few minutes the blinds were thrown open, the window lights knocked out, and then followed the explosion. Hamilton also testified that the same evening the defendant, Whitfield, (629) his brother, Tom, and several others were at his house that while there, the defendant Whitfield asked Hamilton if there was a warrant out against him (Whitfield), and he replied that he thought there was; Whitfield then asked him to arrange to have it taken up, and offered to send the witness down street in a carriage. Whitfield's brother said to witness, in the presence of defendant, Whitfield: "I am going to get even with you." There was evidence that the mayor and chief of police had employed Hamilton as a detective to assist in executing the law against gambling, and liquor selling, and that he reported all these defendants, and that warrants were out for all of them at the time the dynamiting was done. Mrs. Hamilton testified that two days before the explosion the defendant Hogan came to her house, asked for Hamilton, and finding that he was not in, began cursing him, and said he would give him something to take out warrants for; said if he met him he would kill him. Another witness for the State testified that on Saturday evening, before the explosion that night, he saw the defendants, Whitfield and Watson, together, and heard Whitfield ask Watson if he had seen George Colwell, and upon his replying no, he asked Watson, "Have you got that dynamite?" who replied, "No, I gave your wife the money, and told her to get the dynamite, and put it under the lower corner of the house," and pointing to the corner of Hamilton's house said, "I told her to put it there." Whitfield said "I will kill Hamilton if he messes with my business," and Watson replied "I would like to go to his funeral"; that afternoon he saw Whitfield's wife, Whitfield and Watson together, and that after they separated he heard Watson call Loula (Whitfield's wife) and ask her to stop; that he then went up to her and gave her money and told her to get something, adding "Bring it back here." There was evidence that these four defendants were bosom friends and stayed and went together all the time. Hogan, when arrested, made contradictory statements as to his whereabouts that night.

There was evidence that these defendants were all much irritated against Hamilton because warrants had been issued against them, on account of evidence procured against them by Hamil- (630) ton, as a detective; that they had endeavored in vain to get him to withdraw the warrants; that they had made threats against him; that two of them had concurred in getting dynamite that same evening, and directing it to be placed under Hamilton's house; that one of them accompanied by other parties called at the house shortly before the

explosion, evidently to learn if Hamilton was at home, and that another was present immediately after the explosion, doubtless to learn if he had been killed, and that all four of these defendants were inseparable companions and engaged, probably jointly, in the illicit sale of spirituous liquor, for warrants were out against all of them at the same time, as the result of the detective work done by Hamilton. The judge did not err in submitting the case to the jury.

The other exceptions do not require serious discussion.

No error.

Cited: *S. v. Knotts,* 168 N. C., 187.

STATE v. CHARLES B. PLYLER.

(Filed 17 November, 1910.)

1. **Removal of Causes—Local Prejudice—Discretionary Powers—Appeal and Error.**

Generally a motion to remove a cause to another county for local prejudice is a matter within the sound discretion of the trial judge, and not reviewable on appeal, and nothing appears of record to make this case an exception.

2. **Murder—Evidence, Circumstantial—Link in Chain—Sufficiency.**

Upon a trial for murder many independent facts are permitted to be proven against the prisoner, which taken collectively, point to the conclusion of guilt; and when there is evidence tending to prove the prisoner's guilt by waylaying and shooting the deceased, or that he was present in person aiding or abetting it, it is competent to show that some days before the homicide the prisoner called the deceased out on his piazza at night and shot and wounded him. This, with other evidence of the prisoner's declarations, is competent as tending to show the animus of the prisoner toward deceased.

3. **Same.**

As one of the links in the chain of circumstantial evidence tending to prove the prisoner's guilt upon his trial for murder, it is competent to show that he went to the house of the witness after the homicide, about one o'clock a. m. of the same night, before he gave himself up, saying he wanted to talk about the case, and told the witness he had not done the shooting, but knew who did, and would not tell for fear of him, a dangerous character, etc., as such conduct on the prisoner's part was proper evidence for the jury to consider with other evidence tending to fix him with guilty knowledge of the crime.

4. **Murder—Opinion Evidence—Ordinary Inferences—Incompetency.**

An element of defense in a trial for murder being that the prisoner could not have gone from his house, where his evidence tended to show he

was at a certain time, to the place of the homicide, which soon after occurred, in time to have committed the crime, it was incompetent for him to ask a lay witness as to how long, in his opinion, it would take to go the distance, for the testimony called for was such as the jurors themselves could form an opinion of under the evidence which was introduced or capable of being introduced. But it is competent for the witness to testify, under defendant's objection, that he had gone from the one place to the other in a certain length of time as a matter of fact; and in this manner the prisoner got the advantage of the excluded question.

5. Murder—Circumstantial Evidence—Sufficiency.

The circumstantial evidence in this case as to the prisoner's guilt was examined and held to be sufficient to be submitted to the jury.

APPEAL from *William R. Allen, J.*, at August Term, 1910, of (631) UNION.

Indictment charging Charles B. Plyler, George Mayhew and John McManus with the murder of Carter Parks.

The defendant McManus was acquitted. The court below has now under advisement a motion to set aside the verdict as to defendant Mayhew as being against the weight of the evidence.

The defendant Plyler was convicted and sentenced to death. From the judgment of the court he appeals.

The facts are fully stated in the opinion of *Justice Brown.*

Attorney-General and G. L. Jones for State.

Adams & Armfield, J. J. Parker, and Williams, Lemmond & Love for defendant.

BROWN, J. 1. The prisoner excepted to the refusal of the (632) court below to remove the cause for trial to some adjoining county.

As admitted in the brief of the learned counsel for the prisoner it has been repeatedly decided by this Court that a motion to remove is almost always a matter within the sound discretion of the *nisi prius* judge and not reviewable here. Pell's Revisal, sec. 426, and cases cited.

We find nothing in the record which takes this case out of the general rule.

2. The prisoner excepts to the ruling of the court permitting the introduction of evidence by the State tending to prove that not long before the homicide the deceased had been called out on the piazza of his residence at night, shot at and wounded, as contended by prisoner, by an unknown person. The prisoner's contention is evidently based upon the theory that there is no evidence connecting the prisoner with this particular affair. Upon that theory the authorities cited by the learned counsel support the objection to the evidence.

In this case, however, there is abundant evidence, which, if believed, tends to prove not only that the deceased was shot on the occasion in question, but that the prisoner either did the shooting himself or was present in person aiding and abetting it.

The witness Richardson testified that the prisoner, just before the shooting occurred, said to witness, "You go back over there to Carter's house and get him on the porch and get him drunk; I am going to get him." The same witness said he was at deceased's house the night when the shooting occurred, and that he recognized defendant outside by his voice. Again, he testified that on another occasion, while defendant was talking to him about Carter, he (defendant) said: "Pace, I ain't afraid of nobody. I shot one man, and I am the very damned frog that muddied the pond."

In addition to this, the record shows other matters tending to connect the defendant with the first shooting, amply sufficient to convict him of the crime if he had been indicted for it.

It early became necessary for the protection of society that courts should permit the evidence of circumstances to establish the guilt of persons accused of crime. For this purpose many independent (633) facts are permitted to be proven, which taken collectively point to a certain conclusion. It has been well said: "Where the particular fact offered to be proved is equally consistent with the existence or nonexistence of the fact sought to be inferred from it, then the evidence can raise no presumption either way and should be excluded." *Rodman, J. S. v. Vinson,* 63 N. C., 335; *S. v. Brantley,* 84 N. C., 769.

If there was nothing to connect the prisoner with this particular shooting testified to by Richardson, it would be a collateral fact from which no inference could reasonably be drawn injurious to the prisoner and would therefore be incompetent. But when his extraneous crime has been brought home to the prisoner, then the fact becomes competent, because it is much more consistent with his guilt than it is with his innocence, of the crime of shooting the same person a short while after. *S. v. Alston,* 94 N. C., 932; 1 Wharton Crim. Law, secs. 631-670. A previous attempt by the prisoner to assassinate his victim is very potent evidence of the *quo animo,* the motive, and of a fixed purpose to take the life of the deceased.

There are a number of illustrative cases cited in Lawson on Presumptive Ev., 589, directly in point, some of which we cite: V is indicted for shooting at P with intent to kill. Proof that V at a previous time had shot at P is relevant. *S. v. Voke,* R. & R., 531.

A was indicted for poisoning his wife by giving her laudanum. The

fact that A had on a former occasion given her laudanum, which made her sick, is relevant. *Johnson v. State,* 17 Ala., 622.

In *Rex v. Dorset,* 2 C. & K., 306, defendant was charged with having willfully set fire to a haystack. The fact that, on a previous day, the rick was seen to be on fire and the defendant to be near it, was held relevant. While the cases cited by counsel for prisoner recognize the general rule that evidence of a distinct substantive offense can not be admitted in support of another offense, they also recognize the exceptions, within which the fact sought to be proved in this case clearly falls.

3. The prisoner excepted to evidence of a declaration made to P. P. W. Plyler, who testified that prisoner came to his house about 1 o'clock on the night that he gave himself up to the officers and (634) said he wanted to talk some about the case. He said "he did not do the shooting, but he knew who did it, and did not want to tell it for fear of what the man would do to him if they did not put him where he could not get to him; that he said he would kill him if he told, and he was a dangerous man."

This was both relevant and competent. The fact that the defendant went at 1 o'clock and waked witness and wanted to talk about the shooting, was conduct on the part of the defendant which the jury was entitled to consider along with the other evidence.

"Everything calculated to elucidate the transaction is admissible, since the conclusion depends upon the number of links, which alone are weak, but taken together are strong and able to conclude." *S. v. Bradham,* 108 N. C., 794.

Other declarations of the prisoner were introduced, over his objection, which we think were clearly competent, but it is unnecessary to notice them more particularly.

4. The prisoner introduced a witness, Starnes, and asked him this question: "State whether or not, in your opinion, Charlie Plyler could have walked from the barn the straightest line to the scene of the killing while you were going the distance to where you heard the gun fire." This was excluded by the court. He was then asked if it were possible for any man to have done it. This was also excluded.

One of the points made by prisoner in his defense is that he could not have walked from his premises where he was seen at a certain hour to the scene of the homicide in time to have fired the gun that is supposed to have killed deceased.

Evidence of the distance, character of the earth's surface, thickness of the woods, etc., was offered and received to establish prisoner's contention.

It was not proper, therefore, for the witness to pass on that conten-

tion. The rule in opinion evidence is that if all the facts are before the jury or can be placed there, then it is not competent for the witness to express his opinion upon such facts, as the jury can equally well draw the inference for themselves.

"If the jury can judge for themselves on this matter equally
(635) as well as the lay witness, it is obvious that it would be a waste of time to ask for any testimony from him or from a dozen or a hundred other persons no more capable than he of adding to the jury's own information." Greenleaf Evidence, 526.

The prisoner, however, got the full benefit of Starnes' knowledge because on cross-examination by the State he testified, against prisoner's objection, that he traversed the space between the barn and the scene of the homicide in three minutes. This evidence was not only competent, but was positive testimony to a material fact and was well calculated to assist the jury in determining whether or not it was possible for the prisoner to get to the scene of the homicide before the report of the gun was heard by a witness who had passed Plyler's place and seen him, and then gone some distance up the road. This witness had testified that it took him ten or fifteen minutes to go from the house to the place where he was when he heard the report of the gun.

5. We come now to the most important exception and one which impresses us with a deep sense of responsibility in a case of this gravity. The prisoner contends that, taking all the evidence to be true, it is not sufficient in probative force to warrant a conviction, and that the court erred in not directing a verdict of not guilty.

We have scrutinized the evidence with that care which the importance of the case demands, and have no hesitation in concluding that his Honor was fully justified upon the evidence in denying the prisoner's prayer. It is not necessary to go into the evidence in detail, but we will briefly refer to its salient features.

The deceased was a brother-in-law of prisoner and a near neighbor. He left his home Wednesday about six P. M. and was last seen going towards a spring in the woods near which his dead body was found on Friday following. That he was foully murdered by some one, who shot him in the back of the head from behind a tree, is manifest.

About the same time the deceased was seen going towards the spring, the prisoner, with two others, was seen to start from prisoner's premises in same direction, the prisoner saying, "Let's go and do what we said we were going to do." The woods extended from the place of
(636) the homicide up to prisoner's smoke-house, where he was seen by one witness ten or fifteen minutes before the gun fired which was supposed to have killed the deceased.

There is abundant evidence of ill will, bad blood motive, and espe-

cially an attempt by prisoner to assassinate deceased at night by shooting him on his piazza from ambush a short while before the homicide. There is evidence of threats to kill made not long before the homicide. After the discovery of the body there is evidence that prisoner attempted to induce certain persons to "keep their mouths shut." Declarations of the prisoner, as well as his acts, tend to prove that he knew who killed Parks and all about the homicide, but refused to say who it was that committed the murder. There was further evidence that Plyler had a talk with a witness in a restaurant on the day the body was found, in which he said it did not make much difference about Parks being killed; he was a sorry man anyway.

There was also evidence that after the body was found and the investigation began, the defendant tried to escape.

6. Several exceptions are taken to the charge of the court upon the quality of circumstantial evidence and when it is proper to convict or acquit.

This matter has been discussed so much by the courts that we will not "thresh over old straw." We copy that portion of his Honor's charge and give it our full approval as a lucid statement of the law, at which the prisoner has certainly no reason to complain.

"The law says that circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of truth; and it is essential and when properly understood and applied is highly satisfactory in matters of the gravest moment. The facts, relations, connections and combinations between the circumstances should be natural, clear, reasonable and satisfactory. When such evidence is relied upon to convict, it should be clear, convincing and conclusive in all its combinations and should exclude all reasonable doubt as to guilt. In passing upon such evidence, it is the duty of the jury to consider all circumstances relied upon to convict and to determine whether they have been established beyond a reasonable doubt. If not so established, the circumstance should be excluded from further con- (637) sideration and have no weight in reaching a verdict. The State puts up a witness here and undertakes to prove a circumstance; you will first determine in your mind, is this circumstance established beyond a reasonable doubt? If you say that circumstance has been established beyond a reasonable doubt, you take that into consideration in determining what verdict you will find.

"After considering the evidence in this way, and determining the circumstances which are established beyond a reasonable doubt, the next thing for the jury to determine is, Do these circumstances exclude every other reasonable conclusion except that of guilt? If so the evidence is sufficient to convict; otherwise, not."

The last objection which the defendant raises is to the fact the jury were told, during their deliberations, of another murder in the same section of the county, which was committed during the trial of this case. The judge presiding took every precaution that he could in the matter. He sent word at once to the officer who had the jury in charge not to let the matter be disclosed to them. This was too late, though, for they had already been apprised of it. We do not think there is anything in this, nothing else appearing, which should entitle the defendant to a new trial. Nothing in the record shows, so far as the record discloses, that the jury took this matter into consideration one way or another.

Upon a review of the entire record, having considered every assignment of error, we are of opinion that they are without merit and that there is

No error.

Citcd: *S. v. Rowe,* 155 N. C., 445.

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(638)

STATE v. ED. COX.

(Filed 23 November, 1910.)

1. **Murder—Deadly Weapon—Malice—Burden of Proof.**

The admission that a homicide was committed by the prisoner with a pistol, a deadly weapon, implies malice and raises a presumption of murder in the second degree, casting upon the prisoner the burden throughout the trial of showing all matters in mitigation to reduce the crime to manslaughter or to prove self-defense.

2. **Murder—Self-defense—Repellant Force—Burden of Proof.**

For self-defense the prisoner must prove that the force he used was exerted in good faith to prevent the threatened injury, and was not disproportionate to the force it was intended to repel, the question of excessive force and the real or apparent necessity for its use upon the facts presented being for the jury to determine.

3. **Same—Proving Attack—Cessation—Instructions.**

When evidence is conflicting upon the plea of self-defense, it is correct for the trial judge to charge, in effect, that if the jury found that after the accused brought on the difficulty resulting in the death of the deceased he withdrew from the encounter or gave deceased reasonable grounds to believe that he had done so, and did not desire to continue the conflict, but the deceased pursued the accused with an open knife and continued to strike him with it, the accused could defend himself as if he had not originally provoked the fight, if the jury found he had provoked it; but that such withdrawal, if so found by them, must have been made in good faith and not as a cover of the deceased to draw the pistol with which the deadly wound was (as in this case, admittedly) inflicted.

4. Evidence—Instructions—Contentions—Objections and Exceptions.

There was no error in this case made by the trial judge in fairly stating to the jury the various contentions of fact by the parties. He clearly stated they must not consider that he was intimating how the facts should be found by them, the finding of the facts being solely for them; and an omission to recapitulate the evidence favorable to a party is not assignable for error, if not pointed out at the time.

5. Murder—Malice—Verdict—Objections and Exceptions, Immaterial.

Exceptions relating only to questions of malice, upon a trial for murder, become immaterial when the prisoner is convicted of murder in the second degree.

6. Murder—Self-defense—Malice—Unnecessary Force—Evidence.

When there is evidence tending to show that the prisoner several times fired upon the deceased, which resulted in death, a prayer for special instruction, based upon the theory that if the first shot fired was the fatal one, and in self-defense, the other shots had no bearing upon the guilt or innocence of the prisoner on the question of murder or manslaughter, is properly refused, the fact that the other shots were fired being competent as tending to show they were through malice and rage, in contradiction of the idea of self-defense.

7. Murder—Repellant Force—Defense of Another—Son—Evidence.

A son entering a fight to protect his father can justify his act in killing the father's assailant for his protection only to the same extent and under the same circumstances that would justify his father's acts in self-defense.

APPEAL by defendant from *Long, J.*, at August Term, 1910, (639) of MECKLENBURG.

Attorney-General and G. L. Jones for the State.
Osborne, Lucas I. Cocke, and McCall & Smith for defendant.

CLARK, C. J. The prisoner, Ed. Cox, was convicted of manslaughter and sentenced to the State's prison for a term of five years. From this judgment he appeals. The evidence fills nearly 100 printed pages. Graphically, but not unfairly, the Attorney-General sets out in his brief what occurred, as follows: "It was on the ball ground that Mack Cox unfurled the flag of his clan. He flung the epithet 'Son of a_____,' into the teeth of Reece Hucks; but the Huckses, though doughty, are not ready warriors, and they refused to be goaded into battle. It was Charles Cox, father and patriarch of the clan that started the fight. He says he went into Holbrook's store, but when his eye rested on Bat Davis he at once maneuvered for battle. He saluted his enemy, but Bat kept silent. He next flung out an accusation that Bat had flung a dead dog into his yard, and Bat admitted the charge. Then, said Cox, 'I grabbed him.' Bat tried to get away, but Charles held fast, and Mack

Cox struck Bat over the head with a stool while he and Ed. made proclamation that no man should interfere. Charles' own account of this engagement is terse and vigorous. 'Davis got one hand wrapped around my head. He is a tall fellow; he got one of his fingers
(640) in my eye and I was holding him with my right hand, and I just reached up and caught his finger from out of my eye and stuck it in my mouth and just walked out. When we got out of the door I suppose we walked as far as the jury door, angling up the street, and then I threw that right foot out and threw him on his face and got on him and stuck my fingers in his eyes. He was hollering as hard as he could and some one stabbed me on the hip with something.'

"Gilreath Davis, of the Hucks faction, then came up, crying out, 'Come on, the boys are in it.' But Mack Cox intercepted him with a bottle and knocked him out of the door. Next Adrian Hucks came up and, in the language of Ed. Cox, 'Uncle Mack administered on him.' Meantime Ed. Cox, with his hand in his coat pocket on his pistol, was daring anybody to touch the parties, though Davis was crying aloud for mercy and Charles Cox was trying to dig out his eyes.

"The evidence for the State shows that Ed. Cox next approached Reece Hucks with his pistol in his hand, that he abused him, called him vile names, told him he had to get into the fight, and finally struck him. That the parties then clinched and Hucks backed up the street, backed twenty-five or fifty feet. That while the parties were backing Lester Hucks ran up behind and struck Ed. Cox. Cox then ducked and pulled back and this was the very first movement he ever made indicating any desire or willingness to quit the fight. He ducked and jerked away, and as soon as he was free from Hucks he pulled his pistol, advanced and fired. That at the first shot Reece Hucks exclaimed, 'He has killed me!' and fell and Cox deliberately fired two more shots into his prostrate body.

"Meantime Mack Cox had jerked Lester Hucks off, had thrown him into the street and the parties had clinched. When Ed. Cox had shot Reece Hucks three times he turned and fired twice at Lester Hucks, who was then engaged in battle with Mack Cox. Reece Hucks got to his feet, seized a chair and with it knocked Mack Cox down a time or two, and the fight was over."

He gives the casualties as follows:

(641) "Reece Hucks, mortally wounded.

"Lester Hucks, knocked into a ditch by Mack Cox.

"Adrian Hucks, 'administered upon' by Mack Cox.

"Gilreath Davis, knocked out of a store with a bottle in the hands of Mack Cox.

"Bat Davis, knocked on the head with a stool, beaten up and his eyes gouged.

"Charles Cox, cut with a knife in the hip.

"Ed. Cox, badly cut up on the head, face and back.

"Mack Cox, shot in the arm by Ed. Cox, who was aiming at Lester Hucks, and subsequently knocked down two times with a chair in the hands of Reece Hucks."

The Attorney-General adds: "Truly, there was beautiful fighting along the whole line, and if any member of the Cox clan showed any unwillingness to enter the fight, or, being in, any disposition to withdraw or retreat from the fight it is not written down in the history of the battle."

The prisoner testified among other things that he had taken three or four drinks, but was not drunk; that he did not know how many fights he had up till the time he killed Reece, but had had a good many; that he had a fight with Reece Hucks the Christmas before the killing; that he did not call it a fight, but a shooting match; that they shot at each other; that he could not deny that he had had eleven fights in two years; didn't think he had had any more than that; that on this day the Coxes were on one side and the Davises and Huckses on the other; there were seven of the Coxes, including their close kin; says he saw his father on Davis beating him; wasn't caring if he beat him; that he knew a man mean enough to kill his daddy's dog ought to have a beating; says that after "we had administered on Adrian, he said he wouldn't have anything more to do with it. He ran back in there. I got him out of range. When I got back Uncle Homer Cashion had Gilreath Davis. Bat was on the ground hollering. Reckon that was one I had fixed. Reckon Uncle Homer Cashion had fixed Gilreath Davis which made two."

This fight occurred at a Farmers' Union picnic at Huntersville 21 August, 1909, just after sundown, when all parties were pre- (642) paring to go home. The evidence for the State all went to show that the prisoner provoked the deceased to fight and that the prisoner was the aggressor. The prisoner sought to show that the deceased was attempting to take part in the fight between Charles Cox and Bat Davis, and was intending to cut the prisoner's father, and that the deceased was the aggressor. The case was fairly left to the jury, who convicted the prisoner of manslaughter. The result of the fight was not altogether as disastrous as the classical one between the Clan Quhele and the Clan Chattan on the North Inch of Perth, as told by Sir Walter Scott, but from the evidence all the parties engaged on this occasion fought as willingly.

Exception 1 of the prisoner can not be sustained. The killing with a deadly weapon was admitted and this raised a presumption of murder in the second degree, and the burden was upon the prisoner to show

all matters in mitigation either to reduce it to manslaughter or to prove killing in self-defense. *S. v. Fowler,* 151 N. C., 731; *S. v. Hagan,* 131 N. C., 802; *S. v. Brittain,* 89 N. C., 501. "This burden continues to rest upon him throughout the trial." *Walker J.,* in *S. v. Capps,* 134 N. C., 627, where the subject is fully treated.

Exception 2. The court correctly charged that in order to make good the plea of self-defense the force used must be exerted in good faith to prevent the threatened injury, and must not be excessive or disproportionate to the force it is intended to repel, but the question of excessive force was to be determined by the jury. *S. v. Quick,* 150 N. C., 825; *S. v. Goode,* 130 N. C., 651; *S. v. Gooch,* 94 N. C., 987; Bish. New Cr. Law, sec. 893.

Exception 3 can not be sustained. In *S. v. Blevins,* 138 N. C., 668, the Court said: "The necessity, real or apparent, for killing one's assailant to protect one's self is a question to be determined by the jury on the facts as they reasonably appeared to the one assailed."

Exception 4 is simply a repetition, in effect, of exception 1. The Court followed the authorities. In *S. v. Worley,* 141 N. C., 764, *Brown, J.,* said: "The killing with a deadly weapon implies malice, and where this is admitted or proved, the prisoner is guilty of murder
(643) in the second degree, and the burden of proof rests upon him to prove the facts upon which he relies for mitigation or excuse to the satisfaction of the jury," citing *S. v. Exum,* 138 N. C., 599; *S. v. Capps,* 134 N. C., 622; *S. v. Hicks,* 125 N. C., 636; *S. v. Booker,* 123 N. C., 713.

The prisoner seems to rely principally on Exception 5 to the charge because his Honor told the jury: "If, however, you find that the accused brought on the difficulty and he in good faith withdrew from it, and showed to the prisoner that he withdrew from it, or gave him reasonable grounds to believe that he had, and that he did not desire to continue the conflict, and you find that the deceased kept up and pursued the fight, and was striking the prisoner with an open knife, under such circumstances, if so found by you, from the evidence, the defendant had the right to defend himself as if he had not originally provoked the fight, if you find that he did provoke it; but his withdrawal, if you find that there was such withdrawal, must have been made in good faith; it must not have been as a cover for the purpose of drawing a pistol or to obtain an advantage and kill his adversary." This charge was a correct statement of the law and was justified by the evidence, and taken in connection with the 6, 7 and 8 special instructions which were given at the request of the prisoner was fully as favorable as he could ask.

In *S. v. Garland,* 138 N. C., 678, *Hoke, J.,* says: "It is the law of

this State that where a man provokes a fight, by unlawfully assaulting another and in the progress of the fight kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the original assailant to kill in order to save his own life. This is ordinarily true, where a man unlawfully and willingly enters into a mutual combat with another, and kills his adversary. In either case, in order to excuse the killing on the plea of self-defense, it is necessary for the accused to show that he quitted the combat before the mortal wound was given, and retreated or fled as far as he could with safety, and then, urged by mere necessity, killed his adversary for the preservation of his own life." To the same effect in *S. v. Medlin,* 126 N. C., 1127, where *Mr. Justice Douglas* carefully reviewed the authorities.

Exception 14 is covered by what is said in regard to exception 5. Exceptions 6-20, inclusive (excluding sec. 14), are to the (644) statement of the contentions of the State and the prisoner by the court. Before stating these contentions his Honor, out of abundant caution, told the jury "when I call your attention as to how the prisoner insists that you should find the facts from the testimony of the witnesses and when I do the same for the State, I do not intimate to you how to find the facts, because the burden is upon you to find the facts from the evidence. I simply direct your attention to certain contentions they make as to how you shall find the facts, and those contentions are valuable to you if the evidence in the cause supports those contentions made by one side or the other." In this the court followed the usual practice, which is often useful to the jury and when fairly made, as here, can not be prejudicial to either side. In *Clark v. R. R.,* 109 N. C., 431, it is said, "it is not error in the Court to recapitulate fairly such contentions of counsel as illustrate the bearing of evidence upon the issues. The omission to recapitulate evidence favorable to a party is not assignable for error, if not pointed out at the time." *S. v. Grady,* 83 N. C., 643; *S. v. Reynolds,* 87 N. C., 544.

Exceptions 20 and 21 relate only to the question of malice, and as the jury has found the prisoner guilty only of manslaughter, they have become immaterial.

Exception 22, which is the last, is to the refusal of the court to charge the jury, when requested: "If the jury believe the evidence the first shot fired was the fatal one, causing the death of the deceased. If you find said first shot was fired in proper self-defense the guilt or innocence of the prisoner on the charge of murder or manslaughter is not affected by his firing two other shots at the deceased after the fatal one." This prayer was properly refused.

The fact that the prisoner fired two shots into the body of the victim

after he fell was evidence tending to show that he was acting through malice or rage, and not in defense of his life, and that he was disposed to use and did use unnecessary force. In *S. v. Quick,* 150 N. C., 825, *Brown, J.,* said: "There is evidence tending to prove that while the prisoner may have entered the affray unwillingly and have fired (645) at first in self-defense, yet he continued to fire as is contended, unnecessarily. The prisoner himself admits that he was the only person that shot the deceased, and that he fired four times at him. There are circumstances in evidence which surround the occurrence from which it may be fairly inferred that the prisoner's repeated firing was unnecessary, and possibly further wounded the deceased after the latter had ceased to fire, and was disabled. It is well settled that if the prisoner entered the fight in self-defense and without malice but used unnecessary force, which resulted in death, it is manslaughter, and the question of excessive force is peculiarly one for the jury."

In the oral argument here the prisoner's counsel earnestly contended that the prisoner had the right to enter the fight to protect his father, but he only had that right to the same extent and under the same circumstances under which the father himself could have used force. If the father entered the fight willingly, and had not afterwards withdrawn from the fight and retreated to the wall, or if he used excessive force, he would have been guilty if he had slain his assailant. The same principle would apply to the conduct of the son, fighting in defense of a father who had not retreated to the wall or if the prisoner used excessive force.

The prisoner has no cause to complain of the verdict of the jury who upon the evidence might well have found a verdict for a higher offense. The sentence of the court was certainly moderate, and was dictated, we presume, by the opinion of the judge that the father of the prisoner was the guilty cause of the slaying of the deceased, and the wounding of so many others. The fear of the law and the certainty of punishment, should be such as to prevent the recurrence of such events in this State. This can be done only by making the consequences of such conduct exceedingly unpleasant and disagreeable to those, who in thorough contempt of the law and the courts, perpetrate such acts.

No error.

Cited: S. v. Johnson, 161 N. C., 266; *S. v. Greer,* 162 N. C., 648; *S. v. Blackwell, ibid.,* 683; *S. v. Fogleman,* 164 N. C., 461; *S. v. Lane,* 166 N. C., 339; *S. v. Robertson, ibid.,* 365; *S. v. Cameron, ibid.,* 384; *S. v. Pollard,* 168 N. C., 121; *Nevins v. Hughes, ibid.,* 478; *Lloyd v. Venable, ibid.,* 536; *S. v. Wade,* 169 N. C., 308; *Ball v. McCormack,* 172 N. C., 682; *S. v. Johnson, ibid.,* 925; *S. v. Foster, ibid.,* 964; *S. v. Martin,* 173 N. C., 810.

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STATE v. GREGORY.

(Filed 7 December, 1910.)

Indictment—Counts—Receiving Stolen Goods—Conviction—Verdict Sufficient—Intendment.

The verdict of a jury should have a reasonable intendment and receive a reasonable construction; and when an indictment charged the defendant with larceny and receiving stolen goods the property of H., he was tried for receiving the goods knowing them to be stolen, and the evidence tended to show that they were stolen by D. and received by the defendant with guilty knowledge, and to this count of receiving the evidence and charge of the court were alone directed; the record stating that the judge correctly charged "upon all phases of the evidence," the conclusion is indisputable that the jury intended to convict the defendant of the crime alleged in the indictment and for which he was tried, in rendering the verdict, "We find the defendant guilty of receiving goods, knowing them to be stolen," and it is sufficient for conviction. *State v. Whitaker*, 89 N. C., 473; *State v. Parker*, 152 N. C., 790, cited and distinguished.

APPEAL from *Webb, J.*, at March Term, 1910, of HENDERSON.

The facts are sufficiently stated in the opinion of *Justice Walker*.

Attorney-General Bickett, G. L. Jones, and Michael Schenck for the State.

C. F. Toms, Staton & Rector, and H. G. Ewart for defendant.

WALKER, J. The defendant was indicted in the court below for larceny and receiving stolen goods, the property of the Henderson Wholesale Grocery Company. He was tried for receiving the goods knowing them to be stolen. The evidence tended to show that the goods had been stolen by Dave Harris and received by the defendant with the guilty knowledge. The evidence and charge of the court were all directed to the particular crime alleged in the second count, that is, the one for receiving. There was no evidence of any other crime having been committed by the defendant, and as it is stated that the court fully informed the jury as to the law "upon all phases of the evidence," we must assume the judge gave proper instructions (647) and told the jury that, unless they found beyond a reasonable doubt the defendant had received the goods described in the indictment, knowing them to have been stolen, they should acquit him, and they could convict only if they found that he was guilty as charged in the count for receiving. This charge, of course, confined the jury, in the consideration of the case, to the single question whether the defendant was guilty of the offense, in manner and form, as alleged in the second count of the indictment. The jury returned the following verdict: "We

find the defendant guilty of receiving goods, knowing them to be stolen." The defendant moved for a new trial because the verdict is defective, in that it is not found to whom the goods belonged, nor does the verdict show that the defendant has been convicted of the crime alleged in the indictment. He also moved to arrest the judgment. The court refused both motions, and from the judgment upon the verdict, the defendant appealed.

It is contended that the jury may have convicted the defendant of receiving stolen goods other than those described in the bill. The verdict should be read in connection with the issue being tried, the evidence and the charge of the court. *Greenleaf v. R. R.*, 91 N. C., 33. This is so in a civil action and we do not see why the same rule should not apply to an indictment. *S. v. Long*, 52 N. C., 24. We have frequently held that where there are several counts in a bill and a general verdict is rendered without specifying the count upon which it is given, we can look to the evidence and to the charge, and if it is found from them that the trial related to only one of the counts, the verdict will be restricted to that count. *S. v. Long, supra; Morehead v. Brown*, 51 N. C., 367; *S. v. Leak*, 80 N. C., 403; *S. v. Thompson*, 95 N. C., 596; *S. v. Gilchrist*, 113 N. C., 673; *S. v. McKay*, 150 N. C., 816. The verdict is to have a reasonable intendment and should receive a reasonable construction. It should not be avoided except from necessity. Clark Cr. Prac., 486, and cases cited. Why should we infer that the jury intended to convict the defendant of an offense which was not stated in the bill and of which there was no evidence? Is it not more reasonable and sensible to conclude that they obeyed the judge's instructions (648) and considered only the evidence in the case? In *S. v. May*, 132 N. C., 1020, it is said by *Douglas, J.*, that "when an indictment contains two counts, but the evidence, instructions of the court and the argument of counsel refer to one of the counts only, it will be presumed that the verdict followed the trial and related to such count." If the presumption was permissible in that case, it would seem to apply as well to the facts of this case. In *S. v. Hoback*, 69 Va., 922, the defendant was found guilty of "unlawfully shooting with intent to maim," without stating the name of the person upon whom it was alleged in the bill the assault had been committed. The court, after saying that the verdict must always be read in connection with the indictment, and if it appear, upon reading them together, what is meant by the verdict, it is sufficiently certain, as it refers to or adopts the indictment, either expressly or by clear implication, concludes with these words: "Can we place upon the verdict so unreasonable a construction as to make it doubtful whether the jury intended to find that Brown Seagle was the person shot, or that no person was in fact shot?" In *Guenter v. People*,

24 N. Y., 100, the bill contained counts for larceny and embezzlement, and the verdict was "guilty of embezzlement." The defendant contended that the verdict was void for uncertainty, because it did not find the defendant guilty of the embezzlement charged in the indictment, but the court replied: "The verdict is not void for uncertainty. It finds the prisoner guilty of an offense charged in the indictment, and means that offense as charged therein. Its effect is the same as would be a verdict of guilty under a single count. The words 'of embezzlement' were added to designate to which offense they intended the verdict to apply." *S. v. Wilson,* 40 La. Ann., 751. In *S. v. Kinsauls,* 126 N. C., 1095, the defendant was indicted for murder of the person named in the bill and the jury found him "guilty of the felony of murder in the first degree." The judge, the next day after the verdict, added thereto the following words: "In the manner and form as charged in the indictment." The court held the verdict, as returned by the jury and without the added words, to be sufficient and that the amendment of the judge was merely formal and not prejudicial to the defendant. We can not avoid the conclusion that the jury intended to convict the (649) defendant of the crime alleged in the indictment and for which he was tried. *S. v. Whitaker,* 89 N. C., 472, and *S. v. Parker,* 152 N. C., 790, cited by the defendant's counsel in their brief, are not in point. In both cases, the jury found the defendant guilty of the commission of an act which was not criminal. The defendant may have committed the act and yet not have been guilty of the crime alleged in the indictment. An essential element of the crime was omitted by the verdict, in the one case, the "guilty knowledge," and in the other the "concealment of the weapon."

We find no error in the record.

No error.

IN RE PRINTING OF THE SUPREME COURT REPORTS.

1. Supreme Court Reports—Public Printing—Commission of Labor and Printing.

The Supreme Court Reports are a part of the public printing, and the Commissioner of Labor and Printing is charged with the same duty of furnishing paper and stationery therefor, and in the examination and superintendence thereof, as is required for the other public printing. Revisal, sec. 5095.

2. Supreme Court Reports—Printing—Contracts.

By Revisal, sec. 5093, the duty of contracting for the printing of the Supreme Court Reports is confided to the Supreme Court, and with reference thereto this is an exception to section 5092 requiring that such contracts be made by the committee therein designated.

3. Same—Kind and Style.

Upon the Supreme Court devolves the duty only of selecting the printer and directing the style and general execution of the work, the price of which is restricted to that allowed and fixed by the committee. Revisal, secs. 5093, 5095.

4. Same—Size of Volumes.

Until otherwise directed by the Court, the Reports will be leaded, and in all other respects conform as to paper, binding, type and general make-up with Volume 150 of the Reports, and average, as nearly as may be, 800 pages each.

(650) PER CURIAM. We are of opinion: 1. That the printing of the Supreme Court reports is a part of the public printing of the State, and as such, Revisal, 5095, devolves upon the Commissioner of Labor and Printing the duty to examine the printing and binding, and certify the workmanship thereof, and pass upon the accounts rendered, and furnish paper and stationery therefor, in the same manner as for all other public printing.

2. We are further of opinion that as to contracting for the printing of the reports—a matter with which the Commissioner of Labor and Printing is not charged—the duty is confided to the Court to select the printer, and direct the manner in which the work shall be done, and supervise the general conduct of the same in order that the reports may be issued promptly, and shall in all respects conform to the style of printing and binding designated by the Court. Revisal, 5093, is an exception to Revisal, 5092, by which the contracting for the State printing generally is entrusted to the committee therein designated.

3. As section 5093 restricts the Court to the prices allowed and fixed by the committee for the other public printing of the State, and Revisal, 5095, devolves upon the Bureau of Labor and Printing the passing upon the accounts and workmanship and furnishing the paper, it practically results that there devolves upon the Court merely the duty of selecting the printer, and directing the style and general execution of the work. As the price is already fixed by the committee on printing, the Court can contract either verbally or in writing with the printer who shall receive the same prices as are allowed by said committee under Revisal, 5092.

In accordance with the above views, the Court will from time to time select its own contractor for the printing of the reports of the Court. Until otherwise directed by the Court the reports will be leaded, and in all other respects conform as to paper, binding, type, and general make-up with Vol. 150. The volumes will average as near as may be, 800 pages each.

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CARRIERS OF PASSENGERS—*Continued.*

whether the plaintiff had wrongfully been ejected, and that of actual damages for humiliation suffered, etc. *Ibid.*

10. *Same—Ejection from Train—Evidence.*—Therefore, when a passenger being entitled thereto has tendered the proper coupons from a mileage book for his fare, and the same having been refused, he is wrongfully expelled from the train, the fact that he might have avoided the result by paying his fare in money wrongfully required of him, is not a relevant circumstance on the issue as to the amount of damages. *Ibid.*

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5. *Interpretation—Questions of Law—Words and Phrases.*—When the terms of a written contract are explicit its construction is for the court; and the word "*or*" of a contract to construct a railroad from F. to H. "to a depot to be erected within *or* adjacent to the present southern limits of H." will not be construed as "*and*," so as to require the road to be constructed to a depot to be erected "*within and* adjacent to" the town limits, for therein the substitution of a conjunctive for a disjunctive attaches a qualification that necessarily changes the terms and meaning of the contract in an essential feature. *Bridgers v. Armand*, 113.

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7. *Warranty—Breach—Measure of Damages.*—The general rule is that the measure of damages for a breach of warranty in the sale of goods having a market value is *prima facie* the difference in the market value at the time and place of delivery, between the goods as they were and as they would have been had the warranty been complied with. *Ibid.*

8. *Same—Instructions.*—In the present case, being a sale of a piano with a warranty against certain defects, the above rule is substantially complied with, in the absence of a more specific prayer for instruction, by a charge, that "if there was a breach of warranty causing damages, the measure of damages would be the lessened value of the piano by reason of the defects complained of and shown to exist." *Ibid.*

9. *Gaming—Intent—Void—Cotton Futures—Questions for Jury.*—When a defense to an action brought upon contract is that it was given upon an illegal consideration and made in contravention of public policy; that it was merely a gaming contract, with a profit to the one party and loss to the other, based upon the rise and fall of the cotton market, without contemplating the actual delivery of the cotton, the form of the contract is not conclusive in determining its validity; and if upon issue joined the jury find that it was a gaming contract of the character indicated no recovery thereon may be had. *Egerton v. Egerton*, 167.

10. *Gaming—Certainty of Amount—Void—Penalty—Forfeiture.*—A gaming contract in cotton futures is void and no recovery can be had thereon,

CONTRACTS—*Continued.*

irrespective of whether the amount of the stake is certain or uncertain, and recovery can not be had of a penalty in a fixed sum specified in a contract of this character as a forfeit for its breach. *Ibid.*

11. *Written—Conditional Delivery—Evidence.*—It is competent to show that a written instrument to answer for the faithful discharge of the duties of another as manager of a corporation, or to answer for his debt or default, etc., was handed by one of the signers to the obligee therein named, subject to the control of the person delivering it, or upon an agreed condition, and not as a completed instrument; and when there is evidence that the manager has delivered such instrument to the president of the corporation for which he acts, upon the understanding that it was to be delivered to the board of directors when another had signed as surety, the person to whom it was delivered is a mere depository until the condition is complied with. *Dunlap v. Willett*, 317.

12. *Offer—Acceptance.*—Until an acceptance is made according to the terms and conditions of an offer to lease lands, the negotiation is open and no obligations are imposed. *Green v. Grocery Co.*, 409.

13. *Same—Interpretation of Contract.*—The written correspondence between the parties relating to the leasing of certain hotel property being interpreted and held not to constitute a completed contract in an action to recover $400 deposited as for money had and received. *Held* (1) the defendant having failed to confirm by wire the plaintiff's offer contained in the letter enclosing the $400 security money, the plaintiff had the right to withdraw the offer and recover back the money with interest; (2) the defendants could not recover on their counterclaim for damages; (3) there being no contract, plaintiff could not recover damages for the breach of one. *Ibid.*

14. *Written—Parol Evidence—Admissibility.*—When the subject-matter of a contract does not require that it be in writing, and it appears that it was partly written and partly oral, the oral part may be proved when the written part is in evidence, if the written part is not thereby varied, altered, or contradicted. *Kernodle v. Williams*, 475.

15. *Same—Parent and Child — Bonds — Payment Upon Contingency—Advancements.*—The father sued his daughter and son-in-law to recover upon a bond given him by them in a certain sum due one day after date. *Held*, it was competent to show in defense by parol evidence that by a contemporaneous oral agreement, the defendants were to pay and did pay certain amounts upon the bond, and that the balance was only to be accounted for in settlement with the father's estate as an advancement, and that no actual payment thereof was to be made unless needed to pay debts of the estate. Such an agreement did not contradict the terms of the bond, and thereunder the full amount should be paid upon the happening of the contingency, *i. e.*, the necessity thereof to pay the debts of the estate. *Ibid.*

16. *Same—Ordinance—Alternate Powers—Option.*—When a valid and accepted ordinance of a municipality authorizes a public-service electric company to make a certain maximum charge for furnishing electricity to its citizens by meter rate and a certain maximum charge by flat rate, the accepted ordinance being the contract under which the com-

CONTRACTS—*Continued.*

plaining citizen alleges his right to change from a meter rate to a flat rate, the right being granted to the defendant in the alternative, gives to the electric company the option to furnish at a reasonable charge electricity to the citizen upon either the flat or meter basis. *Horner v. Electric Co.*, 535.

17. *Married Women — Executory Contracts — Separate Realty — Charge— Husband's Written Consent.*—A married woman's separate real estate is not responsible for damages arising from the breach of her written agreement of purchase of personal property, though the husband had given his written consent. *Bushnell v. Bertolett*, 564.

18. *Public Officers—Interest—Interpretation of Statutes.*—Upon the facts found by the special verdict in this case, there is not sufficient evidence of guilt for conviction, as the meaning of the statute, Revisal, 3572, does not extend to contracts between a city and those having as an employee a city alderman. *S. v. Weddell*, 587.

CONTRIBUTORY NEGLIGENCE. See Negligence; Evidence.

1. *Railroads—"Look and Listen"—Evidence.*—It appearing that plaintiff's intestate, deaf and dumb, endeavored to rush across defendant's track in front of a rapidly approaching train and was killed, and that the approach of the train could readily have been seen by him when within eleven feet of the track, his contributory negligence bars his recovery. *Mitchell v. R. R.*, 116.

2. *Evidence — Plaintiff's Proof — Nonsuit.*—Contributory negligence is a matter of defense, but a motion as of nonsuit upon the evidence should be allowed when plaintiff's own proof establishes this defense. *Ibid.*

3. *Proximate Cause—Last Clear Chance—Railroads.*—In an action for damages against a railroad for personal injuries, *held*, contributory negligence for an employee in going along a path crossing railroad tracks to go between and under cars standing on a live track and giving indications that they might at any time be moved from their placing. *Edge v. R. R.*, 212.

4. *Proximate Cause—Last Clear Chance—Railroads.*—In such case, however, the negligence of the plaintiff is not the proximate cause unless it continues to the time of the injury complained of, and it is the defendant's duty, notwithstanding plaintiff's previous negligent act, to observe that degree of care required by the doctrine of the last clear chance when through its agents it knew or should have perceived, by keeping a proper lookout, that plaintiff was in such a position of danger or peril that ordinary effort on his own part would not avail to save him. *Ibid.*

5. *Master and Servant—"Green Hand"—Coupling Cars—Duty to Instruct.* The act of a "green" and totally inexperienced hand employed to couple cars, etc., without instruction from the railroad company, in stepping momentarily between the moving engine and a car to couple them by opening the knuckle of the coupling, which for some unexplained reason would not work, does not constitute negligence *per se* on his part. Under the circumstances in evidence the question was properly submitted to the jury. *Horne v. R. R.*, 239.

CONTRIBUTORY NEGLIGENCE—*Continued.*

6. *Nonsuit—Defendant's Evidence—How Considered.*—Upon a motion to nonsuit upon the evidence, the testimony relating to plaintiff's contributory negligence, introduced by the defendant will not be considered. *Ibid.*

7. *Railroads—Crossings—Look and Listen—Duty of Traveler.*—A railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence; and when the conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence. *Coleman v. R. R.*, 322.

8. *Same—Last Clear Chance.*—It is the duty of a passenger before attempting to go across a railroad track at a public crossing to both look and listen for approaching trains, and when by the exercise of ordinary prudence in this respect he could have avoided the injury complained of, he has failed to avail himself of the last clear chance, and his contributory negligence will bar his recovery. *Ibid.*

9. *Issues—Last Clear Chance—Evidence.*—In an action brought by the plaintiff against an electric company for damages alleged to have been caused through the latter's negligence by a collision with a street car and an automobile which the plaintiff was running at the time, the usual issues of negligence and contributory negligence were found for defendant, and a third issue was submitted and found for plaintiff as to whether the defendant's agent could have avoided the injury, "notwithstanding plaintiff's contributory negligence." *Held*, upon the facts presented, the plaintiff failed in his duty to slow down his machine and look and listen before crossing the track in front of defendant's street car, the poles and wire of the company being visible some distance ahead of him; the evidence was insufficient as tending to show that the defendant's motorman could have foreseen and prevented the consequence of plaintiff's negligent act in attempting to rush across the track, and the third issue was erroneously submitted. *Lindley v. Power Co.*, 394.

CORPORATION COMMISSION.

1. *Powers—Eminent Domain—Side Tracks—Res Judicata.*—The Corporation Commission can not confer the power of eminent domain, Revisal, 1097 (5), and when the Legislature has not conferred such power upon a nonresident railroad company respecting the construction of a side track over the lands of others, an order of the Commission for the railroad to build such a track is void. *Semble*, this matter is *res judicata*. *Butler v. Tobacco Co.*, 152 N. C., 416; *S. v. R. R.*, 559.

2. *Same—Industrial Sidings—Tender of Right of Way.*—*Semble*, that the Corporation Commission can require a railroad company to build a side track to an industrial plant only upon the company's right of way or when the right of way is tendered. Revisal, 1097 (5). *Ibid.*

3. *Side Tracks—Interpretation of Statutes—Limitations of Power.*—The power conferred upon the Corporation Commission to order a railroad company to build a side track, Revisal, 1097 (5), is with the restriction that the revenue from such side track shall be "sufficient within five years to pay the expenses of construction"; and the lower court having denied the authority of the Commission in this action, the pre-

CORPORATION COMMISSION—*Continued.*

sumption is in favor of its judgment, and it will be affirmed in the absence of evidence tending to show that the revenue will be sufficient according to the terms of the statute. From the facts in this case it appears that the revenue would be insufficient. *Ibid.*

4. *Side Tracks—Interstate Commerce—Constitutional Law.*—Requiring a nonresident railroad, operating in this State and doing an interstate business, to construct an industrial siding or side track here, with the proper legislative authority to make the order, is not a burden nor an interference with interstate commerce, and it is constitutional. *Ibid.*

CORPORATIONS.

1. *Federal Receivers—Permission to Sue—Submission to State's Jurisdiction.*—In an action for damages against a railroad in the hands of Federal receivers, an objection to the introduction in evidence of an order of the Federal judge permitting the plaintiff to sue, because the order was not properly certified or sealed by the clerk of that court, becomes immaterial when it appears from the complaint and answer that both the railroad and its receivers had submitted to the jurisdiction of the court respecting the matters involved by filing a joint answer to the merits of the action. *Hollowell v. R. R.*, 19.

2. *Receivers—Joinder—Parties.*—It is proper to unite a corporation and its receivers as parties defendant in an action in tort to recover damages against the former in the receivers' hands, though the tort complained of arose before the appointment of the receivers. The effect of priority that a judgment thus obtained will be given in the Federal court, not passed upon. *Ibid.*

3. *Acceptance—Certificate—By-laws.*—By signing and recording the articles of incorporation three or more persons become a body corporate under The Code, sections 677-8, and it is not necessary for the exercise of such powers as are conferred by statute on corporations that the one so formed shall issue certificates of stock or adopt by-laws. Revisal, secs. 1137-1146. *Powell v. Lumber Co.*, 52.

4. *Officers and Directors, Loans from—Solvency.*—The officers and directors of a solvent going corporation may loan the company money secured by mortgage on its property. *Ibid.*

5. *Same—Present Consideration.*—The officers and stockholders of a corporation may duly authorize the execution of a mortgage on its property to two of their own number to secure a loan of $6,000 made by them to the incorporation, the stockholders and directors therein being only three persons, it appearing from plaintiff's own evidence that the value of the property was approximately $12,000, that all the existing debts at that date, except a small debt of $40, had been paid, and nearly half the amount of the notes secured were for a present consideration. *Ibid.*

6. *Same.*—It appearing in this case that the value of the corporate property was approximately $12,000; the amount of the notes secured by the mortgage on the entire property, $6,000, half given for a preëxistent and half for a present consideration; all debts then paid except $40, owed to an unconcerned creditor, the requirements of Revisal,

CORPORATIONS—*Continued.*

secs. 967-858, were held inapplicable, and upon such facts there is no *prima facie* case made out, or presumption of insolvency. *Clements v. Cozart* cited and distinguished. *Ibid.*

7. *Foreign Corporations—Process—Statutory Regulations.*—The Legislature may provide for service of process on foreign corporations doing business within the State, provided the service is reasonable and to be made only upon such agents as are representative, and the provisions of Revisal, sec. 440, meet with this requirement. *Whitehurst v. Kerr*, 76.

8. *Same—"Local Agent"—Interpretation of Statutes.*—The proviso of section 440 (1) of the Revisal, "that any person receiving or collecting money within this State for, or on behalf of" a foreign corporation, with respect to service of process, "shall be deemed a local agent," does not limit the meaning of the word agent, but extends its meaning; and service made in the State on the various officers or agents of a foreign corporation enumerated in this section is binding on the corporation, without the requirement that the corporation has property in the State, or the cause of action arose, or the plaintiff resided therein. *Ibid.*

9. *Same—Definition.*—An agent of a foreign corporation upon whom process may be served under the provisions of the Revisal, sec. 440 (1), must be one regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served on him; and the term agent does not extend to a subordinate employee, without discretion. *Ibid.*

10. *Same.*—One who has charge of the funds of a foreign corporation building a railroad bridge in this State, which carries on an enterprise of large proportions, employing large numbers of hands and expending large sums of money, the said agent paying off the hands and keeping the company's money in local banks in his name as its agent, comes within the meaning of the term "local agent," Revisal, sec. 440 (1), upon whom process on a foreign corporation may be served. *Ibid.*

11. *Domestic Corporation—Principal Office—Foreign Office—Venue.*—While a domestic corporation may be authorized to maintain an office at a place beyond the State, at which some corporate meetings may be held, it is also required to maintain a principal office in some county in this State, which fixes its place of residence therein for the purpose of suing and being sued. *Robeson v. Lumber Co.*, 120.

12. *Interpretation of Statutes—Domestic Corporations—Remedial—Venue.*—The purpose of Revisal, sec. 422, was not to change the provisions of section 424, or to deny plaintiff's right to sue a domestic corporation in the county of his residence; but to remedy the defect of said section 424 so that a domestic corporation can be sued in the same venue as an individual, excepting railroads in certain specified instances, and where the venue is fixed by sections 419, 420, 421. *Ibid.*

13. *Domestic Corporations — Residence — Venue — Removal of Causes.*—Section 422, Revisal, fixing the residence of a domestic corporation at its principal place of business, should be construed in connection with

CORPORATIONS—*Continued.*

section 424, and a plaintiff may elect to sue the corporation for damages for a personal injury in the county of his residence at the time of the commencement of the action, or at the residence of the corporation, and if in the former county it may not be removed to the latter one, on the ground of improper venue. *Propst v. R. R.*, 139 N. C., 397, and *Perry v. R. R.*, this term, cited and approved; *Rackley v. Lumber Co.*, 171.

14. *Receiver's Sale — Confirmation — Discretion of Court — Inadequacy of Price.*—The question of confirming a receiver's sale of the property of an insolvent corporation rests largely in the sound discretion of the lower court; and while the inadequacy of price may at times afford good reason for refusing to confirm a sale, it is not always or necessarily allowed as controlling. *Copping v. Manufacturing Co.*, 329.

15. *Same—Original Cost—Deterioration of Property—Prospects.*—On appeal from the confirmation of the lower court of a receiver's sale of the property of an insolvent corporation, it appearing that the property is of a perishable nature, subject to great deterioration by further delay; that the sale had been properly advertised, duly conducted, and the highest bid had not been raised, and that the nature of the property, the corporation's past history and the prospects gave no promise of an increase of the bid. *Held*, the inadequacy of the price of the bid, as compared with the original cost of the property, was not controlling, and that the sale was properly confirmed. *Ibid.*

16. *Injunction—Shares of Stock—Issuance—Insolvency of Shareholder—Pleadings.*—When, in an action to compel a corporation and others to issue certain shares of stock to the plaintiff and to enjoin the transfer of the shares to another on the books of the corporation, the complaint sufficiently alleges plaintiff's ownership, the insolvency of one of the defendants to whom the certificates were issued, and other facts tending to show that the transfer of the stock would be to plaintiff's irreparable loss, a restraining order should be granted to the hearing. *Zeigler v. Stephenson*, 528.

17. *Electricity—Public Service—Municipal Control—Authorized Maximum Rates—Power of Courts.*—A public-service electric company operated in a town is subject to reasonable regulation and control for the public benefit by the municipal public agencies properly designated, with the power in the municipality to fix upon a maximum reasonable indiscriminative charge between citizens receiving the same kind and degree of service, having due regard to the reasonable profits of the electric company; and in the absence of specific legislative regulation the rates may, under some circumstances, be made the subject of judicial scrutiny and control. *Horner v. Electric Co.*, 535.

18. *Public Service—Ordinance—Acceptance—Contracts—Maximum Rates—Parol Evidence.*—When a citizen bases his cause of action upon the right to demand a public-service electrical corporation that it furnish him electricity upon a flat-rate basis and the company claims the right to furnish him with it upon either a flat rate or a meter basis, under the terms of an accepted municipal ordinance, regarded as a contract, which by a construction of its terms makes it optional with the com-

CORPORATIONS—*Continued.*

pany, it can not be shown by parol evidence in contradiction of the ordinance that the lessor of the defendant had orally agreed that the option should be with the plaintiff. *Ibid.*

19. *Public Service — Maximum Rates — Reasonableness—Discrimination—Evidence.*—In the present case it appeared that the defendant electric company furnished the plaintiff electricity in accordance with a reasonable and fair meter rate basis correctly measured; that the company, with a desire to benefit the public, had changed from a twelve to a twenty-four hour service and had ceased to supply electricity upon a flat-rate basis; that an accepted ordinance of the town authorized the company to make a maximum charge either upon a flat or meter rate; and that plaintiff, a large consumer of electricity, demanded to have it furnished upon a flat-rate basis and brought his action to that effect and to restrain the defendant from cutting off, as threatened, the electricity for his lights. *Held*, no evidence of discrimination against the plaintiff; and as under the ordinance the defendant was given the option to supply the current of electricity upon either basis, and it was making plaintiff a proper charge for electricity for the amount actually used by him, the restraining order was properly dissolved. *Ibid.*

20. *Public Policy—Officers—Acts—Knowledge.*—The prohibition of Revisal, sec. 3572, extends to an officer of a corporation in making contracts between the corporation and the city of which he is a commissioner or an alderman; and includes a president and director of a corporation, who was the manager of the mechanical department, though he excused himself, as alderman, from voting on the resolution of payment which had been approved and was unanimously passed; and whether he had actual knowledge of the making of the contract is immaterial. *S. v. Williams*, 595.

21. *Corporations—Evidence—Indictment—Tenants — Removing Tenements, Etc.*—The intent being an ingredient of the offense, a corporation is indictable for the acts of its officers and agents under Revisal, 3686, when the corporation is a tenant, etc., for injuring or damaging tenement houses, etc.; and the corporate existence may be shown, though not charged in the bill. *S. v. Lumber Co.*, 610.

CORROBORATION. See Evidence.

COSTS. See Interpretation of Statutes.

COTTON FUTURES. See Contracts.

COUNTERCLAIM. See Contracts; Pleadings.

COUNTY COMMISSIONERS.

1. *Eminent Domain—Condemnation—Power Express or Implied—Interpretation of Statutes.*—The right of condemnation, being in derogation of a common-law right, must be conferred by the Legislature either in express terms or by necessary implication. *Commissioners v. Bonner*, 66.

2. *Same.*—When a legislative enactment does not, by express terms, confer on a public corporation exercising its powers strictly for the public benefit, the right of condemnation, this power does not arise by impli-

COUNTY COMMISSIONERS—*Continued.*

cation unless the necessity for it is so strong that without it the grant of the powers conferred will be defeated. *Dewey v. R. R.*, 142 N. C., 392, cited and distinguished. *Ibid.*

3. *Same—Public Landings.*—Chapter 23, Revisal, sec. 1318, subsec. 19, does not confer in express terms the power on the commissioners to condemn land for a public landing on a navigable stream; there is no provision for awarding compensation; and no necessity apparent which would imply this power; and construing this section in connection with the other provisions of the chapter, especially section 8, the intent of the Legislature is manifested that such power was not to be conferred; but the commissioners are confined to lands already dedicated to a public use sufficient to embrace or include the purpose proposed by them, or they must acquire a site by agreement or purchase. *Ibid.*

COUPLING CARS. See Contributory Negligence.

COURTS. See Appeal and Error; Judgments; Jurisdiction.

1. *Superior Court—Equitable Powers.*—The Superior Court still possesses all the powers and functions of a court of equity which it had prior to 1868, though the method of finding facts has been changed. *McLarty v. Urquhart*, 339.

2. *Same—Mortgages—Powers of Sale Specified.*—A mortgagee may invoke the aid of the courts in foreclosing his equity of redemption instead of resorting to the power of sale contained in the mortgage, and irrespective of the terms therein expressed as to the method of advertisement, the court thus acquiring jurisdiction of the parties and the *res*, has full power to direct a sale of the property upon such terms as to advertisement and the like as appears best, and to make all proper orders and decrees. *Ibid.*

3. *Same—Order of Sale—Modification—Imposed Terms.*—The mortgagee elected to invoke the equitable jurisdiction of the court to foreclose his mortgage, and at the sale decreed the mortgagor appeared and gave notice of a motion he would enter to set aside the order thereof, upon the ground that it was required by the terms of the power of sale, expressed in the deed, that advertisement should likewise be made in *The New York Herald.* It appeared that this additional advertisement would cost from $300 to $500, and that the property would not bring the mortgage debt. *Held*, not error for the lower court to refuse to modify the order of sale except upon condition that the mortgagor, by a certain day, pay to the commissioner a sum sufficient to pay for the additional advertisement. *Ibid.*

4. *Office—Title—Quo Warranto—Power of Courts—Mandamus—Process.* The statutory remedy is by *quo warranto* to try a disputed title to a public office occupied by the defendant, and the court trying the issue has the power to issue the writ of mandamus or other necessary and proper process to effectuate its judgment and to induct the successful contestant into office. The successful relator being refused the books and papers on his demand, the court may issue any appropriate process to enforce compliance with the demand by a refractory or contumacious defendant. Revisal, secs. 827, 841, 843. *Rhodes v. Love*, 468.

COURTS—*Continued.*

5. *Criminal Actions—Prosecutor—Costs—Power of Court—Interpretation of Statutes.*—The power conferred upon the courts to determine the question of responsibility and to tax costs against the one adjudged to be the prosecutor, extends to "all criminal actions where the defendant is acquitted, a *nolle pros.* entered, judgment arrested, or if the defendant shall be discharged from arrest for the want of probable cause," and exists at any stage of the criminal proceedings, before or after the finding of the bill or defendant acquitted. *S. v. Stone*, 614.

6. *Same—Trespass—Title—Arbitration.*—When, in a trial under indictment for forcible trespass, the question depended upon a civil issue as to title, which by consent of the parties was referred to arbitration by the trial judge, and one of the claimants is spoken of in the order of arbitration as prosecutor, the order providing that if the question of title be found against him, he shall pay the costs as on *nolle pros.* by the solicitor, which resulted in a judgment taxing the costs against him. *Held*, there being nothing restrictive in the terms of the judgment, it was not error in the trial court to find the appellant, upon further investigation, had advised the prosecution, actively participated therein, and enter judgment making him a prosecutor of record and also taxing him with the costs, and this disposition of the case is not precluded by the prior judgment referring the question of title to arbitration. *Ibid.*

CUSTODY. See Parent and Child.

DAMAGES. See Insane Persons.

1. *Malicious Prosecution — Plaintiff's Poverty — Evidence.*—Evidence of plaintiff's poverty is inadmissible in an action for malicious prosecution, in the absence of evidence tending to show that his actual damage occasioned by the defendant's tortious act was thereby increased. *Robertson v. Conklin*, 1.

2. *Services Rendered—Verified Statement—Evidence—Questions for Jury.* The filing of an itemized statement, duly verified, in an action against a railroad for services rendered an employee in its relief department, Revisal, sec. 1625, is not proof as to the damages recoverable, the action not being instituted upon an account for goods sold and delivered; but as, in this case, there was sufficient evidence of the services rendered, the length thereof, etc., a motion for judgment as of nonsuit upon the evidence should be denied. *Hospital Asso. v. Hobbs*, 188.

3. *Notes — Purchase Price — Equities — False Representations — Date of Credit.*—In an action on a note given for the purchase price of timber, the jury found that there was a false and fraudulent representation as alleged in the answer, in regard to incumbrances on the timber. *Held*, that under an issue calling merely for a general assessment of damages, it was not error for the lower court to refuse to sign a judgment reducing the amount of the note in the amount of the damages assessed, as of its date, for the amount thus found should be deducted as of the time of trial, no date for the credit having been fixed by the verdict. *Steinhilper v. Basnight*, 293.

4. *Railroad—Fire Damage—Logging Roads—Liability.*—A private steam railroad for logging purposes is liable in like manner as *quasi*-public

DAMAGES—*Continued.*

railroad corporations, for damages by fire caused from its locomotives igniting combustible materials along its right of way, or by the negligent operation and running of its locomotives. *Thomas v. Lumber Co.*, 351.

5. *Same—Independent Contractor—Foul Right of Way.*—A company operating a steam railroad for logging purposes is liable in damages for fires caused by its locomotives by reason of the foul condition of its right of way, so dangerous that it might reasonably have been anticipated that injury would thereby occur to adjacent owners; and the principle of independent contractor will not avail the employer in such instances. *Ibid.*

6. *Same—Casual—Collateral Acts.*—The instance in which the employer will be held liable for damages by fire caused to adjacent landowners, arising from the filthy condition of the right of way of its steam road for logging timber, operated by an independent contractor, does not apply to such negligent acts of the employees of the independent contractor as are casual or collateral to the work contracted for as distinguished from those which the contractor agrees and is authorized by his contract to do. *Ibid.*

7. *Railroads — Fire Damage — Negligence—Locomotives—Operation.*—The operation of a defectively equipped engine, or of a good engine not carefully managed, or managed by an unskilled engineer, is such source of danger to the adjacent landowners from fire that an employer can not relieve himself of the consequent damage under a contract with an independent contractor. *Ibid.*

8. *Carriers of Freight—Bill of Lading—Live Stock—Stipulation—Reasonable Notice.*—The purpose of the stipulation in a live stock bill of lading requiring formal written notice to be given the carrier of his loss and intention to demand compensation before removing the stock from the carrier's premises does not relieve the carrier of its liability for negligence, but is simply to give such notice as will enable it to protect itself from fraudulent or unjust claims. *Kime v. R. R.*, 398.

9. *Same—Exceptions.*—The failure to give the carrier the formal written notice of claim or damage to stock through its negligence, shipped under and required by its live stock bill of lading, does not bar a recovery when it appears that the conductor had knowledge thereof while in transit; that the absence of the agent from the station at destination prevented the required notice from being given him, and the stock was removed some two hundred yards from the depot and there examined and inspected by the carrier's inspector before they were intermingled with other live stock. *Jones v. R. R.*, 148 N. C., 580, cited and approved. *Ibid.*

10. *Insane Persons—Torts.*—A lunatic is liable in damages for a tort committed by him, and the measure of damages is compensation for the injury inflicted, and punitive damages are not recoverable. *Moore v. Horne*, 413.

11. *Same—Evidence—Punitive Damages.*—In an action brought against a lunatic for his tort committed in assaulting and injuring the plaintiff, wherein actual damages alone are sought to be recovered, evidence offered by plaintiff tending to show that defendant was sane at the

DAMAGES—*Continued.*

time complained of is inadmissible, as such would only be competent when punitive damages are claimed. *Ibid.*

12. *Same—Resisting Arrest—Abusive Language.*—In an action brought to recover actual damages for an injury tortiously inflicted by defendant, a lunatic, evidence that defendant resisted arrest under a warrant issued by a justice of the peace for the same criminal offense, and was abusive in his language to the officer arresting him, is incompetent for the purpose of proving the assault in the civil action. It is not harmless error, as it tends to prejudice the minds of the jury. *Ibid.*

13. *Wrongful Death—Damages for Mental Anguish.*—Damages for mental anguish can not be awarded in an action for damages for the wrongful killing of another. *Ballinger v. Rader*, 488.

14. *Torts—Acts of Avoidance — Actionable Wrong — Anticipation.*—Where one has been injured by the wrongful conduct of another, he must do what he can to avoid or lessen the effects of the wrong; but this principle does not obtain until a contract has been broken or a tort has been committed, for a person is not required to anticipate that another will persist in misdoing till an actionable wrong has been committed, or to shape his course beforehand so as to avoid its results; he may stand upon his legal rights and hold the other for the legal damages which may ensue. *Harvey v. R. R.*, 567.

DANGEROUS INSTRUMENTALITIES. Cee Cities and Towns; Negligence.

DEADLY WEAPON. See Murder.

DECLARATIONS. See Evidence.

DEEDS AND CONVEYANCES. See Estates; Mortgages Tax Deeds.

1. *Corporations—Conveyances—Total Property—Solvency—Assignments—Filing of Schedules, Etc.*—It is not necessary to the validity of a corporation's mortgage made to two of its creditors of its entire property that the schedules of preferred debts be filed under oath, and inventory filed, under Revisal, secs. 967-968, when it appears that the corporation was not insolvent, and that the consideration for the notes secured was a present one. *Powell v. Lumber Co.*, 52.

2. *Assignments—Fraud—Invalidity—Inter Partes.*—A voluntary conveyance declared invalid for not complying with the provisions of Revisal, secs. 967-968, is not only void as to *bona fide* unsecured creditors, but *inter partes;* and hence it would be unnecessary for such creditors to show fraud in its procurement in order to set it aside. *Ibid.*

3. *Grantee—Middle Initial—Identity of Grantee—Importance.*—The father purchased land and had the conveyance made to his unborn child, he and his wife, Julia A., joining in the deed of the vendor, and for the purposes of the conveyance the child was named Julia C. The wife died before child-birth. In an action of ejectment brought by the heir at law of the deceased wife against the husband, upon an issue as to whether the wife or the child was intended as the grantee: *Held,* that the middle initial was material and important, being upon the question of identity of the grantee; that a charge to the contrary would deprive plaintiff of the benefit of his testimony tending to show that the grantee was not his deceased wife. *Newby v. Edwards*, 110.

DEEDS AND CONVEYANCES—*Continued.*

4. *Evidence—Destroyed Records—Title—Recitals in Deed—Prerequisites —Interpretation of Statutes.*—The preliminary fact of the destruction by fire or otherwise of the courthouse or records must first be shown before "the recitals, reference to, or mention of any decree, judgment or other record" recited in a deed of conveyance, etc., shall have the effect as evidence given by Revisal, sec. 341; and when both parties to the action admit title in a certain person in their chain of title, one of them may not show disseizin by a recital of a sale under partition proceedings in his deed, without first showing that the courthouse, etc., had been destroyed, according to the statutory requirement. *Barefoot v. Musselwhite*, 208.

5. *Wills—Tenants in Common—Division by Deed—Remaindermen—Title.* Tenants in common may agree upon and apportion among themselves by deeds the land held in common under devises to them made by their two different ancestors; but when only a life estate is devised in part of the lands, this method of division can not affect the title of the remaindermen, as their interest is derived exclusively from the will, and the deeds can not have the effect of creating or manufacturing a title. *Jones v. Myatt*, 225.

6. *"Color"—Adverse Possession—Period of—Termination.*—When title is out of the State, one who enters upon a tract of land asserting ownership under a deed sufficiently defining its boundaries and constituting color of title, and continues in the exclusive possession for seven consecutive years, acquires the title, and it is not necessary that such claim and possession should have been next preceding institution of a suit. *Simmons v. Box Co.*, 257.

7. *"Color"—Adverse Possession — Outer Boundaries.*—One in adverse possession of lands, asserting ownership under a deed, having a house thereon and cultivating a small field within the boundaries of his deed under which he holds color of title, holds adverse possession of the lands described in his deed to its outer boundaries. *Ibid.*

8. *Same—Ripening Title.*—When one enters under a deed, constituting color of title to a tract of land contained within the boundaries of a valid grant, or coterminous with it, and occupies any portion of the tract, asserting ownership of the whole, there being no adverse occupation of any part, the force and effect of such occupation is extended to the outer boundaries of his deed, and, if exclusive and continuous for seven consecutive years will ripen into an unimpeachable title to the entire tract. *Ibid.*

9. *Same—Senior Grantee.*—When the junior grantee claims title against the senior grantee of lands embraced in a "lappage" caused by the description in their grants by reason of adverse possession under "color," and has introduced evidence tending to show possession on the lappage, his possession, by construction of law, extends to the boundaries of his deed or grant upon which he relies, and is not confined to so much thereof as may have been in his occupation, if the senior grantee had no actual possession of the "lappage." *Ibid.*

10. *"Color" — True Title — Adverse Possession—Lappage—Inferior Title.*— The principle of constructive possession operates only in favor of the

DEEDS AND CONVEYANCES--*Continued.*

true title, and such possession is not interrupted or impaired because of a deed of some adjoining claimant, under an inferior title, extending its description so as to overlap the lands thus held. *Ibid.*

11. *Description—Calls—Natural Objects—Rules of Interpretation.*—Among the rules established for the correct placing of land boundaries, and more directly pertinent to the facts of this case, are (*a*) that "none of the calls in the deed may be disregarded when they can be fulfilled by any reasonable way of running the lines, which will be deflected only when necessary to give effect to the intent of the parties as expressed in the instrument." (*b*) Natural objects called for in a patent or deed, sufficiently placed and identified, as a rule, control course and distance, and that last rule very generally obtains unless the facts and accompanying data clearly show that its application would lead to an erroneous conclusion. *Bowen v. Lumber Co.*, 366.

12. *Same—"Islands."*—When a grant begins at A, a known and established point, and the course and calls of the same are admitted to a point F, "a pine on Beech Island," and the last call of the grant is "N. 51. E. 1340 poles, including the islands," to the beginning; and there are within the course several islands of firm land adjacent to an old shore line, which the parties evidently had in view; and in order to "include the islands" it was required to run the line N. 51 E. (54 by reason of the variation of the magnetic needle) 1060 poles and then 653 poles to A, the beginning: *Held*, this was the correct placing of the last call of the grant, though the closing line is thereby increased a distance of 375 poles. This interpretation follows the course of the grant for the first and greatest portion of the distance and includes the islands, and thus is more in accord with the two principles stated, that (1) of recognizing more of the calls of the grant; (2) taking proper regard for the natural objects, in this case, the islands. *Ibid.*

13. *Void Acknowledgment—Registration.*—A deed acknowledged before a commissioner of deeds of another State, not authorized by the laws of this State to take acknowledgments, is void, and invalidates the registration here. *Wood v. Lewey*, 401.

14. *Registration—Notice.*—Notice of a prior unregistered deed, however full and formal, can not supply notice by registration required by Revisal, 980. *Ibid.*

15. *Same—Fraud.*—In the absence of fraud, actual notice of a prior unregistered deed or mortgage executed since 1 December, 1885, can not affect the rights of subsequent purchasers whose deed or mortgage is duly recorded. *Ibid.*

16. *Same—Evidence.*—Notice of a prior unregistered deed alone is not evidence of fraud on the part of the grantee in the second and registered conveyance of the same land. *Ibid.*

17. *Same.*—When a duly recorded mortgage is sought to be set aside by one who holds a prior mortgage defective in its registration, and it appears that he had procured the same from one holding an interest in the *locus in quo*, who resided in another State, and who, claiming it had been procured through misrepresentation, offered to return the purchase price, and then gave the second mortgage, which was duly

DEEDS AND CONVEYANCES—*Continued.*

acknowledged and recorded; the mere fact that the grantees knew of the first transaction is no evidence of fraud sufficient to set aside the subsequent deed, which was duly recorded. *Ibid.*

18. *Declarations—Boundaries—Interest.*—Declarations of the deceased as to a disputed corner of his lands are incompetent unless made against his interest. *Chrisco v. Yow*, 434.

19. *Married Women—Separate Realty—Privy Examination—Interpretation of Statutes—Constitutional Law.*—Article X, sec. 6, of our Constitution requiring that a married woman conveying her separate real estate shall have the "written assent of her husband," the statute law now embodied in Revisal, sec. 952, provides the manner in which the assent of the husband must be obtained, to wit, that the deed "must be executed by such married woman and her husband and due proof or acknowledgment thereof must be made by the wife, and her privy examination taken, etc.; and thus construed, the statutes are constitutional and valid. *Council v. Pridgen*, 443.

20. *Married Women—Joinder of Husband—Privy Examination.*—In order to convey a married woman's separate real estate or fix a charge upon it, her privy examination is required, and the husband must join in the deed. *Ibid.*

21. *Same—Interpretation of Statutes.*—Revisal, sec. 2112, establishes a method by which a married woman may become a free-trader, and sec. 2113 provides that "the married woman therein mentioned shall be a free-trader and authorized to contract and deal as if she were a *feme sole*." *Held*, (1) the words "free-trader," "contract," and "deal," refer to contracts and trades in some business enterprise, and are restricted under this section to the dealings of the wife as a free-trader with reference to her contracts in the pursuit of the business she is engaged in; (2) the word "deal," taken in its legal significance, does not enlarge this meaning so as to confer upon a married woman power to convey her real estate, especially in view of the restrictive words of our statute, "that every conveyance, etc., affecting the real estate of a married woman must be executed by the husband and the wife and her privy examination must be taken and certified as provided by law." *Ibid.*

22. *Married Women—Joinder of Husband—Privy Examination—Requisites.* A deed executed by a married woman to her separate real property, the name of the husband not appearing in the body of the deed or his signature thereto, proved on oath of a subscribing witness and registered on such probate, without her privy examination, is inoperative, and the written assent of her husband endorsed on the deed does not meet with the constitutional and statutory requirements necessary for her to make a valid conveyance. *Ibid.*

23. *Title—Adverse Possession—Possession of Another—Priority—Partition —"Color"—Evidence.*—In his action for possession of lands, plaintiff, in deraigning his title, introduced a deed to W., a mortgage from R., the son and heir of W., to secure a debt to L., the land described in the mortgage being a 77-acre tract adjoining the *locus in quo* and the undivided interest of the son in his father's land; also, a contract from L. to R. agreeing to sell him the tract containing the 77 acres and another tract of 16 acres. There was evidence of the partition of the

DEEDS AND CONVEYANCES—*Continued.*

lands of L. among his heirs at law, a part thereof, including the *locus in quo*, being assigned to his daughter, G. There was no sufficient evidence of adverse possession to ripen title to the *locus in quo* in G., or that L. was the owner of the land, but evidence tending to show the possession of R. thereof for sixteen years, and of a part thereof for thirty years. *Held*, (1) For the plaintiff to avail himself of the contract between L. and R. as evidence tending to show that the former claimed by virtue of his contract with the latter, there must be some evidence of privity between these two, of which the contract, failing to describe the *locus in quo*, is none; (2) the possession of R. can not enure to the plaintiff's benefit in claiming under G. as one of the heirs at law of L; (3) G. had color of title to the lands under the division in partition proceedings by the heirs at law of L., but this can not enure to plaintiff's benefit for failure to show her possession thereunder; (4) evidence of possession of R., one of the heirs at law of W., under parol partition proceedings is irrelevant, and fails to show the character of the possession of R. as being adverse and under a claim of right; (5) there being no evidence tending to show the legal right of the plaintiff to claim under R. or sufficient to give him the benefit of the latter's possession of the *locus in quo*, a judgment as of nonsuit upon the evidence was properly allowed. *Tuttle v. Warren*, 459.

24. *"Color"—Ancestor—Possession—Continuity.*—Those in adverse possession of land claiming "color of title" under a deed made to their ancestor, must show that the ancestor entered into possession under his deed, and continuity of that possession in themselves, in order to ripen their title. *Barrett v. Brewer*, 547.

25. *"Color"—Possession—Interpretation of Statutes.*—Title to lands by adverse possession under "color" is by virtue of our statute, Revisal, sec. 382, and it is necessary thereunder to show possession and not merely a claim of title. *Ibid.*

26. *Same—Ancestor—Continuity—Heirs.*—"Color of title" can not descend to the heirs unless the ancestor entered into the possession of the lands and to be available to the former it must come by continuity to them. Hence the heirs can not be advantaged by the color of title of an ancestor who had not entered into the possession of the lands. *Ibid.*

27. *"Color"—Possession—"Privity."*—The term "privity" when used in connection with "color of title" means privity of possession, and not privity of blood, and the latter occupant must enter possession under that of the prior one when his claim of "color" is relied upon. *Ibid.*

DEFAULT. See Judgments.

DELIVERY. See Insurance; Telegraphs; Contracts.

DEMURRER. See Pleadings.

DEPOSITION. See Evidence.

DESCENT.

1. *Heirs at Law—Collateral Relations—Blood of Ancestors.*—Rules 4 and 6 of the Canons of Descent, Revisal, sec. 1556, are *in pari materia*,

DESCENT—*Continued.*

and should be construed together and harmonized; and thus construed, the collateral relations of the half blood inherit equally with those of the whole blood, under the provisions of canon 6, when, under the requirements of canon 4 they are of the blood of the ancestor from whom the estate was derived. *Paul v. Carter*, 26.

2. *Inheritances—Canons of Descent—Collateral Relations—Blood of Ancestor.*—The proviso of Rule 6, Canons of Descent, Revisal, ch. 30, that in all cases where the person last seized shall have left no issue capable of inheriting, nor brother nor sister, etc., the inheritance shall vest in the father, if living, etc., should be construed in connection with rule 4, and in order for a collateral relation of the half-blood to inherit, he must be of the blood of the ancestor from whom the estate was derived. *Watson v. Sullivan*, 246.

DISTRIBUTION. See Executors and Administrators.

DIVERSE CITIZENSHIP. See Removal of Causes.

DIVORCE.

1. *Issues Material—Necessary Findings.*—Material issues raised by the pleadings must be submitted to and answered by the jury, and they must be sufficient to support the judgment and dispose of the matters in controversy. *McKinzie v. McKinzie*, 242.
2. *Same—Condonation.*—The issue of adultery in an action for divorce from the wife is material, and must be answered to establish the fact; and an answer to a subsequent issue finding that the offense, if committed, has been condoned does not necessarily find the fact of adultery. *Ibid.*
3. *Issues—Condonation—Pleadings—Objections and Exceptions.*—In an action for divorce for adultery of the wife, an objection to an issue of condonation because not specifically pleaded must be made at the time the issue is submitted; thereafter it is too late. *Ibid.*
4. *Issues — Brutal Conduct — Evidence Sufficient.* — In this action for divorce *a mensa* there was such evidence upon the issue of the barbarous treatment of the husband, of his murderous assaults on the *feme* plaintiff, and of his brutal conduct and habitual drunkenness, as to fully warrant the jury's affirmative finding of that issue. *Barringer v. Barringer*, 392.

DOCKETING. See Judgments.

DOMESTIC CORPORATIONS. See Corporations.

DOWER. See Uses and Trusts.

DRAINAGE COMMISSION.

1. *Bond Issues—Validity—Interest of Clerk.*—An issue of bonds by a drainage commission formed under chapter 442, Laws 1909, is not void by reason that the clerk of the court who appointed the commissioners owned an interest in a tract of land within the drainage district, as such an interest is too minute, and not directly the subject-matter of the litigation. *White v. Lane*, 14.
2. *Bond Issue—Interest of Clerk—Judgment—Collateral Attack.*—A bond issue by a drainage commission formed under chapter 442, Laws 1909,

DRAINAGE COMMISSION—*Continued.*

may not be restrained on the ground that the clerk appointing the commissioners owned the land within the district, as such action would be a collateral attack upon the order or judgment of the clerk. It is also prohibited by sections 33 and 37 of the act. *Ibid.*

DRUNKENNESS. See Divorce.

DYING DECLARATIONS. See Evidence.

DYNAMITE. See Assault.

EJECTION FROM TRAIN. See Damages.

ELECTRICITY. See Negligence; Corporations.

EMINENT DOMAIN. See Corporation Commission.

1. *Condemnation—Power Express or Implied—Interpretation of Statutes.*—The right of condemnation, being in derogation of a common-law right, must be conferred by the Legislature either in express terms or by necessary implication. *Commissioners v. Bonner*, 66.

2. *Same.*—When a legislative enactment does not, by express terms, confer on a public corporation exercising its powers strictly for the public benefit, the right of condemnation, this power does not arise by implication unless the necessity for it is so strong that without it the grant of the powers conferred will be defeated. *Dewey v. R. R.*, 142 N. C., 392, cited and distinguished. *Ibid.*

3. *Same—County Commissioners—Public Landings.*—Chapter 23, Revisal, sec. 1318, subsec. 19, does not confer in express terms the power on the commissioners to condemn land for a public landing on a navigable stream; there is no provision for awarding compensation; and no necessity apparent which would imply this power; and construing this section in connection with the other provisions of the chapter, especially section 8, the intent of the Legislature is manifested that such power was not conferred; but the commissioners are confined to lands already dedicated to a public use sufficient to embrace or include the purpose proposed by them, or they must acquire a site by agreement or purchase. *Ibid.*

ENDORSEMENT. See Negotiable Instruments.

"ENTIRETY." See Tenants in Common.

EQUITY.

1. *Notes, Negotiable—Notice—Due Cause.*—While our statute authorizes the assignment of things in action and allows the assignee to sustain a demand therefor in his own name, it must be "without prejudice to any set-off or other defense, existing at the time of, or before notice of, the assignment," making an exception of "negotiable promissory notes or bills of exchange transferred in good faith, and upon good consideration before due." *Taylor v. Carmon*, 101.

2. *Same—Offsets.*—In an action brought to cancel certain notes secured by mortgages, the plaintiff alleged that the notes were without valuable consideration and had been paid to the mortgagee with certain money and personal property. It appeared that the defendant's intestate W., the holder of the mortgages, was indebted to one M. and had trans-

EQUITY—*Continued.*

ferred the mortgages as security to this debt. There was no evidence that plaintiff had notice or knowledge of this last assignment of the notes and mortgages, or that M. was a holder in due course. The case was referred, and the referee found for the defendant, but the jury substantially reversed the findings of the referee on issues duly submitted and found that the B. note was paid to W. before notice of transfer, and that the value of personal property, etc., of plaintiff received by him was in a greater sum than the amount of the mortgage notes. *Held,* (1) The value of the plaintiff's property received by the original mortgagee should be applied to the mortgage notes held by the administrator of W. with judgment against the administrator for the balance; (2) as M. was not a holder in due course, his note was taken subject to the equities existing between the plaintiff and W. *Ibid.*

3. *Negotiable Instruments—Endorsers—Parties—Demurrer.*—In order to change the *prima facie* order of the endorsers' liability on a promissory note the plaintiff alleged and set forth an executory contract between the defendant, endorser, and a third person without alleging performance thereof by the latter, through whom he must work out his rights. *Held,* There was an absence of essential connection between the matters alleged and the relief demanded; that such third person was a necessary party to the action, and that a demurrer to the complaint should be sustained. *Lynch v. Loftin,* 270.

4. *Notes — Purchase Price — False Representations — Damages — Date of Credit.*—In an action on a note given for the purchase price of timber, the jury found that there was a false and fraudulent representation as alleged in the answer, in regard to encumbrances on the timber, *held,* that under an issue calling merely for a general assessment of damages, it was not error for the lower court to refuse to sign a judgment reducing the amount of the note in the amount of the damages assessed, as of its date, for the amount thus found should be deducted as of the time of trial, no date for the credit having been fixed by the verdict. *Ibid.*

5. *Negotiable Notes—Endorsement—Title—Due Course—Equitable Owner —Defenses.*—A purchaser of a negotiable instrument, for value, before maturity, but without endorsement, becomes the holder of the equitable title only, and takes subject to any defense the maker may have against the original payee, as for one to become a purchaser in due course he must have acquired title by endorsement. Revisal, secs. 2178, 2198; and in the absence of endorsement of the note sued on in an action by the purchaser, the plaintiff is not entitled to judgment upon evidence which shows a good defense in favor of the maker against the payee. *Steinhilper v. Basnight,* 293.

6. *Superior Court—Equitable Powers.*—The Superior Court still possesses all the powers and functions of a court of equity which it had prior to 1868, though the method of finding facts had been changed. *McLarty v. Urquhart,* 399.

7. *Same—Mortgages—Powers of Sale Specified.*—A mortgagee may invoke the aid of the courts in foreclosing his equity of redemption instead of resorting to the power of sale contained in the mortgage, and irrespective of the terms therein expressed as to method or advertisement,

EQUITY—*Continued.*

the court thus acquiring jurisdiction of the parties and the *res*, has full power to direct a sale of the property upon such terms as to advertisement and the like as appears best, and to make all proper orders and decrees. *Ibid.*

8. *Same—Order of Sale—Modification—Imposed Terms.*—The mortgagee elected to invoke the equitable jurisdiction of the court to foreclose his mortgage, and at the sale decreed the mortgagor appeared and gave notice of a motion he would enter to set aside the order thereof, upon the ground that it was required by the terms of the power of sale, expressed in the deed, that advertisement should likewise be made in *The New York Herald.* It appeared that this additional advertisement would cost from $300 to $500, and that the property would not bring the mortgage debt. *Held,* not error for the lower court to refuse to modify the order of sale except under condition that the mortgagor, by a certain day, pay to the commissioner a sum sufficient to pay for the additional advertisement. *Ibid.*

9. *Notes—Endorsement—Equitable Owner—Fraud—Evidence.*—Negotiation of a note payable to order is "by the endorsement of the holder and is completed by delivery," Revisal, 2178; and the introduction of the note in evidence without endorsement raises the presumption of equitable ownership and assignment, and without proof of endorsement the holder is not one in due course, and takes subject to the equities existing in favor of the maker, and in such instance fraud in its procurement by the payee may be shown. *Woods v. Finley,* 497.

10. *Judgments—Homestead—Estoppel—Procedure—Pleadings.*—The defendant contracted to convey to the plaintiff for $4,300 a certain tract of land chiefly valuable for its timber. The plaintiff paid $3,500 on a prior mortgage debt on the land defendant owed to another, and gave his note to defendant for $400, the balance of the purchase price. He then purchased several judgments against the defendant constituting a prior lien on the land, and brings a successful action in behalf of himself and all other creditors, etc., asking that the contract, the deed and his note be canceled, and that he be subrogated to the rights of the mortgagee. *Held,* (1) defendant's evidence was competent tending to show as an offset that plaintiff entered into possession under his deed and cut, sold and received the price for a part of the standing timber; under the application of the doctrine that "he who asks equity must do equity"; (2) it being an equitable right, growing out of the alleged cause of action, it was unnecessary to assert it by way of answer; (3) the various priorities and liens should be established, and a balance struck between plaintiff and defendant before ordering a sale of the land. *Cox v. Boyden,* 522.

ESTATES. See Homesteads.

1. *Estates — Remainders — Deeds and Conveyances — Interpretation.*—An estate to D. for life, then to W. and the children of P., the said W. surviving the life tenant; *Held,* W. and the eight children of P. held in common an undivided one-ninth interest, each; and at the time of proceedings in partition the said W. being dead, her one-ninth interest descended to her three children. *Whitehurst v. Weaver,* 88.

2. *Tenants in Common—Partition—Infant—Parties.*—A proceeding in partition of lands among tenants in common does not bind an infant not represented in any manner nor properly made a party. *Vick v. Tripp,* 90.

ESTATES—*Continued.*

3. *Same—Ratification—Estoppel—Election.*—An infant having an interest in lands as a tenant in common, and not bound by partition had thereof by the other tenants, by joining in a deed from his cotenants after his majority, to a part of the lands so held, and reciting the partition proceedings for description only, is only estopped to claim title as against those claiming under the deed; and is a ratification only of the lands conveyed; and his joining in the deed does not evidence his election to take the land conveyed therein as his part of the lands held in common. *Ibid.*

4. *Same.*—C. bequeathed certain property to his wife and devised certain of his real property to his four surviving children, T., R., M., and L. T. died devising all of his estate therein to his mother for life, "at her death to" the plaintiff. R. conveyed his said interest to his mother. Afterwards, in proceedings in partition, the tenants in common divided the lands without in any manner making the plaintiff, who was then a minor, a party. In these proceedings, three certain tracts of the land were set apart to the mother, on one of which there was a storehouse; to one of the tracts the defendant claims by mesne conveyances from the mother. After coming of age the plaintiff joined in the deed with the widow of C., conveying the storehouse, and subsequently the widow died. *Held,* (1) by joining in the deed to the storehouse property the plaintiff is not estopped in his action for possession and accounting for the rents and profits of the other lands; (2) the doctrine of election has no application; (3) a recital in the deed of the proceeding in partition would only have the effect of estopping plaintiff from denying the existence thereof and the conclusiveness of its effect as a division of the real estate. *Ibid.*

5. *Partition—Tenants in Common—Vendee.*—A vendee of an undivided interest in lands held in common can commit such waste as "is destructive of the estate and not within the usual legitimate exercise of the right of enjoyment of the estate." *Ibid.*

6. *Uses of Trusts—Parol Trusts—Dower—Husband's Estate—Estate of Former Wife.*—In a petition for dower of a second wife in the lands of her husband, evidence is competent, in behalf of the children of the first marriage, to show that certain of the lands were paid for by their mother and improvements made thereon with her money, and that the deed thereto was made to the husband by mistake, as such evidence, if found as a fact by the jury, would establish a trust estate in favor of the children and heirs at law of their mother, superior to the claim of dower, which must necessarily be laid off from the deceased husband's estate. *Hendren v. Hendren,* 505.

ESTOPPEL. See Judgments.

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ESTOPPEL—*Continued.*

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3. *Mortgagor and Mortgagee—Cancellation of Record.*—A mortgage deed passes the title to the lands mortgaged which is defeasible by the subsequent performance of the conditions of the mortgage, and the entry of satisfaction on the margin of the page of its registration, by the proper person, is conclusive of the fact of the discharge of the mortgage and its satisfaction as to strangers to the mortgage. *Lumber Co. v. Hudson*, 96.

4. *Same—Estoppel by Deed—Heirs at Law—Evidence.*—In an action of trespass the plaintiff and defendant claimed title through one H., the plaintiff through mesne conveyances, and the defendants as widow, and son and heir at law. The plaintiff introduced a mortgage deed from one R. to said H. reciting that it was of a tract of land deeded by said H. to him, the mortgagor; and evidence that thereafter, for several years R. was in actual possession and then conveyed it to D., in plaintiff's chain of title, and a few days thereafter H. made an entry on the margin of the page whereon the mortgage was recorded reciting the cancellation of the mortgage by the mortgagor's giving a deed to said D., and that thereafter H. recognized the title of D. *Held*, evidence as tending to show that H. had sold and conveyed the *locus in quo* to R., received a mortgage to secure the purchase price, which he had canceled on the margin of the registration book upon satisfaction from the proceeds of the sale by R. to D., the entry of satisfaction of record being conclusive on defendants claiming as widow and heir at law of H. *Ibid.*

EVIDENCE. See Nonsuit; Reference; Divorce.

1. *Deeds and Conveyances—Color of Title—Adverse Possession—State—Evidence.*—The testimony of the plaintiff, unexplained and uncontradicted upon cross-examination, that he and his father had been in possession of the *locus in quo* for thirty years, in order to show color of title as against the State under deeds he had introduced in evidence, is sufficient to go to the jury. *Berry v. McPherson*, 4.

2. *Same—Continuity.*—While the evidence of title by adverse possession must tend to prove the continuity of possession for the statutory

EVIDENCE—*Continued.*

period in plain terms or by "necessary implication," it is sufficient to go to the jury if it was as decided and notorious as the nature of the land would permit. *Ibid.*

3. *Same.*—In this case the *locus in quo* is swamp land, unenclosed and without inhabitants, and evidence was held sufficient to go to the jury, which tended to show that plaintiff, and his father, under whom he claimed, had cut wood therefrom, built roads on the land and had permitted others to cut wood therefrom from time to time, at different places, for a length of time more than covering the statutory period, and that, at one time, the defendants had acknowledged plaintiff's possession by admitting in his presence, a certain corner claimed by him, and that defendant had himself cut wood on the land in dispute and paid plaintiff for it. *Ibid.*

4. *Photographs.*—After preliminary proof of the correctness of photographs taken of lands on which damages are alleged to have been caused by the diversion of water from its natural flow by an adjoining owner, it is competent for a witness to use them to explain his testimony as to what effect the diversion of the water had upon the land. *Pickett v. Railroad*, 148.

5. *Destroyed Records—Title—Recitals in Deed—Prerequisites—Interpretation of Statutes.*—The preliminary fact of the destruction by fire or otherwise of the courthouse or records must first be shown before "the recitals, reference to, or mention of any decree, judgment or other record" recited in a deed of conveyance, etc., shall have the effect as evidence given by Revisal, sec. 341; and when both parties to the action admit title in a certain person in their chain of title, one of them may not show disseizin by a recital of a sale under partition proceedings in his deed, without first showing that the courthouse, etc., had been destroyed, according to the statutory requirement. *Barefoot v. Musselwhite*, 208.

6. *Destroyed Records — Recitals in Deeds — Constitutional Law.*—Revisal, sec. 341, making recitals in deeds, etc., of judgments, records, etc., evidence, etc., upon condition that the courthouse, records, etc., have been destroyed by fire, etc., are constitutional. *Ibid.*

7. *Depositions—Objections Waived.*—The objections to the reading of the depositions of a witness under Revisal, 1648, upon the ground that the subpœna, though duly issued, was returned "not to be found" is waived if not taken before the beginning of the trial. *Mfg. Co. v. Townsend*, 244.

8. *Immaterial — Depositions — Objections — Harmless Error.*—Evidence merely immaterial in a deposition is harmless. A new trial will not be granted therein unless for prejudicial error. *Ibid.*

9. *Depositions—Witnesses—Subpœna—Interpretation of Statutes*—By reasonable construction, Revisal, 1645 (9), means that where the deposition has been regularly taken, and where the witness is more than seventy-five miles from the place of trial without the consent of the party, and the presence of the witness can not be procured, the deposition may be read if a subpœna has been duly issued—not necessarily served. *Ibid.*

EVIDENCE—*Continued.*

10. *Domestic Relations — Parent and Child — Payment for Services — Promise—Evidence Sufficient.*—In an action brought by the plaintiff to recover for the value of his services rendered his step-grandfather, while living with him, in managing his business and taking care of him during his illness, there was evidence tending to show that the grandfather had repeatedly stated in the presence of others his intention of paying plaintiff, and that the plaintiff expected to receive compensation for them. *Held*, Not error to submit the question of compensation to the jury under a charge that the law presumed the services were rendered gratuitously, and the burden was upon plaintiff to satisfy the jury by the greater weight of the evidence that the step-grandfather promised to pay plaintiff therefor, or that the parties intended that the plaintiff should be paid for his services. *Lowry v. Oxendine*, 268.

11. *Domestic Relations—Parent and Child—Emancipation Implied—Child's Compensation.*—Evidence that the father permitted his minor son to work for himself and receive the earnings of his own labor is sufficient to go to the jury upon the question of whether the father had impliedly emancipated his own son, and assented to the son's receiving his earnings in his own right. *Ibid.*

12. *Witnesses—Opinion Evidence—Experience—Weight.*—One who has testified that the testatrix, in his opinion, had capacity to make the will caveated, may testify as to what he had observed as to the mental condition of another, who had suffered for many years from an attack similar to that of testatrix, when confined to the purpose of aiding the jury in considering the weight to be given his testimony; this being competent as "opinion evidence" as distinguished from "expert evidence." *Moffitt v. Smith*, 292.

13. *Same—Acts of Another—Intervening Cause—"Fracas"—Causal Connection.*—C., a passenger on defendant's train, being partly intoxicated, became disorderly between stations, whereupon the conductor with the assistance of the porter, the baggage man, and L., another passenger, searched the disorderly passenger for arms, and entirely quieted the disturbance before the train reached the next station. There the disorderly passenger alighted, and, with the train still standing, got into a violent altercation with L., who borrowed a pistol from the baggage master, just at the time the plaintiff, also a passenger, was alighting at the station, his destination. L. attempted to fire on C., his pistol snapping, and C. thereupon drew a pistol, fired at L. and inflicted wounds on the plaintiff. There was evidence that the conductor was in position to see the danger of plaintiff, and permitted him, without warning, to place himself, by alighting, in a place of danger. *Held*, (1) A charge to the effect that defendant would be liable if the baggage master knew the purpose for which he loaned the pistol, is erroneous, there being no evidence of such knowledge; (2) the act of loaning the pistol was not the proximate cause of the injury resulting from the stray bullet, and there is no causal connection between them. *Penny v. R. R.*, 296.

14. *Same—Contributory Negligence—Instructions—General Terms—Specific Requests.*—In an action for damages against a railroad for injuries received by plaintiff, a passenger, from a stray bullet in a fracas between two other passengers, there was evidence that the train had

EVIDENCE—*Continued.*

stopped at the station and conflicting evidence that the shooting occurred in the presence of the conductor under circumstances wherein he should have warned plaintiff in time, and of circumstances under which plaintiff himself should have seen the danger in time to have avoided the injury. *Held*, error to refuse to charge, at defendant's request, that plaintiff could not recover if he did not do what a reasonably prudent man would have done in avoiding danger; and if he did not turn out of his way and avoid the injury, which by the exercise of his senses for his own protection he could have avoided, and thus failed to do so, his contributory negligence would bar his recovery; and a charge upon the plaintiff's duty in general terms, as to his exercising his senses for his own protection, is insufficient compliance with a correct request pointing out the particular phases of the evidence. *Ibid.*

15. *Contracts — Seal — Original Instrument—Presumptions.*—Although the words "signed, sealed," etc., may appear in the face of a written obligation of guaranty, no presumption of a seal is raised when the original undertaking is in evidence, and discloses an entire absence of a seal. *Dunlap v. Willett*, 317.

16. *Contracts, Interpretation — Statute of Frauds — Default of Another — Written—Sufficiency—Seal.*—When the instrument sued on is a written obligation upon the sureties for the faithful performance by another of the duties as manager, that he shall render a just and true account of all moneys, merchandise, etc., the relationship of debtor and creditor is not created, but it is sufficient to charge them, under the statute of frauds, without the seal, to answer the default of another. *Ibid.*

17. *Telegraphs—Independent Accounts—Intent—Questions for Jury.*—But when there is evidence tending to show that there were two independent accounts, and after a correspondence between the creditor and debtor as to one of them containing disputed items, the latter sent the former a check "in settlement of all accounts which you may have against me to this date," it is for the jury to find the intent, upon the facts and circumstances of this case, as to whether this check was given and accepted to include the other account, now in suit, which the debtor had previously denied owing, and which, apparently, was not the subject of the correspondence, or intended to be covered by the check. *Aydlett v. Brown*, 334.

18. *Negligence—Questions for Jury—Warehousemen.*—In an action for damages to a shipment of a carload of corn, brought by the endorsee for value of the consignor's draft with bill of lading attached, shipped to consignor's order, notify, etc., it appeared that the car of corn was found at its destination on a side track near the place of business of the one to be notified. There was conflicting evidence as to whether the carrier duly mailed the notice of the arrival of the car to the consignee, the carrier replying in defense on its testimony that the "advice" or postal card had been duly and properly mailed. *Held*, the evidence raised an issue of fact as to the carrier's negligence for the jury to answer. The question of the railroad's liability as a warehouseman is not presented upon the facts of this case. *Bank v. R. R.*, 346.

19. *Objections and Exceptions — Admissibility — Appeal and Error — Procedure.*—Exceptions to the admissibility of evidence must be taken in

EVIDENCE—*Continued.*

apt time during the trial, and when the record discloses they were taken for the first time in grouping the exceptions on appeal under rule 19 (2) they will not be considered. *Jones v. High Point*, 371.

20. *Impeaching Witness—Explanations.*—On redirect examination, the testimony of a witness explaining an answer made on the cross-examination, tending to impeach him, is competent. *Chrisco v. Yow*, 434.

21. *Evidence, Corroborative—Restrictions—Instructions—Appeal and Error.* When the evidence is corroborative, the failure of the trial court to restrict it will not be considered on appeal unless the objecting party asks for an instruction to that effect. *Ibid.*

22. *Declarations—Boundaries—Interest.*—Declarations of the deceased as to a disputed corner of his lands are incompetent unless made against his interest. *Ibid.*

23. *Newly Discovered—Procedure—New Trial.*—If possible, a motion for a new trial for newly discovered evidence must be made in the Superior Court. *Ibid.*

24. *Newly Discovered—New Trial—Discretion.*—Whether a motion for a new trial upon newly discovered evidence is made in the Superior or Supreme Court, its allowance is a matter in the discretion of the court. *Ibid.*

25. *Newly Discovered—New Trial—Requirements.*—A motion for a new trial for newly discovered evidence will be denied when such evidence is merely contradictory of a witness examined at the trial, or merely discredits an opposing witness or is cumulative. *Ibid.*

26. *Newly Discovered—New Trial—Diligence—Questions for Court.*—The applicant should state the efforts he used to get the newly discovered evidence upon which a motion for a new trial is made, so that the court may determine the matter, and his statement is insufficient that "every means had been used to find out where the witness was." *Ibid.*

27. *Newly Discovered—New Trial—Affidavits—Reply—Matter of Right—Discretion.*—Affidavits in reply to a motion for a new trial for newly discovered evidence may be filed as a matter of right; and it is within the discretion of the court whether the appellant may file additional affidavits. *Ibid.*

28. *Dying Declarations—Res Gestæ.*—In an action for damages for the negligent killing of plaintiff's intestate caused by his catching hold of defendant's live wire improperly placed and exposed, an exclamation of the intestate as he caught the wire, fell and expired, bearing upon the question of defendant's negligence, is a part of the *res gestæ;* and the doctrine as to the admissibility of dying declarations, only in cases of homicide, is inapplicable. *Harrington v. Wadesboro*, 437.

29. *Negotiable Instruments—Fraud—Questions for Jury.*—In this case the burden of proof was on the plaintiff to show that he was an endorsee of the negotiable note sued on, before maturity, for value and without notice of the fraud of the payee in its procurement. There was evidence that he took the note from the payee as part payment of a "bunch" or carload of "railroad" mules, which the payee testified was full value, but which defendant's evidence tended to contradict. *Held,*

EVIDENCE—*Continued.*

in this case, under the conflicting evidence, the questions as to whether the plaintiff was a holder of the note for value in due course was one for the jury. *Myers v. Petty*, 462.

30. *Uses and Trusts—Parol Trusts—Character of Evidence—Questions for Jury.*—The evidence to establish a trust estate by parol must be clear, strong and convincing, but it is for the jury to find whether or not the proof is of this character, under proper instructions from the judge. *Hendren v. Hendren*, 505.

31. *Damages—Carriers of Passengers—Ejection from Train.*—When a passenger being entitled thereto has tendered the proper coupon from a mileage book for his fare, and the same having been refused, he is wrongfully expelled from the train, the fact that he might have avoided the result by paying his fare in money wrongfully required of him, is not a relevant circumstance on the issue as to the amount of damages. *Harvey v. R. R.*, 567.

32. *Evidence—"Bloodhounds."*—In order to render competent the action and conduct of a bloodhound in trailing a person from the place where a crime has been committed, there must exist certain conditions or circumstances which tend to establish the guilt of which the action of the bloodhound is indicative; and where there is a want of evidence tending to show that the bloodhound was put upon the trail of the one who committed the offense, or that the hound was one of experience in following a trail, or that the hound gave indication that the accused was the one whose trail it had apparently followed, and there was evidence only that a store had been robbed of a pistol the accused had in pawn there, and none that the accused had the pistol in his possession thereafter: *Held*, that there was no legal proof of the defendant's guilt. *S. v. Norman*, 591.

33. *Evidence Impeaching—Record Evidence.*—A question asked the defendant in a criminal action, "if he had not theretofore been convicted of an offense and served a sentence upon the roads," is not objectionable upon the ground that the record was the best evidence. *Ibid.*

34. *Nonsuit—Contributory Negligence—Defendant's Evidence—How Considered.*—Upon a motion to nonsuit upon the evidence, the testimony relating to plaintiff's contributory negligence introduced by the defendant will not be considered. *Horne v. R. R.*, 239.

35. *Same—Record—Questions for Jury.*—When the forfeiture of a recognizance is moved for, based upon matters appearing of record, the judge decides without the intervention of a jury; but upon issues of fact the defendant has a right to a jury trial thereof. *S. v. Sanders*, 624.

36. *Same.*—While Revisal, sec. 3216, provides that when evidence of conviction shall be produced in the court in which the recognizance is tried, it shall be the duty of the court to order the recognizance to be prosecuted, etc., yet though the proceedings are of a civil nature, they should be in the cause in which the recognizance is filed. When the facts are denied, an issue for the jury thereon is raised, and when conviction of an offense constituting a breach of the bond is alleged and denied, the proof to be submitted is the conviction in a court of competent jurisdiction; and the judgment should be entered in the court in which the recognizance was filed. *Ibid.*

EVIDENCE, NEWLY DISCOVERED. See Appeal and Error.

EXCEPTIONS. See Reference; Appeal and Error.

EXCUSABLE NEGLECT. See Judgments; Process.

EXECUTION. See Homesteads; Judgments; Process.

EXECUTORS AND ADMINISTRATORS. See Negotiable Instruments.

Personal Property—Gift.—In an action for possession of a horse brought by the administrator of a deceased husband against the wife, the latter claiming her husband had given her the horse, it is only necessary to show by the greater weight of the evidence, the actual delivery and transfer of possession, and an instruction requiring her to prove further that she "thereafter alone had the control and possession of the horse," is erroneous. *Swindell v. Swindell*, 22.

EXEMPTIONS. See Homesteads.

EXPLOSIVES. See Assault.

FEDERAL COURTS. See Jurisdiction.

FEDERAL RECEIVERS. See Corporations.

FEME COVERT. See Partnership; Contracts.

FINDINGS. See Reference; Appeal and Error; Issues.

FIXTURES. See Liens.

FOREIGN CORPORATIONS. See Corporations.

FOREIGN WILLS. See Wills.

FORFEITURE. See Contracts; Waiver; Recognizance.

FRAUD.

1. *Statute of Frauds—Debt of Another—Direct Obligations.*—The statute of frauds requiring that a promise to pay the debts of another be in writing, etc., "does not apply to original promises or undertakings, though the benefit accrues to another than the promisor." *Hospital Asso. v. Hobbs*, 188.

2. *Same—Promise Relied On—Evidence—Questions for Jury.*—Upon demurrer to the evidence, the evidence must be considered in the view most favorable to the plaintiff, and the weight of the evidence, the credibility of the witnesses and reasonable deductions therefrom must be left to the decision of the jury, in an action brought by a hospital association against a railroad company for services rendered an employee of the latter, in good standing in its relief department, when it tends to show that the employee was sick, adjudged by the medical attendants of the railroad to require attention at one of the defendant's hospitals, which it had contracted with the employee to furnish free at one of the hospitals under its control; that the medical and other officials of the defendant attended to and arranged for the employee to be transported and cared for at plaintiff's hospital, one carried on independently of the railroad, where the services were rendered for which the action was brought; and the fact that the employee was joined in the action as a party defendant, does not pre-

FRAUD—*Continued.*

clude the plaintiff, as a matter of law, in this action against the railroad, the question as to whether the plaintiff relied upon the implied promise of the railroad and that credit was extended thereon, being, under the circumstances, a question for the jury. *Ibid.*

FREE-TRADER. See Partnership.

FUTURES. See Contracts.

"GOOD WILL." See Sales.

"GREEN HAND." See Negligence; Contributory Negligence.

GUARDIAN AD LITEM. See Process.

HABEAS CORPUS.

1. *Appeal and Error—Objections and Exceptions—Facts Found—Conclusiveness.*—Upon an appeal from a judgment upon a writ of *habeas corpus* awarding the custody of a minor child, the Court will only review errors of "law or legal inference," Constitution, Art. IV, sec. 8, and not findings of fact made by the lower court upon competent evidence; and Revisal, 1854, allowing an appeal in such cases, does not affect the matter. *Stokes v. Cogdell*, 181.

2. *Parent and Child—Custody.*—In *habeas corpus* proceedings for the possession of a nine-year-old child, the parents of the child, who are living together as lawful man and wife, have *prima facie* the right to its control and custody, and when without being divorced they are living apart, the question concerning the disposition of their offspring must be decided under the provisions of Revisal, sec. 1853. *In re Jones*, 312.

3. *Same—Illegitimate Child—Prima Facie Right.*—In the case of illegitimate children, the same *prima facie* right of the parent to the custody of the offspring exists as in case of legitimacy, perhaps to a lesser degree, in the mother, where she evinces a capacity and disposition to properly care for her children. *Ibid.*

4. *Same.*—It appearing from the findings of the lower court in *habeas corpus* proceedings by the mother, against her uncle and his wife for the care and custody of her nine-year-old illegitimate child, that the petitioner had lived with the uncle and wife, as one of their family, until five years before the proceedings were brought, when she married and was living with her husband, both being desirous of its custody, both of whom were "respectable colored people, capable of rearing and providing for the child"; and that there was no abandonment by the mother, Revisal, sec. 180. *Held*, The mother had the paramount right to the custody of the child, though its physical, mental, and moral welfare were properly being cared for, and the child's affections were with those who then had its custody. *Ibid.*

HARMLESS ERROR. See Divorce; Evidence.

1. *Evidence, Immaterial—Depositions—Objections.*—Evidence merely immaterial in a deposition is harmless. A new trial will not be granted therein unless for prejudicial error. *Manufacturing Co. v. Townsend*, 244.

HARMLESS ERROR—*Continued.*

2. *Instructions—Evidence.*—In an action for damages for the negligent killing of plaintiff's intestate the admission in evidence from a witness that the intestate was kind to his family was rendered harmless by the correct instruction of the court upon the question of the measure of damages. *Watson v. Lumber Co.*, 384.

3. *Instructions—Jury—Incorrect Arguments.*—Under our statute, attorneys have the right to argue both the law and facts to the jury, and an argument made by plaintiff's counsel, in an action to recover damages for the wrongful killing of his intestate, that the jury could take into consideration the value of the intestate "to his family in his care and oversight," is not reversible error when it appears that the trial judge correctly instructed the jury upon the issue as to damages. *Ibid.*

HEIRS AT LAW. See Descent; Mortgages; Deeds and Conveyances.

HOLDER FOR VALUE. See Negotiable Instruments.

HOMESTEADS. See Constitutional Law.

1. *Appraisers' Report—Lost Records—Oral Evidence.*—A purchaser of lands at an execution sale from which defendant's homestead had been exempted and laid off, may show, after proving the loss of the original report of the appraisers, by oral evidence and by copy made thereof, the contents of the original report of the appraisers, which had been filed in the judgment roll, for the purpose of establishing the boundaries of the homestead and the proper location of a disputed line. *Hughes v. Pritchard*, 23.

2. *Appraisers' Report—Independent Action—Collateral Attack—Procedure—Motion.*—The report of the appraisers in laying off a homestead can not be collaterally attacked in an independent action to ascertain the boundaries, upon the ground that they did not sign the report in the presence of the sheriff. This is an irregularity which at most can only render the report voidable, and the remedy is by motion in the original proceedings to set it aside, after it has been filed in the Superior Court clerk's office. *Ibid.*

3. *Actions to Declare Void—Parties—Independent Action—Procedure.*—After a judgment obtained, the judgment debtor conveyed his lands to defendant who had the sheriff to lay off homestead of the judgment debtor in the lands seized by the sheriff under execution; the judgment creditor brings his action against defendant and the sheriff to have exemption declared void. *Held*, An independent action was properly brought, the vendee and sheriff being the parties to be affected and not the parties to the original action of debt; and if a motion in the cause were held proper, the court would treat the present action as such and regard the summons a notice thereof. *Sash Co. v. Parker*, 130.

4. *Action to Declare Void—Independent Action—Procedure.*—An action brought to declare null and void a homestead laid off, under execution, in the lands of a judgment debtor, does not fall within the provisions of Revisal, 699, relating to an erroneous valuation or irregularities, and hence the plaintiff's remedy is not by exception to the valuation of the allotment, and the principle of *res judicata* therein has no application. *Ibid.*

HOMESTEADS—*Continued.*

5. *Exemption Right—Estates.*—A homestead in lands is not an estate therein, but a "mere exemption right." *Ibid.*

6. *Judgment Debtor—Vendee—Execution—Constitutional Law.*—To claim a homestead in lands (Constitution, Art. X, sec. 2) it must be owned and occupied by and allotted to the claimant at the time of the issuance of the execution; and the vendee of a judgment debtor can not claim and have laid off a homestead in the lands conveyed as against a levy by the sheriff thereon under a judgment had against the vendor prior to his deed. *Ibid.*

7. *Same—Constitutional Law—Legislative Interpretation—Precedents.*—A legislative construction of the Constitution, though not binding on the courts, is entitled to great weight. Revisal, 686, is in accordance with the views of the court, and expresses the proper construction of Constitution, Art. X, sec. 2. *Ibid.*

8. *Judgments—Liens—Limitations of Actions.*—In an action against the administrator and heirs at law to sell the homestead of deceased to make assets, brought by the owner of a judgment obtained in the Superior Court, it appeared that the judgment had not been in force ten years at the death of the homesteader or at the time of the commencement of this action, excluding the time the statute was suspended by reason of the allotment of the homestead. *Held*, the lien of the judgment being in force at the time of the commencement of the action, the administrator was properly directed to pay it out of the proceeds of the sale of the homestead in its order of priority, and the statute was not in bar. *Tarboro v. Pender*, 427.

9. *Judgment—Process—Different County.*—Prior to the Acts of 1905, it was not necessary to the validity of proceedings to lay off the homestead of the judgment debtor under execution issued from another county, that the judgment of that county be first docketed in the county of the *locus in quo*. *Cox v. Boyden*, 522.

10. *Exemption Right—Estate—Interpretation of Statutes—Constitutional Law—Sales.*—Our Constitution and laws relating to the homestead do not create or confer any new property rights, but only an "exemption right" operating on the creditors and the agencies provided by law for the collection of claims requiring, in the instance of real estate, that the exemption be given effect before a valid sale can be made. *Fulp v. Brown*, 531.

11. *Interpretation of Statutes — Constitutional Law — Creditors — Sale — Parties.*—A widow having the right to a homestead in the lands of her deceased husband, Constitution, Art. X, sec. 5; Revisal, sec. 707, is not required to take action for the preservation of this right; and before the land can be validly sold by the personal representatives to make assets for the payment of the debts of the deceased the homestead must first be assigned. *Ibid.*

HUMILIATION. See Damages.

HUSBAND AND WIFE. See Tenants in Common; Partnership; Deeds and Conveyances; Process; Uses and Trusts; Contracts.

ILLEGITIMATE CHILD. See Parent and Child.

IMPROPER REMARKS. See Appeal and Error.

INADEQUACY OF PRICE. See Sales.

INDEMNITY. See Action; Insurance.

INDEPENDENT CONTRACTOR. See Master and Servant.

INDICTMENT.

1. *Rocking Trains—Joint Defendants—Motion to Quash—Discretion—Procedure.*—A motion to quash a bill of indictment against several defendants for throwing stones at a train, Revisal, 3763, must be made on the face of the bill, and may be disallowed by the judge, in his sound discretion, except in cases of gross abuse. *S. v. Holder*, 606.

2. *Rocking Trains—Vagueness—Bill of Particulars—Procedure.*—Upon a trial for throwing stones at a train prohibited by Revisal, 3763, a charge in the bill that it was done "from one station to another" follows the form set out in the statute, and is not void for vagueness and uncertainty. The remedy of defendant was by motion made to the court for a bill of particulars. Revisal, 3244. *Ibid.*

3. *Statutory Language—Legislative Powers—Defining Crime—Interpretation of Statutes.*—Revisal, 3763, prescribes a form of indictment for throwing stones at a train, and makes such acts a misdemeanor, punishable "by a fine or imprisonment in the county jail or State's Prison in the discretion of the court"; and a motion in arrest of judgment will be denied if made merely upon the ground that the indictment did not contain the word "feloniously," secs. 3595, 3612, 3615, 3694, 3763, being an exception to the provisions of sec. 3291, when construed together. *S. v. Fesperman*, 108 N. C., 770, cited and distinguished. *Ibid.*

4. *Corporations—Evidence—Tenants—Removing Tenements, Etc.*—The intent being an ingredient of the offense, a corporation is indictable for the acts of its officers and agents under Revisal, 3686, when the corporation is a tenant, etc., for injuring or damaging tenement houses, etc.; and the corporate existence may be shown, though not charged in the bill. *S. v. Lumber Co.*, 610.

5. *Words and Phrases—Tenants—Removing Tenements—Interpretation of Statutes.*—Upon a trial for violating Revisal, 3686, the indictment reading, that defendant corporation, with the three other defendants, "with force and arms did willfully and unlawfully demolish, pull down and remove from said lands . . . the above-mentioned walled-in enclosure, stables, feed room or barn," etc. *Held*, (1) that nothing is charged in the bill to come within the meaning of a "tenement" or "outhouse," the former word referring to a dwelling or place of habitation, and the latter being in some respect a parcel of such dwelling and within curtilage; (2) the words of the statute do not include "stables," a *casus omissus* for the Legislature and not for the courts; (3) "a walled-in enclosure" falls within the meaning of "a wall or other enclosure." *Ibid.*

6. *Misdemeanors—Accessories—Principals.*—A charge in an indictment against a corporation and other defendants, for violating the provisions of Revisal, 3686, that all the defendants, except the corporation, were present assisting in doing the act, makes those present principals in the second degree, not accessories; if they were accessories, the

INDICTMENT—*Continued.*

result in this case would be the same, for in misdemeanors all aiders, abettors and accessories, whether before or after the fact, are principals. *Ibid.*

7. *Quash—Informalities, Etc.*—An indictment under Revisal, 3686, may not be quashed or judgment arrested "by reason of any informality or refinement." Revisal, 3254. *Ibid.*

8. *Sufficiency — Tenants—Removing Tenants—"Willfully"—"Belief."*—In order to convict a tenant under the provisions of Revisal, 3683, for willfully and unlawfully demolishing, etc., any tenement house, etc., it is necessary to prove that the act was done "willfully and unlawfully"; and it was error to refuse a prayer for instruction, that the defendants would not be guilty of "willfully" removing, etc., if the jury shall find from the evidence that the defendants did reasonably and *bona fide* believe they had the right to do so. *Ibid.*

9. *Counts—Receiving Stolen Goods—Conviction—Verdict Sufficient—Intendment.*—The verdict of a jury should have a reasonable intendment and receive a reasonable construction; and when an indictment charged the defendant with larceny and receiving stolen goods the property of H., he was tried for receiving the goods knowing them to be stolen, and the evidence tended to show that they were stolen by D. and received by the defendant with guilty knowledge, and to this count of receiving the evidence and charge of the court were alone directed; the record stating that the judge correctly charged "upon all phases of the evidence," the conclusion is indisputable that the jury intended to convict the defendant of the crime alleged in the indictment and for which he was tried, in rendering the verdict, "We find the defendant guilty of receiving goods, knowing them to be stolen," and it is sufficient for conviction. *S. v. Gregory*, 646.

INFANTS. See Parties; Process; Negligence; Tax Deeds.

INITIAL LETTER. See Evidence.

INJUNCTION.

1. *Trespass—Supreme Court Opinion—Surveys—Orders—Procedure.*—In an action of trespass involving a dividing line between plaintiff's and defendant's land, and asking for a restraining order, the Supreme Court having rendered and certified down its opinion in plaintiff's favor, it is not error for the subsequent trial judge to order the dividing line to be marked, and enjoining trespass upon plaintiff's land; but the cause should be retained until the court has received the surveyor's report, to afford opportunity for exceptions to be made to the line as actually marked. *Yeates v. Forrest*, 17.

2. *Cutting Timber—Undefined Right—Equity.*—An injunction against cutting timber will not be granted when it appears that the plaintiff claims an ill-defined balance of profits made by some of the defendants with others, thereof, under a contract which clearly contemplates the cutting of the timber within a prescribed time; when some of the defendants are solvent and may be made to respond in damages; and in passing upon the question of injunction the courts of equity will

INJUNCTION—*Continued.*

consider the relative loss or advantage to the parties, as, in this case, the expiration of the time in which defendant may cut the timber under the terms of the contract. As to whether Revisal, secs. 807, 808, 809, apply. *Quære? Taylor v. Riley*, 195.

3. *Shares of Stock—Issuance—Insolvency of Shareholder—Pleadings.*—When, in an action to compel a corporation and others to issue certain shares of stock to the plaintiff and to enjoin the tranfer of the shares to another on the books of the corporation, the complaint sufficiently alleges plaintiff's ownership, the insolvency of one of the defendants to whom the certificates were issued, and other facts tending to show that the transfer of the stock would be to plaintiff's irreparable loss a restraining order should be granted to the hearing. *Zeigler v. Stephenson*, 528.

IRREGULAR JUDGMENTS. See Judgments.

INSANE PERSONS. See Murder.

1. *Torts—Damages.*—A lunatic is liable in damages for a tort committed by him, and the measure of damages is compensation for the injury inflicted, and punitive damages are not recoverable. *Moore v. Horne*, 413.

2. *Same—Evidence—Punitive Damages.*—In an action brought against a lunatic for his tort committed in assaulting and injuring the plaintiff, wherein actual damages alone are sought to be recovered, evidence offered by plaintiff tending to show that defendant was sane at the time complained of is inadmissible, as such would only be competent when punitive damages are claimed. *Ibid.*

3. *Same—Resisting Arrest—Abusive Language.*—In an action brought to recover actual damages for an injury tortiously inflicted by defendant, a lunatic, evidence that defendant resisted arrest under a warrant issued by a justice of the peace for the same criminal offense, and was abusive in his language to the officer arresting him, is incompetent for the purpose of proving the assault in the civil action. It is not harmless error, as it tends to prejudice the minds of the jury. *Ibid.*

4. *Parent and Child—Insane Child—Wrongful Death—Damages—Liability of Parents—Negligence—Evidence.*—The parents of an insane son are not liable in damages for his killing a person after he has been in a hospital for the insane and discharged by the proper authorities as safe to be at large, and when there was no evidence or circumstances tending to show any subsequent change in the son or that the parents in any manner could have anticipated the homicide. Under such circumstances there is insufficient evidence to take the case to the jury. The estate of the insane son would be liable, if he had any, under the principles announced in *Moore v. Horne*, 413; *Ballinger v. Rader*, 488.

INSOLVENCY. See Injunctions.

INSTRUCTIONS. See Appeal and Error.

1. *Notes—Fraud—Procurement—Evidence.*—In an action brought by plaintiff bank against the makers of a promissory note, the defense, sup-

INSTRUCTIONS—*Continued.*

ported by evidence, being that the paper was procured by false representations and fraud in the procurement by the payee, there was uncontradicted evidence on the part of the plaintiff, through its officers, that it was an endorsee, for value, before maturity, without notice of infirmity of the paper, if any there was. An instruction to the jury, that if they should find all the facts to be as testified to by the witnesses in the case, they should answer the issue for the plaintiff. *Held*, correct. *Bank v. Fountain*, 148 N. C., 590, approved and applied; *Bank v. Griffin*, 72.

2. *Modifications.*—A modification of instructions requested, which is necessary, in view of the evidence and the nature of the issue being tried, to confine the investigation of the jury to the real questions presented and to state with accuracy the law applicable, is not erroneous. *Pickett v. R. R.*, 148.

3. *Contributory Negligence—General Terms—Specific Requests.*—In an action for damages against a railroad for injuries received by plaintiff, a passenger, from a stray bullet in a fracas between two other passengers, there was evidence that the train had stopped at the station and conflicting evidence that the shooting occurred in the presence of the conductor under circumstances wherein he should have warned plaintiff in time, and of circumstances under which plaintiff should have seen the danger in time to have avoided the injury. *Held*, error to refuse to charge, at defendant's request, that plaintiff could not recover if he did not do what a reasonably prudent man would have done in avoiding danger; and if he did not turn out of his way and avoid the injury, which by the exercise of his senses for his own protection he could have avoided, and thus failed to do so, his contributory negligence would bar his recovery; and a charge upon the plaintiff's duty in general terms, as to his exercising his senses for his own protection, is insufficient compliance with a correct request pointing out the particular phases of the evidence. *Penny v. R. R.*, 296.

4. *Jury—Incorrect Arguments—Harmless Error.*—Under our statute, attorneys have the right to argue both the law and facts to the jury, and an argument made by plaintiff's counsel, in an action to recover damages for the wrongful killing of his intestate, that the jury could take into consideration the value of the intestate "to his family in his care and oversight," is not reversible error when it appears that the trial judge correctly instructed the jury upon the issue as to damages. *Watson v. Lumber Co.*, 384.

INSURANCE.

1. *Life — Policy Contracts — Misrepresentations—Belief—Inducements.*—One who can read, and does not read his policy of insurance, can not maintain an action to recover premiums paid thereon upon the ground that he was induced to pay them by false and fraudulent representations of the agent of the insurance company as to the plain terms and conditions of the written policy, when he admits he did not believe the agent at the time, for he could not therefore have been induced by the alleged misrepresentations to take the policy or pay the premiums, and especially as he was acting under the advice of his attorney when he paid the premiums. *Frazell v. Insurance Co.*, 60.

INSURANCE—*Continued.*

2. *Policy Contract — Ambiguity — Issues — Evidence, How Considered.*— While in interpreting a written policy of life insurance any ambiguity or doubt as to the true meaning of the words employed is to be construed favorably to the insured, it is not so as to the evidence in the trial of the issues before a jury; and an instruction that they should allow to the plaintiff a more favorable consideration of the evidence than to the defendant, and resolve any doubt in his favor, is erroneous. *Powell v. Insurance Co.*, 124.

3. *Policy Contract—Issues Determinative.*—When, in an action to recover upon a policy of life insurance, the pleadings raise an issue as to whether there had been a delivery of the policy sued on, that issue should be directly submitted to and passed upon only by the jury, the issues as to whether any recovery may be had on the policy, being dependent upon the answer to that issue. *Ibid.*

4. *Same—Policy Stipulations.*—When the pleadings raise an issue as to the delivery of a policy, and there is evidence as to whether there had been a delivery, such as fraud in the procurement, etc., of the policy, the subject of the action, the indisputable clause is but one of the terms of the policy dependent for its efficacy upon the valid delivery thereof, which should first be shown. *Ibid.*

5. *Policy Contract—Delivery—Regulations—Fraud—Evidence.*—When the policy of life insurance states that it is "based upon the payment of premiums in advance," and there is evidence tending to show that, by the rules and regulations of the company, a new examination of the insured is required if it is not delivered within sixty days; that the premium must be paid on its delivery, and that it can not be delivered unless the applicant is in good health; that none of these requirements were complied with and the policy was delivered when the insured was sick, only a few days before his death, it is sufficient upon the issue as to whether there had been a valid delivery of the policy sued on. *Ibid.*

6. *Policy Contract—Delivery—Requirements.*—A requirement in a written policy of life insurance that the policy shall not be effective until there has been a delivery thereof, is valid and binding, and the delivery must be either actual or constructive. *Ibid.*

7. *Indemnity—Interpretation of Contract.*—While any doubt as to the intention of an insurance contract, arising from the words in which it is expressed, should always be resolved strictly against the insurer and in favor of the insured, yet when the intention is clearly stated, it should be enforced according to the will of the parties as thus expressed, leaving thereby no room for construction. *Power Co. v. Casualty Co.*, 275.

8. *Same—Indemnity—Legal Liability.*—The plaintiff in this action was sued in a former action for damages arising from a personal injury received by its employee, and upon appeal in that action it was decided in the Supreme Court that it was not liable upon the facts presented. Thereafter this plaintiff compromised its case, and then brought this action against the defendant indemnity company to recover the amount paid by it in compromise, with costs and reasonable attorneys' fees. In the contract of indemnity the defendant agreed to defend any suit brought against the plaintiff (the assured),

INSURANCE—Continued.

but therein explicitly referred to a suit "to enforce a claim for damages on account of an accident policy covered by the policy," the indemnity being against loss from liability imposed by law for damages on account of bodily injuries or death suffered while the policy was in force, by any person or persons not employed by the assured while "at or about work of the assured." It appeared that the injury was done to a trespasser, and that the plaintiff was not liable in law for the same. *Held*, (1) The injured person, under the facts of the case, was not "at or about work" of the insured when he was injured, as contemplated by the terms of the policy, and there was no causal connection between the "work" of the assured and the injury; (2) the defendant indemnity company was not bound to defend a suit for a groundless claim not within the terms of the policy, and the plaintiff (the assured) can not recover; (3) a motion to nonsuit should have been granted. *Ibid.*

9. *Policy—Interpretation of Contracts.*—When a person of mature years and sound mind, who can read and write, accepts a policy of insurance containing stipulations material to the risk and on breach of which the policy may be avoided, and there is nothing confusing or ambiguous in them and no representations made which are calculated or intended to deceive as to their import, the policy with the stipulations becomes the contract between the parties, to be enforced while it stands, according to its terms. *Lancaster v. Insurance Co.*, 285.

10. *Same—"Riders."*—The plain provisions of a "rider" attached to a fire insurance policy on a steam cotton gin will be given effect, when it is expressly thereon stated that it is attached to and made a part of the policy, and when the purpose is to better adapt its provisions to the particular kind of property, with reference to the methods and conditions of its operation, with nothing uncertain or restrictive in its terms; and it appearing by express provision in the policy itself, that it was "made and accepted under the foregoing stipulations and conditions, together with such other provisions, agreements and conditions as may be endorsed hereon." The stipulations in the body of the policy not inconsistent with the "rider" will also be given effect. *Ibid.*

11. *Vendor's Lien—Purchase Price—Personal Property.*—When a note is given for a steam cotton gin retaining title in the vendor until the purchase price is paid, and recorded, Revisal, 983, the character of the property from personal to real is not changed, though it is attached to the realty. *Ibid.*

12. *Vendor's Lien—"Ownership"—Interpretation of Contracts.*—A vendor's lien given by the vendee's note for the purchase price of a steam cotton gin, retaining the title in the vendor for security, does not avoid the vendee's right of recovery under a policy of fire insurance stipulating, in effect, that the policy would be void if the interest of the assured was other than the sole and unconditional ownership, as the vendee is obligated to pay the note in the event of loss, and the character of his ownership does not fall within the prohibition of the terms used in the policy contract. *Ibid.*

13. *Vendor's Lien—Ownership—Mortgages—Interpretation of Contracts.*—A recorded vendor's lien given for the purchase price of a steam

INSURANCE—*Continued.*

cotton gin is, in effect, in the nature of a chattel mortgage to secure the purchase price, and avoids a policy of fire insurance thereon when violative of an express stipulation therein that the entire policy shall be void if the subject of the insurance be personal property or become encumbered by a chattel mortgage. *Ibid.*

14. *Policy—Fraud or Mistake.*—The pleadings in this case, brought to reform a policy of life insurance for mistake and fraud, are sufficient. *Jones v. Ins. Co.*, 151 N. C., 54, and other like cases, cited and approved. *Jones v. Ins. Co.*, 388.

15. *Same—Waiver—Instructions—Reversible Error.*—In an action for the reformation of a life insurance policy for fraud and mistake, the plaintiff's evidence tended to show that the defendant's agent had made fraudulent misrepresentations inducing the contract, that plaintiff would be repaid his premiums and interest at maturity, and the defendant contended that its agent had explained to the plaintiff that the representations were untrue and not contained in the policy, and the latter continued thereafter for years to pay his premiums without objection. The explanation by defendant's agent was denied by plaintiff, who contended that reassuring statements were made several years prior to the time fixed by the defendant's said agent. *Held,* the defendant was entitled to the charge that if the plaintiff continued to pay the premiums with knowledge of the facts he thereby waived any benefit except as provided by the policy; and it was reversible error for the court to add, "Unless you further find from the evidence that the plaintiff was lulled into security or was led to believe" otherwise, there being no evidence thereof. *Ibid.*

16. *Orders—Policies—Rules—Dues—Arrearages — Forfeiture — Waiver.* — The certificate in an insurance order sued on expressly stipulated that the insured at the time of his death shall be a beneficial member in good standing of a subordinate council affiliating with the national council, and also a member in good standing of the funeral benefit department of the national council, in accordance with the laws of the national council and subordinate council now in force or hereafter adopted prior to his death. The charters, rules and constitutions of the order applicable, provided that one becoming indebted to the order for weekly dues for thirteen weeks should not be entitled to the benefits until four weeks after all such arrearages had been paid, etc. *Held,* (1) it appearing that the insured had been in arrears for current dues for more than thirteen weeks, and had paid them while in his last sickness about six days prior to his death, his administrator could not recover on the policy without such satisfactory explanation as amounted to a legal excuse; (2) the payment of the back dues, under the circumstances, was not a waiver of the forfeiture. *Page v. Junior Order*, 404.

17. *Same—Sick Benefits—Offsets.*—The law will not apply the sick benefits to be derived under the policy in an insurance order to the arrearages in weekly dues owed by the assured, which otherwise would invalidate the policy, when it appears that the assured had failed to follow the prescribed methods of the policy required to entitle him to these benefits, and which upon the face of his policy, were binding upon him. *Ibid.*

INSURANCE—*Continued.*

18. *Same.*—When it appears from the local charter of an insurance order that a designated committee "shall visit the sick or disabled brothers within six hours after being notified," and should this committee believe that the sick or disabled member was not "so sick or disabled as to render him incapable of procuring the means of subsistence, the committee may refer the matter to one or more respectable physicians," etc., and it appearing generally from both the local and the general charter that the sickness must be of this character. *Held*, to entitle a member to sick benefits he must have been disabled from earning his livelihood, and such claim can be allowed against current dues only after notice to or knowledge by the company of the sickness and its liability fixed in some way recognized by the company, and applicable under the provisions of the policy. *Ibid.*

INTENT. See Accord and Satisfaction; Indictment; Evidence; Verdict.

INTEREST. See Drainage Commission.

Interpleader—Pleadings—Tender.—An assessment life insurance company having filed its bill of interpleader avowing its readiness to pay into court the amount of its policy claimed by two contestants, is assumed, nothing else appearing, to have continued ready and able to pay upon the order of court, and is not chargeable with interest on the amount by reason of delay caused by litigation, in favor of the successful defendant. *Knights of Honor v. Selby*, 203.

INTER PARTES. See Fraud.

INTERPLEADER.

1. *Pleadings—Defect of Statement—Procedure—Demurrer.*—A defect of overstatement in a bill of interpleader is waived by answers of the parties defendant, such defect should be availed of by demurrer. *Knights of Honor v. Selby*, 203.

2. *Pleadings—Tender—Interest.*—An assessment life insurance company having filed its bill of interpleader avowing its readiness to pay into court the amount of its policy claimed by two contestants, is assumed, nothing else appearing, to have continued ready and able to pay upon the order of court, and is not chargeable with interest on the amount by reason of delay caused by litigation, in favor of the successful defendant. *Ibid.*

3. *Attorney's Fees.*—A successful interpleader is not entitled to reasonable attorney's fees incurred in litigation over the funds held by it as a stakeholder. *Ibid.*

INTERPRETATION OF STATUTES. See Statutes; Penalty Statutes.

1. *Lost Deeds—Records—Oral Evidence.*—Revisal, chapter 11, is an enabling act, and does not exclude oral evidence, admissible at common law, to prove the contents of a lost deed or record. *Hughes v. Pritchard*, 23.

2. *Criminal Actions—Prosecutor—Costs—Power of Court.*—The power conferred upon the courts to determine the question of responsibility and to tax costs against the one adjudged to be the prosecutor, extends to "all criminal actions where the defendant is acquitted, a *nolle pros.* entered, judgment arrested, or if the defendant shall be discharged

INTERPRETATION OF STATUTES—*Continued.*

from arrest for the want of probable cause," and exists at any stage of the criminal proceedings, before or after the findings of the bill or defendant acquitted. *S. v. Stone*, 614.

INTERSTATE COMMERCE. See Penalty Statutes; Constitutional Law.

INTERVENING CAUSE. See Negligence.

ISSUES. See Divorce, 4.

1. *Insurance—Fraud and Mistake—Waiver—Issue, New Trial on One.*—In an action to reform a life insurance policy for fraud or mistake, the sixth issue was upon the question of plaintiff's waiving his right to rely upon the alleged false representations, and in this issue alone error was found on appeal. It being apparent that the matter involved in this issue is entirely distinct and separate from the matters involved in the others, without danger of complication, a new trial is ordered on the sixth issue only. *Jones v. Ins. Co.*, 388.
2. *Appeal and Error—Issue, New Trial as to One.*—A partial new trial having been granted on a former appeal in this case restricted to the issue whether or not the defendant railroad company so used one of its spur tracks as to be a nuisance, to plaintiff's special damage, the lower court properly restricted the trial to this issue alone. *Staton v. R. R.*, 432.

JOINDER. See Parties.

JOINT MAKERS. See Negotiable Instruments.

JUDGMENT CREDITOR. See Liens.

JUDGMENT DEBTOR. See Homesteads.

JUDGMENTS. See Damages; Drainage Commissioners.

1. *Estoppel—Conclusiveness—Constituent Judgments.*—Plaintiff alleged in a former action that he was the owner of certain lands as assignee by mesne conveyances of the dower of E., and an issue being submitted to the jury to establish the boundary line between plaintiff's and defendant's land, it was found that a certain line from A to B, as indicated on a plat in evidence, was the true line, which would exclude the *locus in quo* from the boundaries of plaintiff's land, and include it in those of defendant, and it was adjudged, according to the verdict, that the plaintiff owned the lands lying to the west, and the defendant those to the east of said line, from which judgment there was no appeal. In the present action between the same parties involving the title to the same land, the defendant pleads plaintiff's estoppel by the former judgment, and in response to an appropriate issue the jury found that therein the *locus in quo* had been adjudged as defendant's land. *Held*, (1) The plaintiff is bound by the former judgment and verdict; (2) The judgment defining the dower relied upon as an estoppel is not inconsistent with a judgment theretofore rendered in the same action, which merely declared that the widow was entitled to dower without locating it. *White v. Tayloe*, 29.
2. *Judgments of Other States—Collateral Attack—Fraud—Perjury—Allegations—Demurrer.*—While perjury is a fraud in obtaining a judgment, and judgments obtained in another State may be impeached

JUDGMENTS—*Continued.*

here for fraud, the facts should appear that the courts may see and determine whether new evidence relied on is merely contradictory or cumulative of that offered on the former trial, and that the probable result will be different if the relief is granted; and a demurrer *ore tenus* to a complaint alleging the "belief" that plaintiff is now prepared "to show that the said testimony was, in fact, false," should be sustained. *Mottu v. Davis*, 160.

3. *Judgments of Other States—Jurisdiction—Issues.*—In this action to set aside a judgment of the court of another State, an issue as to the jurisdiction of the foreign court was submitted, and it appearing that the necessary jurisdiction was conferred by the statutes of that State introduced in evidence without objection, an instruction to find in favor of the jurisdiction was proper. *Ibid.*

4. *Executors and Administrators—Sales—Motion to Set Aside—Reasonable Time—Pleadings—Prima Facie Case—Coverture—Infants—Service.*—A decree and confirmation of sale by an administrator of the deceased, in proceedings to sell lands to make assets, will not be set aside as against a *bone fide* purchaser for value, upon motion of petitioners, claiming, as heirs at law, that they were infants at the time and not duly served with process if not made within a reasonable time, and in the absence of allegation of such facts as will make out a *prima facie* case that they had a valid defense to the sale of the lands in the original petition to sell. The statute of limitations for the commencement of actions is not applicable to the decision of such cases, and the coverture of female defendants is immaterial. *Glisson v. Glisson*, 185.

5. *Irregularities—Collateral Attack—Motions—Procedure.*—The plaintiff claiming the fee in lands alleges damages for waste committed thereon by the tenant in dower; by order of court other parties were made defendants, and filed answer claiming the reversionary interest as heirs at law. To show that the title of the ancestor of the new parties had been divested, plaintiff introduced a deed, reciting that the *locus in quo* had been sold under proceedings in partition, and had he met the requirements of Revisal, sec. 342, so as to make the recitals evidence of his title, the defendants' remedy, to avail themselves of any irregularity in the proceedings, was by motion in the original action. *Barefoot v. Musselwhite*, 208.

6. *Irregular Judgments—Amendment—Terms Imposed.*—Upon motion to set aside a judgment by default, upon the grounds that the summons was issued to another county without having affixed the seal of the court issuing it (Revisal, sec. 431). *Held*, the judgment was irregular at best, and it was within the discretion of the trial court to set it aside upon the terms that the defendant enter a general appearance. *Calmes v. Lambert*, 248.

7. *Consent—Agreement—Parties.*—A consent judgment is not, strictly speaking, a judgment of the court, and when rendered without the consent of a party will be held inoperative in its entirety. *Lynch v. Loftin*, 270.

8. *Justice of the Peace—Superior Court—Docketing.*—A judgment of a justice of the peace docketed in the Superior Court, for the purposes

JUDGMENTS—*Continued.*

of the lien on the lands of the judgment debtor, becomes a judgment of the latter court; and when the time from the docketing of the judgment to the allotment of the homestead, added to the period of time elapsing since the death of the homesteader to the bringing of the action, does not exceed ten years, the statute of limitations does not bar recovery, or destroy the lien of the judgment. *Tarboro v. Pender*, 427.

9. *Same—Husband and Wife—Agency—Authorization.*—In an action to set aside a deed made by the husband to his wife on the ground that it was fraudulent as to the creditors of the former, it appeared that service of summons was made by publication, that actual notice was only given to the husband and that judgment was rendered binding upon the husband by reason of his laches in employing an attorney not authorized to practice in this State, and who failed to make defense: *Held*, upon the affidavit of the wife setting forth a valid defense, also, that she had neither knowledge nor notice of the pending suit until after judgment rendered, without legal evidence in contradiction, and that she then at once employed an attorney authorized to practice in the county to represent her, who acted promptly in his motion to set aside the judgment; and, further, there being no evidence that the husband's attorney acted for her or that she had authorized her husband to that effect. *Held*, the judgment against her will be set aside and she will be allowed to answer. *Bank v. Palmer*, 501.

10. *Process—Execution.*—The Laws of 1905, ch. 412 (Revisal, sec. 622), providing that "no execution shall issue from the Superior Court upon any judgment until such judgment shall be docketed in the county to which the execution shall be issued," do not apply to executions issued prior to the enactment of said chapter 412. *Cox v. Boyden*, 522.

11. *Same—Homestead—Different County.*—Prior to the Acts of 1905, it was not necessary to the validity of proceedings to lay off the homestead of the judgment debtor under execution issued from another county, that the judgment of that county be first docketed in the county of the *locus in quo*. *Ibid.*

12. *Judgment Suspended — Recognizance—Forfeiture—Evidence—Procedure.*—Judgment having been suspended against the defendant, he being required to enter into bond conditioned that he appear at each term of court for two years and show he has kept the peace toward C. and W. and all other good citizens, and to further show that he had refrained from libel or slander, etc.: *Held*, (1) conviction of publishing, etc., indecent literature is not a violation of the bond; (2) conviction of an affray is a violation of its terms, and it was error in the trial court to hold it had no power to declare the bond forfeited. *S. v. Sanders*, 624.

13. *Same—Record—Questions for Jury.*—When the forfeiture of a recognizance is moved for, based upon matters appearing of record, the judge decides without the intervention of a jury; but upon issues of fact the defendant has a right to a jury trial thereof. *Ibid.*

JURISDICTION. See Removal of Causes.

1. *Corporations—Federal Receivers—Permission to Sue—Submission to State's Jurisdiction.*—In an action for damages against a railroad in

JURISDICTION—*Continued.*

the hands of Federal receivers, an objection to the introduction in evidence of an order of the Federal judge permitting the plaintiff to sue, because the order was not properly certified or sealed by the clerk of that court, becomes immaterial when it appears from the complaint and answer that both the railroad and its receivers had submitted to the jurisdiction of the court respecting the matters involved by filing a joint answer to the merits of the action. *Hollowell v. R. R.*, 19.

JURY. See Reference.

JUSTICE OF THE PEACE. See Judgments.

LANDLORD. See Indictment.

LAPPAGE. See Deeds and Conveyances.

LARCENY. See Principal and Agent.

LAST CLEAR CHANCE. See Contributory Negligence.

LIBEL.

Absolute Privilege—Pleadings.—An affidavit of an executor sought personally to be taxed with cost of an action against the estate, upon the ground of bad faith in defending it, does not render him liable, in an action for libel, for stating in his affidavit to resist the motion that the testimony of the plaintiff was "false," "false in the start and fraudulent in the manner in which it was attempted to be established," as such matters are "absolutely privileged," even if shown to be false and actual malice proven. *Perry v. Perry*, 266.

LIENS. See Judgments; Mortgages.

Insurance—Vendor's Lien—Purchase Price—Personal Property.—When a note is given for a steam cotton gin retaining title in the vendor until the purchase price is paid, and recorded, Revisal, 983, the character of the property from personal to real is not changed, though it is attached to the realty. *Lancaster v. Ins. Co.*, 285.

LIFE ESTATES. See Estates.

LIMITATION OF ACTIONS. See Process; Judgments; Pleadings.

LIVE STOCK. See Carriers of Goods.

LIVE WIRES. See Negligence.

LOCAL AGENT. See Process.

LOCAL PREJUDICE. See Removal of Causes.

LOGS AND LOGGING ROADS. See Damages.

"LOOK AND LISTEN." See Contributory Negligence.

LOST RECORDS. See Evidence.

MALICIOUS PROSECUTION.

Damages—Plaintiff's Poverty—Evidence.—Evidence of plaintiff's poverty is inadmissible in an action for malicious prosecution in the absence

MALICIOUS PROSECUTION—*Continued.*

of evidence tending to show that his actual damage occasioned by the defendant's tortious act was thereby increased. *Robertson v. Conklin*, 1.

MALPRACTICE.

1. *Physicians and Surgeons—Examinations—Test—Care.*—An attending physician and surgeon is not confined to any special test in his examination of his patient to discover whether or not the latter's shoulder joint had been injured by a fall; but in regard to the examination and treatment, he is required to exercise that reasonable skill and care which a prudent member of his profession should use under the circumstances. *Long v. Austin*, 508.

2. *Same—Instructions.*—In plaintiff's action for damages against an attending physician and surgeon for malpractice, in failing to discover an injury to her shoulder blade, received in consequence of a fall, and in his failure to use the proper treatment, a prayer for special instructions is improper which confines the inquiry of the jury to the kinds of test used, leaving out of consideration the degree of care and skill which is required of the physicians and surgeons. *Ibid.*

3. *Physicians and Surgeons—Examinations—Test—Proficiency.*—The application alone of the ordinary tests by a surgeon to discover the extent of an injury received by his patient would be an insufficient defense in an action to recover damages resulting from his failure to ascertain the extent of the injury received. He is required to possess the knowledge and skill ordinarily had among men of his profession, with the understanding of the symptoms disclosed, and the ability to apply the proper remedy. *Ibid.*

4. *Same—Instructions.*—In this action against a surgeon to recover damages for his alleged malpractice, it was correct for the judge to charge the jury upon the evidence "that the defendant owed to the plaintiff that degree of care and skill which is ordinarily practiced and possessed by the average of his profession, and not the highest known to his profession; and where a physician exercises ordinary skill and diligence, he is not liable for a mere mistake of judgment." *Ibid.*

MANAGING AGENT. See Partnership.

MANDAMUS. See Procedure.

MARRIAGE.

Races—Intermarriage—Third Generation—"Pure Negro Blood."—To bring an action for divorce, *a vinculo*, within the meaning of Revisal, sec. 2083, which, among other things, declares void a marriage "between a white person and a person of negro descent to the third generation inclusive," etc., it must be shown the ancestor of the generation stated must have been of pure negro blood. *Ferrall v. Ferrall*, 174.

MARRIED WOMEN. See Deeds and Conveyances; Contracts.

MENTAL ANGUISH. See Telegraphs; Damages.

MILEAGE BOOKS. See Carriers of Passengers.

MISREPRESENTATION. See Fraud.

MONOPOLIES. See Contracts.

MORTGAGES. See Courts; Tenants in Common.

1. *Cancellation of Record—Estoppel.*—A mortgage deed passes the title to the lands mortgaged which is defeasible by the subsequent performance of the conditions of the mortgage, and the entry of satisfaction on the margin of the page of its registration, by the proper person, is conclusive of the fact of the discharge of the mortgage and its satisfaction as to strangers to the mortgage. *Lumber Co. v. Hudson*, 96.

2. *Same—Estoppel by Deed—Heirs at Law—Evidence.*—In an action of trespass the plaintiff and defendant claimed title through one H., the plaintiff through mesne conveyances, and the defendants as widow, and son and heir at law. The plaintiff introduced a mortgage deed from one R. to said H. reciting that it was a tract of land deeded by said H. to him, the mortgagor; and evidence that thereafter, for several years R. was in actual possession and then conveyed it to D., in plaintiff's chain of title, and a few days thereafter H. made an entry on the margin of the page whereon the mortgage was recorded reciting the cancellation of the mortgage by the mortgagor's giving a deed to said D., and that thereafter H. recognized the title of D. *Held*, evidence as tending to show that H. had sold the *locus in quo* to R., received a mortgage to secure the purchase price, which he had canceled on the margin of the registration book upon satisfaction from the proceeds of the sale by R. to D., the entry of satisfaction of record being conclusive on defendants claiming as widow and heir at law of H. Ibid.

3. *Notes—Partnership—Retiring Partner—Indemnity—Definite Liability—Loss—Right of Action.*—When a collateral obligation is in strictness one of indemnity an action at law will not lie unless and until some actual loss or damage has been suffered; but when the obligation amounts to a binding agreement to do or refrain from doing some definite, specific thing materially affecting the rights of the party an action will presently lie for breach of such agreement, and no loss or damage need be shown prior to its commencement. *Hilliard v. Newberry*, 104.

4. *Same — Notice — Demand — Waiver—Written Instrument—Parol Evidence.*—A retiring partner from the firm sold his interest to his copartner and received in payment therefor certain tracts of land on which there was a debt secured by a mortgage. In order to secure the vendor partner from loss by reason of the mortgage, the vendee gave his note in a certain sum, with interest, payable at a fixed time, duly dated, signed and sealed. Upon default of the vendee partner, under the term of the mortgage the vendor partner brought his action on the note. *Held*, (1) The note was to pay a definite sum at a specified time, and it was unnecessary for plaintiff, to maintain his action on the note, to show loss or damage by reason of the mortgage it was given to indemnify against; (2) failure to give notice of loss suffered under the mortgage does not affect plaintiff's right of action, but only his right to presently sue without first making demand, and this requirement was waived by a general denial of liability; (3) evidence of a contemporaneous verbal agreement that time of payment could be extended was inadmissible as contradictory to the written note definitely fixing the time thereof. *Ibid.*

MORTGAGES—*Continued.*

5. *Foreclosure—Process—Judgment Conclusive.*—A decree of foreclosure of a mortgage reciting that personal service of summons had been made can not be collaterally attacked by the plaintiff mortgagor, upon the ground that the summons had not been served, the procedure being by motion in the original cause; and the title of an innocent purchaser at the sale for value will not be disturbed. *McDonald v. Hoffman*, 254.

6. *Title Divested—Subsequent Defect.*—The title of plaintiff having been divested by a decree of foreclosure of his mortgage, an objection to a subsequent defect of examination of a *feme covert* in the chain of title is immaterial. *Ibid.*

7. *Judgment Creditors—Junior Liens—Receivership—Equity.*—The mortgagee of partnership assets had them delivered to him by the mortgagor firm for the purpose of foreclosure, but at the sale a deputy sheriff announced that the plaintiff, a judgment creditor, had a lien thereon and that the sale should not be made. The assets were worth about $2,000, the mortgage note amounted to $1,585, and the property brought $1,450. No sale was made and the mortgagee put a new lock on the door, and by locking it retained the possession of the goods. The mortgagor, without his knowledge, broke into the store and sold and continued to sell the goods until restrained by plaintiff's action and injunction. *Held*, it was error in the lower court at the suit of one holding a junior judgment to appoint a receiver of the partnership, and seize the property, deprive the mortgagee of his right to foreclose given him by his contract and entail upon the fund the cost of litigation, threatening to some extent the sufficiency of the security, in the absence of any allegation or suggestion of insolvency or mismanagement, or bad faith on the part of the mortgagee or any other recognized ground of equitable interference. *Stone Co. v. McLamb*, 378.

8. *Same—Mortgagor—Wrongful Seizure.*—In this case the rights of the mortgagee are not affected by the facts that the mortgagor tortiously broke into the store and resumed possession of the property and proceeded to sell it, such fact not being known by or assented to by the mortgagee; and the act of the mortgagor being tortious, will not be allowed to avoid or injuriously affect the legal rights of the parties. *Ibid.*

MOTION. See Procedure; Judgments; Indictments.

MOTION TO QUASH. See Indictment.

MUNICIPAL CONTROL. See Corporations.

MURDER. See Evidence.

1. *Self-defense—Evidence—Questions for Jury.*—Upon a trial for murder, it is error for the trial judge to charge the jury that in no view of the evidence could the prisoner be acquitted upon the ground of self-defense, the testimony of the prisoner tending to show that deceased without provocation cursed and violently assaulted him, a much weaker man, over a dispute they theretofore that day had had, giving in detail an account of an assault which would reasonably

MURDER—*Continued.*

make him apprehensive of great bodily harm or of his life, and that the fatal shot was fired when he was unable to get away and in the power of deceased. *S. v. Stevens*, 604.

2. *Range of Bullet—Expert Evidence.*—On a trial for murder committed by shots from a pistol, a question was asked of a nonexpert witness, "whether from the course of the ball after it struck the body, could the shot have been made when both parties were standing," was not improperly excluded, no prejudice being shown. *S. v. Thomson*, 618.

3. *Second Degree—Range of Bullet—Evidence Germane—Premeditation.*—Prisoner admitted the killing, with a pistol, of his former wife, from whom he had been divorced, in a struggle for the possession of their young child, and testified that in the struggle the child was turning black in the face because he held to it, and the mother, who was holding to it, continued to do so after she had fallen. There was evidence that he fired at the woman just before she fell, and then again while she was on the floor. It was not clear which shot was the fatal one, and the prisoner further testified that the second shot was to scare her so that she would release the child. There was no suggestion of self-defense. *Held*, a question relating to the range of the bullet to show the position of the parties, was not germane to the issue, and the prisoner having admitted the killing with a deadly weapon, no excuse appearing, he was at least guilty of murder in the second degree, and the exclusion of the question by the court was proper. *Ibid.*

4. *Second Degree—Deadly Weapon—Purpose—Evidence.*—The prisoner upon trial for the murder of his wife from whom he had been divorced and who had married again, attempted to show that on a former occasion the present husband had tried to carry away two children of the former marriage who were with him, the divorced husband, and he had drawn a pistol on the prisoner, and that on this occasion, when the prisoner went to his former wife's home to get his young child which had been carried there, he did not intend to use the pistol he was carrying unless necessary. *Held*, the testimony was properly excluded: (1) the trial of prisoner was not for the shooting of the husband; (2) the prisoner was acquitted of murder in the first degree, and the question could only have been competent, in any event, upon the question of deliberation and premeditation. *Ibid.*

5. *Defense—Insanity—Expert Witness—Incompetent Questions.*—Upon a plea of insanity as a defense to a charge of murder, the answer of an expert, to be competent, must be to a question presenting all the vital facts in the case, for otherwise his opinion could not have any value upon the query whether the prisoner had sufficient mind at the time to understand what he was doing, and to know whether he was doing right or wrong. *Ibid.*

6. *Defense—Insanity—Expert Witness—Evidence—Basis.*—In order for an expert to testify upon the insanity of the prisoner, in his defense to a charge of murder, there must be some evidence that the prisoner's mind had been diseased or that there had been insanity in his family; and the mere fact that the witness is an expert does not give latitude to his expression of opinion. *Ibid.*

MURDER—*Continued.*

7. *Defense—Life of Another—Justification.*—It appearing that the prisoner twice shot his wife from whom he had been divorced, while struggling for the possession of their young child, both shots taking effect, and fired at such close range as to scorch her clothes, he is not entitled to a charge to the effect that he had the right to use such force as was necessary to save the life of the child, even though it was necessary to kill the deceased, it further appearing that the deceased had been fleeing from him, and that by releasing his hold upon the child any danger to it would have been avoided.

Semble, that where the punishment imposed by the court is less than the maximum allowed on a conviction for manslaughter, the prisoner can not complain that the verdict was for murder in the second degree instead of manslaughter. *Ibid.*

8. *Evidence, Circumstantial—Link in Chain—Sufficiency.*—Upon a trial for murder many independent facts are permitted to be proven against the prisoner, which taken collectively, point to the conclusion of guilt; and when there is evidence tending to prove the prisoner's guilt by waylaying and shooting the deceased, or that he was present in person aiding or abetting it, it is competent to show that some days before the homicide the prisoner called the deceased out on his piazza at night and shot and wounded him. This, with other evidence of the prisoner's declarations, is competent as tending to show the animus of the prisoner toward deceased. *S. v. Plyler,* 630.

9. *Same.*—As one of the links in the chain of circumstantial evidence tending to prove the prisoner's guilt upon his trial for murder, it is competent to show that he went to the house of the witness after the homicide, about one o'clock a. m. of the same night before he gave himself up, saying he wanted to talk about the case, and told the witness he had not done the shooting, but knew who did, and would not tell for fear of him, a dangerous character, etc., as such conduct on the prisoner's part was proper evidence for the jury to consider with other evidence tending to fix him with guilty knowledge of the crime. *Ibid.*

10. *Opinion Evidence—Ordinary Inferences—Incompetency.*—An element of defense in a trial for murder being that the prisoner could not have gone from his house, where his evidence tended to show he was at a certain time, to the place of the homicide, which soon after occurred, in time to have committed the crime, it was incompetent for him to ask a lay witness as to how long, in his opinion, it would take to go the distance, for the testimony called for was such as the jurors themselves could form an opinion of under the evidence which was introduced or capable of being introduced. But it is competent for the witness to testify, under defendant's objection, that he had gone from the one place to the other in a certain length of time as a matter of fact; and in this manner the prisoner got the advantage of the excluded question. *Ibid.*

11. *Circumstantial Evidence—Sufficiency.*—The circumstantial evidence in this case as to the prisoner's guilt was examined and held to be sufficient to be submitted to the jury. *Ibid.*

12. *Deadly Weapon—Malice—Burden of Proof.*—The admission that a homicide was committed by the prisoner with a pistol, a deadly

MURDER—*Continued.*

weapon, implies malice and raises a presumption of murder in the second degree, casting upon the prisoner the burden throughout the trial of showing all matters in mitigation to reduce the crime to manslaughter or to prove self-defense. *S. v. Cox*, 638.

13. *Self-defense—Repellant Force—Burden of Proof.*—For self-defense the prisoner must prove that the force he used was exerted in good faith to prevent the threatened injury, and was not disproportionate to the force it was intended to repel, the question of excessive force and the real or apparent necessity for its use upon the facts presented being for the jury to determine. *Ibid.*

14. *Proving Attack—Cessation—Instructions.*—When evidence is conflicting upon the plea of self-defense, it is correct for the trial judge to charge, in effect, that if the jury found that after the accused brought on the difficulty resulting in the death of the deceased he withdrew from the encounter or gave deceased reasonable grounds to believe that he had done so, and did not desire to continue the conflict, but the deceased pursued the accused with an open knife and continued to strike him with it, the accused could defend himself as if he had not originally provoked the fight, if the jury found he had provoked it; but that such withdrawal, if so found by them, must have been made in good faith and not as a cover of the deceased to draw the pistol with which the deadly wound was (as in this case, admittedly) inflicted. *Ibid.*

15. *Evidence — Instructions — Contentions—Objections and Exceptions.*—There was no error in this case made by the trial judge in fairly stating to the jury the various contentions of fact by the parties. He clearly stated they must not consider that he was intimating how the facts should be found by them, the finding of the facts being solely for them; and an omission to recapitulate the evidence favorable to a party is not assignable for error, if not pointed out at the time. *Ibid.*

16. *Malice—Verdict—Objections and Exceptions, Immaterial.*—Exceptions relating only to questions of malice, upon a trial for murder, become immaterial when the prisoner is convicted of murder in the second degree. *Ibid.*

17. *Self-defense—Malice—Unnecessary Force—Evidence.*—When there is evidence tending to show that the prisoner several times fired upon the deceased, which resulted in death, a prayer for special instruction, based upon the theory that if the first shot was the fatal one, and in self-defense, the other shots had no bearing upon the guilt or innocence of the prisoner on the question of murder or manslaughter, is properly refused, the fact that the other shots were fired being competent as tending to show they were through malice and rage, in contradiction of the idea of self-defense. *Ibid.*

18. *Repellant Force—Defense of Another—Son—Evidence.*—A son entering a fight to protect his father can justify his act in killing the father's assailant for his protection only to the same extent and under the same circumstances that would justify his father's acts in self-defense. *Ibid.*

NEGLIGENCE.

1. *Master and Servant—"Green Hand"—Duty to Instruct.*—A railroad company owes the duty to instruct a perfectly green and totally inexperienced hand employed to couple cars, and its failure to do so is actionable negligence for consequent injury inflicted on him. *Horne v. R. R.*, 239.

2. *Carriers of Passengers—Employee a Passenger—Wrongful Acts.*—An employee of a railroad, but in this instance but a passenger, and not engaged in the performance of a duty to his employer, must be regarded as a passenger, in an action against the railroad company for injuries to a fellow passenger inflicted by another passenger as a result of his acts, and a charge which assumes that the defendant is in any event liable for his acts is erroneous. *Penny v. R. R.*, 296.

3. *Evidence—Nonsuit.*—Motion to nonsuit properly overruled in this case, there being sufficient evidence of negligence to take the case to the jury. *Nowell v. Cotton Mills*, 322.

4. *Carriers of Goods—Evidence—Questions for Jury—Warehousemen.*—In an action for damages to a shipment of a carload of corn, brought by the endorsee for value of the consignor's draft with bill of lading attached, shipped to consignor's order, notify, etc., it appeared that the car of corn was found at its destination on a side track near the place of business of the one to be notified. There was conflicting evidence as to whether the carrier duly mailed the notice of the arrival of the car to the consignee, the carrier relying in defense on its testimony that the "advice" or postal card had been duly and properly mailed. *Held*, the evidence raised an issue of fact as to the carrier's negligence for the jury to answer. The question of the railroad's liability as a warehouseman is not presented upon the facts of this case. *Bank v. R. R.*, 346.

5. *Railroads—Fire Damage—Locomotives—Operation.*—The operation of a defectively equipped engine, or of a good engine not carefully managed, or managed by an unskillful engineer, is such source of danger to the adjacent landowners from fire that an employer can not relieve himself of the consequent damage under a contract with an independent contractor. *Thomas v. Lumber Co.*, 351.

6. *Independent Contractor—Damages—Master and Servant—Respondeat Superior.*—The defense of an independent contractor is not available when from the contract it appears that he was to cut and haul logs on the defendant's logging road to its main line where it received them; and that plaintiff's intestate was killed on the main line through the negligent running of the locomotive, under defendant's orders, for other purposes than those embraced in the contract. In such instances the contractor acts as the agent of the employer, and a charge by the court making defendant's liability depend upon whether the intestate was killed at a point covered by the contract can not prejudice it. *Watson v. Lumber Co.*, 384.

7. *Appeal and Error—Objections and Exceptions—Presumptions.*—There being no motion to nonsuit and no prayer for instruction in this case upon the issue of negligence alleged, upon appeal it will be assumed that the issue was properly found by the jury. *Lindley v. Power Co.*, 394.

NEGLIGENCE—*Continued.*

8. *Contributory Negligence—Last Clear Chance—Verdict—Judgment.*—In an action for damages, the jury having found that the defendant was negligent, and that the plaintiff was guilty of contributory negligence, and a third issue as to whether the plaintiff could have avoided the injury having been erroneously submitted upon the evidence in this case: *Held*, the defendant is entitled to a judgment in its favor upon the verdict. *Ibid.*

9. *Electricity—Dangerous Instrumentalities—Degree of Care.*—Persons, corporate or individual, engaged in operating an electric plant and supplying power from them, are held to a very high degree of care; and when an untrained and inexperienced boy takes hold of a live wire improperly placed or negligently exposed, such act of the boy does not of itself ordinarily afford evidence of contributory negligence. *Ibid.*

10. *Same—Live Wires—Improper Placing—Insulation—Children—Contributory Negligence—Evidence.*—The defendant town was engaged in furnishing for profit the electrical power to run a moving picture show, operated in a tent, the wires conducting the electricity passing to the tent over a path where persons were accustomed to move, and these wires were permitted to sag in easy reach of such persons. Plaintiff's intestate, an inexperienced boy of seventeen years, and who worked on a farm, living there with his mother, in passing along this path stooped under and caught hold of one of the wires, which was, at that place, permitted to remain uninsulated for the distance of about a foot, and received a shock that killed him. *Held*, (1) The defendant was negligent in permitting the wires to remain as placed and under the existing conditions, is liable for the consequent damages; (2) the act of the boy in thus catching the wire was not in itself such contributory negligence as to bar plaintiff's recovery. *Ibid.*

11. *Killing—Action, When Brought—Evidence—Appeal and Error—Record—Presumptions.*—Actions of this character for damages for negligent killing must be brought within a year under our statute, not as one of limitations, but a *constituent* feature of the right of action; the courts, however, will take judicial notice of relevant facts and entries of record in the suit being tried, and when therein it appears that the killing occurred in July, the summons was issued in the following January, it is proper for the appellate court to assume, in support of the verdict and judgment rendered, that a fact of this character was brought to the attention of the jury in some permissible way. *Ibid.*

12. *Evidence—Dying Declarations—Res Gestæ.*—In an action for damages for the negligent killing of plaintiff's intestate caused by his catching hold of defendant's live wire improperly placed and exposed, an exclamation of the intestate as he caught the wire, fell and expired, bearing upon the question of defendant's negligence, is a part of the *res gestæ;* and the doctrine as to the admissibility of dying declarations, only in cases of homicide, is inapplicable. *Ibid.*

13. *Electricity — Subsequent Repair — Evidence — Harmless Error—Facts Proven.*—The questions in this case turning upon whether the negligent placing and improper insulation of defendant's live wire caused

NEGLIGENCE—*Continued.*

the death of plaintiff's intestate, the admission of a question and answer under defendant's objection, tending to show that the wire causing the death had afterwards been properly wrapped and insulated, without connecting defendant with it, is harmless; and, also, not reversible error in this case under the evidence on this question which clearly establishes the defendant's negligence therein. *Ibid.*

14. *Electricity—Thunder Storm—Care Required.*—In an action for damages for the negligent killing of plaintiff's intestate through defendant's negligence in the placing of its defective live wire with improper insulation, by means of which electricity was furnished by the defendant as a motive power, it was not error for the trial court to exclude evidence of a "hard" thunder storm occurring about the time of the killing, it not appearing from the evidence that the storm was likely to have charged these wires; and the defendant in such cases being charged with the duty of observing reasonable care in protecting the citizens from atmospheric as well as artificial electricity. *Ibid.*

15. *Unskilled Employment—Nonsuit.*—Plaintiff, a carpenter, received the injury complained of while taking down an old shed for the defendant company which he and another had been directed to do. They had been engaged in this work several days when plaintiff was injured in knocking the rafters loose while standing on the joist of the shed, which latter gave way, causing him to fall to the ground to his injury. The work was simple in its performance, well within plaintiff's experience and training, and he was left to do it in his own way. *Held*, upon the facts in evidence no breach of defendant's duty was shown, and a motion to nonsuit should have been allowed. *Rumbley v. R. R.*, 457.

16. *Causeway—Public Turnpike—Bridges—Handrail.*—The defendant had built upon its public turnpike road across a hollow or gulch between two ridges a straight causeway forty feet long constructed of logs, rocks and earth, with stringers on either side to prevent wagons from running off of it. At the highest part the causeway was thirteen and one-half feet high, and sloped out to a grade on either end. In an action for damages, for the death of plaintiff's intestate, caused by his inadvertently riding off the bridge on a dark night, *held*, the failure of the defendant to provide handrails on the sides of the causeway was negligence *per se*. *Stout v. Turnpike Co.*, 513.

17. *Same—Proximate Cause.*—In this case it appearing that the defendant had negligently failed to provide handrails for its causeway over a hollow or gulch on its public roadway, and that plaintiff's intestate was killed on a dark night by the horse he was riding going over its side, the question of the proximate cause of his death should be submitted to the jury under evidence tending to show that there was an electrical storm raging, and at the time of the occurrence the horse was frightened by lightning to such an extent that a handrail would not in all probability have been sufficient to avoid the fatality. *Ibid.*

NEGOTIABLE INSTRUMENTS.

1. *Pleadings—Judgments—Interest—Default—Demand—Stipulations.*—In an action upon a promissory note before the date named for its maturity, the note providing that if "any installment of interest is not

NEGOTIABLE INSTRUMENTS—*Continued.*

paid when due or ten days after demand" the principal shall become due and payable, it is necessary to show that default was made under the terms of the proviso, for the note is not due till then; and when the allegation of a demand for the interest has been denied, a judgment can not be had upon the pleadings, for an issue of fact has been raised. *Trust Co. v. Duffy*, 62.

2. *Same—Waiver.*—The provision in a promissory note that upon default of the payment of interest when due "or" within ten days after demand, "the principal shall become due and payable," is a valid one. The word "or" is construed so as to read "nor" (within ten days after demand); and the waiver of the notice of dishonor and protest in a subsequent clause, wherein the makers and endorsers agree to become bound notwithstanding an extension of time, is not construed as a waiver by the payee of the right to a demand for the payment of interest, before the principal sum shall become due. *Ibid.*

3. *Same—Joint Makers.*—Judgment for plaintiff upon the pleadings will not be granted against one of two joint makers of a note for a default in the payment of interest in an action brought before maturity, it appearing that in his answer he denies that demand was made on him under the terms of a provision in the note that it would become due and payable "if any installment of interest is not paid when due or within ten days after demand," and the admission of demand and default for the ten days of one of the makers is no evidence as to the admission of the other. *Ibid.*

4. *Fraud—Procurement—Evidence—Instructions.*—In an action brought by plaintiff bank against the makers of a promissory note, the defense, supported by evidence, being that the paper was procured by false representations and fraud in the procurement by the payee, there was uncontradicted evidence on the part of the plaintiff, through its officers, that it was an endorsee, for value, before maturity, without notice of infirmity of the paper, if any there was. An instruction to the jury, that if they should find all the facts to be as testified by the witness in the case, they should answer the issue for the plaintiff. *Held*, correct. *Bank v. Fountain*, 148 N. C., 590, approved and applied. *Bank v. Griffin*, 72.

5. *Equities—Notice—Due Cause.*—While our statute authorizes the assignment of things in action and allows the assignee to sustain a demand therefor in his own name, it must be "without prejudice to any set-off or other defense, existing at the time of, or before notice of, the assignment," making an exception of "negotiable promissory notes or bills of exchange transferred in good faith, and upon good consideration before due." *Taylor v. Carmon*, 101.

6. *Same—Offsets.*—In an action brought to cancel certain notes secured by mortgages, the plaintiff alleged that the notes were without valuable consideration and had been paid to the mortgagee with certain money and the personal property. It appeared that the defendant's intestate W., the holder of the mortgages, was indebted to one M. and had transferred the mortgages as security to this debt. There was no evidence that plaintiff had notice or knowledge of this last assignment of the notes and mortgages, or that M. was a holder in due course. The case was referred, and the referee found for the

NEGOTIABLE INSTRUMENTS—*Continued.*

defendant, but the jury substantially reversed the findings of the referee on issues duly submitted and found that the B. note was paid to W. before notice of transfer, and that the value of personal property, etc., of plaintiff received by him was in a greater sum than the amount of the mortgage notes. *Held*, (1) The value of plaintiff's property received by the original mortgagee should be applied to the mortgage notes held by the administrator of W. with judgment against the administrator for the balance; (2) as M. was not a holder in due course, his note was taken subject to the equities existing between the plaintiff and W. *Ibid.*

7. *Subsequent Endorser—Liability.*—An endorser of a negotiable instrument who had paid a judgment obtained thereon in an action against him and the insolvent makers can not, nothing else appearing, recover the amount in his action therefor against a subsequent endorser. Revisal, sec. 2217. *Lynch v. Loftin*, 270.

8. *Subsequent Endorsers—Change of Liability—Pleadings.*—In an action to recover upon a negotiable note by one endorser against a subsequent one, when the complaint does not distinctly allege a change in the *prima facie* order of liability, but sets out a contract relied on for this purpose which, under its interpretation, affects this change, it is sufficiently pleaded. *Ibid.*

9. *Same—Equities—Parties—Demurrer.*—In order to change the *prima facie* order of the endorsers' liability on a promissory note the plaintiff alleged and set forth an executory contract between the defendant, endorser, and a third person without alleging performance thereof by the latter, through whom he must work out his rights. *Held*, there was an absence of essential connection between the matters alleged and the relief demanded; that such third person was a necessary party to the action, and that a demurrer to the complaint should be sustained. *Ibid.*

10. *Endorsement — Title — Due Course — Equitable Owner—Defenses.*—A purchaser of a negotiable instrument, for value, before maturity, but without endorsement, becomes the holder of the equitable title only, and takes subject to any defense the maker may have against the original payee, as for one to become a purchaser in due course he must have acquired title by endorsement. Revisal, secs. 2178, 2198; and in the absence of endorsement of the note sued on in an action by the purchaser, the plaintiff is not entitled to judgment upon evidence which shows a good defense in favor of the maker against the payee. *Steinhilper v. Basnight*, 293.

11. *Fraud in Procurement—Endorser.*—The affirmative finding of an issue as to whether the signatures to a negotiable instrument were procured by fraud of the payee is not always decisive in an action thereon against the makers by an endorsee for value before maturity. Revisal, secs. 2151 *et seq.*; 2171. *Myers v. Petty*, 462.

12. *Same—Requisites—Instructions.*—In an action upon a negotiable instrument by the endorsee, it is necessary for him to show endorsement by the payee before maturity for him to become a holder in due course and have the benefit of the presumptions of the negotiable instrument act; and when he has introduced evidence of such endorsement, and there is no evidence in contradiction, it is proper for the trial judge

NEGOTIABLE INSTRUMENTS—*Continued.*

to instruct the jury that if they "found the facts to be as testified to" they should regard them, with the statutory inferences therefrom, as established. *Ibid.*

13. *Fraud in Procurement—Endorsee—Burden of Proof.*—An endorsee, claiming to be the holder in due course, for value, of a negotiable instrument purchased before its maturity, brings his action on the instrument against the makers, who defend upon the ground that their signatures to the note were procured by the fraud of the payee, and that the facts and circumstances were sufficient to put the plaintiff on notice of the fraud; and, also, that he was not a purchaser for value. Upon evidence tending to show the fraud by the payee, in the procurement and issuance of the instrument, *held*, the burden of proof was upon the plaintiff to show that he was a *bona fide* purchaser for value. Revisal, 2201; 2208. *Ibid.*

14. *Notes, Joint and Several—Several Liability Only—Parol Evidence.*—When a note sued on is, upon its face, joint and several, evidence is incompetent, as contradictory of the written instrument, of a contemporaneous oral agreement that the makers should only be liable each for his *pro rata* part of the note. *Wood v. Finley*, 497.

15. *Notes, Joint and Several—Payment in Discharge—Several Liability—Evidence.*—When the holder of a note appearing to have been jointly and severally executed by several makers, accepts and collects a check expressing upon its face to be in payment of the drawer's "share" of the note, the check is competent evidence, as tending to show that the owner agreed to receive the payment in discharge of the drawer's liability upon the note. *Ibid.*

16. *Endorsement—Equitable Owner—Fraud—Evidence.*—Negotiation of a note payable to order is "by the endorsement of the holder and is completed by delivery," Revisal, 2178; and the introduction of the note in evidence without endorsement raises the presumption of equitable ownership and assignment, and without proof of endorsement the holder is not one in due course, and takes subject to the equities existing in favor of the maker, and in such instance fraud in its procurement by the payee may be shown. *Ibid.*

NEGROES. See Marriage.

NEW TRIAL. See Issues, 9; Evidence.

NOTICE OF ARRIVAL. See Carriers of Goods.

NUISANCE.

1. *Railroads—Spur Track—Necessary Acts—Instructions.*—In an action for special damages for the improper use for freight trains by defendant railroad company of its spur track in front of, or adjacent to, plaintiff's residence, the spur not being at a freight depot, it was error in the trial court to charge, in effect, that the acts complained of would constitute an actionable nuisance if unnecessarily done in the operation of the road, when the facts recited would constitute a nuisance in the use of a spur track for such purposes. *Staton v. R. R.*, 432.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error; Issues; Reference.

OFFICE HOURS. See Telegraphs.

OFFICERS. See Corporations; Contracts.

OFFICE, TITLE TO. See Procedure.

OPINION EVIDENCE. See Evidence.

"ORDER, NOTIFY." See Carriers of Goods.

ORDINANCE. See Corporations.

PARENT AND CHILD.

1. *Domestic Relations—Payment for Services—Promise—Evidence Sufficient.*—In an action brought by the plaintiff to recover for the value of his services rendered his step-grandfather, while living with him, in managing his business and taking care of him during his illness, there was evidence tending to show that the grandfather had repeatedly stated in the presence of others his intention of paying plaintiff, and that the plaintiff expected to receive compensation for them. *Held*, Not error to submit the question of compensation to the jury under a charge that the law presumed the services were rendered gratuitously, and the burden was upon plaintiff to satisfy the jury by the greater weight of the evidence that the step-grandfather promised to pay plaintiff therefor, or that the parties intended that the plaintiff should be paid for his services. *Lowry v. Oxendine*, 267.

2. *Domestic Relations—Emancipation Implied—Child's Compensation.*—Evidence that the father permitted his minor son to work for himself and receive the earnings of his own labor is sufficient to go to the jury upon the question of whether the father had impliedly emancipated his own son, and assented to the son's receiving his earnings in his own right. *Ibid.*

3. *Bonds—Payment Upon Contingency—Advancements.*—The father sued his daughter and son-in-law to recover upon a bond given him by them in a certain sum due one day after date. *Held*, it was competent to show in defense by parol evidence that by a contemporaneous oral agreement, the defendants were to pay and did pay certain amounts upon the bond, and that the balance was only to be accounted for in settlement with the father's estate as an advancement, and that no actual payment thereof was to be made unless needed to pay debts of the estate. Such an agreement did not contradict the terms of the bond, and thereunder the full amount should be paid upon the happening of the contingency, *i. e.*, the necessity thereof to pay the debts of the estate. *Kernodle v. Williams*, 475.

PAROL EVIDENCE. See Evidence.

PAROL TRUSTS. See Uses and Trusts.

PARTIES. See Process; Homestead.

PARTITION. See Tenants in Common; Deeds and Conveyances.

Process—Infants Under Fourteen—Final Judgment—Meritorious Defense—Representation—Estoppel.—While a final judgment in proceedings to partition land is ordinarily merely voidable as against infants under fourteen not personally served with summons as required by the pro-

PARTITION—*Continued.*

visions of the Revisal, secs. 440 (2), 406, the order of the trial court in setting aside the judgment as to the infants will not be disturbed on appeal, it appearing that the action is between the original parties and that no rights of third persons have intervened; that they had a meritorious defense, claiming an equitable estate in the lands partitioned; that though a guardian *ad litem* had been appointed, he made no real defense; and *held*, that the doctrine of representation, the parties being *in esse*, and of estoppel, are inapplicable. *Hughes v. Pritchard*, 135.

PARTNERSHIP.

1. *Feme Covert—Husband and Wife—Managing Agent—Free-trader—Liability.*—A married woman being a member of a firm, with another, under the name and style of M. & Co., her husband acting as general manager and agent, without posting a sign displaying her Christian name or stating the fact that she was a married woman, subjects all the firm's property to the payment of the firm's debts, whether the person dealing with the firm was aware of her being a *feme covert* or not; for she "shall for all purposes be deemed and treated as to all debts contracted by the firm as a free-trader," etc. Revisal, sec. 2118. *Stone Co. v. McLamb*, 378.

2. *Managing Agent—Mortgages—Partnership Acts—Feme Covert—Execution—Liability.*—One partner may execute a valid mortgage on the partnership property to secure a partnership debt; and when the general manager of a firm composed of a *feme covert* and another executes such mortgage and has it registered, and its execution and registration are admitted by the other partner as a partnership mortgage, it will be binding upon the partnership property, whether its execution on the part of the *feme covert* was formally and correctly proven or not. *Ibid.*

PAYMENT. See Negotiable Instruments.

PENALTY STATUTES.

1. *Carriers of Freight—Refusal to Accept—Interstate Commerce—Interpretation of Statutes.*—There being no act of Congress relating to the provisions of the Revisal, 2631, imposing a penalty on a common carrier for refusing to accept freight for shipment when tendered, this section of the Revisal is constitutional in its application to interstate shipments. *Reid v. R. R.*, 490.

2. *Same—Through Bills of Lading—Liability of Initial Carrier.*—It appears in this case that the defendant carrier refused to receive for shipment from the plaintiff goods tendered to it and based its right to refuse upon the ground that it was necessary for the shipment to go over lines of connecting carriers in order to reach its destination and that no joint rate had been made, or filed with the Interstate Commerce Commission, known as section 6 of the Interstate Commerce Act. The plaintiff offered to prepay the freight, and asked for a bill of lading. *Held*, (1) it was the common-law duty of the defendant, as well as its statutory duty, to accept the shipment, forward it to its connecting line; and to use reasonable means of ascertaining the rate of freight, by wire if necessary, for the issuance of a through

PENALTY STATUTES—*Continued.*

bill of lading, which in this case it did not use; (2) it was no defense that the joint rate had not been made or filed as required by the United States statutes; (3) the mere tender of freight charges by the plaintiff and a request for a bill of lading was not a demand for a through bill of lading, so as to justify the refusal of the defendant to accept the shipment; (4) section 20 of the Interstate Commerce Act, making the initial carrier liable for the default of itself and connecting carriers to point of destination, has no application to the facts of this case. *Ibid.*

PERJURY. See Fraud.

PERMISSION TO SUE. See Jurisdiction.

PHYSICIANS AND SURGEONS. See Malpractice.

PLEADINGS. See Removal of Causes; Judgments; Libel; Procedure.

1. *Amendments—Damages—Limitation of Actions.*—An amendment to the complaint in an action against a railroad company to recover damages to a crop caused by diversion of the natural flow of water, so as to allege permanent damages to the land (Revisal, 394-2) does not add a new cause of action, but relates only to the measure of damages arising from the injury; and the statute of limitations (Revisal, sec. 394-2) will not bar the plaintiff by reason of the amendment alone. *Pickett v. R. R.*, 148.

2. *Interpleader—Defect of Statement—Procedure—Demurrer.*—A defect of overstatement in a bill of interpleader is waived by answers of the parties defendant, such defect should be availed of by demurrer. *Knights of Honor v. Selby*, 203.

3. *Amendment—Cloud on Title—Nonsuit—Issue.*—In a proceeding for partition of land, plaintiffs, by inadvertence in describing the land, included two acres in which they claimed no interest. The court, without objection, allowed an amendment expressly excluding that part of the land from the description. Appellant, served with process only in behalf of his children who lived with him, filed an answer asserting title in himself to the two acres and asking that plaintiff's claim, which was a cloud upon his title, be removed. *Held*, proper to refuse the submission of an issue based upon the averment of the answer after the amendment had been made without objection, which left the appellant without any basis for his alleged counterclaim, he not claiming any interest in the remainder of the land. *Held further*, that the amendment was not in the nature of a nonsuit, but was intended to remove vagueness from the description of the land. *Webster v. Williams*, 309.

4. *Filing—Time Enlarged—Answer—Nonsuit—Judgment—Excusable Neglect.*—A general order for time to file pleadings has no effect upon a judgment by default for the want of an answer, rendered upon motion made before the order was entered, it appearing that several terms of the court had intervened since the action was begun and complaint filed. *Reynolds v. Machine Co.*, 342.

5. *Same — Notice — Motions — Calendar — Terms, Regular or Special.* — Whether at a regular or special term of the court, Revisal, secs. 1516, 1517, a notice to the adverse party of a motion in term for judgment

PLEADINGS—*Continued.*

by default for the want of an answer is not necessary, for in legal contemplation the defendant is in court by service of summons and is charged with notice of whatever action the court takes during the pendency of the suit, irrespective of whether the cause has or has not been placed on the list of motions to be made at that term, there being no motion calendar in contemplation of law. *Ibid.*

6. *Demurrer—Corporations—Acts of Agents—Larceny—Ratification.*—A complaint in an action against a corporation for damages based upon the ground that its agent and night watchman, acting under the instruction of the night foreman, swore out a search warrant and a warrant of arrest for plaintiff charging him with larceny from the defendant, is demurrable in the absence of allegation that the corporation authorized or ratified the acts of its agents. *Minter v. Express Co.*, 507.

POWERS. See Wills.

PRESUMPTION. See Evidence; Appeal and Error; Tax Deeds.

PRIMA FACIE CASE. See Judgments.

PRINCIPAL AND AGENT. See Process.

PRINCIPAL OFFICE. See Corporations.

PRIORITY. See Executors and Administrators.

PRIVILEGED COMMUNICATION. See Libel.

PRIVITY. See Deeds and Conveyances.

PRIVY EXAMINATION. See Deeds and Conveyances.

PROCEDURE.

1. *Certiorari.*—The appellant having requested the judge, in ample time, to settle the case on appeal, he is entitled to a *certiorari*, to the end that the judge now settle the case. *Chauncey v. Chauncey*, 12.

2. *Trespass—Injunction—Supreme Court Opinion—Surveys—Orders.*—In an action of trespass involving a dividing line between plaintiff's and defendant's land, and asking for a restraining order, the Supreme Court having rendered and certified down its opinion in plantiff's favor, it is not error for the subsequent trial judge to order the dividing line to be marked, and enjoining trespass upon plaintiff's land; but the cause should be retained until the court has received the surveyor's report, to afford opportunity for exceptions to be made to the line as actually marked. *Yeates v. Forrest*, 17.

3. *Office—Title—Books and Papers—Mandamus.*—An action by mandamus, brought by one claiming to be the duly elected and qualified treasurer of a graded school committee, to compel the present occupant to deliver to him the books and papers of the office alleged to be wrongfully withheld, is not the proper remedy and the action will be dismissed, when the pleadings put the title to the office at issue, and that is the real matter in controversy. *Rhodes v. Love*, 468.

PROCEDURE—*Continued.*

4. *Same—Quo Warranto.*—The title to a public office in dispute between two rival claimants must be determined by an action of *quo warranto*, or by an action in the nature of a *quo warranto*, especially when the defendant is in possession of the office under a claim of right in him to hold it and exercise its functions or perform its duties; and a mandamus to compel the surrender of the books and papers will not lie until the claimant has established the disputed title. *Ibid.*

5. *Office—Title—Quo Warranto—Parties.*—Though the proceeding by *quo warranto*, or in the nature of *quo warranto*, may be in the name of the State upon the relation or complaint of a private party, it is personal to the parties claiming the office, and raises an issue as to the right of occupancy. *Ibid.*

6. *Office—Title—Quo Warranto—Power of Courts—Mandamus—Process.* The statutory remedy is by *quo warranto* to try a disputed title to a public office occupied by the defendant, and the Court trying the issue has the power to issue the writ of mandamus or other necessary and proper process to effectuate its judgment and to induct the successful contestant into the office. The successful relator being refused the books and papers on his demand, the court may issue any appropriate process to enforce compliance with the demand by a refractory or contumacious defendant. Revisal, secs. 827, 841, 843. *Ibid.*

7. *Office—Title—Quo Warranto—Statutory Time—Accrual of Action.*—Revisal, sec. 834, requiring a private relator, upon leave of the Attorney-General, to bring his action within ninety days after the induction of the defendant into the contested office, does not apply where the alleged intruder has occupied the office more than ninety days before the plaintiff's cause of action accrued, or where it is impossible, under the circumstances, to give the required notice. *Ibid.*

PROCESS.

1. *Original Destroyed—Copy—Removal of Causes—Admissions.*—The defense to a judgment by default and inquiry that the original summons had been destroyed by fire and no copy substituted, is not available when the defendant admitted in his petition to remove the cause for diverse citizenship, filed and moved on too late in the State court, that it had been made a party defendant to the action. *Higson v. Ins. Co.*, 35.

2. *Foreign Corporations—Statutory Regulations.*—The Legislature may provide for service of process on foreign corporations doing business within the State, provided the service is reasonable and to be made only upon such agents as are representative, and the provisions of Revisal, sec. 440, meet with this requirement. *Whitehurst v. Kerr*, 76.

3. *Same "Local Agent"—Interpretation of Statutes.*—The proviso of section 440 (1) of the Revisal, "that any person receiving or collecting money within this State for, or on behalf of" a foreign corporation, with respect to service of process, "shall be deemed a local agent," does not limit the meaning of the word agent, but extends its meaning; and service made in this State on the various officers or agents of a foreign corporation enumerated in this section is binding on the corporation, without the requirement that the corporation has property in the State, or the cause of action arose, or the plaintiff resided therein. *Ibid.*

PROCESS—*Continued.*

4. *Same—Definition.*—An agent of a foreign corporation upon whom process may be served under the provisions of the Revisal, sec. 440 (1), must be one regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served on him; and the term agent does not extend to a subordinate employee, without discretion. *Ibid.*

5. *Same.*—One who has charge of the funds of a foreign corporation building a railroad bridge in this State, which carries on an enterprise of large proportions, employing large numbers of hands and expending large sums of money, the said agent paying off the hands and keeping the company's money in local banks in his name as its agent, comes within the meaning of the term "local agent," Revisal, sec. 440 (1), upon whom process on a foreign corporation may be served. *Ibid.*

6. *Infants Under Fourteen—Service—Guardian Ad Litem.*—It appearing on appeal that the trial judge set aside a final judgment in proceedings to partition land, because there were certain infants under the age of fourteen who were not personally served as required by the statute, the judgment is affirmed, though a guardian *ad litem* had been appointed and served with process. *Hughes v. Pritchard*, 135.

7. *Same—Interpretation of Statutes.*—Revisal, sec. 441, validating decrees and judgments in civil actions and special proceedings in which there was no personal service of summons on infant defendants, does not cure the defect of failing to meet the requirements of the statute where neither the infants nor any other person in their behalf are served with summons. *Ibid.*

8. *Infants Under Fourteen—Legislation.*—The reason that under the age of fourteen is fixed by the statute as that wherein service of summons should be personally made on infants, etc., is one for the Legislature. *Ita lex est scripta. Ibid.*

9. *Amendment—Effect—Seal of Court.*—A summons issued to another county, but not attested by the seal of the court of the county issuing it, as provided by Revisal, sec. 431, may have the defect removed by amendment on application to the proper tribunal, both as to the original and final process, and the amendment, when made, will validate all acts done under the process, in so far as it affects the original parties to the suit or record. *Calmes v. Lambert*, 248.

QUO WARRANTO. See Procedure.

RAILROADS. See Corporation Commission; Removal of Causes.

1. *Contributory Negligence—"Look and Listen"—Evidence.*—It appearing that plaintiff's intestate, deaf and dumb, endeavored to rush across defendant's track in front of a rapidly approaching train and was killed, and that the approach of the train could readily have been seen by him when within eleven feet of the track, his contributory negligence bars his recovery. *Mitchell v. R. R.*, 116.

2. *Contributory Negligence—Evidence—Plaintiff's Proof—Nonsuit.*—Contributory negligence is a matter of defense, but a motion as of nonsuit upon the evidence should be allowed when plaintiff's own proof establishes this defense. *Ibid.*

RAILROADS—*Continued.*

3. *Fire Damage—Logging Roads—Liability.*—A private steam railroad for logging purposes is liable in like manner as *quasi*-public railroad corporations, for damages by fire caused from its locomotives igniting combustible materials along its right of way, or by the negligent operation and running of its locomotives. *Thomas v. Lumber Co.*, 351.

4. *Same—Independent Contractor—Foul Right of Way.*—A company operating a steam railroad for logging purposes is liable in damages for fires caused by its locomotives by reason of the foul condition of its right of way, so dangerous that it might reasonably have been anticipated that injury would thereby occur to adjacent owners; and the principle of independent contractor will not avail the employer in such instances. *Ibid.*

5. *Same—Casual—Collateral Acts.*—The instance in which the employer will be held liable for damages by fire caused to adjacent landowners, arising from the filthy condition of the right of way of its steam road for logging timber, operated by an independent contractor, does not apply to such negligent acts of the employees of the independent contractor as are casual or collateral to the work contracted for as distinguished from those which the contractor agrees and is authorized by his contract to do. *Ibid.*

6. *Spur Track—Nuisance—Necessary Acts—Instructions.*—In an action for special damages for the improper use for freight trains by defendant railroad company of its spur track in front of, or adjacent to, plaintiff's residence, the spur not being at a freight depôt, it was error in the trial court to charge, in effect, that the acts complained of would constitute an actionable nuisance if unnecessarily done in the operation of the road, when the facts recited would constitute a nuisance in the use of a spur track for such purposes. *Staton v. R. R.*, 432.

7. *Water and Watercourses—Lower Riparian Owner—Damages.*—A railroad company has the right, as an upper riparian owner, where its bridge crosses a natural watercourse, to the use of so much of the water as is necessary for the running of its locomotives, and a lower riparian owner can not recover damages, on that account, in the operation of his water mill, when the use of the water by the railroad company does not materially or substantially diminish its natural flow; and upon conflicting evidence, the question is one for the jury. *Harris v. R. R.*, 542.

RATES. See Carriers of Passengers; Corporations.

RATIFICATION. See Estoppel; Principal and Agent.

RECEIVERS. See Corporations; Equity.

RECITALS IN DEEDS. See Evidence; Deeds and Conveyances; Tax Deeds.

RECOGNIZANCE.

1. *Judgment Suspended — Forfeiture — Evidence—Procedure.*—Judgment having been suspended against the defendant, he being required to enter into bond conditioned that he appear at each term of court for

RECOGNIZANCE—*Continued.*

two years and show he has kept the peace toward C. and W. and all other good citizens, and to further show that he had refrained from libel or slander, etc. *Held,* (1) conviction of publishing, etc., indecent literature is not a violation of the bond; (2) conviction of an affray is a violation of its terms, and it was error in the trial court to hold it had no power to declare the bond forfeited. *S. v. Sanders,* 624.

2. *Same—Record—Questions for Jury.*—When the forfeiture of a recognizance is moved for, based upon matters appearing of record, the judge decides without the intervention of a jury; but upon issues of fact the defendant has a right to a jury trial thereof. *Ibid.*

3. *Same.*—While Revisal, sec. 3216, provides that when evidence of conviction shall be produced in the court in which the recognizance is tried, it shall be the duty of the court to order the recognizance to be prosecuted, etc., yet though the proceedings are of a civil nature, they should be in the cause in which the recognizance is filed. When the facts are denied, an issue for the jury thereon is raised, and when conviction of an offense constituting a breach of the bond is alleged and denied, the proof to be submitted is the conviction in a court of competent jurisdiction; and the judgment should be entered in the court in which the recognizance was filed. *Ibid.*

RECORDS. See Removal of Causes; Evidence; Appeal and Error; Recognizance.

RECORDS, DESTROYED. See Evidence.

REFERENCE.

1. *Appeal and Error—Objections and Exceptions—Referee—Findings—Evidence.*—Exceptions to the findings of fact by a referee, approved by the trial judge, if supported by any evidence, will not be considered on appeal. *Williams v. Hyman,* 166.

2. *Appeal and Error—Compulsory Reference—Exceptions—Procedure.*—When there is a plea in bar, a party to the action may except to an order of reference made by the trial judge and appeal at once, or wait until there is a final judgment and then appeal. *Pritchett v. Supply Co.,* 344.

3. *Findings—Evidence.*—If affirmed by the judge, the referee's findings are conclusive when there is any evidence tending to support them. *Mirror Co. v. Casualty Co.,* 373.

4. *Jury Trial—Objections and Exceptions—Waiver.*—A mere exception to an order of reference is not sufficient to entitle the party excepting to a trial by jury upon an adverse finding of fact by the referee, and this right is waived by his not demanding the jury trial in his exceptions to the report. *Ibid.*

REGISTRATION. See Deeds and Conveyances.

REINSTATEMENT. See Appeal and Error.

REMAINDER. See Estates; Wills.

REMARKS OF COUNSEL. See Appeal and Error.

REMOVAL OF CAUSES.

1. *Diverse Citizenship—Jurisdiction—Procedure.*—The petition and bond to remove a cause from the State to the Federal court on the ground of diversity of citizenship must be presented in the former court before the judge in term, when the answer is due, and failure of plaintiff to move for judgment by default does not extend the time therefor. *Higson v. Insurance Co.*, 35.

2. *Same—Order of Federal Court.*—A copy of a petition and bond for removal of a cause from the State to the Federal court on the ground of diversity of citizenship, addressed to the Federal judge, and originally filed in the Circuit Court of the United States, together with a copy of his order for the removal of the cause, which was filed with the clerk of the State Superior Court, is not a compliance with the Removal Act and does not operate to remove the cause from the State court. *Ibid.*

3. *Same—Record.*—The right of removal of a cause from the State to the Federal court for diverse citizenship is purely statutory, and before the jurisdiction of the State court can be disturbed, it must appear affirmatively that a proper petition and bond has been in due form and time presented to the State court; and an order of the Federal judge merely filed with the clerk of the State court removing the cause upon petition and bond filed in the Federal court is ineffectual. *Ibid.*

4. *Jurisdiction—Acquiescence.*—Appearing in the Circuit Court of the United States before the judge and moving to remand a cause ordered removed by him on the ground of diverse citizenship is not a recognition of the jurisdiction and power of that court to make the order. *Ibid.*

5. *State Court—Pleadings—Judgments—Default and Inquiry.*—A judgment by default and inquiry for the want of an answer will not be disturbed on appeal, for the reason that defendant had not filed his answer relying upon an ineffectual order of the Federal court that the cause be removed for diverse citizenship. *Ibid.*

6. *Injury to Realty—Venue.*—An action against a railroad company to recover damages for burning land is a local one in its nature and triable in the county in which the injury occurred (Revisal, sec. 419), and upon demand in writing (Revisal, sec. 425) should be removed to that county if brought in a different one. *Perry v. R. R.*, 117.

7. *Same—Appeal and Error.*—An appeal directly lies from the refusal of the trial judge to remove a cause to the county in which injury to the plaintiff's land, the subject of the action, was committed. *Ibid.*

8. *Domestic Corporations—Residence—Venue.*—Section 422, Revisal, fixing the residence of a domestic corporation at its principal place of business, should be construed in connection with sec. 424, and a plaintiff may elect to sue the corporation for damages for a personal injury in the county of his residence at the time of the commencement of the action, or at the residence of the corporation, and if in the former county it may not be removed to the latter one, on the ground of improper venue. *Probst v. R. R.*, 139 N. C., 397, and *Perry v. R. R.*, 117, cited and approved. *Rackley v. Lumber Co.*, 171.

REMOVAL OF CAUSES—*Continued.*

9. *Local Prejudice—Discretionary Powers—Appeal and Error.*—Generally, a motion to remove a cause to another county for local prejudice is a matter within the sound discretion of the trial judge, and not reviewable on appeal, and nothing appears of record to make this case an exception. *S. v. Plyler*, 630.

REMOVING TENEMENTS. See Indictment.

REPORTS.

1. *Supreme Court Reports—Public Printing—Commissioner of Labor and Printing.*—The Supreme Court Reports are a part of the public printing, and the Commissioner of Labor and Printing is charged with the same duty of furnishing paper and stationery therefor, and in the examination and superintendence thereof, as is required for the other public printing. Revisal, sec. 5095. *In re Supreme Court Reports*, 649.

2. *Supreme Court Reports—Printing—Contracts.*—By Revisal, sec. 5093, the duty of contracting for the printing of the Supreme Court Reports is confided to the Supreme Court, and with reference thereto this is an exception to sec. 5092 requiring that such contracts be made by the committee therein designated. *Ibid.*

3. *Same—Kind and Style.*—Upon the Supreme Court devolves the duty only of selecting the printer and directing the style and general execution of the work, the price of which is restricted to that allowed and fixed by the committee. Revisal, secs. 5093, 5095. *Ibid.*

4. *Same—Size of Volumes.*—Until otherwise directed by the Court, the Reports will be leaded, and in all other respects conform as to paper, binding, type and general make-up with Volume 150 of the Reports, and average, as nearly as may be, 800 pages each. *Ibid.*

RESIDENCE. See Corporations.

RESISTING ARREST. See Evidence.

RESTRAINT OF TRADE. See Contracts.

RETROACTIVE ACTS. See Statutes.

REVISAL.

SEC.

213. The contracts of a *feme* free-trader, to be binding, must relate to matters of business engaged in. *Council v. Pridgen*, 443.

274. This section does not apply, as a rule, to motions to vacate irregular judgments, and is not controlling. *Calmes v. Lambert*, 248.

327 *et seq.* does not exclude oral evidence otherwise competent to prove contents of lost deed or record. *Hughes v. Pritchard*, 23.

341. The provisions of this section must be complied with to make recitals in a lost, etc., deed evidence. The section is constitutional; and defendant's remedy is by motion in original action for irregularity in the proceedings. *Taylor v. Riley*, 195.

REVISAL—*Continued.*

SEC.

382. To show color of title in ancestor, his possession is necessary to be shown. *Barrett v. Brewer*, 547.

394 (2). Amendment to complaint alleging permanent damages in action to recover damages of a railroad company does not add a new cause of action. *Pickett v. R. R.*, 148.

406. The action of the lower court in setting aside a judgment because process not served on infant parties under fourteen will not be disturbed. *Hughes v. Pritchard*, 135.

419. This section not modified by sec. 424 as to venue for action against railroad for burning land. *Perry v. R. R.*, 117.

419. Action for damages against railroad for burning lands tried in county injuries occurred and should be removed there upon demand in writing. Revisal, 425. *Ibid.*

419. Exception to when suits against corporations have same venue as those against individuals. *Roberson v. Lumber Co.*, 120.

420. Exception to when suits against corporations have same venue as those against individuals. *Ibid.*

421. Exception to when suits against corporations have same venue as those against individuals. *Ibid.*

422. Construed with sec. 424 giving plaintiff right to sue domestic corporation for personal injury in the county where it was inflicted. *Rackley v. Lumber Co.*, 171.

422. This section is to remedy defect in sec. 424 so that same venue would apply to corporations as to individuals, excepting as to railroads in certain instances. *Roberson v. Lumber Co.*, 120.

424. This section does not repeal or modify sec. 419 as to venue in action against a railroad for burning lands. *Perry v. R. R.*, 117.

424. Corporations may be sued in same venue as individuals, excepting railroads in certain instances. *Roberson v. Lumber Co.*, 120.

424. Construed with sec. 422, a domestic corporation may be sued for damages for personal injury in the county damage occurred. *Rackley v. Lumber Co.*, 171.

425. Action for damages against a railroad for burning lands tried in county injury occurred (419) and should be removed there upon written demand. *Perry v. R. R.*, 117.

431. Defect in issuing a summons to another county without the seal may be removed on application to proper tribunal, upon terms. *Calmes v. Lambert*, 248.

440. Legislature may provide for reasonable service on foreign corporations. *Whitehurst v. Kerr*, 76.

440 (1). This section extends the meaning of the term local agent upon whom process may be served, definition. *Whitehurst v. Kerr*, 76.

440 (2). The action of the lower court in setting aside a judgment because process not served on infant parties under fourteen, will not be disturbed. *Hughes v. Pritchard*, 135.

REVISAL—*Continued.*

SEC.

441. The requirements of statutes that infants or others in their behalf must be served with process, not affected by this section. *Hughes v. Pritchard*, 135.

449. Summons served by publication, a party entitled to provisions of this section can avail himself of all defenses as if he had made answer; and his rights will not be lost by neglect, unless after actual notice. *Bank v. Palmer*, 501.

622. Does not apply to executions issued prior to 1905; and homestead validated by long acquiescence. *Cox v. Boyden*, 522.

699. Action to declare a homestead null and void does not fall within the provisions of this section. *Sash Co. v. Parker*, 130.

707. Enacted to enforce Art. X, sec. 5, Constitution; requires personal representative to lay off widow's homestead against rights of creditors, and doctrine of election or dissent to will inapplicable. *Fulp v. Brown*, 531.

807. As to whether this section applies in an action for injunction for cutting timber in a prescribed time. *Quœre? Taylor v. Riley*, 195.

808. As to whether this section applies in an action for injunction for cutting timber in a prescribed time. *Quœre? Ibid.*

809. As to whether this section applies in an action for injunction for cutting timber in a prescribed time. *Quœre? Ibid.*

827. The court may issue appropriate process to compel enforcement of its decisions in *quo warranto*. *Rhodes v. Love*, 468.

841. The court may issue appropriate process to compel enforcement of its decisions in *quo warranto*. *Ibid.*

950 (4). When made in statutory time a tax deed made by ex-sheriff not invalid. *Jones v. Schull*, 517.

952. This section provides that the constitutional requirement of the assent of the wife to charge her separate realty must have the privy examination of wife, and is valid. *Council v. Pridgen*, 443.

967. A voluntary conveyance being void under this section, it is not necessary for creditors to show fraud. *Powell v. Lumber Co.*, 52.

967. A corporation mortgage of its entire property does not require filing schedules of its preferred debts, the corporation being solvent. *Ibid.*

968. A voluntary conveyance being void under this section, it is not necessary for creditors to show fraud. *Ibid.*

968. A corporation mortgage of its entire property does not require filing schedules of its preferred debts, the corporation being solvent. *Ibid.*

980. No notice, however full and formal, can supply that of registration. *Wood v. Lewey*, 401.

1097 (5). Corporation Commission can not convey power of condemnation. *S. v. R. R.*, 559.

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1137. It is not necessary to issue certificates of stock for a corporation to exercise its powers. *Powell v. Lumber Co.*, 52.

1146. It is not necessary to issue certificates of stock for a corporation to exercise its powers. *Ibid.*

1556. Rule 6, construed with rule 4; the collateral relation to inherit, must be of the blood of the ancestor. *Watson v. Sullivan*, 246.

1556. Canons of Descent, Rules 4 and 6, construed together and only collateral relations of the original ancestor inherit his estate. *Paul v. Carter*, 26.

1625. This section does not apply in an action against a railroad relief department for services rendered an employee therein. *Hospital Association v. Hobbs*, 188.

1645 (9). Reading of depositions regularly taken depends upon issuance of subpœna, not necessarily its having been served. *Manufacturing Co. v. Townsend*, 244.

1648. Objection to reading of deposition waived if not taken before trial. *Ibid.*

1853. *Habeas corpus* proceedings of parents living apart for custody of child must be decided under this section. *In re Jones*, 312.

1854. This section does not affect an appeal, the Supreme Court reviewing only errors of law or legal inference in proceedings in *habeas corpus* for custody of minor child. *Stokes v. Cogdell*, 181.

2083. The third generation which invalidates a marriage between the white and negro race refers to an ancestor of pure negro blood. *Ferrall v. Ferrall*, 174.

2112. The contracts of a *feme* free-trader to be binding must relate to matters of the business engaged in. *Council v. Pridgen*, 443.

2118. Partnership property is liable for partnership debts when one of the firm is a married woman, and has not complied with the provisions of this section. *Stone Co. v. McLamb*, 378.

2151. Fraud in the procurement of a negotiable instrument is not always decisive of an action by endorsee for value before maturity against makers. *Myers v. Petty*, 462.

2178. When a note payable to order is held without endorsement, only equitable ownership is presumed. *Woods v. Finley*, 497.

2171. Fraud in the rocurement of a negotiable instrument is not always decisive of an action by endorsee for value before maturity against makers. *Ibid.*

2178. Holder in due course of negotiable instrument is by endorsement. *Steinhilper v. Basnight*, 293.

2198. Holder in due course of negotiable instrument is by endorsement. *Ibid.*

2201. Burden is on endorsee to show *bona fides* where there is evidence of fraud in procurement of negotiable instrument. *Myers v. Petty*, 462.

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2208. Burden is on endorsee to show *bona fides* where there is evidence of fraud in procurement of negotiable instrument. *Ibid.*

2217. Endorsee of negotiable instrument can not recover payment he has made thereon against subsequent endorser. *Lynch v. Loftin*, 270.

2631. Penalty imposed by this section on carrier's refusing to accept freight is constitutional. *Reid v. R. R.*, 490.

3135. The probate of the will in this case in the Orphans' Court, Baltimore, is deemed sufficient. *Lumber Co. v. Hudson*, 96.

3216. Proceedings upon a recognizance, though of a civil nature, should be by motion in original cause. *S. v. Sanders*, 624.

3244. Remedy is to move for bill of particulars, when indictment is vague and uncertain. *S. v. Holder*, 606.

3254. Judgment under sec. 3686 not quashed for informality or refinement. *S. v. Lumber Co.*, 610.

3572. Applies to officer of a corporation contracting with board of which he is member. *S. v. Williams*, 595.

3572. Does not apply to contracts between a city and an employee of the party who is an alderman. *S. v. Weddell*, 587.

3686. Intent is an ingredient of offense for unlawfully removing tenements on landlord's realty; defendant's corporate existence may be shown, though not charged; this section interpreted. *S. v. Lumber Co.*, 610.

3686. Judgment may not be quashed for informality or refinement. *S. v. Holder*, 606.

3763. Not necessary to show conspiracy when it appears defendants were present and participating in rocking train; and indictment stating "from one station to another" is sufficient; the charge "feloniously" unnecessary. *Ibid.*

5093. The Supreme Court will only select the printer and direct style and general execution, etc., of the Reports. *In re Printing the Supreme Court Reports*, 649.

5095. Commissioner of Labor and Printing should examine, supervise, etc., printing of Supreme Court Reports as a part of public printing. *In re Printing the Supreme Court Reports*, 649.

RIGHT OF WAY. See Railroads; Corporation Commission.

RIPARIAN OWNER. See Water and Watercourses; Railroads.

ROADS AND HIGHWAYS. See Cities and Towns.

1. *Causeway—Public Turnpike—Bridges—Handrail—Negligence.*—The defendant had built upon its public turnpike road across a hollow or gulch between two ridges a straight causeway forty feet long constructed of logs, rocks and earth, with stringers on either side to prevent wagons from running off of it. At the highest part of the causeway it was thirteen and one-half feet high, and sloped out to a

ROADS AND HIGHWAYS—*Continued.*

grade on either end. In an action for damages, for the death of plaintiff's intestate, caused by his inadvertently riding off the bridge on a dark night, *held*, the failure of the defendant to provide handrails on the sides of the causeway was negligence *per se*. *Stout v. Turnpike Co.*, 513.

2. *Same—Proximate Cause.*—In this case it appearing that the defendant had negligently failed to provide handrails for its causeway over a hollow or gulch on its public roadway, and that plaintiff's intestate was killed on a dark night by the horse he was riding going over its side, the question of the proximate cause of his death should be submitted to the jury under evidence tending to show that there was an electrical storm raging, and at the time of the occurrence the horse was frightened by lightning to such an extent that a handrail would not in all probability have been sufficient to avoid the fatality. *Ibid.*

ROCKING TRAINS. See Railroads.

RULES OF INTERPRETATION. See Deeds and Conveyances.

RULES OF SUPREME COURT. See Appeal and Error.

SALES. See Estates; Tax Deeds; Homesteads; Spirituous Liquors; Contracts.

SEAL. See Evidence.

SEAL OF COURT. See Process.

SEPARATE PROPERTY. See Deeds and Conveyances; Contracts.

SETTLING CASE. See Appeal and Error.

SIDINGS. See Corporation Commission.

SOLVENCY. See Corporations.

SPIRITUOUS LIQUORS.

Secret Sale—Devices—Notice—Corroborative Evidence.—By aiding in the sale of spirituous, etc., liquors in prohibited territory, a person is as guilty as the principal; and evidence tending to show that certain devices for the secret traffic in spirituous liquors, etc., were constructed in defendant's place of business and of such character as he would naturally be aware, is competent in corroboration. *S. v. Winner*, 602.

SPUR TRACK. See Railroads; Corporation Commission.

STATUTE OF FRAUDS. See Fraud.

SUBPŒNA. See Process.

SUMMONS. See Process.

SUPREME COURT REPORTS. See Reports.

SURVEYS. See Injunction.

SURVIVORSHIP. See Tenants in Common.

TAX DEEDS.

1. *Unlisted Lands—Record Evidence—Notice—Ex-sheriff—Interpretation of Statutes.*—In an action to try the title to certain lands in the possession of the defendant claiming as purchaser under a tax deed made under ch. 119, Acts of 1895, which the plaintiff, showing paper title in himself, seeks to impeach: *Held*, (1) evidence on behalf of defendant is competent to show that the lands were not listed for the years 1893-4, and that the chairman of the board of county commissioners had for those years caused the property to be listed in the name of the supposed owners, charging against the property double the ordinary charges (sec. 29, ch. 296, Acts 1893); (2) the act of 1897, prescribing that notice be given the owners, is prospective by its terms, and as it was effective only one month before the time for redemption had expired, the three months' notice could not have been given, and its provision is inapplicable to this case; (3) the tax deed was made in the statutory time, and the fact that it was made by an ex-sheriff does not affect its recitals, Revisal, sec. 950; (4) the right of the owner to redeem his land sold for taxes exists only in conformity with the statutory provisions. *Jones v. Schull*, 517.

2. *Infants—Redemption—Interpretation of Statutes.*—Section 60, ch. 119, Laws 1895, providing that infants, etc., may redeem their lands sold under a tax sale within "one year after the expiration of the disability on like terms as if the redemption had been made within one year from the date of the sale," etc., is not available to such minors who make no offer to redeem within the time given them by the statute after reaching their majority or for several years thereafter. *Ibid.*

3. *Recitals—Evidence—Presumptions.*—On the conclusiveness of a tax deed made in 1895 as evidence of certain facts, and presumptive evidence of others, *Eames v. Armstrong*, 146 N. C., 1; *King v. Casper*, 128 N. C., 347; *Matthews v. Fry*, 141 N. C., 582, are cited and approved. *Ibid.*

TELEGRAPHS.

1. *Contract—Notice—Damages Speculative.*—A telegraph company, as a public agency, is compelled to accept telegrams for transmission and delivery with the charges for such service fixed by the Corporation Commission, and it is not held to contract with reference to all special damages claimed because of information given its agent by the sender, as to the purpose and effect of the message, and remote or speculative damages are not recoverable. *Newsome v. Telegraph Co.*, 153.

2. *Damages Speculative.*—Only such damages are recoverable as flow directly and naturally from the negligence of a telegraph company in transmitting a telegram, and they must be certain in their nature and in respect to the cause from which they proceed. *Ibid.*

3. *Same—Evidence—Nominal Damages.*—In an action for damages against a telegraph company alleged to have been caused by the change of name of the sender of the message in transmission, the message reading, "Send four gallons corn, Mintz Siding, Rush, Raft hands," upon the ground that the error prevented the sender from receiving

TELEGRAPHS—*Continued.*

four gallons of corn whiskey which he had contracted to furnish his raft hands to raft rosin and timber to Wilmington, and that in consequence the hands would not go into the water to raft the stuff, causing plaintiff to lose advantage of the freshet to his damage, and that these facts were communicated to defendant's agent at the time the message was sent: *Held*, damages too speculative and remote, and recovery, except nominal damages, denied. *Ibid.*

4. *Office Hours—Attempted Delivery—Evidence—Nonsuit.*—In an action for damages against defendant for delayed transmission and delivery of a message, it appeared from plaintiff's evidence that the telegram was filed at a substation of another company in Baltimore at 8 p. m., Saturday, and upon the face of the original message, introduced by plaintiff, that it was not transmitted from main office in Baltimore until 10:15 p. m. It further appeared that the message was delivered to this defendant at Raleigh for transmission to Kinston, N. C., and was delivered to sendee at 9:15 next morning. It further appeared that in the regulation fixing the office hours of the Kinston office it was closed from 9 p. m. Saturday to 9 a. m. Sunday. *Held*, no evidence of negligence upon part of defendant. Evidence that at 9:30 p. m. Saturday defendant's messenger had attempted to deliver a message in defendant's envelope addressed to plaintiff to one of a similar name, who did not open it, and informed the messenger where plaintiff was to be found, and that the message sued on was unusually dry the next morning, when delivered, for a message just received, is too conjectural to identify the message attempted to be delivered Saturday night as the one sued on. *Marquette v. Telegraph Co.*, 156.

5. *Mental Anguish—Damages—Notice to Company—Nominal Damages.*—Plaintiff while at work near G. was injured and caused a telegram to be delivered to the defendant telegraph company at G. a message to be transmitted and delivered to his father at V. reading, "Come at once. Bob hurt very bad." The plaintiff ("Bob") was immediately taken to S., and sues the defendant for damages for mental anguish for the nondelivery of the message alleged to have arisen from the consequent failure of his father to meet him at S. The father, the plaintiff's witness, testified that had he received the telegram from G. he would not have gone to S. *Held*, the plaintiff failed to show that his father would have gone to S. and can only recover nominal damages, the cost of the message. *Beal v. Telegraph Co.*, 331.

6. *Same.*—In an action to recover for mental anguish against a telegraph company for its failure to deliver a message plaintiff caused to be filed with its agent at G. to be transmitted and delivered to plaintiff's father at V., telling him to "Come at once. Bob (plaintiff) hurt very bad," plaintiff's testimony was to the effect that the message was to have been sent to his father telling him to come there. The plaintiff sues because his father did not meet him at S. *Held*, (1) the plaintiff should have definitely telegraphed his father to go to S.; (2) the plaintiff's evidence showing that he intended the message to be sent as written, he can not fix liability on the defendant on the theory that the defendant knew he expected his father to meet him at S. *Ibid.*

TENANTS. See Indictment.

TENANTS IN COMMON.

1. *Partition—Infant—Parties.*—A proceeding in partition of lands among tenants in common does not bind an infant not represented in any manner nor properly made a party. *Vick v. Tripp*, 90.

2. *Same—Ratification—Estoppel—Election.*—An infant having an interest in lands as a tenant in common, and not bound by partition had thereof by the other tenants, by joining in a deed from his cotenants after his majority, to a part of the lands so held, and reciting the partition proceedings for description only, is only estopped to claim title as against those claiming under the deed; and is a ratification only of the lands conveyed; and his joining in the deed does not evidence his election to take the land conveyed therein as his part of the lands held in common. *Ibid.*

3. *Same.*—C. bequeathed certain property to his wife and devised certain of his real property to his four surviving children, T. R., M. and L. T. died devising all of his estate therein to his mother for life, "at her death to" the plaintiff. R. conveyed his said interest to his mother. Afterwards, in proceedings in partition, the tenants in common divided the lands without in any manner making the plaintiff, who was then a minor, a party. In these proceedings, three certain tracts of the land were set apart to the mother, on one of which there was a storehouse; to one of the tracts the defendant claims title by mesne conveyances from the mother. After coming of age the plaintiff joined in a deed with the widow of C., conveying the storehouse, and subsequently the widow died. *Held*, (1) by joining in the deed to the storehouse property, the plaintiff is not estopped in his action for possession and accounting for the rents and profits of the other lands; (2) the doctrine of election has no application; (3) a recital in the deed of the proceeding in partition would only have the effect of estopping plaintiff from denying the existence thereof and the conclusiveness of its effect as a division of the real estate. *Ibid.*

4. *Partition—Vendee.*—A vendee of an undivided interest in lands held in common can commit such waste as "is destructive of the estate and not within the usual legitimate exercise of the right of enjoyment of the estate." *Ibid.*

5. *Wills—Division by Deed—Remaindermen—Title.*—Tenants in common may agree upon and apportion among themselves by deeds the land held in common under devises to them made by their two different ancestors; but when only a life estate is devised in part of the lands, this method of division can not affect the title of the remaindermen, as their interest is derived exclusively from the will, and the deeds can not have the effect of creating or manufacturing a title. *Jones v. Myatt*, 225.

6. *Husband and Wife—Deeds and Conveyances—Interpretation—Intent.*—When lands are granted to husband and wife, and it appears from the words of the grant that the intention was to create a joint tenancy, or a tenancy in common, they will take and hold as joint tenants or tenants in common and not as tenants of the entirety. *Isley v. Sellars*, 374.

7. *Same—"Entirety."*—When one of two tenants in common makes a conveyance of his interest to the wife of the other, the husband and wife thereafter hold as tenants in common and not alone by entireties. *Ibid.*

TENANTS IN COMMON—*Continued.*

8. *Same—Mortgages.*—A husband and wife being tenants in common in land of an undivided moiety, sold a part thereof, and to secure the balance of the purchase money took a note payable to themselves secured by a mortgage on the lands. *Held*, (1) being tenants in common of the land when it was sold, they became severally and equally interested in the purchase money; (2) the mortgage only made them the trustees of the legal title to secure the debt, because they were the owners of the note secured by it; (3) the notes being payable to them both entitled each to one-half of the amount; (4) the mortgagor having paid the note, without foreclosure, the result is the same as if no mortgage had been executed, and as the wife was entitled to one-half of the purchase money her interest was not lost by drawing the notes payable to both; (5) the husband having received more of the purchase price than his one-half interest, and died, the wife is entitled to the remainder thereof in the hands of his administrator. *Ibid.*

9. *Husband and Wife—Entireties—Survivorship.*—In this case the husband and wife sold the lands, the wife survived the husband and sues his administrator for a balance of the purchase price paid into his hands. *Held*, if the doctrine of estates by entireties has any application to the facts, the wife is entitled to the fund by virtue of the right of survivorship, existing between husband and wife in such instances. *Ibid.*

TITLE TO OFFICE. See Procedure.

TORTS. See Negligence; Contributory Negligence; Equity; Insane Persons; Damages.

TRESPASS. See Morgtages.

Criminal Actions—Title Arbitration.—When, in a trial under indictment for forcible trespass, the question depended upon a civil issue as to title, which by consent of the parties was referred to arbitration by the trial judge, and one of the claimants is spoken of in the order of arbitration as prosecutor, the order providing that if the question of title be found against him, he shall pay the costs as on *nolle pros.*, by the solicitor, which resulted in a judgment taxing the costs against him. *Held*, there being nothing restrictive in the terms of the judgment, it was not error in the trial court to find the appellant, upon further investigation, had advised the prosecution, actively participated therein, and enter judgment making him a prosecutor of record and also taxing him with the costs, and this disposition of the case is not precluded by the prior judgment referring the question of title to arbitration. *S. v. Stone*, 614.

TRIAL BY JURY. See Reference.

TRUSTS. See Contracts.

TURNPIKES. See Negligence.

UNDUE INFLUENCE. See Wills.

USES AND TRUSTS.

1. *Parol Trusts—Dower—Husband's Estate—Estate of Former Wife.*—In a petition for dower of a second wife in the lands of her husband,

USES AND TRUSTS—*Continued.*

evidence is competent, in behalf of the children of the first marriage, to show that certain of the lands were paid for by their mother and improvements made thereon with her money, and that the deed thereto was made to the husband by mistake, as such evidence, if found as a fact by the jury, would establish a trust estate in favor of the children and heirs at law of their mother, superior to the claim of dower, which must necessarily be laid off from the deceased husband's estate. *Hendren v. Hendren*, 505.

2. *Parol Trusts—Purchase Price—Locus in Quo—Identity.*—In this case the objection is without merit that the proof of the payment for the lands upon which a parol trust is sought to be engrafted by defendants was not sufficiently definite as to the lands in controversy. *Ibid.*

VENUE. See Removal of Causes; Corporations; Railroads.

VERDICT. See Judgments.

VERDICT, EXCESSIVE. See Appeal and Error.

Indictment — Counts — Receiving Stolen Goods—Conviction—Sufficient—Intendment.—The verdict of a jury should have a reasonable intendment and receive a reasonable construction; and when an indictment charged the defendant with larceny and receiving stolen goods, the property of H., he was tried for receiving the goods knowing them to be stolen, and the evidence tended to show that they were stolen by D. and received by the defendant with guilty knowledge, and to this count of receiving the evidence and charge of the court were alone directed; the record stating that the judge correctly charged "upon all phases of the evidence," the conclusion is indisputable that the jury intended to convict the defendant of the crime alleged in the indictment and for which he was tried, in rendering the verdict, "We find the defendant guilty of receiving goods, knowing them to be stolen," and it is sufficient for conviction. *S. v. Whitaker*, 89 N. C., 473; *S. v. Parker*, 152 N. C., 790, cited and distinguished. *S. v. Gregory*, 646.

VERDICT SET ASIDE. See Appeal and Error.

WAREHOUSEMEN. See Carriers of Goods.

WASTE. See Estates.

WATER AND WATERCOURSES. See Eminent Domain.

1. *Upper Riparian Owner—Material Impairment.*—Water flowing in its natural channel is not subject to ownership, and may be used by the upper riparian owner in such reasonable quantities, taking into consideration the size and character of the stream, as not to materially or substantially impair the lower riparian owner in its legitimate use. *Harris v. R. R.*, 542.

2. *Same—Railroads—Lower Riparian Owner—Damages.*—A railroad company has the right, as an upper riparian owner, where its bridge crosses a natural watercourse, to the use of so much of the water as is necessary for the running of its locomotives, and a lower riparian owner can not recover damages, on that account, in the operation of

WATER AND WATERCOURSES—*Continued.*

his water mill, when the use of the water by the railroad company does not materially or substantially diminish its natural flow, and upon conflicting evidence, the question is one for the jury. *Ibid.*

WHOLE BLOOD. See Descent.

WIDOW. See Dower; Mortgages; Homesteads.

WILLS.

1. *Interpretation—Life Estates—Devise to Widow—Dower, Lieu of—Sale of Timber—Consent.*—A devise of lands to two minor granddaughters, and to testator's "present wife"; her life right to and in said premises and lands for her support and for the support of said minor heirs: *Held*, (1) The words "for her support and the support of the minor heirs" do not constitute a condition precedent to the vesting of the life right or estate of the widow, or a condition subsequent by which the estate could be defeated; (2) the devise to the widow was in lieu of dower; (3) the granddaughters, now being of age, could not sell the standing timber on the lands without the consent of the widow, the life tenant. *Lumber Co. v. Lumber Co.*, 49.

2. *Devisavit Vel Non—Undue Influence—Confidential Adviser—Evidence, Sufficient.*—In an action to set aside a will for undue influence, evidence is sufficient to go to the jury which tends to show that deceased was illiterate, and devised or bequeathed her whole estate to her brother and his daughter, leaving to her son, the caveator, only $10; that the brother, her confidential business adviser, upon whom she relied, had the testatrix at his house during her last illness, and at that time would not permit the caveator to see his mother without the presence of himself or his daughter, and had the will written and signed under circumstances tending to show that the testatrix was unaware of its contents and kept it in his own possession; that the testatrix had theretofore expressed the desire of providing for her son, with whom she was on good terms; that he procured the testatrix, just before her death to sign a check drawing all her money from the bank, which he gave to his daughter, who then left and remained from the State. The doctrine of presumptions, burden of proof and the character of the evidence required, discussed by BROWN, J. *In re Will of Amelia Everett*, 83.

3. *Foreign Wills—Registration—Certificates—Sufficiency.*—In this case the record and certification by the Orphans' Court, of Baltimore, having jurisdiction to admit wills and testaments to probate, is sufficient under Revisal, 3135, and it will be admitted to probate and registration in this State, though the pages of the manuscript exemplified copy are not orderly arranged. *Lumber Co. v. Hudson*, 96.

4. *Interpretation — Devisees — Realty — Words and Phrases.*—While the term used in a will, "distributive share," ordinarily refers to personal property, and "distributee" denotes the person or persons upon whom such property devolves, this definition is not controlling so as to exclude real property when it appears from the interpretation of the will that real property was the subject of disposition. *Jones v. Myatt*, 225.

5. *Same—Estates—Remainders.*—A devise of negroes to be kept on the plantation until the daughter of testator shall marry or become of

WILLS—*Continued.*

age, or until the two named sons become of age, then the property, both real and personal, shall be equally divided between them; and by the next following item, a devisee of one-half of each distributive share to these three children "as directed above, shall be settled upon each one of my children, . . . so that they shall have the use of said half of each one's distributive share during their natural lives, and at their death to be equally divided between their children, and should either of them die and leave no child, then the said half distributive share shall go to the living child or children." *Held,* the intent or meaning of the words "distributive share" used in the last named item, in connection with the words "devise," "as directed above," was to include both real and personal property; (2) the entire estate was devised to the testator's three children in equal shares with the time of actual division fixed as specified, and upon division each child would take one-half of one-third in fee, and in the other half a life estate only with remainder in fee to his or her children, to be equally divided among them at the parent's death. *Ibid.*

6. *Interpretation of.*—In construing a will the primary purpose of the court is to ascertain the intention of the testator from the language used, and the entire will must be considered. *Herring v. Williams,* 231.

7. *Same—Conditions and Surroundings.*—It is competent to consider, in determining the intent of the testator, the condition of his family, how he was circumstanced, and his relationship to the objects of his testamentary disposition, so as nearly as possible to get his viewpoint at the time the will was executed. *Ibid.*

8. *Same—Life Tenant—Conveyance of Fee—Powers.*—It appearing that the plaintiff was adopted by the testator and his wife, who had no children of their own, was raised by them and was living with them at the time of his death; that the property of deceased consisted chiefly of a farm, and a house and lot, all of small value or income, the testator apparently obtaining his living by employment as overseer, which constituted the principal source of support for his wife and foster child; and that he devised to his wife all his property, "to have and to hold during the term of her natural life, and at the death of my wife, the said property, or as much thereof as may be in her possession at the time of her death," to the plaintiff, "her heirs and assigns forever." *Held,* that by the express terms of the will, the wife took a life estate with the power to dispose in fee of the property during her life, and that the plaintiff took, as the devisee of the remainder in fee, the real estate undisposed of by the wife. *Ibid.*

9. *Homestead—Widow—Election.*—When a widow is entitled to her homestead in the lands of her deceased husband under the provisions of Art. X, sec. 5, of our Constitution and of Revisal, sec. 707, she is not put to her election to take under the will, as in this case, a life estate in the lands, or to dissent from the will, in order to receive the benefits of the homestead conferred by the law; and she is not barred of her right by entering upon and enjoying the lands devised to her. *Fulp v. Brown,* 531.

WITNESSES. See Process; Evidence.