ANNOTATIONS INCLUDE 174 N. C.

NORTH CAROLINA REPORTS

VOL. 155

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1911
(IN PART)

BY
ROBERT C. STRONG,
STATE REPORTER.

ANNOTATED BY
WALTER CLARK.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SPRING TERM, 1911

JAMES McLELLAN v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 19 April, 1911.)

Railroads—Public Crossings—Gates—Warnings — Negligence — Contributory Negligence—Rule of the Prudent Man—Questions for Jury.

The defendant and two other railroads each had a track where a public road crossed, protected at each side by gates operated by compressed air, under the charge of a gatekeeper, who, according to custom, rang a gong to give warning of approaching trains. While plaintiff was crossing the tracks in a buggy, his horse at a trot, the gong sounded for an approaching train, and in endeavoring to get through the opposite gate it fell upon his horse, which consequently caused personal injury to the plaintiff. There was conflicting evidence as to whether the gate could be stopped after it had started to be lowered: *Held*, (1) evidence was competent tending to show defendant's custom in ringing the gong to give time for those between the gates to get through; (2) evidence sufficient upon the issue of defendant's negligence; (3) plaintiff was not guilty of contributory negligence, as a matter of law, in not seeking a place of safety between the gates, and this question was properly submitted to the jury under instructions as to the rule of the prudent man.

APPEAL *from Daniels, J.*, at January Term, 1911, of DURHAM. (2)

Action to recover damages for alleged negligence upon the part of defendant's gate-keeper in injuring plaintiff while passing through the railroad gates protecting the tracks at Corcoran street crossing in the city of Durham.

The usual issues of negligence, contributory negligence and damages were submitted.

The jury answered the issues in favor of the plaintiff and assessed his damage at $1,000. Defendant appealed.

Bryan & Brogden for plaintiff.
Guthrie & Guthrie and J. Lathrop Morehead for defendant.

BROWN, J. The facts are that the defendant operated railway gates on both sides of Corcoran street crossing in the city of Durham for the protection of its tracks, as well as those of the Norfolk & Western and Seaboard Air Line railways.

On 22 December, 1909, the gates being up, plaintiff entered upon the crossing, going south, driving a horse and buggy. When within fifty-nine feet of the south gate the gong in the gate-tower sounded, a signal that a train was approaching and that gates would close. The plaintiff was then on the N. & W. track, and his horse in a trot. He did not stop, but drove on, attempting to get through the south gate before it closed. The gate descended on the horse's back, causing the animal to plunge through the gate, throwing plaintiff out and seriously injuring him.

The plaintiff offered evidence tending to prove it was defendant's custom to sound the gong as a warning to those between the gates and to give them an opportunity to pass out before the gates were lowered, and that plaintiff was acquainted with and relied upon this custom. To this evidence defendant excepted.

We think it was competent to prove the custom of defendant in sounding the gong and that plaintiff knew of the custom and relied on it. *Parrott v. R. R.*, 140 N. C., 549; 1 Wigmore, sec. 92, sec. 376. But a discussion of this exception is unnecessary as it is proven by defendant's witnesses that there was a gong on the tower used for the purpose
(3) of giving notice of the lowering of the gates, and the gate-keeper testified that he sounded the gong on this occasion. This is a very proper precaution, for the sounding of the gong not only serves to notify those then on the tracks to hasten off, but to those approaching the crossing it is a signal to stop, which they must heed at their peril.

The other exceptions to the evidence, upon examination, we think, are without merit and need not be discussed.

In apt time, defendant moved to nonsuit: (1) Upon ground that there is no evidence of negligence, and (2) that the plaintiff, as a matter of law, was guilty of contributory negligence upon his own showing.

The evidence of negligence is plenary. It was the gate-keeper's duty to observe those who were crossing the tracks when he commenced to lower the gates. When he saw plaintiff trotting his horse in his endeavor to get through the gate it was the gate-keeper's duty to momentarily arrest the descent of the gate and not let it come down on the horse's back.

It is said the gate was operated by compressed air and could not be stopped.

The defendant's witness, the gate-keeper, testified that he had never had occasion to stop the gates when he started them down, and further stated, "I expect you can stop them in any position if they are in proper order. Gates were in pretty good condition that day; about as good as they had been."

The fact is that the gate-keeper made no attempt to stop the gates, although he saw plaintiff, and must have known that his purpose was to escape from the peril he was in by being on the tracks when a train was approaching on one of them.

Upon the question of contributory negligence the evidence shows that when the gong sounded as a signal that a train was approaching and that the gates would be closed, plaintiff was only fifty-nine feet from the south gate on the N. & W. track, and his horse at a trot.

We can not say as matter of law that he should have stopped and waited on the track until the train passed. It is a very dangerous and unpleasant position to occupy to be in a buggy between closed gates enclosing three railroad tracks when a train is passing on one of them. The plaintiff was in a position of danger, and doubtless (4) his first impulse was to push ahead and drive on through the gate.

We think upon this issue the trial judge gave the defendant all it was entitled to when he submitted plaintiff's conduct under the circumstances to the judgment of the jury under the rule of the prudent man.

No error.

B. R. HOUSTON, ADMINISTRATOR, v. DURHAM TRACTION COMPANY.

(Filed 19 April, 1911.)

Electricity—Negligence—Evidence—Questions for Jury.

Evidence of the death of plaintiff's intestate by the negligence of the defendant in permitting an excessive voltage of electricity upon the wires where the intestate was employed to work by contractors repairing the building, and a defect in the mechanism of an electric socket for a lamp: *Held* sufficient, in connection with other circumstantial evidence, to take the case to the jury.

CLARK, C. J., delivering the opinion; ALLEN, J., concurring therein; HOKE, J., concurring in the result; BROWN and WALKER, JJ., dissenting.

APPEAL from *W. J. Adams, J.*, at March Term, 1910, of DURHAM.

The facts are sufficiently stated in the opinion of *Mr. Chief Justice Clark.*

Branham & Brawley and Guthrie & Guthrie for plaintiff.

Foushee & Foushee and Bryant & Brogden for defendants.

CLARK, C. J. This is a petition to rehear this case, which was affirmed by an evenly divided Court, at this term.

Plaintiff's intestate was a young man nineteen years of age working as a hand for contractors in the basement of a store which was being repaired by them for the owner in consequence of damages from fire. On the application of the contractors, the defendant traction company supplied them with three incandescent lights swinging on cords
(5) forty or fifty feet in length so as to enable the workmen to move the lights from place to place as occasion required, in order to see how to perform their duties. The electric current and the bulbs and cords were furnished by the defendant.

The plaintiff's intestate was killed on Monday, 21 December. A new basement floor of cement had been put down on Thursday, 18 December, three days before his death. At the time of his death this basement floor had not thoroughly dried out, and water was standing on it in some places, and it was damp all over. He was standing on this floor at the time of his death. There were no obstructions on the floor which could have caused him to fall. His tool-box was in a corner of the room, and in going to the tool-box the intestate had to pass the light under which his body was found. It was necessary for him to get some of these tools to perform his work, and he could not have seen how to get his tools without moving the light and carrying it with him. He had just resumed his work after dinner and handing a step-ladder to his brother, who was also working in the building, plaintiff's intestate turned and walked towards his tool-box. Two or three seconds after handing his brother the ladder, his brother saw deceased's body lying directly under the light, and the light was swinging to and fro, hanging directly over him. Intestate did not speak after he fell to the floor. The light, before deceased went to it, was hanging upon the wall, still burning. When his body was discovered lying under it, the light was swinging to and fro. No one had been near it, or could have caused it to swing to and fro, except the intestate. The electric light into which the incandescent glass globe was screwed was a brass socket. There was place for two screws in the socket which held the brass cap over the exposed wires in the interior of the socket. One of these brass screws was out of the socket and missing, and the cap on the socket was raised so that the wiring inside the brass socket was pulled up. The wires inside the brass socket were exposed just under the cap, and these wires were touching the sides of the brass cap. The current for these artificial lights, as well as the sockets and cords attached thereto, was furnished by the defendant company. It was an alternating light, and the voltage in such currents is from 104 to
(6) 110 volts. Tests made on the voltage of this light, immediately after the death of plaintiff's intestate, showed that the voltage was between 260 and 280 volts.

It is much more dangerous to stand on a wet floor than to stand on a dry floor when coming in contact with an electric current.

Dr. Graham, a medical expert, in reply to hypothetical questions, gave it as his opinion that the death of plaintiff's intestate was caused "by paralysis of the heart from the electric current." A member of the police force testified that he went to the spot immediately after the death of plaintiff's intestate; that he examined the socket as soon as he got there; found one of the screws loose and the other pulled out, and that he could see the inside of the brass lining.

The intestate was young and in good health.

Upon the above evidence, which must be taken as true, upon a motion to nonsuit, though there was some conflict in regard to some features of it, the motion to nonsuit was properly refused. There was evidence tending to show that the death of plaintiff's intestate was caused by the defective condition of the wires, with which he might have come in contact when he took up the movable light to see how to get his tools. There was no evidence tending to show death from apoplexy or heart disease or any other cause. The matter was properly left to the jury. "If the circumstances be such as to raise more than mere conjecture, the judge can not pronounce upon their sufficiency to establish the fact, but must leave them to be weighed by the jury, whose exclusive province it is to decide the effect of the testimony," as was said by *Judge Battle, Jordan v. Lassiter,* 51 N. C., 131. To the same effect, *McMillan v. R. R.,* 126 N. C., 725; *Williams v. R. R.,* 140 N. C., 627, and indeed our authorities are uniform.

The deadly current of electricity furnished by the defendant passes through the ether, imperceptible by any of the natural senses of man. In *Mitchell v. Electric Co.,* 129 N. C., 169, the Court said, speaking of this powerful agency which passes unseen, unheard, odorless, and without any warning of its dangerous presence, "In behalf of human life and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise (7) the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition."

In this case the reading of defendant's instruments showed negligence on its part in sending an excessive voltage over its wires. If, directly after the death of the deceased, the socket was in the condition described by the witness, and the voltage was excessive as shown by its own meter, this, taken in connection with the evidence of the expert above quoted and the absence of evidence tending to show any other cause of death, was sufficient to submit the case to the jury. There was evidence that when the ground is wet, as was here the case, the voltage received by the intestate, if it passed through him, was double the voltage of 260 volts,

shown by the meter, and was sufficient to cause death. The evidence was sufficient to authorize a finding that the death of the intestate was not the "mere happening of a casualty."

The second assignment of error can not be sustained. The court charged the jury, "If you find from the evidence that the defendant was employed by Houston & Christian to install lights, to be moved in the building from place to place for the convenience of Houston & Christian and their employees while engaged in repairing the building; that these lights were put in 19 December, and that on 21 December the intestate was in the employ of Houston & Christian, and while in the prosecution of his work and acting in the scope of his authority took hold of the electric appliances so as to enable him better to perform his work, and that upon doing so the current of electricity was transmitted from the appliances to his body and he was thereby killed, this would constitute *prima facie* negligence on the part of the defendant, and it would be incumbent on the defendant to rebut such *prima facie* evidence."

This is not a charge that the burden of the issue was shifted to the defendant, or that there was any presumption of law in plaintiff's favor, but is merely an instruction that if the jury should find that state of facts it was incumbent upon the defendant "to go forward with its proof," in accordance with what was said by *Mr. Justice Walker*
(8) in *Stewart v. Carpet Co.*, 138 N. C., 66; *Cox v. R. R.*, 149 N. C., 117; *Winslow v. Hardwood Co.*, 147 N. C., 275; *Dail v. Taylor*, 151 N. C., 285; *Marcom v. R. R.*, 126 N. C., 200; *Overcash v. Electric Co.*, 144 N. C., 572. In these last two cases the Court said, "When a derailment is shown, a *prima facie* case is made out, and the burden is upon the defendant to show that the injury was occasioned by an accident."

In Shearman & Redfield on Negligence, sec. 58, which is approved in *Dail v. Taylor, supra,* it is said: "The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and a resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence to rebut the presumption."

The third error alleged is the failure to give the following prayer: "If you find from the evidence in this case that the wires, lights and socket were in good condition when put in, then the defendant would not be responsible for any defect that might arise from the use or handling of the same by others."

In *Electric Co. v. Letson,* 68 C. C. A., 453, the Court said, "The contention of the company amounts to this: that if the wires were properly installed it can not be held responsible for their being out of repair, unless it is proved that they got out of repair through its own fault. But

this loses sight of the duty of the company not only to make the wires safe at the start, but to keep them so. They must not only be put in order, but kept in order. The obligation is a continuing one. The safety of patrons and the public permits no intermission. Constant oversight and repair are required and must be furnished. Customers who contract for a harmless current to light their houses are entitled to rely upon such inspection and repairs as will effectually guard them against a dangerous current. They can not guard themselves. Any attempt to do so would expose them to immediate peril. They must take and use the current on trust, relying upon the protection of the company. In view of this, when a deadly current enters a customer's house and kills him, it is not too much to call upon the company to explain the existence of the defect which caused the tragedy."

In *Light & Power Co. v. Arntson,* 157 Fed., 540, the facts (9) were almost identical with this. A laborer seeking to get his tools in a basement where he was doing some repair work, was killed from a shock caused by an excessive current of electricity, and the verdict and judgment obtained in the United States Circuit Court was affirmed in the Circuit Court of Appeals.

In *Hoboken Co. v. Electric Co.,* 71 N. J. L., 430, the Court of New Jersey, in passing upon the contention, made also in this case, that the employees of the deceased were independent contractors: *held,* "An electric company, before sending its current for lighting purposes through the apparatus installed in a building by other parties, is bound on its own responsibility to make reasonable inspection of the apparatus to see whether it is fit for use." In *Electric Co. v. Lawrence,* 31 Col., 301, the decision is to the same effect.

The fourth assignment of error is the refusal of the court to submit a fourth issue as to contributory negligence. It has been repeatedly held that this Court will not sustain an objection to the issues if they are such that every phase of the contentions of the parties can be submitted to the jury. *Humphrey v. Church,* 109 N. C., 132, and cases there cited. Besides, if the intestate was killed by the excessive voltage caused by the negligent condition of the apparatus furnished him, which is the finding of the jury, there was no evidence tending to show contributory negligence on his part.

The fifth exception, for permitting plaintiff to introduce certain rules and regulations in evidence, was harmless as the court in its charge withdrew the evidence of the rules from the consideration of the jury. *Wilson v. Mfg. Co.,* 120 N. C., 94, and cases cited thereto in the Annotated edition.

The sixth assignment of error, for permitting the medical expert to answer the questions put to him, can not be sustained. Every fact

embraced in the hypothetical question had been shown in evidence, and it was admitted that Dr. Graham was a medical expert.

The seventh exception was to the evidence as to the socket having been approved by the National Board of Fire Underwriters. This evidence was withdrawn from the jury by the court.

(10) After a careful review of the evidence, the charge, and the exceptions, we find no error.

Petition dismissed.

HOKE, J., concurs in result; WALKER and BROWN, JJ., dissenting.

Cited: Shaw v. Public Service Corporation, 168 N. C., 618; *Cochran v. Mills Co.,* 169 N. C., 63.

S. C. LEONARD v. SOUTHERN POWER COMPANY.

(Filed 19 April, 1911.)

1. Written Contracts—Parol Evidence—Fraud.

One who can read and write and has been afforded opportunity to do so, and to inform himself, will not ordinarily be relieved of liability under a written contract he has thus signed, upon the ground that he did not understand its purport or that it was an improvident one.

2. Same—Exceptions—Misrepresentation—Inducements—Confidential Relations—False Security.

The ordinary rule that one will not be relieved from liability under his written contract which he could have read and informed himself of before signing can not be invoked in behalf of one who lulls the other party to security, for the law does not require men to deal with each other upon the presumption that they are rascals.

3. Same—"Caveat Emptor"—Equal Knowledge.

Where the falsity of misrepresentation relied on to avoid liability under a contract is patent and the party seeking to avoid it accepts and acts upon it with his eyes open, he has no right to complain, for if the parties have equal information, the rule of *caveat emptor* applies unless the complaining party has fraudulently been prevented by some artifice or contrivance of the other party from making proper inquiry.

4. Deeds and Conveyances—Right of Way—Electricity—Fraud—Parol Evidence—Confidential Relations—Misrepresentations.

The owner of lands will not be held upon his written contract granting an easement to a power company to erect steel towers upon his land, when it is shown that the agent of the company was well known to him, and he relied upon the assurances of the agent that only a line of one or two poles and wires was included in the conveyances; that the agent of

the company read the writing without mentioning the towers which were expressly specified therein, and that at the time actual work had been commenced to the knowledge of the agent and without that of the grantor upon a location of a line of towers and wires that would embrace a greater acreage than verbally represented, though the grantor could have read the grant and have informed himself of its contents at the time of signing it.

5. Deeds and Conveyances—Contracts—Inadequate Consideration—Fraud—Evidence.

When the inadequacy of the consideration for a contract or conveyance is so gross as to shock the conscience, it is in itself sufficient evidence of fraud to submit the case to the jury; but mere inadequacy thereof, while it may not alone justify setting aside a contract or other paper-writing, may be considered by the jury with other evidence on the question of fraud.

6. Deeds and Conveyances—Fraud—Misrepresentation—Evidence—Requisites of Proof.

In an action to recover damages of defendant power company for entering upon plaintiff's lands and erecting steel towers and stringing wires for conveying electricity for power purposes, wherein the defendant set up authority to do so under a written grant which the plaintiff sought to set aside for fraud in the procurement, a charge, in part, in this case held correct, that if the jury find that the representations made by defendant's agent were false to the knowledge of the defendant, and that they were made with intent and were calculated to deceive plaintiff, who relied thereupon and was thereby deceived and damaged, they should answer the pertinent issue in the affirmative.

APPEAL from *W. J. Adams, J.,* at November Term, 1910, of (11) DAVIDSON.

The plaintiff sues to recover damages, alleging that the defendant entered upon her land and erected steel towers and strung thereon wires conveying electricity at a high voltage, for the purpose of selling the same to operate factories and to furnish light.

The defendant admitted these facts, but claimed that it was acting lawfully by reason of the provisions of the following paper, spoken of by the witnesses as the "blue paper," which the plaintiff admitted she signed:

NORTH CAROLINA—COUNTY OF DAVIDSON.

Know all men by these presents, that I, Mrs. Sallie C. Leonard, of said county and State, in consideration of the premises and of the sum of ------dollars to------in hand paid by the Southern Power Company, the receipt whereof is hereby acknowledged, do hereby (12) grant unto the said Southern Power Company, its successors and assigns, the right, privilege and easement to go in and upon that tract of land situated in said county and State bounded by lands of L. A.

Weise, J. W. Brown and others, and to construct and maintain in, upon and through said premises in a proper manner with poles, towers, wires and other necessary apparatus and appliances, a line for the purpose of transmitting power by electricity, together with the right, at all times, to enter upon said premises for the purpose of inspecting said lines and making necessary repairs and alterations thereon, together with the right to cut away and keep clear of said lines all trees and other like obstructions that may in any way endanger the proper operation of the same.

"In witness whereof, the said Mrs. Sallie C. Leonard does hereunto set her hand and seal, this 15 August, 1908.

MRS. SALLIE C. LEONARD. (Seal.)

Witnesses: A. E. Hutchinson and Dave Leonard.

It was also admitted that another paper, spoken of as the "yellow paper," was signed at the same time by the plaintiff and the defendant, which is as follows:

NORTH CAROLINA—COUNTY OF DAVIDSON.

This agreement made this 15 September, 1908, between the Southern Power Company, party of the first part, hereinafter called the "power company," and Mrs. Sallie Leonard, party of the second part, hereinafter called the "owner"—

Witnesseth: That it is hereby agreed between the parties hereto that the power company shall pay one dollar ($1) for each and every pole or support placed, and one dollar ($1) per cord for each and every cord of wood cut on the premises of said owner, the wood to be cut by and to remain the property of the owner, together with all actual damages to the crops of said owner occasioned by the construction or repairing of the transmission lines; provided that said owner presents a written claim therefor within sixty days after the act causing such damages.

(13) In witness whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written.

SOUTHERN POWER COMPANY,
By A. E. Hutchison, (Seal.)
Right of Way Agent.
MRS. SALLIE C. LEONARD. (Seal.)

Sealed and delivered in the presence of: Dave Leonard.

The plaintiff alleged that her signature to these papers was procured by fraud, which was denied by the defendant.

The following are the issues and the responses thereto:

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

2. Did defendant Southern Power Company enter upon the said lands of plaintiff and commit the acts therein and appropriate the same to its use, as alleged in the complaint? Answer: Yes.

3. Did plaintiff execute the paper-writing set up in answer? Answer: Yes.

4. Does said paper-writing authorize the erection and maintenance of defendant's line across plaintiff's lands, as alleged in answer? Answer: Yes, across the six acres.

5. Was the execution of said paper-writing procured by fraud and misrepresentation, as alleged in complaint? Answer: Yes.

6. What damage, if any, is plaintiff entitled to recover of defendant on account of its appropriation of her land, as alleged in complaint? Answer: Eighteen hundred dollars ($1800).

There were six towers erected on the land, and under the terms of the blue paper the plaintiff would be entitled to $6 therefor.

The defendant has no exception to the issue of damages, and it does not appear that it asked the presiding judge to set it aside or to reduce it as excessive.

It has abandoned all exceptions except the one to the refusal of the judge to charge the jury that, upon the whole evidence, they must answer the issue of fraud, No.

The plaintiff admitted that she could read and write and was educated, and that her son, twenty-eight years of age, who was intelligent and could read and write, was present when she signed the (14) papers.

The plaintiff and the witness Hutchison had known each other before this transaction.

S. E. Williams and Emery E. Raper for plaintiff.

Osborne, Lucas & Cocke and Walser & Walser for defendant.

ALLEN, J., after stating the case: We are not disposed to modify the principle laid down in *Dellinger v. Gillespie,* 118 N. C., 737, and many other cases, that the law will not relieve one who can read and write from liability upon a written contract, upon the ground that he did not understand the purport of the writing, or that he has made an improvident contract, when he could inform himself and has not done so. "The law aids those who are vigilant, not those who sleep on their rights."

This rule can not be invoked, however, in behalf of one who induces sleep and lulls to security, nor does it require men to deal with each other upon the presumption that they are rascals, as is clearly stated in *Walsh v. Hall,* 66 N. C., 238: "The law does not require a prudent man to deal with every one as a rascal, and demands covenants to guard

against the falsehood of every representation which may be made, as to facts which constitute material inducements to a contract. There must be a reasonable reliance upon the integrity of men, or the transactions of business, trade and commerce could not be conducted with that facility and confidence which are essential to successful enterprise, and the advancement of individual and national wealth and prosperity. The rules of law are founded on natural reason and justice and are shaped by the wisdom of human experience, and upon subjects like the one which we are considering, they are well defined and settled. . . . No specific rule can be laid down as to what false representations will constitute fraud, as this depends upon the particular facts which have occurred in each case, the relative situation of the parties and their means of information. Examples are given in the books which have established some general principles which will apply to most cases that may arise. If the falsehood of the misrepresentations is *patent* and a party accepts and acts upon it with 'his eyes open,' he has no (15) right to complain. If the parties have equal means of information, the rule of *caveat emptor* applies, and an injured party can not have redress, if he fails to avail himself of the sources of information which he may readily reach, *unless he has been prevented from making proper inquiry by some artifice or contrivance of the other party.*"

The same principle is stated as to a kindred subject in *Hill v. Brown,* 76 N. C., 125: "The maxim *caveat emptor* does not apply in cases where there is actual fraud," and has been approved in *Smathers v. Gilmer,* 126 N. C., 759; *May v. Loomis,* 140 N. C., 356; *Griffin v. Lumber Co.,* 140 N. C., 518, and numerous other cases. Under these authorities, we think there was evidence of fraud, which the judge properly submitted to the jury.

The plaintiff lived at Spencer and not on the land, and she had known the agent of the defendant before she entered into this transaction.

He testified that he read the blue paper to her, while she testified that the paper read to her did not have the word "towers" in it. There was evidence tending to prove that the agent of the defendant went to see her three times to procure her signature; that at first she refused to grant any easement to the defendant; that she was told that the defendant wanted to put up one or two poles on the land, across the six acres, and that the line of poles would not go near the big field; that the blue paper was drawn by the defendant, and the land described so indefinitely that one might be misled as to whether it conferred a right as to the six acres or the whole tract; that at that time the line had been run and staked on the land, and the defendant's agent knew this and did not inform the plaintiff of the fact, and that the agent gave the plaintiff the yellow paper, representing it to be a copy of the blue paper.

In addition to this, the inadequacy of consideration was so gross that it afforded sufficient evidence of fraud to justify submitting the question to the jury, in the absence of other evidence.

In *Byers v. Surget,* 19 How., 311, the Supreme Court of the United States says: "To meet the objection made to the sale in this case, founded on the inadequacy of the price at which the land was (16) sold, it is insisted that inadequacy of consideration, singly, can not amount to proof of fraud. This position, however, is scarcely reconcilable with the qualification annexed to it by the courts; namely, unless such inadequacy be so gross as to shock the conscience; for this qualification implies necessarily the affirmation, that if the inadequacy be of a nature so gross as to shock the conscience, it will amount to proof of fraud"; and again, in *Hume v. United States,* 132 U. S., 411: "It (fraud) may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other."

Our Court, speaking through *Justice Brown,* so declares the law in reference to awards and other transactions, in *Perry v. Insurance Co.,* 137 N. C., 406. He says: " 'Where there is a charge of fraud or partiality made against an award, the fact that it is plainly and palpably wrong would be evidence in support of the charge, entitled to greater or less weight according to the extent or effect of the error and the other circumstances of the case. There might be a case of error in an award so plain and gross that a court or jury could arrive only at the conclusion that it was not the result of an impartial exercise of their judgment by the arbitrators.' *Goddard v. King,* 40 Minn., 164. The settled rule, which is applicable not only to awards, but to other transactions, is that mere inadequacy alone is not sufficient to set aside the award, but if the inadequacy be so gross and palpable as to shock the moral sense, it is sufficient evidence to be submitted to the jury on the issues relating to fraud and corruption or partiality and bias."

Where there is inadequacy of consideration, but it is not gross, it may be considered in connection with other evidence upon the issue of fraud, but will not, standing alone, justify setting aside a contract or other paper-writing on the ground of fraud.

What we have said applies to persons bargaining with each other and seeking to reach an agreement as to a fair consideration, and does not prevent one from giving away his property or selling it for less than its value, if he wishes to do so, and the transaction is (17) honest.

The presiding judge presented the case to the jury clearly and accurately. He said: "It is true that a person who can do so is generally

required to read a paper before signing, and his failure to do so is negligence for which the law affords no redress. This rule does not apply, however, in case of positive fraud or false representation made by another party, by which the person signing the paper is lulled into security or thrown off his guard and prevented from reading it, and induced to rely upon such false representations or fraud. If, then, you find from the evidence and by its greater weight that the defendant's agent represented to the plaintiff that it was the present, existing purpose of the defendant to place on the six-acre tract of her land, and not in her fields, poles and wires such as are used in the construction and operation of telephone or telegraph lines, and said nothing about the erection of towers, you may consider such representations, together with the circumstances arising from the evidence, in finding whether there was positive fraud by the defendant in procuring the execution of the papers. And if you further find that he pretended to read to her Exhibit A and did not read the provision as to the erection of towers, lulled her into security and threw her off her guard by the positive assurance that only such poles and wires would be placed on the land referred to, and that she relied upon such assurance of the agent, and for these reasons did not herself read the paper, the circumstance that the plaintiff did not read Exhibit A (if you find that she did not read it) would not be imputed to her as such negligence in the execution of the paper as would leave her without legal redress for that reason. And if you further find that the representations made by the defendant's agent were false to the knowledge of the defendant, and that they were made with intent to deceive the plaintiff, and were calculated to deceive her, and that the plaintiff relied upon these representations, and that she was thereby deceived, and caused to suffer damage, your answer to the fifth issue will be, Yes. If you do not so find, your answer will be, No."

No error.

Cited: *King v. R. R.*, 157 N. C., 65; *Machine Co. v. McKay,* 161 N. C., 591; *McPhaul v. Walters,* 167 N. C., 184; *Starnes v. R. R.*, 170 N. C., 225; *Bank v. Redwine,* 171 N. C., 565; *Knight v. Bridge Co.* 172 N. C., 397.

(18)

SUSAN M. GREGG, ADMINISTRATRIX, v. CITY OF WILMINGTON.

(Filed 19 April, 1911.)

1. **Cities and Towns—Licensee—Negligence—"Pari Delicto."**

When a city has permitted its codefendant in the action to pile upon a sidewalk bricks taken from a building which was being torn down for the purpose of erecting a new one on the same site, and the codefendant negligently piles the brick in such manner as to cause the injury resulting in the death of plaintiff's intestate, the city and its codefendant are not *in pari delicto*, so as to deprive the city of the right to indemnity against the delinquent codefendant, as the permission to pile the brick implied that the piling should be carefully done.

2. **Same—Notice—City's Liability.**

The negligence complained of in an action against a city and one who, under contract with the city, is alleged to have negligently piled brick upon a sidewalk in such a manner as to cause the alleged injury, does not render the city responsible in damages, unless it appears that the city permitted the continuance of the negligent act after it was fixed with actual or constructive notice thereof.

3. **Same—Dependent Liability.**

When, in an action against a city and one whom it had permitted to pile bricks on its sidewalk, the negligence consisted in carelessly piling the bricks on the sidewalk so as to injure and cause the death of plaintiff's intestate, the negligence of the city is directly and necessarily dependent upon the negligence of the licensee, and can not exist without it.

4. **Same—Inconsistent Verdict.**

The verdict, in an action against a city and one who was permitted by it to pile bricks on its sidewalk, alleged to have been so negligently done as to cause the injury complained of, which resulted in the death of the plaintiff's intestate, is inconsistent when it finds that the intestate was killed by the negligence of the city and not by that of its licensee, for the injury could not have occurred except for the alleged negligent act of the latter in piling the brick insecurely.

5. **Verdict—Issues Set Aside—Judgment—Legal Rights.**

When the questions involved in an action are so interwoven that they can not be separated, and a new trial allowed as to one or more issues, without prejudicing the rights of one or more parties or preventing a full and just trial of the whole matter, the power which exists in certain cases to set aside a finding upon one of the issues should not be exercised.

6. **Same—Appeal and Error.**

When a city and its licensee are sued for negligence in the same action, and the negligence of the licensee, if any, is primary, the liability of the city necessarily depends upon the existence of negligence in the licensee; and where the jury find that the city was negligent and the licensee was

not, it was error for the trial judge to set aside the issue relating to the negligent act of the licensee and render a judgment upon the other issue against the city.

7. Cities and Towns—Licensee—Secondary Liability—Indemnity.

In an action against a city and its licensee for injury caused by the negligent act of the latter, of which the city had notice, their liability as between them and the plaintiff would be joint and several, but the city would be entitled to judgment against the licensee to indemnify it from loss in the event of recovery, being only secondarily liable. The doctrine of contribution has no application.

8. Contracts—Negligence—Primary Liability—Release—Effect.

The release by the plaintiff from liability of one of two defendants for a tort which was committed by both will also release the other defendant.

9. Appeal and Error—Verdict Set Aside in Part—Legal Rights—Procedure.

When upon appeal it appears that the trial judge has erroneously set aside issues as to the negligence and liability of one defendant and rendered judgment against the other, it is not an invasion of the discretion of the judge below for the Supreme Court to order a new trial upon all the issues, and it will be so ordered.

10. Pleadings—Inconsistent Pleas—Negligence—Primary and Secondary Liability—Indemnification—Judgment.

In an action against a city for permitting the continuance of a negligent act by its licensee, alleged to have caused the injury complained of, it is not inconsistent, but proper, for the city to deny negligence on the part of both defendants, and then to aver that if, as between the plaintiff and the defendants the latter were both guilty of negligence, the licensee is, as between the defendants, primarily liable, and the judgment should be so framed as to indemnify the city and reimburse it for what it will have to pay on account of the negligence of the licensee.

11. Negligence—Primary and Secondary Liability—Indemnification—Judgment—Instructions—Procedure.

While the secondary liability of a city for the negligent acts of its licensee and codefendant must first be established before a judgment of indemnification can be given the city against its codefendant, if it is alleged that the latter's negligent act primarily caused the injury complained of, the question of primary and secondary liability should be determined by the jury upon proper instructions of the court.

(20) APPEAL from *Cooke, J.*, at May Term, 1910, of NEW HANOVER.

This action was brought against the City of Wilmington and James F. Woolvin to recover damages for negligently causing the death of E. M. Gregg, her husband and intestate.

The defendant Woolvin, who was engaged in the demolition of an old building for the purpose of constructing a new one on the same site, obtained permission from the authorities of the city to use the sidewalk in front of the lot temporarily as a place for piling bricks taken from

the old building. In order to do the work, it became necessary to close the sidewalk, and the bricks were piled on it and in the street, so that pedestrians were compelled to pass around the pile of bricks in using Princess street, where the work was being done. It is alleged by the plaintiff that the pile of bricks was twelve feet high, six feet wide and twenty-five feet long, and that the bricks were improperly and dangerously stacked, and not being securely propped they were liable to be toppled from their position by the jar of a passing street car, the railway being laid in the street only a few feet from the pile of bricks. The intestate, while walking from his home to his business office along Princess street, that being the direct and usual route for him, was stopped by a friend near the pile of bricks, and while standing there engaged in conversation a street car passed and jarred the bricks so that they fell on the intestate and killed him. The plaintiff charges that her intestate's death was in this way caused by the negligence of Woolvin in piling the brick and leaving them in a dangerous condition not perceptible to persons using the street, by ordinary inspection, and that the city was negligent in permitting the bricks to remain piled in the street after it either knew, or could have known, of the danger to (21) those using the street.

The city of Wilmington answered the complaint by denying all the material allegations as to negligence. It then averred that if the bricks were negligently piled, it was done by Woolvin, who, as between him and the answering defendant, is primarily liable, though it admits that they are both liable to plaintiff if her intestate was killed by the negligent act of Woolvin, and the city was also negligent in respect to that act, as alleged by the plaintiff. It prayed for judgment against Woolvin in the event that it should be held liable to the plaintiff and compelled to pay damages to her for Woolvin's negligent act.

The defendant Woolvin demurred to this answer, but it is not now necessary to pass upon it, as we will do so when we come to consider his appeal.

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

1. Was the plaintiff's intestate killed by the negligence of the city of Wilmington? Answer: Yes.

2. Was the plaintiff's intestate killed by the negligence of the defendant James F. Woolvin or his contractor, B. H. Stevens? Answer: No.

3. Was the plaintiff's intestate guilty of contributory negligence? Answer: No.

4. Were the bricks piled by B. H. Stevens, and was said Stevens an independent contractor in respect to that work? Answer: No.

5. What amount of damage is plaintiff entitled to recover? Answer: $7,000.

The court set aside the verdict as to the second and fourth issues, and rendered judgment for the plaintiff upon the remaining issues against the city of Wilmington. Both defendants appealed.

John D. Bellamy & Son and Rountree & Carr for plaintiff.
Herbert McClammy and E. K. Bryan for City of Wilmington.
Ricaud & Empie for defendant Woolvin.

(22) APPEAL OF CITY OF WILMINGTON.

WALKER, J., after stating the case: We need not consider the numerous exceptions taken in this case, amounting in all to eighty-six. It is sufficient for us to say that there was error in setting aside the answers to the second and fourth issues and giving judgment against the city upon the others. The negligence of Woolvin necessarily preceded that of the city, if there was any negligence at all, for the city is charged with negligence, not because it carelessly piled the brick in the street, but because Woolvin having so negligently piled them, it permitted them to remain so negligently piled in the street and thereby to become dangerous to the public. The negligence of the city, upon the admitted facts, is directly and necessarily dependent upon the negligence of Woolvin and can not exist without it. If Woolvin was not negligent, then the city is free from blame, for it is not alleged, nor is it suggested, that the intestate would have been killed or injured in any way if the bricks had been properly stacked and secured. Even though the bricks were piled in the street, his position with respect to them would have been a safe one but for the negligence of Woolvin. The verdict of the jury was, therefore, inconsistent. They could not, in law, discharge Woolvin and charge the other defendant. But it does not follow that because Woolvin is guilty the city is also, because in order to charge the city with negligence the jury must find not only that the bricks were negligently piled by Woolvin, but that the city, with actual or constructive knowledge of their dangerous condition, permitted them to remain so.

It is true, as contended by counsel for the plaintiff, that the defendants are liable jointly and severally to her, if there was negligence by both of them which proximately caused her husband's death, and she might have sued them jointly or separately. If she had sued the city alone, a question might have arisen as to whether it would be proper to make Woolvin a party, at the request of the city and against the plaintiff's consent, even if thereby the entire controversy could be settled in one action. But she sued both defendants, and served Woolvin, as well as the city, with process and required them to come in and answer her

complaint. She has also declared against both of them in her complaint, or at least her allegations are sufficient in form and (23) substance to entitle her to judgment against both defendants.

The judge's refusal of the plaintiff's motion that she be permitted to enter a nonsuit as to Woolvin is not before us for review, even if it was not right under the circumstances of the case. We must, therefore, decide upon the ruling of the court below with all the parties before the court.

As between the defendants, Woolvin's liability is primary, and that of the city is secondary, not that Woolvin must be placed in front of the city with respect to the plaintiff's right to recover for the alleged wrong, but if the plaintiff recovers against the city, then the latter is entitled to judgment against Woolvin for the amount of the plaintiff's recovery, because it was his wrong in negligently piling the brick that originated the plaintiff's cause of action against the city, and without which there would have been none, and it is but just and right that he should answer over to the city and indemnify and save it harmless. It is a well-established rule of law that there can be no contribution or indemnity among mere tort feasors. But the principle does not apply to a person seeking indemnity who did not join in the unlawful act, although he may thereby be exposed to liability, or to one who did not know and was not presumed to know that his act was unlawful. It must appear that the parties are *in pari delicto* as to each other before the plaintiff's recovery will be barred. 22 Cyc., 99. *Judge Cooley* thus states the rule: "As under the rules already laid down, the party wronged may, at his election, compel any one of the parties chargeable with the act, or any number less than the whole, to compensate him for the injury. It becomes a consideration of the highest importance to the person or persons thus singled out and compelled to bear the loss, whether the others who were equally liable may be compelled to contribute to his relief. On this subject there is a general rule, and there are also some very important exceptions. The general rule may be found expressed in the maxim that no man can make his own misconduct the ground for an action in his own favor. If he suffers because of his own wrongdoing, the law will not relieve him. The law can not recognize equities as springing from a wrong in favor of one (24) concerned in committing it. But there are some exceptions to the general rule which rest upon reasons at least as forcible as those which support the rule itself. They are of cases where, although the law holds all the parties liable as wrongdoers to the injured party, yet as between themselves some of them may not be wrongdoers at all, and their equity to require the others to respond for all the damages may be complete. There are many such cases where the wrongs are unintentional, or

where the party, by reason of some relation, is made chargeable with the conduct of others." Cooley on Torts (3d Ed.), p. 254.

The rule has been stated in another striking way: "The general rule which denies indemnity or contribution to joint wrongdoers is elementary. The cases in which recovery over is permitted in favor of one who has been compelled to respond to the party injured are exceptions to the general rule and are based upon principles of equity. Such exceptions obtain in two classes of cases: (1) Where the party claiming indemnity has not been guilty of any fault except technically or constructively, as where an innocent master is held to respond for the tort of his servant acting within the scope of his employment; or (2) where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury. Very familiar illustrations of the second class are found in cases of recovery against municipalities for obstructions to the highways caused by private persons. The fault of the latter is the creation of the nuisance, that of the former the failure to remove it in the exercise of its duty to care for the safe condition of the public streets; the first was a positive tort and the efficient cause of the injury complained of, the latter the negative tort of neglect to act upon notice, express or implied. Of the latter class are the cases cited by counsel for the respondents: *Port Jervis v. Bank,* 96 N. Y., 550; *Seneca Falls v. Zalinski,* 8 Hun, 575; *Rochester v. Montgomery,* 72 N. Y., 65; *Lowell v. R. R.,* 23 Pick., 24;
(25) *Geneva v. Electric Co.,* 50 Hun, 57 N. Y. Supreme Ct., 584; *S. c.,* 3 N. Y. Supp., 595."

An apt illustration of the rule and its application to a concrete case, much like ours, will be found in *Washington Gas Co. v. District of Columbia,* 161 U. S., 316. The company was permitted to use the streets and sidewalks of Washington for the purpose of connecting its mains with abutting dwellings, by laying supply or service pipes with gas boxes and other apparatus. The District, as successor to the city of Washington, in a suit against it of a person injured by falling in a gas box negligently left in the sidewalk, open and unguarded, by the gas company in doing the work, was adjudged to pay damages to the plaintiff and sued the gas company for its indemnification. The court considered two questions, as being presented in the case: First. Did the legal duty rest primarily on the gas company to repair and keep the gas box in order? Second. Had the District a cause of action against the gas company, resulting from the fact that it had been condemned to pay damages occasioned by the defective gas box, which it was the duty of the gas company to supervise and repair? The court stated that an affirmative answer to these propositions was rendered necessary by both

principle and authority, and it based its decision upon the following three important and leading cases, among numerous others, and thus referred to them: "This Court said in *Chicago v. Robbins,* 2 Black., 418, 422: 'It is well settled that a municipal corporation having the exclusive care and control of the streets is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrongdoer.' And the same doctrine is reiterated in almost the identical language in *Robbins v. Chicago,* 4 Wall., 657, 670. The principle thus announced qualifies and restrains within just limits the rigor of the rule which forbids recourse between wrongdoers. In the leading case of *Lowell v. R. R.,* 23 Pick., 24, 32, the doctrine was thus stated: "Our law, however, does not in every case dis- (26) allow an action, by one wrongdoer against another, to recover damages incurred in consequence of their joint offense. The rule is, *in pari delicto potior est conditio defendantis.* If the parties are not equally criminal, the principal delinquent may be held responsible to his codelinquent for damages incurred by their joint offense. In respect to offenses, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum,* and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers.' In *Brooklyn v. R. R.,* 47 N. Y., 475, 487, the same rule was applied, the court saying: 'Where the parties are not equally criminal, the principal delinquent may be held responsible to a codelinquent for damage paid by reason of the offense in which both were concerned in different degrees as perpetrators.' All the cases referred to involved only the right of a municipal corporation to recover over the amount of the damages for which it had been held liable in consequence of a defective street, occasioned by the neglect or failure of another to perform his legal duty. The rule, however, is not predicated on the peculiar or exceptional rights of municipal corporations. It is general in its nature." In the course of the opinion in the *Gas Company case* the court says that the authorities in support of the rule of law in regard to the right of indemnity in such cases are entirely too numerous for citation.

But is has been squarely held that a person who negligently places an obstruction in a highway, or leaves it in a defective or dangerous condition, so as to render its use by the public hazardous, can not resist the

claim of a municipality to indemnity for damages paid to a party injured by it, on the ground that the neglect or failure of the municipal authorities to remove the obstruction contributed in some degree to the injury. *Waterbury v. Traction Co.,* 74 Conn., 152. The language of the court applies so closely to the facts of this case, as they now appear, that we can not do better than quote it here: "The primary cause of
(27) the accident was the act and fault of the defendant in taking down the railing and failing to restore it, assuming that the defendant took it down as alleged. As between the plaintiff and defendant there was no coöperation in the act of negligence which caused the injury. The plaintiff did not permit the defendant to leave the railing down. If the defendant took it down it promised impliedly, if not expressly, to do so in a way not to endanger public travel, and to put it up again. If it failed to keep that promise it can not justly charge the plaintiff with negligence, either in having relied upon such promise or in having failed to compel its performance. If the defendant removed the railing and left it down, as alleged, the fact that the plaintiff had knowledge of the defect and neglected to repair it, although it had a fair opportunity to do so, will not prevent a recovery in this action," citing *Hampden v. R. R.,* 27 Conn., 158, 167; *Norwick v. Breed,* 30 ibid., 535, 545; *Holyoke v. Hadley Co.,* 174 Mass., 424; *Brookville v. Arthurs,* 152 Pa. St., 334; *Chicago v. Robbins,* 2 Black., 418, 425. See also *Waburn v. R. R.,* 109 Mass., 283; *Manchester v. Quimby,* 60 N. H., 10; *Wickwire v. Angola,* 4 Ind. App., 253.

Manchester v. Quimby, just cited, is exactly like this case in its facts. Quimby had been permitted by the city to pile boards upon a street in front of his house while making repairs on it. This was negligently done, and the city was compelled to pay damages to a person injured thereby. The court held that he took the license with the implied promise to do the work carefully and was liable over to the plaintiff for any damage it had been forced to pay in consequence of his negligence; and to the same general effect is the other case, *Wickwire v. Angola, supra. Brooklyn v. R. R.,* 47 N. Y., 475.

A very instructive case, and one much in point in the clear statement of the principles distinguishing and classifying the cases, and assigning ours to that class where there is, in law, primary and secondary liability and a right to indemnity, is *Union Stock Yards Co. v. R. R.,* 196 U. S., 217, in which *Justice Day,* for the Court, says: "Coming to the very question to be determined here, the general principle of law is well settled that one of several wrongdoers can not recover against
(28) another wrongdoer, although he may have been compelled to pay all the damages for the wrong done. In many instances, however, cases have been taken out of this general rule, and it has been

held inoperative in order that the ultimate loss may be visited upon the principal wrongdoer, who is made to respond for all the damages, where one less culpable, although legally liable to third persons, may escape the payment of damages assessed against him by putting the ultimate loss upon the one principally responsible for the injury done. These cases have, perhaps, their principal illustration in that class wherein municipalities have been held responsible for injuries to persons lawfully using the streets in a city, because of defects in the streets or sidewalks caused by the negligence or active fault of a property owner. In such cases, where the municipality has been called upon to respond because of its legal duty to keep public highways open and free from nuisances, a recovery over has been permitted for indemnity against the property owner, the principal wrongdoer, whose negligence was the real cause of the injury."

And again: "This is not like the case of the one who creates a nuisance in the public streets; or who furnishes a defective dock; or the case of the gas company, where it created the condition of unsafety by its wrongful act; or the case of the defective boiler, which blew out because it would not stand the pressure warranted by the manufacturer. In all these cases, the wrongful act of the one held finally liable created the unsafe or dangerous condition from which injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other."

This Court has approved the rule thus settled by the authorities. *Brown v. Louisburg,* 126 N. C., 701; *Raleigh v. R. R.,* 129 N. C., 265; and those cases can not in any way be distinguished from the one now under consideration. If the city had been sued alone and condemned to pay damages to the plaintiff it could, by a separate action, have recovered the full amount of Woolvin, not merely a pro- (29) portionate part, as it is not a question of contribution, but of indemnity. The conclusiveness of the judgment against the city upon Woolvin in the action against him for indemnity would depend upon the notice given to him of the pendency of the former suit and his opportunity to defend the same. *Jones v. Balsley,* 154 N. C., 61; *Prescott v. Leconte,* 82 N. Y. Supp., 411 (83 App. Div., N. Y., 482, and cases cited at page 487); *Chicago v. Robbins,* 67 U. S., 418; *Robbins v. Chicago,* 71 U. S., 657; *Gas Co. v. D. C., supra.* The other cases cited sustain the rule as to notice laid down in the case of *Jones v. Balsley, supra.* Where the real delinquent is a party to the original action against the person entitled to indemnity, judgment over against him

will be given without the necessity of a separate suit, and it has been so expressly decided. *Fort Worth v. Allen,* 10 Tex. Civ. App., 488.

We think that the continued presence of Woolvin as a party is essential to determine finally the rights of all the parties involved in the entire controversy. The Code contemplates this method of trial in order to avoid circuity and multiplicity of actions. "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side as between themselves." Clark's Code (3d Ed.), sec. 424. It has been held under this section that a judgment can be rendered in favor of a defendant against his codefendant upon matters connected with the same cause of action, and that while the rule is that a judgment against several defendants, nothing else appearing, determines none of their rights among themselves, but only the existence and legality of the plaintiff's demand, yet where the respective rights of the defendants, as between themselves, are put in issue by the pleadings, they may be adjudicated, and the judgment is binding and conclusive upon them. *Baugert v. Blades,* 117 N. C., 221; Clark's Code, *supra,* and notes, where the cases are collected.

In *Baugert v. Blades,* the Court said: "It is quite apparent from the pleadings that an intelligent trial required that the rights of
(30) the defendants, as well as the plaintiffs, should be fully determined and settled, as appears from the judgment was done."

All this being so, and the liability of the city being dependent upon the prior negligence of Woolvin, who was the author of the alleged wrong and the principal delinquent, if there was any negligence, the case is brought directly within the following rule stated in *Jarrett v. Trunk Co.,* 144 N. C., 299: "We will, however, caution the judges of the superior courts in respect to such practice, and invite their attention to what is said in *Benton v. Collins,* 125 N. C., at page 91: 'Before such partial new trial, however, is granted, it should clearly appear that the matter involved is entirely distinct and separable from the matter involved in the other issues, and that the new trial can be had without danger of complication with other matters'; and we will add that before such partial new trial is ordered it should clearly appear that no possible injustice can be done to either party." While the power to set aside the answer to a particular issue may exist under certain circumstances, it should not be exercised except in a clear case. *Burton v. R. R.,* 84 N. C., 192; *Jones v. Insurance Co.,* 153 N. C., 388. And we now add to what is said in those cases, that where the questions involved are so interwoven that they can not be separated and a new trial allowed as to one or more issues, without prejudicing the rights of one or more of the parties or preventing a full and just trial of the whole matter, the

power to grant a partial new trial should not be exercised. That is our case, and we think that the judge should have set aside the entire verdict, as it was the only course to adopt that would conduce to a fair trial and give to each of the parties an equal chance to be heard, without being fettered or hampered by a restricted trial. It will not prejudice the plaintiff, for if there was actionable negligence on the part of Woolvin, or if both defendants were guilty of such negligence, the plaintiff will recover against one or both, according to his right in law, but one or both of the defendants may suffer great detriment and wrong by the opposite course. In directing the whole verdict to be set aside, we are not reviewing the exercise of the judge's discretion, but deciding, as matter of law that having set aside a part, he should have (31) gone further and set aside the entire verdict.

We think, though, that the issues should be amended by submitting one as to the primary and secondary liability of Woolvin and the city, as between themselves. If separate issues as to the negligence of Woolvin and the city are submitted, affirmative answers to them will not determine their liability as between themselves, or of Woolvin to the city, but the jury, by their verdict, must find as to this liability, otherwise the court can not proceed intelligently in rendering judgment, as between the defendants. There would be no finding upon which to base such a judgment. We are of the opinion, as the case is now presented to us, that there is a primary and secondary liability, as between Woolvin and the city; in other words, if Woolvin piled the brick negligently, and this proximately caused the death of plaintiff, his liability is primary and that of the city secondary, as between them, provided the city has been negligent at all, but we can not foretell how the facts will appear at the next trial.

It was said on the argument that the plaintiff has released the defendant Woolvin from all liability. If so, the city may set up the release in its answer, as a bar to the plaintiff's recovery, if so advised, and have an issue as to the release submitted to the jury. We will not now express an opinion as to the effect of the instrument said to be a release, if one has been given, for that may depend upon its terms, and the facts in regard to it are not before us. We will not thus venture in the dark, but rather wait until the light is turned on, that we may the better see and understand.

It is not necessary to examine the other exceptions. There was error in the ruling of the judge in the particular indicated. The verdict, as to the city, will be set aside and a new trial granted as to all the issues.

New trial.

WOOLVIN'S APPEAL.

WALKER, J. The defendant Woolvin demurred to the city's answer upon the following grounds:

1. That the city denies that he was negligent, and yet asks judgment against him because he was.

(32) The city, in its answer, does allege that Woolvin was not negligent and then avers that, if he was, his liability is primary and that, if it is made to pay damages, judgment should be given for it, so that it may be indemnified and reimbursed for what it will have to pay on account of Woolvin's negligence in piling the bricks. It was proper to plead in this way. If Woolvin was not negligent, or rather, if the intestate's death was not caused by his negligence in piling the brick, the city would not be liable, and the other branch of the pleading is predicated upon a possible adverse finding upon that issue, in which case the city asserts its right to recover against Woolvin. There is nothing even inconsistent in the two allegations.

2. That it must be determined that the city is liable before it can be adjudged that Woolvin is liable to indemnify the city and subjected to a judgment in its favor for his wrong to the plaintiff.

This is true, but the two questions can be settled, as we have said in the city's appeal in this action, and the judge will instruct the jury, upon the issues, as to the liability of the respective parties, the defendants, one or both of them, to the plaintiff, and of Woolvin to the city.

The court properly overruled the demurrer of Woolvin to the answer of the city. We do not think that *Dillon v. Raleigh,* 124 N. C., 184, is an authority in support of the demurrer. The point was not presented by proper exception and appeal in that case, and the court did not profess to pass upon it. The authorities cited by us in the opinion delivered in the appeal of the city amply sustain the order of the court overruling the demurrer, and it is not necessary to repeat them here.

The other exceptions of the defendant Woolvin are not tenable, in the present state of the case, and require no special or separate discussion at this time. We give no opinion in regard to them. This appellant's brief indicates that he is content with the decision in the city's appeal, by which we granted a new trial of all the issues, but whether so or not, there was no error committed by the court in this appeal.

No error.

Cited: Comrs. v. Indemnity Co., post, 225; *Sircey v. Rees, post,* 300; *Bailey v. Winston,* 157 N. C., 260; *Doles v. R. R.,* 160 N. C., 320; *Lucas v. R. R.,* 165 N. C., 268; *McDonald v. R. R., ibid.,* 626; *Guthrie v. Durham,* 169 N. C., 575, 576; *Conway v. Ice Co.,* 169 N. C., 578.

(33)

HATTIE A. DENNY, ADMINISTRATRIX, v. CITY OF BURLINGTON.

(Filed 19 April, 1911.)

1. **Appeal and Error—Instructions—Verdict Directing—Evidence, How Considered.**

In passing upon the correctness of a peremptory instruction given by the trial judge to the jury to find for the defendant upon the evidence, the latter will be construed in the most favorable view for the plaintiff.

2. **Master and Servant—Contracts—Independent Contractor.**

When one contracts with another that the latter shall do a certain work in accordance with plans and specifications furnished him, the work not being intrinsically dangerous, and there being no suggestion that the contractor was incompetent to do it, and the contractee retains or assumes no control of the methods by which it is to be done or of the workmen employed to do it, and the contractor has the sole right to employ and discharge the workmen in pursuance of doing or completing the work contracted for, the relation of independent contractor is established, and the contractee is not responsible in damages for an injury to one of the workmen alleged to have arisen from a tort committed by the contractor.

3. **Same—Torts—Independent Control—Inspection—Suggestion of Supervisor—Liability.**

When the relation of independent contractor has been established and the work is to be done according to plans and specifications furnished, the mere fact that a supervisor of the contractee is present for the purpose of seeing that the work is being done according to the contract, at the time the tort complained of is committed, does not render the contractee liable therefor; nor is the contractee liable for mere suggestions made by his supervisor without authority and with relation to the work or workmen over whom he has no control, and in the performance of which work the contractee is interested only to the extent that it shall be done in accordance with his contract.

4. **Same—Cities and Towns—Reservoir—Civil Engineer.**

The plaintiff's intestate was killed while at work on a reservoir which the city had contracted to be built. The evidence tended to show that the contractor was to complete the reservoir for a certain sum under the plans and specifications furnished by the city, and the contractor had sole authority to hire and discharge the workmen employed thereon, and was required to do the work according to the plans and specifications; that the city engineer was frequently present while the work was being done, in order to see that it was done in accordance with the contract, and for that purpose only gave directions in regard to it: *Held*, an instruction was proper that if the jury found the facts to be as testified to, the relation of independent contractor was established, and that the city was not responsible for the tort complained of in not sufficiently curbing the walls of the reservoir when the plaintiff was at work therein.

5. **Same—Ratification.**

A person who undertakes to act for another without any authority to do so can not generally render such other liable for his unauthorized

torts unless his acts are ratified, and a city can not be held responsible for the torts of its civil engineer who, without authority, gives directions in the progress of work the city has contracted with an independent contractor to do, and concerning which the city could not otherwise be charged, the only duty of the engineer being to see that the contract is being properly carried out.

(34) APPEAL from *Biggs, J.*, at January Term, 1911, of ALAMANCE.

The plaintiff sues to recover of the defendants the sum of $25,000 for the death of her intestate, alleging that his death was caused by the negligence of the city and its agents and servants, the defendants Russell and Harris, and that the negligence consisted in not providing a safe place for intestate to work while in the employ of the defendant, the city of Burlington, and while engaged in the work of building a reservoir for sewerage purposes. She alleges that this negligence consisted in not sufficiently curbing the walls of the reservoir while intestate was working therein.

The defendant city of Burlington, answering, denied all allegations of negligence, and averred that the work in which the intestate of plaintiff was engaged at the time of the accident, resulting in his death, was being done and performed by the defendants Russell and Harris, as independent contractors of the defendant city of Burlington, and attached to said answer the written contract between the city and Russell and Harris. The city further sets up the defenses of assump-

(35) tion of risk and contributory negligence on the part of the intestate of plaintiff.

Plaintiff introduced one W. C. Dameron, who testified as follows: "I was present when the bank caved in and the plaintiff's intestate was killed thereby. A. F. Barrett, the mayor of Burlington, and J. L. Scott, an officer of said city, had been about the pit one hour before the cave-in occurred. Mr. Kueffner was there inspecting the work. There was a dispute between Mr. Stevens, an engineer, and Mr. Rodden, a foreman of defendant Russell, as to the manner of mixing certain concrete. I was there at the request of Russell, and Rodden was directing the work as foreman of the defendants Russell and Harris. Rodden (foreman of Russell and Harris) directed plaintiff's intestate Denny to do the exact work he was doing at the time of the cave-in by which Denny sustained the injury that killed him."

W. C. Johnson, plaintiff's witness, testified: "I was in the reservoir when cave-in occurred, and was employed by defendant Russell and paid by Russell. Denny was paid off at the same time and by the same person I was.

L. J. Rodden, for plaintiff, testified: "I was employed to work as foreman on the reservoir at Burlington by Russell and Harris. Mr.

Kueffner was there and giving directions as to placing concrete. I was employed by Russell and Harris as foreman of this work, and Mr. Kueffner simply did the locating as to where concrete was to go, and observed the mixing of concrete. Russell paid for the material and I, as foreman, hired Denny and Russell paid him. I directed Denny to do the work he was doing at the time of the accident. I had power to discharge Denny."

A. F. Barrett, for plaintiff, testified: "I was mayor of Burlington at the time of the accident. The city of Burlington had an engineer directing the work of putting in its waterworks named Gilbert C. White, and Mr. White had two assistants, one named Stevens and one named Kueffner." He proved the execution of the original contract, it being Exhibit A annexed to the answer, as the contract under which this work was done by Russell and Harris.

Defendant city of Burlington introduced in evidence the contract, Exhibit A annexed to answer, and also introduced evi- (36) dence showing that White, its general supervising engineer, had only instructed Kueffner to exercise such oversight over the work as to see that it was done according to contract. Defendant city further introduced evidence as to what Kueffner did in inspecting this work. There was further evidence introduced showing the manner in which the accident occurred.

At the close of all the evidence, his Honor intimated that he would instruct the jury, if they found the facts to be as testified by the witnesses, to answer the issues, as to the liability of the city, in its favor. The plaintiff, in deference to this instruction, submitted to a nonsuit as to the city. Plaintiff entered a nonsuit as to the defendants Russell and Harris, excepted to the judge's charge, and appealed from the judgment rendered upon the verdict, which was in favor of defendant.

Long & Long and R. C. Strudwick for plaintiff.
W. H. Carroll and Parker & Parker for defendant.

WALKER, J. If we concede that the plaintiff has sufficiently alleged and shown that the death of Denny, plaintiff's intestate, was caused by a negligent or wrongful act of Russell and Harris, and that there is no evidence of assumption of risk or contributory negligence on the part of Denny, we are yet of the opinion that the charge of the court was right, in view of the evidence, even when construed and considered in its most favorable aspect for the plaintiff, which is the settled rule by which we must be governed in passing upon the correctness of such a peremptory instruction as that given in this case. The defendant,

city of Burlington, wishing to construct a reservoir for municipal purposes, in connection with its system of sewerage, employed Russell and Harris to do the work under a written contract, not set out, as we deem it unnecessary to do so, which by its very terms constituted Russell and Harris independent contractors in their relation to the city, as much so as did the contract in *Young v. Lumber Co.*, 147 N. C., 26, and *Gay v. Lumber Co.*, 148 N. C., 336. In the former case, *Justice Connor* quoted with approval the following definition of an independent contractor, taken from *Craft v. Lumber Co.*, 132 N. C., 151: "When the contract is for something that may be lawfully done, and it (37) is proper in its terms, and there has been no negligence in selecting a suitable person in respect to it, and no general control is reserved, either in respect to the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work and not in the several steps as it progresses, the latter is not liable to third persons for the negligence of the contractor as his master." And in *Gay v. Lumber Co., supra,* it is said that, "An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified," citing Pollock on Torts, 78; Barrow on Negligence, 160, and the Court also adopts the definition as given in *Craft v. Lumber Co.*, and afterwards approved in *Young v. Lumber Co., supra.* The doctrine relating to the non-liability of a person who employs an independent contractor to do work for him and the limit to the exemption, is fully considered in the following cases, in addition to those already cited: *Davis v. Summerfield,* 133 N. C., 325; *Midgette v. Mfg. Co.*, 150 N. C., 333; *Hunter v. R. R.*, 152 N. C., 682; and it is exhaustively and learnedly discussed in two recent cases, *Thomas v. Lumber Co.*, 153 N. C., 351 (opinion by *Justice Manning*), and *Beal v. Fibre Co.*, 154 N. C., 147 (opinion by *Justice Hoke*). Reference to these cases will disclose that the subject has been considered by this Court in all of its essential features and varying phases. But to decide this case, we need only advert to the general principle, with its usual qualifications or exceptions, which are that the work must not be intrinsically dangerous (if this applies to a servant of a contractor and not merely to third persons, not interested in or connected with the work), and the employer must not retain control or supervision of the work. It would perhaps be more accurate to say that these requirements are rather a part of the definition than qualifications of it. We think the contract between the defendant and Russell and Harris, the contractors, was a perfectly lawful and proper one, and that the work was not intrinsically

dangerous, so that the case is brought to the other test, whether the city reserved such control over the work in its several and (38) successive stages, as to create the relation of master and servant, as between it and Denny, and to deprive it, consequently, of any immunity from responsibility to the plaintiff for the value of his life, if his death was caused by its negligence or the negligence of any other person imputable to it. It will be well, therefore, to add to the citations from our own reports, two or three from other jurisdictions, where the law in respect to this particular branch of the rule has been aptly stated: "When one contracts to do and deliver certain specific work, which is not unlawful, and the manner of the doing of which, including the employment, payment and control of the labor, is left entirely to him, he is an independent contractor, for whose acts and omissions in the execution of such contract the other contracting party is not liable, since the doctrine of *respondeat superior* has no application where the employee represents the employer only as to the lawful purpose of the contract, but does not represent him in the means by which that purpose is to be accomplished." *Roberdeaux v. Herbert,* 118 La., 1089, 12 L. R. A. (N. S.), 632.

"The accepted doctrine is that, in cases where the essential object of an agreement is the performance of work, the relation of master and servant will not be predicated, as between the party for whose benefit the work is to be done and the party who is to do the work, unless the former has retained the right to exercise control over the latter in respect to the manner in which the work is to be executed." *Richmond v. Sitterding* (101 Va., 354), 65 L. R. A., 447, and notes.

"One who contracts to construct bridge abutments according to plans and specifications already prepared for one who has taken the contract for the construction of the bridge, is an independent contractor, for whose acts the employer is not responsible, although his agent exercises some kind of general supervision for the purpose of seeing that the work is done according to the contract." *Salliotte v. Bridge Co.,* 58 C. C. A., 466; 65 L. R. A., 620.

We have carefully examined and analyzed the evidence in this case and can find, none legally sufficient to show that the defendant, at any time during the progress of the work, assumed control (39) thereof or of any part of it. There are to be found, to be sure, expressions from witnesses to the effect that Kueffner, the city engineer, was present now and then when the work was going on, but when the evidence touching upon this feature of the case is justly and properly considered, it amounts to no more than proof that he was there, in the interest of the city and under instructions from it, for the purpose of seeing that the work was done according to the contract, and not to

give any instructions as to how it should be done or to supervise or control it. He made a suggestion, it is true, as to how some of it should be done, but it was not made while in the exercise of any power or control over those doing the work, and was merely the gratuitous expression of an opinion, which any outsider might have given, and it was entirely optional with Rodden, foreman of Russell and Harris, whether to adopt or accept this advice which related to the concrete work. Counsel for the plaintiff, in his able argument, relied on the authority of Lawson, 1 Rights, Remedies and Practice, sec. 299, where it is said: "The proprietor may make himself liable by retaining the right to direct and control the time and manner of executing the work or by interfering with the contractor and assuming control of the work, or of some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference." But Lawson supplements that statement with these words, which more significantly and peculiarly apply to the facts of this case: "But merely taking steps to see that the contractor carries out his agreement, as, having the work supervised by an architect or superintendent, does not make the employer liable, nor does reserving the right to dismiss incompetent workmen." So it is said in the note to that section, that if the owner of a building deals with the contractors, with reference to the manner of doing the work, in such a way "that in doing any particular act they are obeying the directions of the owner, if that act is negligent and damage ensues, he is liable. In such a case, it is his duty to see that what is done under his special orders is not negligently done," citing *Hefferman v. Benkard,* 1 Robt., 436. But this record does not contain any evidence for the jury that the city, through its
(40) engineer, assumed to control the work or any part of it, and that the intestate's death was caused thereby. The only supervision that the city retained was that required to protect its interests and insure a compliance with the contract in the completed work. This supervision was necessary, as a part of the work would be hidden when it was finished. The defendant's engineer was nothing more than an inspector, whose duty it was to inform his employee when there was any departure from the plans and specifications in doing the work. The right to control the work and direct how it should be done was vested in Russell and Harris, and none in the city. "The simple test is," says Mr. Wood, "who has the general control over the work? Who has the right to direct what shall be done, and how to do it? And if the person employed reserves this power to himself, his relation to his employer is independent, and he is a contractor; but if it is reserved to the employer or his agents, the relation is that of master and servant." Wood on Master and Servant, 614. Again it is said: "All authorities

agree that the immunity of a contractee depends on his entire abstinence from control, and that if he personally interferes in the work and assumes control of it or of some part of it, and through such interference, whether as a direct result or as a consequence thereof, injury results to a servant, he is responsible. 2 Thompson on Negligence, 913, No. 40; Wood on Master and Servant, 837; Wharton on Negligence, secs. 186, 205; Cooley on Torts, 548; *Gilbert v. Beach,* 16 N. Y., 608; *Hefferman v. Benkard,* 1 Robt., 432." Applying these tests to our case, we must conclude upon the evidence, and as a necessary deduction therefrom, that there is no liability on the part of the city for the death of plaintiff's intestate, and this conclusion is supported by the following authorities: *Nevins v. Peoria,* 41 Ill., 505; *Kelleher v. Mfg. Co.,* 122 Mass., 635. The case of *Harrison v. Kiser,* 79 Ga., 588, expressly holds that "the employer's agent may supervise the work, for the mere purpose of seeing that it is done in conformity with the contract, without rendering him liable." And it is also held in *Bibb v. R. R.,* 87 Va., 711, that, "Where an employer selects with due care a competent contractor, and to him commits a work that (41) is lawful, and such as may be done without injury to third persons, and to be done in a workmanlike manner, at a stipulated price, such employer can not be held liable for injuries caused by the negligence of such contractor or his servants to third persons, not servants of such employer nor passengers on his cars. An independent contractor is one who renders service in the course of an occupation, and represents the will of his employer only as to the result of his work, and not as to the means whereby it is accomplished, and is usually paid by the job. The reservation to the employer of the privilege of inspecting and supervising the work of the contractor does not destroy or impair his character as an independent contractor. The rule of *respondeat superior* applies only to cases where the relation of master and servant exists, and does not apply as between an employer and the servants of an independent contractor. And the same is true of the rule of *qui facit per alium, facit per se.*" In the recently published treatise upon this subject, this rule is stated: "A true test is said to be to ascertain whether the one rendering service to another does so in the course of an independent occupation, representing the employer's will only as to the result and not as to the means. In a recent Massachusetts case (*Driscoll v. Towle,* 181 Mass., 416), it is said: 'In such cases the party who employs the contractor indicates the work to be done and in that sense controls the servant, as he would control the contractor if he were present. But the person who receives such orders is not subject to the general orders of the party who gives them. He does his own business in his own way, and the orders which he receives

simply point out to him the work which he or his master has undertaken to do. There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make the employer liable under the fiction that the act of the employed is his act." Moll on Independent Contractors and Employers' Liability, sec. 20.

There is no suggestion in the case, nor was there in the argu-
(42) ment before us, that Russell and Harris were incompetent, nor that the city was negligent in any way other than that already stated.

It should be remarked that the court did not nonsuit the plaintiff, but intimated merely that it would tell the jury that if they found the facts to be according to the testimony, their verdict should be for the defendant. There was uncontroverted evidence for the defendant that Keuffner was not authorized by the city to take any charge or control of the work or any part of it. A person who undertakes to act for another without any authority to do so can not generally render such other liable for his unauthorized torts unless his acts are ratified. This is a self-evident proposition. *Gaslight Co. v. Norwalk,* 63 Conn., 495. But, as we have shown, Keuffner did not interfere with the work in such a way as to charge his principal, even if he had authority to act for it. "The mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant. More than that is necessary to take him out of the relation established by the only contract which he has made, and to make him a voluntary subject of a new sovereign—as the master sometimes was called in the old books." *Driscoll v. Towle, supra.*

In no reasonable view of the case was plaintiff entitled to recover of this defendant, and the charge of the court was, therefore, right.

No error.

Cited: Hopper v. Ordway, 157 N. C., 128; *Johnson v. R. R., ibid.,* 383; *Harmon v. Contracting Co.,* 159 N. C., 27; *Embler v. Lumber Co.,* 167 N. C., 461; *Dunlap v. R. R., ibid.,* 670; *Gadsden v. Craft,* 173 N. C., 420.

(43)

NATIONAL EXCHANGE BANK OF BALTIMORE v. ROOK GRANITE COMPANY, W. H. ROOK AND WIFE, M. W. ROOK.

(Filed 19 April, 1911.)

1. **Contracts—Feme Coverts—Other Jurisdictions—Contractual Rights—Remedies.**

   Where a nonresident *feme covert* has entered into an ordinary business executory contract, in a jurisdiction where she has full contractual capacity, the obligation will be binding here, and the obligee may avail himself of any and all remedies provided by our law for the enforcement of his rights.

2. **Same—Nonresident—Real Property—Attachment—Publication.**

   Notice by publication is sufficient against a nonresident *feme covert* upon her executory contracts when the statutes here applicable have been complied with and attachment is duly levied on her real property situated in North Carolina, if by the law of the State wherein the contract was made a married woman has full contractual rights. *Armstrong v. Best*, 111 N. C., 231, cited and distinguished.

3. **Contracts—Lex Loci Contractus—Signed Elsewhere—Common Law—Presumptions.**

   A contract is held to be executed where the same becomes a binding agreement between the parties, and when it appears that this is done in one of our sister States, the mere fact that it was dated in another one does not affect the matter in relation to the *lex loci contractus*.

APPEAL from *O. H. Allen, J.*, at March Term, 1911, of ANSON. Motion to discharge an attachment and dismiss the case.

It appeared that plaintiff bank, holding two promissory notes, past due, one for $400, dated 12 August, 1909, and another for $300, 31 August, 1909, made by defendant, the Rook Granite Company and endorsed by W. H. Rook and his wife, M. W. Rook, nonresidents of this State, instituted action thereon in the Superior Court of Anson County, and an attachment in said suit having been duly issued, the same was levied on a lot of real estate, lying and being in said county, as the property of said M. W. Rook, *feme covert*. The affidavits contained averment, in effect, that the contract and endorsement by said *feme coert* were had and made in the city of Baltimore, Md., (44) and that by the law of said State "married women had full power to contract and be contracted with the same as if she were not married, and had power to endorse a note for the accommodation of her husband or any other person or corporation and bind herself and her separate estate to the payment of same as if she were a *feme sole*."

The defendants having entered a special appearance moved to dismiss

the action for the reason that there has been no personal service on the defendants or either of them, and that service was made in the cause by publication, and that no property subject to attachment had been levied on in the action so as to confer jurisdiction upon the court.

The court below entered judgment, in part, as follows: "The court finds as a fact that the property levied upon by the sheriff under the order of attachment is the property of the *feme* defendant M. W. Rook, and the court being of opinion that said property is not subject to attachment in the action, sustained defendant's motion to discharge the attachment and dismiss the suit."

Plaintiff excepted, assigning for error the rulings of the court that the real estate of the defendant M. W. Rook, *feme covert,* is not subject to attachment and to the judgment, dismissing the action and taxing plaintiff with costs.

J. W. Gulledge for plaintiff.
Robinson & Caudle for defendant.

HOKE, J., after stating the case. When an attachment or the levy on property under it forms the sole basis of the court's jurisdiction, the authorities are very generally agreed that the discharge of the writ requires the dismissal of the action. 4 Cyc., 805, 806; 3 A. & E., 244. There would seem, therefore, to be no valid objection to the judgment, so far as the form is concerned. We are of opinion, however, that on the facts presented there was error in the ruling that the property of defendant M. W. Rook was not subject to attachment. While the common-law disability of married women to bind themselves, personally, by their contracts has heretofore very generally ob-
(45) tained in this State (see *Doughton v. Sprinkle,* 88 N. C., 300; *Baker v. Garris,* 108 N. C., 218), it has been held in several cases, that where a nonresident *feme covert* has entered into an ordinary business contract in a jurisdiction where she has full contractual capacity, the obligation will be binding here, and the holder may avail himself of any and all remedies provided by our laws for the enforcement of his rights. *Wood v. Wheeler,* 111 N. C., 231; *Taylor v. Sharp,* 108 N. C., 377.

Armstrong v. Best, 112 N. C., 59, to which we were referred, is not in contravention of this position. In that case the *feme covert,* having her residence and domicile in this State, had ordered goods for her business in Goldsboro, N. C., and same were shipped to her by plaintiffs, from Baltimore, Md. It was held that no recovery could be had here. The ruling was made on the ground that, by the law of her domicile, the *feme covert* was not allowed to bind herself personally,

and that this disability being an established principle of our domestic policy would so far attach that the courts of this State would not aid in the enforcement of such an agreement; but the case is in full recognition of the decision we make on the facts presented here, that a *feme covert,* having her domicile elsewhere, who makes a contract, binding where made, will be bound here, and the obligations arising from such a contract may be enforced by action in our courts. In the citation from Prof. Mordecai's Law Lectures, 342, that the doctrine, as far as determined by our Court, may be thus summed up: "The contracts of married women who are domiciled out of the State will be enforced in this State according to the *lex loci contractus,* except in so far as such contracts affect real estate situate in this State," the learned author, no doubt, refers to contracts directly affecting real estate, in which case the *lex rei sitæ* always governs, as in *Wood v. Wheeler,* 106 N. C., 512, and so interpreted, the reference is in support of the present ruling.

It was earnestly contended for defendant that as the notes purport to bear date at Washington, D. C., this will be taken *prima facie* as the place of the making, and in the absence of allegation or evidence to the contrary, the common-law disability as to *feme covert* will be presumed to obtain; and in that view, the defendant M. W. (46) Rook would not be bound. But the position can not be sustained. As a general rule, a contract is said to be executed where the same becomes a binding agreement between the parties. In Paige on Contracts, sec. 1718, the author says: "The general rule is, the place where the last act is done which is necessary to give the contract validity is the place of the execution of the contract. . . . Illustrations of the principle are often found in insurance contracts. If the parties to insurance contracts are in different jurisdictions, the place where the last act is done which is necessary to give validity to the contract is the place where it is entered into." And the decisions fully support the statement. *Equitable Insurance Co. v. Clements,* 140 U. S., 226; *Scudder v. Bank,* 91 U. S., 406; *Ivy v. Kern County Land Co.,* 115 Cal., 196; *Ford v. Insurance Co.,* 69 Ky., 133.

There are affidavits in the record, and thus far uncontradicted, that the notes sued on were endorsed and delivered in the State of Maryland, and that in said State a married woman had full capacity to bind herself by contract. On these facts the said notes are a Maryland contract and must be so construed and dealt with till the contrary is made to appear.

The precise question as to future transactions certainly would seem to be no longer of much importance, as the General Assembly, at the last session, has removed the contractual disability of married women as to all ordinary business contracts. The exception being that as to

contracts between husband and wife, the provisions and limitations of Revisal, sec. 2107, are retained, and as to conveyance of her realty, the same must be executed with the written assent of her husband and her privy examination thereto is still required.

There was error in discharging the attachment, and the judgment to that effect is

Reversed.

Cited: *Bluthenthal v. Kennedy,* 165 N. C., 373.

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(47)

T. C. JOHNSON v. W. B. LASSITER.

(Filed 26 April, 1911.)

1. Notes—"Order or Bearer"—Non-negotiability.

A note not payable "to the order of a specified person or to bearer" is not negotiable. Revisal, secs. 2158, 2276, 2334.

2. Notes—Non-negotiable—Endorsement—Non-negotiability.

An endorsement in blank on the back of a non-negotiable note does not render the note negotiable under Revisal, sec. 2159.

3. Notes—Negotiability—"Code Repealed"—Common Law.

Sections 41 and 50 of the Code are repealed by Revisal, sec. 5453 and therefore have no application upon the endorsement in blank, upon a non-negotiable note, and in respect to matters thereunder arising the rights of the parties must be determined at common law.

4. Notes—Non-negotiable—Dishonor—Notice—Liability of Endorser.

The endorser of a non-negotiable note in blank after maturity is held to be a guarantor of payment of the paper, and is not entitled to notice of dishonor, or to his discharge from liability by failure of the endorser to proceed promptly against the maker.

5. Same—Statutory Provisions—Interpretation of Statutes.

The rights of an endorser in blank upon a non-negotiable note are sufficiently protected under Revisal, sec. 2846, providing that a surety or endorser on any note, bill, bond or written obligation, except those held in trust or as collateral, may notify, in writing, the payee or holder, requiring him to bring suit and use all diligence to collect, and if the payee or holder refuses to bring action within thirty days, the surety or holder giving notice is discharged.

APPEAL from *Lyon, J.,* at October Term, 1910, of GUILFORD.

On 25 April, 1907, the plaintiff sold to the defendant W. B. Lassiter a tract of land for $2,000, and accepted in part payment two notes

under seal. One of these notes was for $300, and executed 29 December, 1902, payable six months from date to S. H. Carter, and the other was for $200, and executed 17 August, 1903, payable on demand to said Carter.

The name of S. H. Carter was written on the back of each of said notes on 25 August, 1906, and the name of the defendant was written on the back of each of said notes on 25 April, 1907, the day he bought the land from the plaintiff. The following payments (48) were made on the first note: $25, 8 January, 1905, and $100, 18 January, 1906, and on the second note $25, 10 November, 1904.

The defendant resisted a recovery upon the ground that no notice of dishonor was given him, and because the plaintiff had not prosecuted with diligence his claim against the makers of the notes. The judge presiding held that the defendant was not entitled to notice, and that he was bound absolutely on his endorsement. The defendant excepted and appealed.

Sapp & Williams for plaintiff.
J. A. Spence for defendant.

ALLEN, J., after stating the case: The paper-writings in controversy are non-negotiable under the Negotiable Instrument Law, because they are not payable "to the order of a specified person or to bearer." (Revisal, sec. 2151.)

This is the construction placed upon this section by Mr. Mordecai in his treatise on the Negotiable Instrument Law, and it is strengthened by reference to sections 2158, 2276 and 2334 of the Revisal. They were not made negotiable by endorsement under section 2159 of the Revisal, providing that an instrument is payable to bearer (5) "when the only or last endorsement is an endorsement in blank."

The term "endorsement" is frequently used to describe the act of writing on the back of a paper, without reference to the character of the paper, but strictly it applies only to negotiable instruments, and as said in Norton on Bills, page 106: "It has its origin in and is confined to negotiable instruments."

It is in this sense it is used in Revisal, sec. 2159. If a broader meaning is adopted and it applies to any non-negotiable instrument, it must apply to all, as there is no qualification in the language used.

These two sections (2151 and 2159), in the exact language contained in our statute, were construed by the Supreme Court of Kentucky in *Wettlaufer v. Baxter,* 137 Ky., 362. The Court says: "The negotiable instrument act is not a new law. It is, with few exceptions, merely the codification of old laws that were in force and effect (49)

by virtue of judicial pronouncement or legislative enactment, and generally uniform. . . . If there is any doubt about the meaning of any of its provisions, and that doubt can be solved by a reference to the law-merchant as it was theretofore administered, this law should be looked to, and the act, if practicable, given such a construction as will make it harmonize with the general principles of commercial law in force before its enactment. . . . The usual form of negotiable paper is a provision for payment to 'order' or to 'bearer.' These or similar words are, in general, necessary to its negotiability and are often required by statute, but a note which is non-negotiable for want of such words is still a valid note and may be declared on as such. Bills payable to bearer were formerly held to be non-negotiable, as being without words of transfer, but they are now recognized as negotiable and transferable by delivery. Making the instrument payable 'to the order of' a person named is the same as to such person 'or order,' and in like manner to a person named 'or bearer' is the same in effect as 'to bearer.' . . . It will thus be seen that it was uniformly held that in order to make a note or bill negotiable, the words 'to order' or 'to bearer,' or equivalent words, must be used in the body of the note. It will be kept in mind, however, that the absence of these words does not affect the validity of a note or render it non-transferable or non-assignable; their only effect is to make the instrument negotiable, and thereby cut off defenses that the maker or either of the parties to the paper might have and make against a holder in due course if the note was not negotiable. The Negotiable Instrument Act does not apply to or affect the rights or liabilities of persons on paper that is not within its meaning negotiable. . . . This note, in our opinion, which was payable to Baxter alone, and did not contain the words 'to order' or 'bearer' was not a negotiable instrument. . . . But the argument is further made that as Baxter endorsed the note in blank—that is, signed his name on the back of it without any other words—he thereby converted the note into a negotiable instrument. It is true that section 9 of the act provides that 'the instrument is payable to bearer. . . .
(50) when the only or last endorsement is an endorsement in blank'; but this does not mean that the endorsement in blank converts a note non-negotiable on its face and by its terms, into a negotiable note. This construction would enable the person who last signed his name on the back of the note to change entirely the contract as entered into between the parties, and have the effect of making the maker payee, and all prior endorsers liable upon a negotiable instrument, when they intended to and only became liable upon a note that was not negotiable; and this, as can readily be seen, would be a most important and material change in the obligation assumed by them when they signed the paper.

To give the act this construction would place it in the power of any endorser who chose to sign his name in blank to change by this act the entire character of the paper as well as to the rights and liabilities of the parties to it. It would make the character of the paper depend upon the manner of the endorsement and not upon the terms expressed in the paper. Thus, if A endorsed it in blank to B, it would be negotiable; but if B endorsed it specially to C, it would be non-negotiable. Manifestly, it was not intended that the mere endorsement of the note by a remote or other endorser should have this effect. When a paper is started on its journey into the commercial world it should retain to the end the character given to it in the beginning and written into its face. If it was intended to be a negotiable instrument, and was so written, it should continue to be one. If it was intended to be a non-negotiable instrument, and was so written, it should so remain. Then every one who puts his name on it, as well as every one who discounts or purchases it, will need only to read it to know what it is and what his rights and liabilities are. In our opinion, section 9 was merely intended to describe or designate the conditions under which a note negotiable on its face might become payable to bearer, and was not intended to apply to a note not on its face or by its terms negotiable."

Nor are they negotiable by endorsement under sections 41 and 50 of the Code (1883), as construed in *Spence v. Tapscott,* 93 N. C., 246, because both of those sections are omitted in the Revisal of 1905, which went into effect on 1 August, 1905, before the writings were endorsed; and Rev., 5453 provides that "all public and general statutes not contained in this Revisal are hereby repealed, with the excep- (51) tions and limitations hereinafter mentioned," and these sections are not within "the exceptions and limitations hereinafter mentioned."

The rights of the parties must, therefore, be determined at common law, which is in force, and the writings, being under seal, are bonds at common law and non-negotiable. *Respass v. Latham,* 44 N. C., 138.

Originally, promises to pay, whether under seal or not, were not assignable nor negotiable, the reason given being that the contract created a strictly personal obligation between the creditor and the debtor, and that to permit assignment or negotiation would encourage litigation.

As trade advanced and mercantile transactions became enlarged, it was found that this rule eliminated one of the principal elements of value, and a custom gradually prevailed among the merchants of negotiating bills of exchange and promissory notes. A dispute, however, arose between the merchants and the law courts as to whether a note was within the custom of the merchants, and *Lord Holt* held in *Clark v. Martin,* 1 Salk., 129, it was not. As a result, the Statute of Anne was passed, which made notes assignable and endorsable, and soon thereafter

it was held that non-negotiable notes, although not mentioned, were embraced in the statutes. Norton on Bills, 6; *Birchell v. Sloarch,* 2 Ld. Ray., 1545; *Smith v. Kendall,* 6 Term, 123. It was also held that notice of dishonor need not be given to the endorser of a non-negotiable paper. Byles on Bills, 447.

In this country there is much difference of opinion as to the effect of the endorsement in blank of a non-negotiable paper.

In *Richards v. Warring,* 1 Keyes, 582 (N. Y.), the Court, speaking of this question, says: "When a party writes his name on the back of a note not negotiable, as there is no contract of endorsement, the courts endeavor to prevent the utter failure of the contract by giving it effect in some other way, as by allowing the holder to overwrite the endorser's name with the real contract implied by law, or recover against him as a maker or guarantor of the note."

In *Sweeter v. French,* 54 Mass., 262, it was held that the en-
(52) dorsee was authorized to write above an endorsement in blank; "For value received, we promise to pay the money mentioned in the within note to T. Ames & Co.," and this case is affirmed in *Bank v. Lincoln,* 85 Mass., 173.

Billingham v. Bryan, 10 Iowa, 317, is to the same effect. The Court says: "The question presented in this cause is, whether the endorser of a non-negotiable promissory note is liable to the holder, without demand upon the maker, and notice of nonpayment. We think this question has been fully settled by this Court in *Wilson v. Ralph,* 3 Iowa, 450; *Long v. Smyser & Hawthorne,* 3 Iowa, 266, and *Hall v. Monahon,* 6 Iowa, 450, the Court in those cases following the authority as laid down in *Seymour v. Van Shaick,* 8 Wend., 421, in which it is held that such an endorsement is equivalent to the making of a new note, and is a direct and positive undertaking on the part of the endorser to pay the note to the endorsee, and not a conditional one to pay if the maker does not, upon demand, after due notice." See *Helfer v. Alden,* 3 Minn., 236; *Bank v. Falkenham,* 94 Col., 144. In those cases, the endorsements were before the notes were due.

The reason is stronger for holding the endorser liable, and for dispensing with notice to him, and diligence as against the maker, when the note is past due and already dishonored at the time of the endorsement. Under such circumstances, the endorser is held to be a grantor of payment of the paper endorsed, and not entitled to notice of dishonor, and he is not discharged from liability by failure of the endorsee to proceed promptly against the maker. *Love v. Levillion,* 4 Ark., 83; *Foster v. Tallison,* 43 S. C., 33; *Read v. Cutts,* 22 Am. Dec., 188, (Me.).

As said in Byles on Bills, the endorsee is presumed to have acted on the credit of the endorser.

In *Lilly v. Baker,* 88 N. C., 154, it is decided that one who endorses a non-negotiable instrument is a guarantor; and in *Jenkins v. Wilkerson,* 107 N. C., 707, that the holder can sue at once upon a guaranty of payment; and in *Mudge v. Varner,* 146 N. C., 149, that the obligation of a guarantor of payment, as distinguished from one for collection becomes absolute at once upon default of the principal. (53) See also *Farrer v. Respass,* 33 N. C., 170, and *Cowan v. Roberts,* 134 N. C., 415.

The question of the liability of an endorser of a non-negotiable instrument did not arise in *Sutton v. Owens,* 65 N. C., 123, relied on by the defendant. In that case, the payee in a note under seal wrote on the back of it: "I guarantee the payment of the within note to Junius La Rogue or bearer," and the only question decided was that the holder could not sue in his own name prior to the statute requiring the action to be brought by the real party in interest.

In the case under consideration, payments had been made on the notes prior to the endorsement, indicating that the holder had been endeavoring to collect, and at the time of the endorsement the defendant received a present consideration for the notes, and they had been long since dishonored. Why should he be notified of facts of which he had full knowledge?

We conclude that no error was committed on the trial, and this conclusion can work no hardship on endorsers, as it is provided in section 2846 of the Revisal that a surety or an endorser on any note, bill, bond or other written obligation, except those laid in trust or as collateral, may notify, in writing, the payee or holder, requiring him to bring suit and to use all reasonable diligence to collect, and if the payee or holder fails to bring action within thirty days, the surety or endorser giving the notice is discharged. This affords ample protection to the endorser.

No error.

Cited: *Newland v. Moore,* 173 N. C., 729.

STATE EX REL. CORPORATION COMMISSION v. J. K. MORRISON & SONS COMPANY.

(Filed 26 April, 1911.)

1. Corporation Commission—Taxation—Assessment—Local Property—Deductions.

Fixing at par the value of a corporation's shares of stock by the Corporation Commission under section 34, chapter 440, Laws 1909, in ascertaining the excess for taxation by deducting the value of local real and personal property from the paid-in amount of the capital stock, will not be declared excessive by the courts, it appearing that while there was no accumulated surplus, or that any of the stock had been sold, large dividends were being annually declared.

2. Same—Surplus—Stock in Other Corporations.

By the language of chapter 440, section 34, Laws 1909, only the value of the real and personal property locally assessed is to be deducted by the Corporation Commission from the total value of the shares of the capital stock to be ascertained in the manner therein prescribed; and no further deduction may be allowed for investments by a corporation in stock in other corporations, chapter 438, section 4, Laws 1909, having no application, when it appears that the complainant had no surplus. *Pullen v. Corporation Commission*, 152 N. C., 548, cited and distinguished.

(54) APPEAL from *Lyon, J.*, at February Term, 1911, of IREDELL.

Appeal from the ruling and findings of the Corporation Commission in assessing for taxation under the Revenue and Machinery Acts of 1909 the capital stock of the appellant, a corporation organized under the laws of North Carolina and having its principal office in Statesville in Iredell County, North Carolina.

The Corporation Commission heard and overruled the exceptions of the respondent, and upon appeal being taken, the cause was docketed for trial in the Superior Court of Iredell County, where it was heard upon the findings of fact and record as made up by the commission. His Honor affirmed the said findings, and the defendant appealed.

Attorney-General T. W. Bickett and Assistant Attorney-General G. L. Jones for plaintiff.

Dorman Thompson and H. P. Grier for defendant.

BROWN, J. It appears from the report of the defendant made to the Corporation Commission in accordance with section 34, Machinery Act, 1909, that its capital stock fully paid in amounts to $50,000; that the assessed value of its real and personal property in which a part of its capital stock is invested, and listed by the defendant with the local assessors in Iredell County for taxation in accordance with law,

amounts to $34,600. It further appears from its said report (55) that the defendant has paid out $12,000 annually as dividends, and has no surplus or undivided profits.

The Corporation Commission assessed the capital stock at $50,000, and deducted therefrom $34,600, the assessed value of real and personal property according to the statute, and found a corporate excess of $15,400, upon which the defendant is required to pay taxes in addition to the property already listed for taxation.

1. The defendant excepts because it contends that such appraisement of the value of its capital stock is excessive.

Upon the findings of the commission upon which this appeal is heard, as well as upon the defendant's report to the commission this contention can not be sustained. Its capital was paid in to the extent of $50,000 in cash, and there is no claim made that any part of it has been lost. On the contrary, it appears to be a very prosperous concern, as it has been able to return to its stockholders dividends at the rate of twenty-four per cent per annum.

To value such a profitable stock at par surely can not be considered an excessive valuation. It had no market value reported doubtless because none of it has been for sale. The statute prescribes that corporations of this character shall pay a tax on the *actual* value of its whole capital stock after deducting therefrom the "assessed value of real and personal property listed with local assessors."

In ascertaining the actual value of its capital stock the statute authorizes the commission to consider: First, the number of shares issued; second, the par value of each share; third, amount actually paid into the treasury on each share; fourth, total amount actually paid in; fifth, the dividend paid or carried into the surplus or undivided profits; sixth, the highest price paid for stock during the year. These are the facts which, in the estimation of the business world, and by the terms of the Machinery Act, should determine the actual value of the capital stock of a corporation.

We see no reason, even if we had the power, to revise this finding. There is most abundant evidence to support it.

2. The principal contention of defendant is that the commission, after valuing its capital stock, refused to deduct therefrom (56) the sum of $10,350, representing stock in other corporations, owned by the defendant.

In overruling this exception the commission says: In assessing this corporation the Corporation Commission did not understand that they were authorized to deduct anything from the capital stock except "the assessed value of real and personal estate upon which the corporation pays taxes." That is the language of section 34 of the Machinery Act.

But the defendant bases its contention on section 4 of the Revenue Act, which enacts that "Individual stockholders in any corporation . . . paying a tax on its capital stock shall not be required to pay any tax on said stock or list the same, nor shall corporations legally holding capital stock in other corporations upon which the tax has been paid by the corporation issuing the same be required to pay any tax on said stock or list the same."

It appears to be the policy of the General Assembly to require that all corporations (with a partial exception as to banks) shall pay all taxes on their capital stock out of the treasury of the corporation, instead of the individual stockholders paying them.

This has been the law for many years, and the same right is extended to a corporation owning stock in another corporation.

As the individual stockholder is not required to list and pay taxes on such stock, neither is the corporate stockholder. But we fail to see in the statutes anything which authorizes the deduction of such investments from the capital stock of the corporation owning them in assessing its value, as is the case with the "assessed value of real and personal estate."

If such had been the intention of the Legislature it would doubtless have been more explicit and would not have left its purpose in doubt and to be arrived at by a process of reasoning.

The learned counsel for the defendant contends that his position is supported by the opinion of this Court in *Pullen v. Corporation Commission,* 152 N. C., 548.

In that case we were not dealing with the original capital stock of a corporation, but with its surplus, something which this defendant seems to regard as undesirable. The decision was based upon the language of the statute under which the bonds of the State were
(57) issued, which is as follows: "The said bonds and coupons shall be exempt from all State, county or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation."

North Carolina bonds have never been the subject of taxation, and no individual owning them is required to pay taxes on them. Nevertheless, under the terms of that decision, as broad as the language of the statute is, they are not to be deducted from the original capital stock of a corporation in assessing its value, but only from its *surplus,* and if the corporation has no surplus it can not claim such deduction.

The opinion of the majority is based upon the words of the statute,

which it must be admitted are quite different from those employed in the statute now under consideration, and which the majority held authorized and required the deduction claimed.

We do not think the language of section 4 of the Revenue Act of 1909 herein quoted authorizes the commission to deduct from defendant's capital the value of its shares in other corporations, in assessing the value of defendant's capital stock for taxation.

The judgment of the Superior Court is

Affirmed.

W. B. CLEMENTS v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 26 April, 1911.)

1. **Insurance—Policy—Written Contract—Presumption—Equity—Fraud—Evidence—Proof.**

There is a presumption that a written contract of insurance expresses the intention of the parties, and a party who alleges mistake and seeks to reform the contract must overcome it and show mistake by clear, strong and convincing proof.

2. **Insurance—Policy—Written Contract—Fraud—Misrepresentations—Equity—Correction—Evidence.**

A mistake made by one party alone to a contract of insurance will not afford a ground for rectification or correction thereof, though equity will, in a proper case, afford relief by rescinding the contract.

3. **Same.**

In an action upon a policy of life insurance, when it may fairly be inferred from the evidence that the defendant issued and caused to be delivered to the insured the very policy it was intended he should have, and there is no sufficient evidence that it made any mistake in its terms, there is no equitable ground for reformation or correction.

4. **Equity—Relief—Diligence—Rule of Prudent Man.**

Equity will not afford relief to one who sleeps upon his rights, or whose condition is traceable only to that want of diligence which may fairly be expected from a reasonable and prudent man; and it requires of one asserting an equity, who was watchful and discovered the wrong, that he be prompt in asserting his rights.

5. **Same—Insurance—Policy—Written Contract—Fraud—Misrepresentation—Correction—Cancellation.**

An insured who could read and write and who was afforded a fair opportunity to understand his policy, put it in his trunk and kept it there until it would suit his convenience to read it over. After he had read the policy and discovered, or should have discovered, that a provision which induced him to take the policy was missing, he continued to pay

the premiums, and brought this action to reform or set aside the policy on the ground that the agent of the company falsely represented that after he had paid the premiums for a certain period he would, in addition to the insurance afforded, be repaid the full amount of the premiums and interest thereon: *Held*, equity will afford no relief, as the conduct of the insured amounted to an assent to the contract as written and a full acquiescence therein, and any loss he may have suffered was attributable to his own fault.

6. Instructions—Fraud—Verdict—Appeal and Error—Evidence—Nonsuit—Practice.

When, under erroneous instructions of the trial judge upon an issue of fraud raised in an action to set aside a policy of life insurance, the jury has found the issue against the defendant, and there is no evidence of any fraud, viewing the case in its most favorable light to the plaintiff, the error complained of vitiates the entire verdict, and it will be set aside on appeal with directions to dismiss the action upon defendant's motion to nonsuit made in apt time in the trial court.

(59) APPEAL by defendant from *Daniels, J.*, at January Term, 1911, of DURHAM.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

Branham & Brawley and Manning & Everett for plaintiff.
Bryant & Brogden for defendant.

WALKER, J. The plaintiff brought this action to recover the amount of premiums paid by him on two insurance policies, with interest. He alleged that an agent of the defendant had represented to him that he was selling policies for the defendant, by the terms of which his life would be insured for ten years; that if he died before the expiration of the ten years, the beneficiaries would receive the amount of the policy, but if he lived to the end of the insurance period, he could withdraw the total amount of premiums paid to the company by him, with four per cent interest. After some solicitation, he consented to take the policies, and they were sent to him. He put them in his trunk without reading them, although he could read, and without making any effort to ascertain whether they conformed to the representation or agreement of the agent. The plaintiff paid the premiums regularly, and continued to do so even after he had received information sufficient to put him on his guard and to notify him that no stipulation for the return of the premiums and interest was in the policy, which was the fact. There is a provision for the surrender of the policy at the end of the dividend period of ten years and the payment to him of the entire cash value, that is, his part of the legal reserve computed according to the tables of mortality and four per cent interest, together with the dividends,

or for a settlement with the company upon the basis of either one of four other options, but none permitting a withdrawal of all premiums paid and interest. The plaintiff appears from his own evidence, none having been introduced by the defendant, to be an intelligent man, fully capable of taking care of himself in any negotiation between him and the defendant's agent, who dealt with him, for the purchase of the policies. There is absolutely no evidence tending to show that the agent attempted to take any advantage of him, except in making the false representation or promise, or that he resorted to any trick, device or artifice to prevent his reading the policies, or that he (60) misread them to him or made any false statement about their contents when the policies were delivered. They were left with him at his home by the agent, without a word being said as to their contents. It is true the plaintiff testifies that he was not a good reader, and was not able to make out some words of the policies when he took them from his trunk and attempted to read them afterwards, but he could not say what words they were, and he also stated that he could easily have had them read to him, though he did not ask any one to do so. The defendant, at the close of the evidence, moved to nonsuit the plaintiff. The motion should have been allowed and the refusal of the court to grant it was error.

The defendant's agent may have made a false promise to the plaintiff, but there is no more than this in the case. There is no element of fraud in the transaction and no case made out for either a rescission or reformation of the contract. "The rule that all prior parol agreements are merged in a subsequent written contract touching the same subject-matter, is now too well established to need the support of cited authority. Therefore, when a policy of insurance, properly executed, is offered by the insurer and accepted by the insured as the evidence of their contract, it must be conclusively presumed to contain all the terms of the agreement for insurance by which the parties intend to be bound. If any previous agreement of the parties shall be omitted from the policy, or any terms not theretofore considered added to it, the parties are necessarily presumed to have adopted the contract as written as the final form of their binding agreement." Vance on Insurance, p. 348.

In *Insurance Co. v. Mowry,* 96 U. S., 547, the rule is thus strongly expressed by *Justice Field:* "The entire engagement of the parties, with all the conditions upon which its fulfillment could be obtained, must be conclusively presumed to be there stated. If, by inadvertence or mistake, provisions were omitted the parties could have had recourse, for a correction of the agreement, to a court of equity, which is competent to give all needful relief in such cases. But until thus corrected the policy must be taken as expressing the final understanding of

(61) the assured and of the insurance company." There is always a strong presumption in favor of the correctness of the instrument as written and executed, for it must be assumed that the parties knew what they had agreed and have chosen fit and proper words to express that agreement in its entirety. In order to overcome this fair presumption, the one who alleges that there is a mistake therein and seeks to reform the contract, is required to make out his case by clear, strong and convincing proof, and until this is done, the contract must stand and be enforced as it is written. *Warehouse Co. v. Ozment,* 132 N. C., 839. There is another principle to be considered. If reformation be sought solely on the ground of mistake, it must appear that the mistake was material and common to both parties. A court can not make for the parties a contract which they did not make and did not intend to make for themselves. A mistake by one party may sometimes be ground for rescission, but not for rectification or correction. Kerr on Insurance, sec. 72; *Floars v. Insurance Co.,* 144 N. C., 232. There is no evidence in this case of any mutual mistake. On the contrary, it is to be fairly inferred from the evidence that the defendant issued and caused to be delivered to the plaintiff the very policy it intended he should have, and there is no sufficient proof, not meaning to pass upon the quantum or weight of the evidence, that *it* has made any mistake at all. The facts in this case are similar to those in *Cathcart v. Insurance Co.,* 144 N. C., 623, and our decision must be the same as in that case. We there held that no case had been shown, either for cancellation or reformation of the contract. *Frazell v. Insurance Co.,* 153 N. C., 60. The loss of the plaintiff, if any he has sustained, is directly and wholly attributable to gross neglect of his own interests and to his supineness when he should have been active and vigilant. Equity will not assist one whose condition is traceable only to that want of diligence which may fairly be expected from a reasonable and prudent person, and even when he is watchful and discovers a wrong practiced upon him, a court of equity requires that he should be prompt in asserting his claim to relief against it, for it will not aid those who sleep on their

(62) rights, but only those who are vigilant. *Upton v. Tribilcock,* 91 U. S., at p. 45. In that case it is said: "That the defendant did not read the charter and by-laws, if such were the fact, was his own fault. It will not do for a man to enter into a contract, and when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they were written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission. *Jackson v. Croy,* 12 Johns., 427; *Leis v. Stubbs,* 6

Watts., 48; *Farly v. Bryant,* 32 Me., 474; *Coffing v. Taylor,* 16 Ill., 457; *Slafyton v. Scott,* 13 Ves., 427; *Alvanly v. Kinnaid,* 2 Mac. & G., 7; 29 Beav., 490."

Applying the foregoing principles to the facts, we find that the plaintiff could easily have ascertained by reading the policies whether the sixth option, upon which he says he relied, had been inserted therein, but instead of doing this, which was his plain duty under the circumstances, he carelessly and without the least regard for his own rights or the protection of his interests, deposited them in his trunk until it suited his convenience to read them, and even after he read them and discovered, or should have discovered, that the provision was missing, he continued to pay the premiums. This was a clear assent on his part to the contract as written, and a full acquiescence in its terms. If he has suffered any loss by reason of the fact that the option was not inserted in the policies, it is all his own fault and he must bear the consequences of his own neglect. In *Floars v. Insurance Co.,* 144 N. C., at p. 240, it is said: "There is also strong authority for the position that on the facts of this case the relief sought would not be open to plaintiff even if there had been a mutual mistake in the preliminary bargain, and by persons with full power to contract, for the reason that plaintiff accepted the policy with the alleged stipulation omitted without having read same, and held it without a protest for three months," citing *Upton v. Tribilcock, supra.* This case bears no resemblance to *Caldwell v. Insurance Co.,* 140 N. C., 100; *Sikes v. Insurance Co.,* 144 N. C., 626; *Sikes v. Insurance Co.,* 148 N. C., 13; *Austin v. Insurance Co.,* 148 N. C., 24; *Whitehurst v. Insurance Co.,* 149 N. C., 273; (63) *Jones v. Insurance Co.,* 151 N. C., 54; for in those cases it appeared that the agents dealt with illiterate persons of inferior intelligence, and took advantage of the fact by misreading and falsely explaining the policies, by reason of which fraud the plaintiffs were induced to sign contracts they had not made.

The jury have found, under erroneous instructions as to the law, that the plaintiff was defrauded by the defendant's agent. There was no evidence of any fraud, viewing the case in the most favorable light for the plaintiff. The error of the court vitiates the entire verdict, and it must be set aside, with directions to dismiss the action upon the defendant's motion to nonsuit.

Action dismissed.

Cited: McWhirter v. McWhirter, post, 147; *Wilson v. Ins. Co., post,* 176; *Cedar Works v. Lumber Co.,* 168 N. C., 395.

THE UNITYPE COMPANY v. ASHCRAFT BROTHERS.

(Filed 26 April, 1911.)

1. Vendor and Vendee—Contracts—Fraud—Declarations—Inducements—False Representations.

While expressions of opinion by a seller, amounting to nothing more than mere commendation of his goods, such as extravagant statements as to value, etc., are not, as a rule, to be regarded as fraudulent in law, yet when assurances of value are seriously made and are intended and accepted and reasonably relied upon as statements of fact, inducing a contract, they may be considered in determining whether there has been fraud perpetrated.

2. Same—Questions for Jury.

Where there are declarations of value of goods made by the seller, though made in the form of opinions, and there is doubt as to whether they were intended and received as mere expressions of opinion or as statements of facts to be regarded as material, the question must be submitted to the jury.

3. Same—Knowledge Implied.

To create a right of action for deceit in a sale, there must be a statement made by the seller or by one for whom the defendant is answerable, which is untrue in fact, and is known by the person making it to be untrue, or he is culpably ignorant—*i. e.*, does not know whether it is true or false, and made with the intent that the plaintiff shall act upon it or in a way reasonably calculated to mislead him, and he does act in reliance upon the statement and in the manner contemplated or reasonably probable, and damage to him must result therefrom.

4. Same—Unequal Opportunity.

A false representation of the value of goods made by the seller is actionable which materially affects the transaction, when the facts are peculiarly within the knowledge of the seller, and in respect to them the other party, in the exercise of the proper care, had not a fair opportunity of ascertaining the truth.

5. Inventor.

When the inventor of a typesetting machine, who is the agent of the manufacturers to sell the same, makes false representation as to its mechanical construction and its quality or value, they are presumed to have been knowingly made, and being well calculated to deceive the vendor will be bound by them if the seller is induced thereby to act to his preference.

6. Contracts—False Representations—Fraud—Parol Evidence.

Pertinent evidence tending to show fraudulent representations sufficient to invalidate a contract of sale can not be objectionable on the ground that the contract can not be contradicted or varied by parol, as in law, it does not have that effect. The contract is canceled and not varied.

7. Vendor and Vendee—False Representations—Principal and Agent—Evidence—Declaration of Agent—Proof Aliunde.

False representations made by an agent sent to negotiate a sale and made as an inducement thereto are binding upon the principal, and an objection that the agency was not shown *aliunde* the acts and declarations of the agent is not tenable when it appears that the agent was acting for the principal, who recognized his authority and claims the benefit of the transaction after acknowledging his acts and declarations.

CLARK, C. J., concurring; ALLEN, J., did not sit.

APPEAL from *W. R. Allen, J.*, at November Term, 1910, of (64) UNION.

This action was brought to recover the amount of eight notes, each for $25, given in part payment of the purchase price ($1,750) promised by the defendants to be paid to plaintiff for a Simplex Typesetting Machine, No. 2. C. H. Lombard, an expert machinist and (65) inventor of this machine, was sent by the plaintiff to close the contract with the defendants, who were printers and publishers of a newspaper at Monroe, N. C. He represented to them, as defendants allege and there was evidence to prove: "1. That Simplex No. 2 was an improvement on Simplex No. 1, and did not have its imperfections, because of which No. 1 had proved to be a failure and had been taken off the market by the plaintiff. 2. That it was so constructed as not to break type in setting or distributing same. 3. That with the assistance of two men it would set from five to six thousand ems per hour, or three times as much as hand composition, and with the same economy as hand composition. 4. That said machine was so constructed that the life of the type used in it was the same as when used in hand composition." Defendants further alleged and introduced evidence to prove that the representations, each and all of them, were knowingly false and were fraudulently made with the intent and purpose to induce the defendants to buy the machine, and that they were misled thereby, while in the exercise of due care and judgment on their part, and induced to buy the machine; that it was impossible to discover the falsity of the representations and the radical defects in the machine, save by the long use of the same, and that the machine was so defective as to cause them great loss and damage, and that plaintiff, by reason of the fraud and damage, was not entitled to recover any part of his alleged claim. Issues were submitted to the jury which, with the answers thereto, are as follows: 1. Did the defendants execute the contract introduced in evidence? Answer: Yes. 2. Did defendants execute the notes introduced in evidence? Answer: Yes. 3. Did the plaintiff represent and warrant to the defendants that the machine sold to them was an improvement on machine No. 1; that it would not break type and that type could be used with it as economically as by hand? Answer: Yes. 4. If so, was such

representation and warranty false? Answer: Yes. 5. If so, did the plaintiff know it was false? Answer: Yes. 6. If so, did defendants rely thereon and were they induced thereby to execute said notes and
(66) contracts? Answer: Yes. 7. If so, what damage, if any, have defendants sustained thereby? Answer: Eleven hundred dollars, with interest from date of notes. Judgment was entered upon the verdict that the defendants go without day and recover their costs. Plaintiff, having entered exceptions to the rulings of the court, appealed to this Court.

Redwine & Sikes for plaintiff.
Williams, Lemmond & Love and Adams & Armfield for defendant.

WALKER, J. There have recently been several cases of this kind before the Court, and we have held that while expressions of opinion by a seller, amounting to nothing more than mere commendation of his goods—puffing his wares, as it is sometimes called—or extravagant statements as to value or quality or prospects, are not, as a rule, to be regarded as fraudulent in law, yet "when assurances of value are seriously made, and are intended and accepted and reasonably relied upon as statements of fact, inducing a contract, they may be so considered in determining whether there has been a fraud perpetrated; and though the declarations may be clothed in the form of opinions or estimates, when there is doubt as to whether they were intended and received as mere expressions of opinion or as statements of facts to be regarded as material, the question must be submitted to the jury." 14 A. & E., 35; 20 Cyc., 124; *Morse v. Shaw,* 124 Mass., 59; *Whitehurst v. Insurance Co.,* 149 N. C., 273; *Cash Register Co. v. Townsend,* 137 N. C., 652.

We also held in the *Whitehurst case,* approving what is said upon the subject in Pollock on Torts (7 Ed.), 276, that to create a right of action for deceit, there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur: (a) It is untrue in fact. (b) The person making the statement, or the person responsible for it, either knows it to be untrue or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not. (c) It is made with the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it. (d) The plaintiff
(67) does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage. What is still more to the point, we further held that the false representation of a fact which materially affects the value of the contract and which is peculiarly within the knowledge of the person making it, and in respect

to which the other party, in the exercise of proper vigilance, had not an equal opportunity of ascertaining the truth, is fraudulent. Thus false and misleading representations made by a vendor to a purchaser of matters within his own peculiar knowledge, whereby the purchaser is injured, are a fraud which is actionable. Where facts are not equally known to both sides, a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he, impliedly, states that he knows facts which justify his opinion. Smith on Fraud, sec. 3; *Modlin v. R. R.*, 145 N. C., 218; *Ramsey v. Wallace,* 100 N. C., 75; *Cooper v. Schlesinger,* 111 U. S., 148; Kerr on Fraud and Mistake, 68. The principles relating to this question are so fully and clearly stated by *Justice Hoke* in *Whitehurst v. Insurance Company, supra,* and so applicable to the facts of this case in its every phase, that no other authority would seem necessary to sustain the ruling of the Court upon the question of fraud. It appears in this case that the false statements were made by the inventor of the machine, who must be supposed to have been fully informed as to its good and bad qualities and who must, therefore, have made the representations knowing them to be false. It was so expressly held in *Peebles v. Guano Co.,* 77 N. C., 233. The plaintiff in this case is a corporation and the manufacturer of the machine, and therefore what is said in the *Peebles case* is clearly pertinent to the facts as presented in the record: "It is said that the jury have not found that the representations were fraudulent, but only that they were false, and without fraud, the action can not be maintained. If we consider the action as for the deceit, this objection would be unanswerable if the defendant was the seller only, and not also the manufacturer of the article. It is difficult to conceive how a manufacturer of guano can make a representation concerning the substances of which it is composed, which is false, and not also fraudulent, in the sense that it was knowingly false. If his servants employed (68) in the manufacture, on any occasion by negligence, or willfully, omitted to put in the valuable ingredients without the knowledge or connivance of the manufacturer, it would free his false representation from immorality, but he must in law be held equally liable for the acts of his servants, and he can not be held innocent of a moral fraud, if after being informed of the omission he seeks to take advantage of it by demanding for a spurious and worthless article the price of the genuine one. We think that on the facts found by the jury the plaintiff was entitled to damages." The representation which Lombard, plaintiff's agent, made to defendants was of such a nature as to mislead them and induce them to purchase a worthless machine instead of the improved and perfect one they had the right to think was being sold to them. It was well adapted to accomplish the purpose for which it was made,

namely, to deceive the defendants as to the true quality of the machine. He lauded its merits, if it had any, but willfully concealed its demerits, and having no knowledge or means of acquiring knowledge themselves, they were easily duped, as any intelligent and careful man would have been, and were practically at his mercy. The representation was substantially like that made in *Audit Co. v. Taylor,* 152 N. C., 272, which we held to be sufficient as the basis for a charge of deceit. The representation in our case was as to the mechanical construction of the typesetter, and it proved by actual use to be mechanically defective. It was not a mere expression of opinion or commendation, but the false statement of a hidden or concealed fact, which was material because it was the main inducement to the purchase. *Machine Co. v. Feezer,* 152 N. C., 516; *Savings Bank v. Chase,* 151 N. C., 108.

The plaintiff contends that the evidence tended to vary or contradict the written contract of sale, and relies upon *Etheridge v. Palin,* 72 N. C., 216, but the case does not apply here. It was attempted in *Etheridge v. Palin* to vary the contract by adding a warranty, but that is very different from an attack upon the contract as having no validity because induced by fraud. It does not change the contract, but nullifies it, and is competent for that purpose, as we held in *Tyson v.* (69) *Jones,* 150 N. C., 181; *Whitehurst v. Insurance Co., supra.*

The exception that there was no evidence of the agency of Lombard other than his own acts and declarations, is not meritorious. He was sent out by the plaintiffs to make the contract and install the machine, and there was other competent and sufficient evidence of his agency. The declarations were made by him *dum fervet opus,* and his principal must be considered as bound by them, as much so as if it could have made them and had made them itself. *Qui facit per alium facit per se.* In this connection we may revert to the case of *Peebles v. Guano Co., supra,* where it is said: "There is no reason that occurs to us why a different rule should be applicable to cases of deceit from what applies to other torts. A corporation can only act through its agents, and must be responsible for their acts. It is of the greatest public importance that it should be so. If a manufacturing and trading corporation is not responsible for the false and fraudulent representations of its agents, those who deal with it will be practically without redress and the corporation can commit fraud with impunity." In *Manufacturing Co. v. Davis,* 147 N. C., 267, the present *Chief Justice* says: "The plaintiff company is liable for the fraudulent representations of its salesman and agent, which were made to defendant to his injury. This would be so whether the agency of Guy were general or special. *Hunter v. Matthias,* 90 N. C., 105; *Peebles v. Patapsco Co.,* 77 N. C., 233; 1 A. & E. Enc. (2 Ed.), 1143." See also *Savings Bank v. Chase, supra.*

Whether the machine was in fact defective, as alleged by the defendants, was a question for the jury, and so were the other matters involved in the issues. We think the delay of defendants in discovering the defect and the fraud, and in asserting their rights in respect of it, is sufficiently explained by the proof. There was evidence to support the verdict of the jury, and we are not privileged to review their findings. The judgment thereon was correct. *McClennahan v. Cotten,* 83 N. C., 333.

Upon a careful review of the whole case, no error has been discovered. No error.

ALLEN, J., did not sit.

CLARK, C. J., concurring: There was no error in this appeal (70) which was by the plaintiff. This was an action begun before a justice of the peace upon eight notes for $25 each, being part of the purchase price ($1,750) for a typesetting machine. On the trial in the Superior Court, on appeal, the defendant's counterclaim for damages on account of false representations and breach of warranty in the sale was fully investigated and the jury found that the defendant was entitled to recover therefor the sum of $1,100 and interest from the day of sale. By reason of several decisions of this Court the defendant could not recover judgment for the difference, $900 and interest thereon. Yet, if the jury had the right to consider the alleged counterclaim and upon the conflicting evidence and under the charge of the court, to find that the plaintiff was indebted to the defendant in the sum of $1,100, it is surely illogical to hold that the court could not render judgment for the amount which the jury were authorized to find that the plaintiff owed the defendant. The judge had jurisdiction upon the trial and investigation up to and including the reception of the verdict. By what process of reasoning did his jurisdiction stop there? Besides, it will be an inconvenience, and often lead to a denial of justice, if the defendant, as in this case, must practically remit all of his counterclaim above the amount which he owes the plaintiff. In this case should the plaintiff sue upon his other notes for the balance of the purchase money, the defendant will be debarred from using the other $900 of his counterclaim against such notes.

It is true that we have decisions to that effect. But they are not bottomed on the reason of the thing, and the court should not hesitate to overrule them. The courts are very slow, and justly so, to overrule a decision, however erroneous, when it has become a rule of property. But this is merely a question of practice and procedure. It is true also that it has been held that this is a question of jurisdiction, and therefore settled by the Constitution. But clearly this is not so. The Constitu-

tion does prescribe that the justice of the peace has jurisdiction as to contracts only when the principal sum does not exceed $200. But when the case has been carried by appeal into the Superior Court, it is
(71) no longer a question of the jurisdiction of the justice of the peace, but of the jurisdiction of the Superior Court.

When the Superior Court becomes seized of jurisdiction of a case it has it fully, with full power of amendment, in all cases. It can make no difference whether the case has been brought into the Superior Court by the service of summons, or by appeal from the clerk, or by appeal from a justice of the peace. The summons is nothing but a notice to appear in the Superior Court. The notice of appeal from the clerk or from the justice of the peace has exactly the same effect. By either process, the Superior Court is vested with the same jurisdiction.

If the defendant had been brought into court by a summons upon a contract for $201, the court could permit an amendment making it any other amount. The same power of amendment exists in all cases, because the jurisdiction of the Superior Court confers the same powers upon the judge, even though the case is brought into its jurisdiction by appeal from the clerk or a justice of the peace. Preconceived opinions and former decisions being set aside, there is nothing in the Constitution which denies power to the judge to enter up judgment for any amount which the jury, under his instructions, has legally found to be due. The decisions to the contrary should be disregarded.

There was formerly the same inconvenience and difficulty on appeals from the clerk to the Superior Court. But this has now been cured by the Act of 1887, now Revisal, 614, which provides, "Whenever any civil action or special proceedings begun before the clerk of any Superior Court shall be, for any ground whatever, sent to the Superior Court, before the judge, the judge shall have jurisdiction," and authorizes him "to hear and determine all matters in controversy in such action." The decisions hold that the judge may make any amendment whatever, and that this is so even though the proceeding before the clerk was a nullity. *In re Anderson,* 132 N. C., 243; *R. R. v. Stroud, ibid.,* 416; *Ewbank v. Turner,* 134 N. C., 81. The same rule and for the same reason should obtain on appeals from a justice of the peace. The case being in the Superior Court that court should be seized of jurisdiction as fully as if the case had originated there, and the judge should have power to make amendments and to try the case even though the proceeding
(72) before the justice was a nullity. The decisions to the contrary can be corrected by overruling the erroneous precedents referred to. In the matter of appeals from the clerk to the judge the correction was made by statute, but it could have been made by the court itself overruling its former decisions. If it had been a matter of jurisdiction

under the provisions of the Constitution it could not have been corrected by statute.

In this connection it may not be amiss to call attention to another inadvertence, into which former courts, whose judges were still under the influence of the former ideas as to procedure, have fallen in holding that a justice of the peace and the clerk have no jurisdiction in equity. The Constitution having abolished the distinction between law and equity, such distinction cannot survive in actions before a justice of the peace or a clerk or any other officer any more than in the Superior Courts. The abolition is broad and general, and applies to all courts. The ruling to the contrary was nothing more than the survival of preconceived opinions. It is true that neither a justice of the peace nor a clerk can issue an injunction or appoint a receiver. The Legislature has thought fit to restrict such powers to the judges of the Superior Court. That is a matter of practice resting in the discretion of the law-making power. But it is a very different matter to hold, by judicial enactment, that those officers have no jurisdiction where an equity is to be administered. The Constitution having abolished the distinction between law and equity there is no reason why equitable rights as well as equitable defenses should not be set up in proceedings before a justice of the peace or before the clerk, though the administration of an equitable remedy by an injunction or the appointment of a receiver is not conferred upon those officers. It has been held that a justice has jurisdiction of equitable defenses. *Levin v. Gladstein,* 142 N. C., 494. If so, he must have jurisdiction of equitable causes of action.

When by appeal such cases get into the Superior Court, the judge can and does issue an injunction and appoint receivers if found an appropriate remedy. The same rule should apply to judgments upon a counterclaim, or a cause of action or defense set up by (73) amendment in the Superior Court.

The case being in the Superior Court by virtue of the appeal, the parties should not be dismissed thence to reënter the same court by service of summons in order to litigate identically the same matter.

Cited: Anderson v. Corporation, post, 135; *Whitmire v. Heath, post,* 307; *Cheese Co. v. Pipkin, post,* 401; *Robertson v. Halton,* 156 N. C., 220, 221; *Hodges v. Smith,* 158 N. C., 263; *Fields v. Brown,* 160 N. C., 299; *Machine Co. v. Bullock,* 161 N. C., 13; *Machine Co. v. McKay, ibid.,* 587; *S. v. McAden,* 162 N. C., 578; *Pate v. Blades,* 163 N. C., 273; *McIver v. R. R., ibid.,* 547; *Ottman v. Williams,* 167 N. C., 314; *McLaurin v. McIntyre, ibid.,* 356; *Register Co. v. Bradshaw,* 174 N. C., 416.

L. R. BRIGGS v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 26 April, 1911.)

1. **Insurance—Contracts—Procurement—Ignorance—Misrepresentations—Fraud.**

It is fraud in law for an agent of an insurance company to induce an illiterate and ignorant old man, trusting in his honesty, to take a policy of insurance by falsely representing that the policy provided for the repayment with interest of all the premiums paid thereon after the expiration of a ten years period of insurance; and the fraud is not waived because the insured requested the agent to read the policy to him, confiding in the fair dealing of the agent, when the policy was falsely read to him.

2. **Same—Equality of Knowledge.**

An illiterate and ignorant old man dealing with an insurance agent for a policy of insurance is not deemed to have equal knowledge with the agent as to the meaning of the stipulations contained in a policy, and an action to set aside the contract for fraud and deceit will lie when the insured was induced by false and material representations to take out the policy.

3. **Insurance—Principal and Agent—Respondeat Superior.**

The fraudulent misrepresentations of an agent of an insurance company, which would be sufficient if made directly by the principal to set aside a policy thereby procured, binds the company, and the doctrine of *respondeat superior* applies. *Peebles v. Guano Co.*, 77 N. C., 233, approved; *Medicine Co. v. Mizell*, 148 N. C., 383, cited and distinguished.

4. **Insurance—Contracts—Fraud—Measure of Damages.**

When an insurance policy has been canceled for fraud in its procurement by the company, the measure of damages is the amount of the premiums paid, with interest.

(74) APPEAL from *Lyon, J.*, at October Term, 1910, of DURHAM.

The facts are sufficiently stated in the opinion by *Mr. Justice Walker.*

Branham & Brawley and Manning & Everett for plaintiff.
Bryant & Brogden for defendant.

WALKER, J. This action was brought to recover damages for fraud and deceit practised upon the plaintiff, by which he was induced to accept certain policies of insurance from the defendant upon the lives of his children, the false representation being that the company had issued the policies with a provision that at the end of the insurance period, which was ten years, the plaintiff would be entitled to receive the total amount of premiums paid by him with four per cent interest. The

plaintiff alleged that this representation was made, that it was false and intended and calculated to deceive him, and that he relied upon it, believing it to be true, and was induced thereby to accept the insurance and pay the premiums thereon from time to time, as they matured; that he demanded payment of the money, according to the stipulation, and it was refused, and he prosecutes this action to recover it. Issues were submitted to the jury and they found the facts to be as alleged by the plaintiff, and assessed the damages at $101.37. The court entered judgment upon the verdict, and the defendant, upon its exceptions to the rulings of the court, brought the case here for review.

There was evidence sufficient to carry the case to the jury upon the issues formulated for their consideration. It appears therefrom that the plaintiff could not read or write and had to rely upon the reading and representation of the defendant's agent, who negotiated the insurance, for his understanding of its terms, and especially did he have to rely upon him to give correct information as to its contents with reference to the stipulation for a return of the premiums and interest, and he thought the policy contained this provision when he received it from him, relying upon his honesty and integrity in all his dealings with him. It turned out that the paper was falsely read and explained to him. This is, in law, a fraud. It was an advantage taken of plaintiff's illiteracy in order to induce the making of the contract. As the plaintiff (75) was unable to read and understand the terms of the policies, it will not be imputed to him as a negligent act that he requested the agent to read it to him and afterwards acted in reliance upon what he said. He was not bound to deal with him as if he were a rascal and unworthy of his trust, and by confiding in him he has not waived any of his rights. The act of the agent is none the less a fraud because this old and ignorant man trusted in his honor and sense of fair dealing. *McArthur v. Johnson,* 61 N. C., 317; *Hayes v. R. R.,* 143 N. C., 125.

We are unable to distinguish this case from those of a like kind which have been so recently decided by this Court. *Caldwell v. Insurance Co.,* 140 N. C., 100; *Sykes v. Insurance Co.,* 148 N. C., 13; *Stroud v. Insurance Co.,* 148 N. C., 54; *Whitehurst v. Insurance Co.,* 149 N. C., 273; *Jones v. Insurance Co.,* 151 N. C., 54; *Jones v. Insurance Co.,* 153 N. C., 388. As said in *Caldwell v. Insurance Co., supra:* "She could not read the policies, and it is no serious reflection upon her intelligence to surmise that, if she could have done so, she would not have been very much wiser." The plaintiff, as the evidence tends to show, was not only illiterate, but below the average in intelligence and incapable of coping with a man who had full knowledge of all the intricacies of life insurance, and was trained by habit and experience to catch the unwary. He had a decided advantage of the plaintiff, who was not by any means at arms'

length with him, and he forgot his duty in an over-zealous effort to advance the interests of his company, when he availed himself of his greater superiority and thus procured the contract. "He (the plaintiff) was an easy mark for the false and fraudulent practices of the defendant's agent, who was evidently a man of much superior intelligence. There was some evidence to the contrary, but what was the fact in this conflict of testimony was a question for the jury. The agent, it seems, took advantage of the plaintiff's ignorance and misled him as to the true nature of the contract. The policy was so worded as to leave some room for doubt and uncertainty as to what or how much the plaintiff would receive at the end of the insurance period, and what the agent (76) said in explanation of it was fairly calculated to mislead an ignorant man." *Sykes v. Insurance Co.,* 148 N. C., 13. This case is much like *Jones v. Insurance Co.,* 151 N. C., 54, except that the evidence now before us is much stronger to show fraud than was the evidence in that case. What is there said, though, is strictly applicable to the facts now under consideration.

But the defendant contends that what the agent said was not binding upon his principal, the defendant, as no authority in him is shown to make the fraudulent representations. We can well answer this contention by stating what was said in regard to a similar one in *Peebles v. Guano Co.,* 77 N. C., 233: "There is no reason that occurs to us why a different rule should be applicable to cases of deceit from what applies to other torts. A corporation can only act through its agents, and must be responsible for their acts. It is of the greatest public importance that it should be so. If a manufacturing and trading corporation is not responsible for the false and fraudulent representations of its agents, those who deal with it will be practically without redress and the corporation can commit fraud with impunity." So in *Mfg. Co. v. Davis,* 147 N. C., 267, the present *Chief Justice* says: "The plaintiff company is liable for the fraudulent representations of its salesman and agent which were made to defendant to induce the trade and acted upon by defendant to his injury. This would be so whether the agency of Guy were general or special. *Hunter v. Matthias,* 90 N. C., 105; *Peebles v. Patapsco Co.,* 77 N. C., 233; 1 A. & E. Enc. (2 Ed.), 1143." Vance, in his treatise on Insurance, at page 341, speaking of clauses in policies relieving the companies of liability for any stipulation or representation made by an agent and not contained in the policy, and forbidding him to change the terms of the contract as written in the policy, says: "Closely related in principle to the attempted limitations just discussed, and usually contained in the same term of the policy or application, are those agreements whereby the insurer seeks to escape responsibility for fraud perpetrated by the agent in the course of the transaction looking

to the procurement of the policy. It is a fundamental principle that one shall not be allowed to exempt himself by contract from liability by reason of the fraud of his servants or agents. It would seem (77) therefore, necessarily to follow that any agreement contained in the policy, by which the insurer is relieved from the consequences of his agent's fraud in making the contract of insurance, is necessarily without effect." In our case, the plaintiff seeks to recover damages for the deceit practiced upon him by the agent or to have the contract rescinded because of the fraud and recover the premiums paid by him, and the verdict is sufficient to entitle him to this relief. In this connection, what is said in *Caldwell v. Insurance Co.,* 140 N. C., at page 105, is applicable: "The court correctly announced the law which gives relief, the jury upon ample evidence have found the facts as testified by the plaintiff. It is admitted that the policies do not entitle her to receive the amount paid in or any other amount at the end of ten years; that on the contrary, she forfeits all that she has paid. Upon the verdict the law declares that as she can not have what was promised to her, she must have her money back with interest. If the defendant has been compelled to carry the risk during the life of the policies without compensation, it must look to its accredited agent, whom the jury finds made the false representation. This Court has uniformly held that in such cases the measure of relief is the amount paid with interest." What the rate of interest should be under the circumstances is not a question in the case. In *Floars v. Insurance Co.,* 144 N. C., 232, the plaintiff sought to reform the policy and recover accordingly, and the question of the agent's authority to make the reformed contract became material in order to ascertain whether there had been any mistake on the part of the company through its agent, or whether it had delivered the very policy intended by it, for in order to a reformation or correction of the instrument, a material mistake of both the parties must have been shown, and not merely the mistake of one of them. So in *Sykes v. Insurance Co.,* 148 N. C., 13, no point as to the agent's authority was involved. We were dealing merely with a verdict which found that "the defendant, through its agent," had made the false representation, and the question was whether the verdict was sufficient in its findings to entitle the plaintiff to a reformation of the policy, and to (78) recover the premiums paid with the stipulated interest. We held that he was, though we also intimated that he might have recovered damages for the deceit, when we said: "It would seem that when a plaintiff sues to recover damages for deceit he should be recompensed in damages to the extent of placing him in as good a position as he would have occupied if the contract had been as represented. In *Heddon v. Griffen,* 136 Mass., at page 232, where it appeared that a fraudulent

representation had been made as to a policy of insurance, the Court said: 'We are of the opinion that under the circumstances he (the plaintiff) has a right to recover damages of the defendant to an amount which will put him in the same position as if the fraud had not been practiced on him.' Our case is stronger than this one, for there the contract was still executory, but here the full insurance period had elapsed. The plaintiff had received the insurance which it was represented he would receive, and is now suing for the balance due, if the defendant is required to make good its deceitful representation."

The question in *Medicine Co. v. Mizell,* 148 N. C., 385, which case is relied on by the defendant, is quite different from the one in this case. There evidence of the verbal declarations or statements of an agent, without authority to make them, was admitted to vary the terms of a written contract, and we held, in accordance with the well settled rule, that it was incompetent and should have been excluded. There was no question of fraud in that case. The defendant could read and signed the contract, well knowing what it contained, and thereby freely assented to the provision that there was "no agreement, verbal or otherwise, affecting the terms of the order (for the goods) other than specified therein." That is not like our case.

No error.

Cited: Hughes v. Ins. Co., 156 N. C., 593; *Piano Co. v. Strickland,* 163 N. C., 253.

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(79)

S. J. ROBERTS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 April, 1911.)

1. **Carriers of Passengers, Duty of—Negligence—Stations—Obstructions—Safety.**

Railroad companies in the performance of their duty as common carriers are held to a high degree of care in providing at their regular stations, places and conditions by which passengers may board and alight from their trains in safety and in keeping such places free from unnecessary obstructions which threaten them harm.

2. **Same—Trunks—Evidence.**

Unloading a trunk from a passenger train and leaving it so near thereto that a passenger was injured thereby while endeavoring to get on the train as it was slowly leaving the station is a relevant fact to be considered with other facts and circumstances in this case, tending to show that negligence on the part of defendant's employees on the train proximately caused the injury complained of.

3. Same—Negligence—Proximate Cause.

It is the duty of a railroad company to exercise reasonable care for the safety of passengers attempting to board its trains at one of its stations, and if there is a failure of such duty on the part of the railroad company, and as the proximate cause thereof a person is injured, it would constitute actionable negligence.

4. Carriers of Passengers—Negligence—Duty of—Stations—"All Aboard."

The call of "all aboard" by the conductor is an express invitation to passengers to get aboard, and the immediate moving of the train after such announcement, without affording this opportunity to those who have placed themselves so near the train as to cause a reasonable inference that they intended to become passengers, is a negligent act.

5. Same.

The negligence of the defendant is established when the jury finds from supporting evidence that plaintiff's injury was proximately caused by the acts of the conductor of a passenger train in calling "all aboard" and immediately starting the train without affording him sufficient time to comply with the invitation to get aboard, and it appears that the conductor should have reasonably inferred that he was a passenger for that train.

6. Carriers of Passengers—"Passenger" Defined.

One who has purchased a ticket at a railroad depot for a certain train and who is standing at the station in full view of the conductor and train crew, near to where the train had stopped, in such manner as to indicate his intention, is regarded as a passenger on that train and is entitled to the consideration due a passenger.

7. Same—"All Aboard"—Duty of Carrier.

One who has purchased a ticket as passenger for a certain train and indicates by his location at the depot and manner that he is a passenger, has ordinarily the right to assume that it is safe for him to get on the train when the conductor calls "All aboard."

8. Carriers of Passengers—Moving Train—Negligence—Contributory Negligence.

The plaintiff had purchased a ticket for defendant's train and by his position and manner indicated that he intended to be a passenger thereon. There was evidence tending to show that the train had come to a full stop at the station, and being prevented by the entrance of other passengers from sooner boarding the car, the plaintiff attempted to get on just after the conductor had called "All aboard"; the conductor immediately started the train, and while the train was slowly leaving the station the porter on the train unobservedly stood upon the second step of the car, so that plaintiff was unable to ascend, and consequently, while with one foot on the lower step of the car and the other "hanging down," the plaintiff's leg was struck and injured by a trunk which had been taken from the train and left standing near the track; that the conductor saw the plaintiff, and called, warning him of the danger from the trunk, without attempting to stop the train. Upon the issues of negligence and contribu-

tory negligence, instructions held proper, that the first issue should be answered by the jury Yes, and the second No, if the jury should find by the greater weight of the evidence: (1) that in attempting to board the train the plaintiff relied on the invitation, "All aboard," that it was safe to get on, and was injured by the trunk; (2) that plaintiff was prevented from safely boarding the train by reason of the nearness of the trunk to the track and the negligent obstruction of his way by the porter; (3) that by the exercise of ordinary care the conductor could have stopped the train in time to have prevented the injury.

9. Same—"Last Clear Chance."

When there is evidence tending to show that plaintiff, a passenger, while attempting to board a train moving slowly from the station was injured by his leg striking against a trunk which was left standing near the track; that he could safely have gotten aboard except for the trunk, and the negligent acts of the employees of the defendant's railroad on the train, the doctrine of the "last clear chance" applies; and a requested instruction is properly refused which confines the liability of the defendant to the inquiry as to whether the train had stopped at the station a sufficient time to allow the passengers to safely get aboard before it started; and to the plaintiff's knowledge of the signals which indicate that the train would immediately start.

10. Carriers of Passengers—Moving Trains—Negligence—Presumptions—Exceptions.

While the general rule is that a passenger or outsider who is injured in the voluntary effort to board a moving train is guilty of contributory negligence, there are exceptions to the rule; and this is especially true when the act is induced by the direction or advice of the employees of the company, and when the movement of the train does not make it obviously dangerous, giving due and proper regard to the surrounding conditions.

APPEAL from *Cooke, J.*, at Fall Term, 1910, of WAYNE.

Action to recover damages for personal injuries caused by alleged negligence on the part of defendant company. There was evidence on the part of the plaintiff tending to show that on or about 9 November, 1909, the plaintiff having purchased a ticket at Warsaw, N. C., with a view of returning to Mt. Olive on the 10:30 train of defendant company, was seriously injured in endeavoring to get aboard said train as it was leaving the station yard; that the train in question was twenty minutes late, and plaintiff having bought his ticket drove with a friend around the town of Warsaw, and having returned, awaited the arrival of the train on the station yard in a few feet of the main track and of the train when it came up. The incoming passengers left the train and baggage was unloaded. In unloading, the defendant's employees placed a trunk on the platform very near the train; that the engine and the baggage car were opposite plaintiff when the train came to a standstill, and plaintiff started down to board the train and "had reached front

end of second-class car. I moved up to get hold of the rails of the platform. Another gentleman ahead stepped on the step. He was helping on a lady and child. I took hold of the rear end of the next forward rail, which was the car for colored people. I caught (82) hold with both hands. The porter had stepped right ahead of me on the step. Conductor gave signal to leave. I saw it and stepped my left foot on the bottom step. The porter was on the second step. He was looking over my head. I spoke to him and told him to move out of the way. I repeated it a time or two. He did not appear to hear me—paid no attention to me. The train moved away at fast speed. That left me standing on the step with my left foot forward and right foot hanging down. Several yards up the track there was a trunk sitting up on end, right by the side of train. The trunk struck my right leg from my knee down and knocked me off the step; knocked me pretty hard; knocked my right hand loose. I still held to the rail with my right hand. When I came down I struck on the crotch of the steps with the small of my back, left side. My hand slid down on the rail and I descended low enough for me to see the track rails on that side. I caught with my left hand the cog to the brake at the platform and was trying to get straight. The conductor came up and asked me if I was hurt. I replied, 'Do you think I am iron?' I did not know the conductor. I was badly hurt in my left side, and in about five hours I was very sick, and was in bed seven weeks. I have been in bed two-thirds of my time since. Dr. Kornegay saw me about five hours after I was hurt, and he has been attending me ever since."

There was evidence further that the occurrence as it took place was in view of the conductor and other employees of the train; that the conductor called "All aboard," and immediately the train started. Speaking to the significance of this call the conductor testified, "When I make this announcement 'All aboard' I mean, to give notice to those who are not on the train to get on and that, I understand, to be the general meaning." There was evidence on part of defendant that plaintiff was at southeast corner station platform talking to some one when call "All aboard" was made, and the train after having waited the full time at the station started; that he approached and was injured in the endeavor to get on a moving train. The porter testifying for defendant denied that he in any way hindered or obstructed plaintiff. The conductor testifying gave account of the occurrence as follows: "I was (83) conductor on the train. We stopped at Warsaw six or eight minutes. It was transfer point of Clinton Railroad. The train had been at station several minutes before I saw plaintiff. I had assisted passengers off and on, then walked up baggage car two lengths away. I then saw plaintiff. He was at the southeast corner of the station

platform talking with some one who was sitting on a buggy. After the train started I stepped on front end of first coach. Plaintiff attempted to catch rear end of same car. He was walking backwards with both hands raised as if to catch hold of the rails to the platform (which was the right way for him to walk if he was going to catch on to a moving train). It was after he had caught the hand-rail that he came in contact with the trunk. I hollered to him. I think I said, 'Look out.' I saw he was going to strike the trunk, but I don't think he heard me. I saw him pull himself up. I then went through the train where he was. I found him in the first car. I asked him if he was hurt, to which he replied, 'I think not.' He was ten or fifteen feet from the train when I first saw him coming to the train. It had moved about the distance of one coach when he struck the trunk. It was moving at four miles an hour. I say 'All aboard' and hold up my finger and start immediately. If the trunk had not been there he would have made the platform all right. The trunk had just been taken off the baggage car and placed there, and was for Warsaw. The trunks as they are taken off are placed beside the track. I don't know what rule there is as to how long they are to remain there before removal, if there is any."

The Pullman conductor testifying said: "I saw him as I came up the train after it stopped, standing by a buggy. He, I think, got up in the buggy about twenty or twenty-five feet from the train. When conductor called 'All aboard' and the train began moving off he jumped from the buggy and ran and caught the train at rear end of the car for colored people. There were some trunks on track. I saw
(84) his danger and hollered to him to look out."

The ordinary issues were submitted as to negligence, contributory negligence and damages.

Verdict for plaintiff. Judgment. Defendant excepted and appealed.

Aycock & Winston and J. D. Langston for plaintiff.
W. C. Munroe for defendant.

HOKE, J., after stating the case: Railroad companies, in the performance of their duty as common carriers, are held to a high degree of care in providing at their regular stations places and conditions by which passengers may board and alight from their trains in safety and in keeping such places free from unnecessary obstructions which threaten them harm. This obligation has been illustrated and applied in several recent decisions of the Court, as in *Smith v. R. R.*, 147 N. C., 450; *Mangum v. R. R.*, 145 N. C., 152, 153; *Pineus v. R. R.*, 140 N. C., 450. And the decisions in other jurisdictions and text-writers of authority are in approval of the principle. *Ayers v. R. R.*, 158 N. Y.,

254; *Reese v. R. R.*, 93 Ill., 662; Hutchinson on Carriers (3 Ed.), secs. 928, 935. In *Smith v. R. R., supra,* the Court quotes with approval from Hutchinson on Carriers, sec. 128, as follows: "It is the duty of railway companies as carriers of passengers to provide platforms, waiting-rooms and other reasonable accommodations for such passengers at the stations upon such roads at which they are in the habit of taking on and putting off passengers. Their public profession as such carriers is an invitation to the public to enter and alight from their cars at their stations, and it has been held that they must not only provide safe platforms and approaches thereto, but that they are bound to make safe for all persons who may come to such stations in order to become their passengers or who may be put off there by them, all portions of their station grounds reasonably near to such platforms and to which such persons may be likely to go; and for not having provided such stational accommodations and safeguards railway companies have frequently been held liable for injuries to such persons." And in *Mangum v. R. R.*, 145 N. C., 153, *Associate Justice Brown,* in delivering the opinion said: "It seems now to be almost elementary that one of the recognized duties of a railway company that undertakes (85) to carry passengers is to keep its station premises in a reasonably safe condition, so that those who patronize it may pass safely to and from the cars. *Pineus v. R. R.*, 140 N. C., 450; Wood on Railways, 310, 1341, 1349. This duty extends not only to the condition of the platform itself, whereon passengers walk to and from the trains, but also to the manner in which that platform is allowed by the common carrier to be used. *Western v. R. R.*, 73 N. Y., 595; Wood, *supra.* The defendant owed a duty to plaintiff, and to all other passengers, to keep its depot platforms used by them as means of ingress and egress free from obstructions and dangerous instrumentalities, especially at a time when its passengers are hurrying to and from its cars," citing *Pineus v. R. R.*, and *R. R. v. Johnston,* 36 Kansas, 769. Applying the principle we are of opinion that the cause has been correctly decided and no reversible error appears in the record. While not prepared to say that the placing of the trunk in the position shown would under all circumstances constitute negligence, on the testimony presented it is certainly a relevant fact to be considered with other facts and circumstances in determining the question of defendant's responsibility, and this was all the significance given it on the trial below, and in this there was no error certainly of which defendant could complain. Allowing then to this fact only the weight as suggested, the question of defendant's liability was submitted to the jury in three aspects:

1. Whether there was negligence in wrongfully starting the train immediately on the call "All aboard" by the conductor?

2. Did the porter negligently hinder the plaintiff in his effort to board the train?

3. Was there a negligent failure on the part of the defendant's employees to stop the train after plaintiff was discovered by them to be in a position threatening danger?

All of them fairly arising on the testimony and all of them in our opinion given to the jury under correct and intelligent charge. His Honor charged the jury generally: "It is the duty of a railroad company to exercise reasonable care for the safety of persons attempting to board its trains at one of its stations to become passengers (86) thereon, and if there shall be a failure of such duty on the part of the railroad company, and in consequence thereof a person is injured, that would be negligence, and if such negligence is the proximate cause of the injury that would be *actionable negligence*," and on the first position, among other things said, "When the conductor calls 'All aboard,' this is an express invitation to those who have not yet boarded the train to do so, and if the said train moves off after said announcement without giving opportunity to passengers who had placed themselves so near the train that there was a reasonable inference that they intended to become passengers thereon to avail themselves of this invitation, then the moving of said train is a negligent act." And further that if the jury should find by the greater weight of the evidence that the conductor called "All aboard" and immediately started the train without giving plaintiff time, by the exercise of reasonable care, to enter the train, and shall further find that such act was the proximate cause of plaintiff's injury, they would answer the first issue, Yes.

The plaintiff in this instance having purchased his ticket was standing in the station yard, seemingly on the platform, in full view and very near, awaiting the arrival of his train and was clearly a passenger. *Clark v. Traction Co.*, 138 N. C., 77; *Tillett v. R. R.*, 115 N. C., 665; *Seawell v. R. R.*, 132 N. C., 859.

The conductor himself testified that the call "All aboard" is intended to give notice to those who are not on the train to get on, and that such was the general meaning of the term, and well considered authority is in favor of the definition as given by the witness. *Lent v. R. R.*, 120 N. Y., 467; *Carr v. R. R.*, 98 Cal., 366. See a full and informing note to that case in 21 L. R. A. (N. S.), 356.

On authority, therefore, as well as on the "reason of the thing," there was testimony from which a breach of duty here could be inferred and justified the court in submitting this view to the jury. And on the first and second position the court further charged the jury in part as follows: "If the jury shall find by the greater weight of the evidence that the conductor shouted 'All aboard,' and contemporaneously gave a

signal for the train to move forward, and the train did immediately move forward, then this was notice on the part of the (87) defendant that it was safe for a passenger who had placed himself near the train, as stated above, to enter said train, and if the jury shall further find that the plaintiff having placed himself near the train accepted said invitation, relying upon it, and was injured by reason of the closeness of the trunk to the railroad, then the defendant was guilty of negligence, and if the jury shall find by the greater weight of the evidence that such negligence was the proximate cause of the injury, they shall answer the first issue, Yes." And further: "If the jury shall find that the porter obstructed the passage of the plaintiff in attempting to board the car, and the plaintiff was unable to board the car conveniently by reason of the closeness of the trunk to the train in conjunction with said obstruction, then the jury shall answer the first issue Yes, and the second issue No." And further, as more especially bearing on the second issue, the court instructed the jury: "That although the plaintiff attempted to enter the train while it was moving off, and had succeeded, with his hands on the hand-rail, in placing one foot on the lowest step, but was prevented from going on up the steps before he reached the trunk from the fact that the porter on the train had preceded the plaintiff, had negligently stepped on the second step, and who saw, or by the exercise of reasonable care could have seen the condition of the plaintiff, and if the jury shall find such to be the facts by the greater weight of the evidence, then the negligence of the porter, which would be imputed to the defendant, would be the proximate cause of the injury, and the plaintiff's negligence in entering the moving train would not be the proximate cause of the injury."

The charge here presents the conduct of the porter in the proper relation to the cause and in terms which give defendant no just ground of complaint. *Sharer v. Paxson,* 171 Pa. St., 26, is an authority in support of this position.

And on the third view presented the court charged: "If the jury shall find that the conductor saw the plaintiff attempting to board the car and shall further find that he saw the trunk and could by the exercise of ordinary care have stopped the train in time to pre- (88) vent the injury, then the jury should answer the first issue Yes, and the second issue No." There was evidence that although the train moved off instantly it was going only four miles an hour at the time of the injury and with the powerful appliances now at command, could have been readily stopped, and on this feature of the case the conductor himself testified: "I then saw plaintiff. He was at the southeast corner of the station platform talking with some one who was sitting on a buggy. Plaintiff attempted to catch rear end of same car. He was

walking backwards with both hands raised as if to catch hold of the rails to the platform (which was the right way for him to walk if he was going to catch on to a moving train). It was after he had caught the hand-rail that he came in contact with the trunk. I hollered to him. I think I said 'Lookout.' I say he was going to strike the trunk, but I don't think he heard me." And the Pullman conductor testified: "When conductor called 'All aboard' and the train began moving off he jumped from the buggy and ran and caught the train at rear end of the car for colored people. There were some trunks on track. I saw his danger and hollered to him to lookout. I caught the front end of the second car, one next the above car, just about the time he caught grab-irons on next platform to me. He struck the trunk standing there."

Under authoritative decisions here and elsewhere, this testimony was, we think, amply sufficient to justify and require that the case be submitted on the doctrine of the "last clear chance." The negligent failure on the part of a person charged to avail himself of the last clear chance to avoid the injury as explained and illustrated in *Edge v. R. R.*, 153 N. C., 212; *R. R. v. Stewart*, 91 Ala., 421; *Straus v. R. R.*, 86 Mo., 422, and other cases. In what has been said, many of the positions urged upon our attention by the diligent and learned counsel for the defendant have been already adverted to. It was, however, in addition, earnestly contended that the court committed error in refusing to give the following prayers for instructions as made: "If the jury shall find from the evidence that the defendant's train remained at the station at Warsaw, on the occasion on which the plaintiff alleges that
(89) he was injured, a sufficient time for plaintiff and all others who desired to do so to have boarded said train, and to have entered into a car with safety, and while the train was not moving, then the defendant was not guilty of negligence, and the jury should answer the first issue, No." And "If the jury shall find from the evidence that the defendant's train remained at Warsaw, on the occasion on which the plaintiff alleges that he was injured, a sufficient length of time to enable the plaintiff and all other passengers desiring to do so to board said train and enter into a car while it was standing still and the plaintiff, instead of boarding said train and entering into a car while it was standing still, delayed to board said train until he knew the signal for departure had been given and the train was just about to start, and that his injury, if he was injured, was caused by such delay he would be guilty of contributory negligence, and they should answer the second issue, Yes," but modified the same by adding thereto, in effect, "And if such delay on part of plaintiff in taking the train was the proximate cause of the injury." On the facts in evidence this modification was entirely proper. Nearly all the facts relied upon by plaintiff in support of his

demand, the starting of the train too soon after the call "All aboard," the act of the porter in hindering the plaintiff's efforts to get aboard, and the failure to stop the train after the danger to plaintiff was or should have been observed by defendant's employees, arose and were chiefly relevant after the train had started on its way. And the court could not, therefore, have made the conduct of plaintiff, in not taking the train until it had started, determinative and controlling, and as in matter of law the proximate cause of the injury. Again it was insisted that recovery should be barred because plaintiff was injured in the endeavor to get aboard a moving train. The general rule is that a passenger or outsider who is injured in the voluntary effort to board a moving train is guilty of contributory negligence, but numerous decisions here and elsewhere recognize exceptions to the rule, and this is especially true when the effort is induced by the direction or advice of the employees of the company, and when the movement of the train does not make it obviously dangerous, giving due and proper regard to the con- (90) ditions suggested. *Owens v. R. R.*, 152 N. C., 439; *Johnston v. R. R.*, 130 N. C., 488; *Nance v. R. R.*, 94 N. C., 622; *Straus v. R. R.*, 86 Mo., *supra; R. R. v. Stewart*, 91 Ala., *supra; R. R. v. West*, 66 Miss., 310; *Lent v. R. R.*, 120 N. Y., *supra.* The evidence in the case showed that the train having moved off quickly had only reached a speed of four miles an hour when the injury occurred. The call of the conductor "All aboard," as we have seen, was properly construed by his Honor as an invitation to all passengers, who had placed themselves so near as to afford reasonable indication that they intended to become passengers, to "get aboard," and this with the other testimony and circumstances elsewhere stated, presents a case requiring the question of contributory negligence to be submitted to the jury, and the authorities cited are in approval of his Honor's action in doing so. Apart from this and as a further fact the injury was not caused by any of the ordinary dangers incident to the attempt to board a moving train. The conductor himself said, "If the trunk had not been there he would have made it all right," and in that view the effort of plaintiff was not necessarily and of itself the proximate cause of the injury. On consideration of the entire evidence the facts are very similar to those in *Talbert v. R. R.*, 72 S. C., 132, a decision which fully supports the recovery had in the present case.

No error.

Cited: Kearney v. R. R., 158 N. C., 546; *Fulghum v. R. R., ibid.*, 561; *Doles v. R. R.*, 160 N. C., 320; *Leggett v. R. R.*, 168 N. C., 367; *Thomas v. R. R.*, 173 N. C., 496.

JOHN W. SHELL v. M. I. ROSEMAN.

(Filed 3 May, 1911.)

1. Deeds and Conveyances—Fraud—Misrepresentation—Acreage—Description—Imputed Knowledge.

The mere fact that a grantee in a deed to a tract of land, said to contain 108 acres, had previously been shown the tract and its corners, without other knowledge or information of its acreage, does not necessarily conclude him in his action for damages upon ascertaining that the deed he accepted conveyed only 88 acres, the deed reciting the corners he had been shown, and apparently conveying 113 acres, and it further appearing that the grantor had had the tract surveyed in the absence of the grantee and had failed in his agreement to notify the grantee of the time of the survey.

2. Deeds and Conveyances—Fraud—Misrepresentations—Evidence—Questions for Jury.

When there is evidence tending to show that a grantor of a tract of land induced the grantee to purchase at a certain price by falsely and knowingly representing that it contained 108 acres, and that the grantee, without knowledge of the acreage and relying upon the misrepresentations, accepted a deed to the tract purporting to convey 113 while in fact it conveyed only 88 acres, it is sufficient to go to the jury in the grantee's action to recover damages for false and fraudulent representations in the sale of the land.

3. Evidence, Conflicting—Determinable Facts—Questions for Jury.

Conflicting statements of plaintiff's witness of a material or determinate fact in controversy will not justify the withdrawing of the case from the jury. It goes only to the credibility of the witness.

(91) APPEAL from *Joseph S. Adams, J.*, at August Term, 1910, of IREDELL.

This action is to recover damages for a false and fraudulent representation in the sale of land.

The plaintiff offered evidence tending to prove that the defendant agreed to sell him a tract of land, known as the Christopher place, for $1,600; that the plaintiff did not know the boundaries of this place; that the defendant agreed to have the land surveyed before the deed was made, and to notify the plaintiff so that he might be present at the survey; that the defendant had the survey made, but gave no notice to the plaintiff, and by the survey there were found to be 108 acres in the Christopher place, and 88 acres in the deed afterwards made to the plaintiff; that after the survey, the defendant showed the plaintiff certain corners and made the deed according to those corners, but did not show him the corners of the Christopher place and did not tell him the corners shown to him did not embrace all of the place; that the

defendant made the deed to the plaintiff conveying 88 acres, (92) a part of the Christopher place, and in the deed it is stated that it contains 113 acres more or less, and the plaintiff swears: "I relied on his (defendant's) statement that Exhibit B (the deed made by defendant to the plaintiff) covered all of the Christopher place, and that there were 113 acres."

There was evidence to the contrary, and on cross-examination the plaintiff said: "I don't remember his telling me how many acres there were in the tract. It was always spoken of as 113 acres."

There was a verdict for the plaintiff, and the defendant appealed.

No counsel for the plaintiff.
W. D. Turner and J. B. Armfield for defendant.

ALLEN, J. The defendant relies on two exceptions in his brief, and all others are waived.

The first is to the refusal to charge that there was no evidence of fraud, and the second for failure to give the following instruction: "If the jury shall find from the greater weight of the evidence that before the delivery and acceptance of the deed from the defendant to plaintiff the plaintiff and the defendant went upon and looked over the land, and that the defendant Roseman showed to the plaintiff, Shell, the lines and corners of the land defendant was selling to plaintiff; and if the jury shall further find from the greater weight of the evidence that the deed delivered by Roseman and accepted by Shell, covered the identical lands so pointed out and the identical lines and boundaries, and that the plaintiff, at the time of the acceptance of the deed, knew what land he was getting and the lines and boundaries thereof, then you will answer the second issue, No."

The two exceptions present only one question for determination, and that is, was there evidence of fraud fit to be submitted to the jury, because the facts embodied in the prayer, the basis of the second exception, were admitted by the plaintiff, and if, upon these facts, in connection with the other evidence, the jury must answer the second issue, No, there was no evidence of fraud.

We do not think it was necessarily fatal to the action of the (93) plaintiff that the corners, afterwards embraced in his deed, were shown to him. If he had known the corners of the Christopher place, or had known there were only 88 acres within the lines shown him, he could not recover, because under these circumstances he would not have been misled, but there is no evidence that he knew either of these facts, and it is requiring too much to say he must have known the acreage, because he saw the land and knew the corners. Men of intelligence and

experience will frequently differ widely as to the acreage of a tract of land of seventy or one hundred acres, and the fact that one has relied on a statement that there are one hundred and eight or one hundred and thirteen acres in a tract of land containing eighty-eight acres, which he has seen, would not be such negligence as would defeat a recovery, particularly when it is known that the party making the statement has recently surveyed the land.

The rule applicable to cases like this is clearly and accurately stated in *Etheridge v. Vannoy,* 70 N. C., 724: "In all contracts for the sale of land it is the duty of the purchaser to guard himself against defects of title, quantity, incumbrances and the like; and if he fails to do so, it is his own folly, for the law will not afford him a remedy for the consequences of his own negligence. If, however, representations are made by the bargainor, which may reasonably be relied upon by the purchaser, and they constitute a material inducement to the contract, and are false within the knowledge of the party making them, and cause loss and damage to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief," and this is approved in *Woodbury v. Evans,* 122 N. C., 781. The same principle is stated in reference to a contract for the sale of land in *Foy v. Haughton,* 85 N. C., 173: "If there is, on the part of the vendor, any act or actual misrepresentation or other positive fraud in regard to a material matter reasonably relied on, then the purchaser will be afforded relief; otherwise the maxim *caveat emptor* applies in all courts, whether of law or equity."

Guided by these authorities, and many others could be cited to the same effect, we think there was evidence of fraud, and it was for the jury to determine its reliability.

(94) There was evidence that the defendant agreed to sell the plaintiff the Christopher place for $1,600, and represented that there was an acreage of 113 acres; that he agreed to have the land surveyed and to notify the plaintiff of the time of the survey that he might be present; that he had the land surveyed, but did not notify the plaintiff, who was not present at the survey; that by the survey he found that the Christopher place contained 108 acres, and that he ran a line cutting off about 20 acres of the place; that he took the plaintiff to the land and showed him the corners of the land which he embraced in his deed, containing 88 acres; that he represented these corners to be the corners of the Christopher place and did not tell the plaintiff he had cut off the 20 acres; that after the survey he represented that there were 113 acres in the deed he made to the plaintiff and that he so stated in the deed; that the plaintiff did not know the boundaries of the Christopher

place, nor the acreage of the place conveyed to him and relied on the representations of the defendant.

If so, there was evidence that the defendant made a representation which was material to the contract, false within his knowledge, and relied on by the plaintiff, and, we think, not unreasonably relied on, in view of the fact that the plaintiff knew that the land had been surveyed for the defendant a few days before. We attach much importance to this circumstance, as it distinguishes this case from those where there is an expression of opinion or a statement as to the supposed acreage of a tract of land, which could not be made the basis of a cause of action.

We are not inadvertent to the fact that the plaintiff made a statement on cross-examination as to a material matter, apparently in conflict with his evidence when examined in chief, but this affected his credibility only, and did not justify withdrawing his evidence from the jury. *Ward v. Mfg. Co.*, 123 N. C., 252.

The meaning of the statement itself, as presented in the record, is not very clear when considered in connection with the sentence which follows. If the plaintiff had stated on cross-examination that he was mistaken as to some statement made on his first examination and wished to correct it, the rule would be different. We find

No error.

Cited: Tarault v. Seip, 158 N. C., 371; *Christman v. Hilliard,* 167 N. C., 5; *Bank v. Brockett,* 174 N. C., 42.

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(95)

E. BONEY, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 3 May, 1911.)

1. Witnesses—Expert—Qualification.

For expert evidence to be competent there must be a finding by the lower court, or an admission, that the witness was an expert.

2. Same—Negligence—Opinion Evidence.

A locomotive engineer, not qualified as an expert upon the trial, who was not present at the time the injury causing the death of plaintiff's intestate occurred, the intestate being an engineer on a passenger train and killed while running his train thirty-five miles an hour where the defendant's rules required a speed not exceeding six miles, is not competent to give testimony as to whether the injury would have been caused had the intestate complied with the rules of the company.

3. Appeal and Error—Evidence—Questions—Expected Answers—Harmless Error.

On appeal it must appear that the refusal of the trial judge to admit evidence is with prejudice to the appellant, and when a question is asked, and it does not appear of record what the witness would have answered, or what was expected to be proved by him, no reversible error is shown.

4. Railroads—Engineer—Excessive Speed—Contributory Negligence—Proximate Cause.

When it appears that plaintiff's intestate, an engineer, was killed by a collision of his passenger train with another train at a station which it was entering, the rules of the company, known to him, prescribing that under the conditions a speed over six miles an hour was prohibited and he was running thirty-five miles an hour, an instruction that the jury should find the intestate guilty of contributory negligence which would bar his recovery, leaves out the essential point that it must proximately cause the injury, and is an improper one.

5. Pleadings—Contributory Negligence—Instructions.

In order for a defendant to avail himself of instructions relating to plaintiff's contributory negligence as a bar to his recovery in an action for damages it is necessary for the defendant to set up the defense of contributory negligence in his answer.

6. Pleadings—Contributory Negligence—Allegations.

In this case the defense that plaintiff's intestate, an engineer on defendant's road, was negligently running at a speed in excess of defendant's orders, and that he failed to stop upon a signal given, which caused the death complained of, is a defense of contributory negligence.

7. Railroads—Engineer—Light at the Switch—Warnings—Location—Presumptions—Contributory Negligence.

While running at night on defendant's passenger train and colliding with another train unexpectedly on defendant's main line where it was expected to go, the other train obstructing the track because of a broken switch, and where there were numerous tracks and switches, the plaintiff's intestate is not required, without qualification, to know the exact location of the broken switch so as to impute contributory negligence to him in not observing the rules of the company when there is no light appearing at such locations.

8. Railroads—Collisions—Open Switch—Negligence—Presumptions.

In an action for damages against a railroad company for negligently permitting a switch to be open so as to cause a collision at its station between a train run by the intestate, as engineer, and another train, a presumption of negligence on the part of the defendant is raised by the fact of the open track and the collision, and a *prima facie* case being thereby established, the issue as to defendant's negligence is for the determination of the jury.

9. Same—"Rule of the Prudent Man."

When plaintiff's intestate was an engineer on defendant's engine, running at night into a depot where there were numerous tracks and switches,

where it was the defendant's duty to have the main line track cleared five minutes before his train was to arrive, and to turn on a red light as a danger signal if danger existed, the mere fact that there was danger of collision with another train on the main line, by reason of a broken switch, and that there was no light thereat, which was under the defendant's rules a signal to the intestate to stop his train, does not of itself bar the plaintiff from recovery, as a matter of contributory negligence, for the death of the intestate caused by a collision with such other train, as such would omit the rule of the prudent man.

10. Same—"Last Clear Chance"—Questions for Jury.

The plaintiff's intestate was killed while running as engineer on defendant's passenger train at night in going into a station, where it collided with another of defendant's trains, on the main line, which, under defendant's rules, should have been cleared for the passenger train five minutes before its arrival. The intestate was running at the rate of thirty-five miles an hour and the rules of the company prohibited an excess of six miles. The rules further required that the intestate should regard the absence of a light at the switch as a signal to stop. There were numerous tracks and switches in the yard. An employee of defendant could have turned on a red light, an understood signal for the intestate to stop in time to have avoided the collision resulting in the intestate's death: *Held*, in this case it was for the jury to determine whether the intestate's negligence or that of the defendant was the proximate cause of the former's death, under the doctrine of the last clear chance.

11. Railroads—Warnings—Switches—Lights—Evidence.

When, in an action against a railroad for damages for the wrongful death of its engineer caused by a collision of the train he was running at night into a station with another train negligently permitted to be on the main line, and the question is material as to whether there was a white light showing at the time, evidence is sufficient to be submitted to the jury which tends to show that the "white glass" was turned to the main line at 8 o'clock that night, and that the injury was inflicted at 2 o'clock the following morning, the yard, lights, etc., being under the supervision and control of the defendant during that time.

APPEAL from *Whedbee, J.*, at November Term, 1910, of (97) DUPLIN.

This is an action to recover damages for the killing of the plaintiff's intestate by the defendant.

The plaintiff alleges that his intestate, G. W. Boney, was in the employment of the defendant as engineer, and that he was killed on the main line of the defendant near South Rocky Mount, while on duty, at 2:30 o'clock a. m., of 6 November, 1907, by running into an open switch and coming in collision with another train.

The plaintiff alleges various acts of negligence on the part of the defendant. The defendant denies that it was negligent, but admits that the intestate was killed while on duty in the manner alleged.

The defendant also pleads contributory negligence as follows:

For a further defense:

First. That the plaintiff's intestate was a locomotive engineer, and at the time of his death was engineer on a passenger train running from Florence, S. C., to Rocky Mount and beyond; that the printed schedule containing the time-table of the defendant's different trains, and also the rules and regulations to be observed by conductors
(98) and engineers running their several trains are furnished when issued to all of its conductors and engineers; that the time-table and schedule which was in force and effect at the time mentioned in the complaint was numbered ten (10) and went into effect 15 September, 1907, at one minute past twelve a. m.; that this schedule or time-table contained the following rules and regulations:

All trains passing through Rocky Mount and South Rocky Mount will approach passenger station at Rocky Mount, N. & C. main line cross-over, cross-over at Bassett street telegraph office, South Rocky Mount and middle yard cross-over, under full control, expecting to find tracks occupied. Trains will not exceed six miles per hour passing these points.

That the collision mentioned in the complaint happened at one of the points mentioned in the said rules above quoted. A copy of this schedule containing the said rules and regulations was duly given and furnished to the plaintiff's intestate at the time or before the said schedule and regulations and rules went into effect, and it was his supreme duty to inform himself of all rules and regulations and the time-table applying to his district, and in particular to carefully obey and comply with the rules and regulations above quoted. That in addition to this the following rule was issued from the transportation department:

ROCKY MOUNT, N. C., 9 September, 1907.

BULLETIN No. 18.

C. & E. and All Concerned:

All trains passing Rocky Mount and South Rocky Mount, will approach passenger station at Rocky Mount, N. & C. main line cross-over, crossing at Bassett street telegraph office, South Rocky Mount and middle-yard cross-over, under full control, expecting to find track occupied. Trains will not exceed six miles per hour passing these points.

W. B. DARROW,
Superintendent Transportation.

Richmond, Manchester, Weldon, Rocky Mount, South Rocky Mount, Pinners Point, Tarboro, Contentnea, Wilmington, Florence, Selma.

Second. Defendant further alleges that the plaintiff's intestate (99) was guilty of negligence which directly contributed to bring about the injury complained of in the complaint, in that the plaintiff's intestate, while approaching the point where the accident occurred, was given the danger or stop signal by waving a lantern in the usual manner and acknowledged the same with his whistle, but failed to stop his train in time to avoid the accident; that if plaintiff's intestate had obeyed the instructions given in the schedule or time-table and bulletin above mentioned, he could have stopped his train in time to have avoided the accident, but that at the time he was disobeying and violating the said rules and regulations and instructions aforesaid, and running at a very high rate of speed, between forty and fifty miles per hour.

The following facts seem to be undisputed:

(1) That the intestate was running a first-class passenger train as engineer, at the time he was killed, on the main line of defendant; that the train was going north and the track was straight for more than two miles.

(2) That he was killed by running into an open switch, and colliding with another train.

(3) That as he approached the switch, his train was running at the rate of 30, 35 or 40 miles an hour.

(4) That the rules of the defendant required him to approach this switch at six miles an hour.

(5) That a switch lamp was maintained at this switch with a white and red light, and when the white light was turned to the track, it indicated safety and that the switch was all right for the main line, and the red light indicated danger.

(6) That the following rules were in force:

Rule 13, page 15. Any object waved violently by any one on or near the track is a signal to stop.

Rule No. 934. They (engineers) must have a copy of the current time-table, to which they must conform in running their trains, and a full set of signals which they must keep in good order and ready for immediate use. (100)

Rule 27. A signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a stop signal, and the fact reported to the superintendent.

Rule 7, page 14. Employees whose duty may require them to give signals must provide themselves with proper appliances, keep them in good order and ready for immediate use.

Rule 91 (A), page 31. The speed of a train would ordinarily be that of its schedule, but in cases of delay may be so moderately increased as in the judgment of the engineer and conductor will be safe

and prudent, due consideration always being given to condition of track, weather and all circumstances.

Rule 93, page 32. Within yard limits the main track may be used, protecting against third and fourth-class trains.

Third and fourth-class and extra trains must move within yard limits prepared to stop unless the main track is seen or known to be clear.

Rule 93 (a), page 32. Engines working within yard limits must clear the time of first-class trains five minutes.

Enginemen must know that switches are properly set before they attempt to pull in or out of siding.

B-72. Trains of the first class are superior to those of the second; trains of the second class are superior to those of the third, and so on.

(7) That the switch track led from the switch at which the intestate was killed on the main line, to what is called the lead track, which ran about parallel with the main line.

(8) That as the train on which the intestate was approached the switch (the distance from it being in dispute), another train of the defendant was on the lead track.

(9) That this last train consisted of an engine and fifteen cars of coal; that the cars were in front of the engine and the engine was running backwards.

(10) That it was the intention of the defendant for this train to remain on the lead track, but when it reached the switch going from the lead track to the main line, this switch was open or out of fix, and the train passed through the switch, across the switch track,
(101) through the switch to the main line and on the main line, and as the intestate was approaching it ran back on the switch track, where the collision occurred.

(11) That the switch at which the intestate was killed was on the yards of the defendant at South Rocky Mount, and that there were numerous tracks and switches in said yards.

The facts in dispute relate to the condition of the switch at the main line; the condition of the lights at this switch; the conduct of the conductor, named Cole, in charge of the train that came from the lead track, after he discovered the switch at the main line was open; the distance from the switch, at that time, of the train on which the plaintiff's intestate was running, and the conduct of the plaintiff's intestate.

The plaintiff contends:

(1) That the switch at the main line was broken, and that the defendant has given no satisfactory explanation why it was so.

(2) That if the explanation of the defendant is accepted that it

was caused by the engine and cars running from the lead track, that this would not excuse the defendant, because the engine and cars could not have reached the switch at the main line but for the negligent act of the defendant in permitting the switch at the lead track to be open or out of fix.

(3) That a white light was turned to the main line, indicating safety, or there was no light at the switch, and the purpose of lights at the switch is not only to show its condition, but also its location.

(4) That at the time the conductor Cole discovered the switch was broken, he was at the switch, and the plaintiff's intestate was distant one and one-fourth miles; that he (Cole) could then have turned the red light to the main line, and if he had done so, it would have been seen, and the train on which the intestate was could have been stopped.

(5) That instead of doing so he waited until the intestate was in twenty-five yards of the switch before he gave any signal, and when he did so it was by waving a lantern some distance from the track and not across it.

The defendant contends:

(1) That it explained the breaking of the switch; that it was broken a few minutes before the plaintiff's intestate was killed (102) by the train coming from the lead track, and was the result of an accident.

(2) That there is no evidence that it was negligent in leaving the switch at the lead track open, but if this was a negligent act it was remote, and not the cause of the death of the plaintiff's intestate.

(3) That there is no evidence that the white light was turned to the main line, and if there was no light at the switch, this was notice to the plaintiff's intestate to stop, under the rules of the defendant.

(4) That at the time the defendant's conductor, Cole, discovered the switch was broken, the plaintiff's intestate was one-quarter mile from the switch, and if he (Cole) had then turned the red light on the main line, it would have been too late to stop the train.

(5) That the conductor, Cole, did all that a prudent man could do to avert any injury; that he waved his lantern across the track; that this was a danger signal, and if it did not cause the train to stop a red light would not have done so.

(6) That the plaintiff's intestate was running in violation of the rules of the defendant, and this was the cause of his death.

The material parts of the evidence are stated, but not all of it.

J. C. Mercer testified that he was police for defendant on its yards; that he went to the switch at 8 o'clock a. m. of 6 November, 1907; that he examined the switch; nothing was broken except the rod which throws the switch; that he tried to operate it, and it would not throw

the switch, *but would turn the lamp; that the white glass was turned to the main line.*

H. T. Cole, the conductor, testified: "As soon as I discovered that switch was broken, I ran down the track of the main line to flag No. 82 (Mr. Boney's train), and he was blowing the station blow when I signaled him down by stop signal, and he answered my signal by two short blasts, which was an answer to my signal, and understood that he knew what I meant, and then I stepped aside and he ran into the yard. Our train was then moving ahead, trying to get out of the way.

(103) Mr. Boney was a good quarter of a mile when he answered my signal. I was twenty-five yards from the switch down the track towards Mr. Boney's train. He could have seen me for two miles signing him down. It was seventy-five yards from where switch left main line to where train collided with our train. *The wheels of my engine broke the rod which controlled the switch.* . . . Boney blew the station blow and then immediately blew the two short blasts answering my signal. I got away far enough to keep myself from harm. I did not have time to get a red light and signal with, after I saw Boney's train was coming. I did not display any red light. I knew train was coming when I told engineer. It was an accident that we were out on the main line. We were trying to go on the lead, but got out on the main line. The switch which let us on the cross-over from the lead to the main line had been left open or was out of fix, so that instead of going on the lead we went on the switch which goes into the main line, then went on the main line; that is, the engine went on the main line and the switch at this point had the rod broken (that is, the switch at the main line). The only thing I know was when I got there the rod was broken, and I know of no other way it could have been broken except by my engine. I mean by that the engine I was using. I did not see the engine break it, but the engine had just got on the switch point at the main line just far enough to break the rod."

William Andrews testified: "I am fireman for defendant and have been for six years. Was on engine at the time of the accident. I was coming back dead-head to Rocky Mount from Fayetteville, to which point I had fired another train. I had run extra on this run for two years. Just as we got one and a quarter miles of South Rocky Mount station Mr. Boney blew one long blast. That was the station blow, and when he got within one mile of station, some one waved a white lantern, but not across the main line. He waved it across his body. I know what that meant. The signal was to stop. Mr. Boney shut off the steam. The man who gave the signal was twenty-five yards from the main line to one side. I do not know who he was signaling

to. The yard engine blew Mr. Boney, and he then blew two short blasts, and then he applied emergency brakes and stood up and reversed the engine. The switch is at the middle cross-over. (104) *Mr. Boney was twenty-five yards from the switch when he answered the signal by two blasts and was in the switch or entering the switch when he put on emergency brakes.* Mr. Boney was running thirty-five to forty miles an hour when he turned off steam. . . . Mr. Boney *was one and a quarter miles from the switch when he blew the signal station blow and then he shut off the steam.* I was looking over Mr. Boney's shoulder. It was usual for them to have lights at switch, but I did not see any. *If there had been a red light at the switch Mr. Boney could have seen it in time to stop at the rate his engine was going.* I do not know whether the man was signaling with a lantern, was signaling a train on the switch in the yard to stop, or signaling the train we were on."

Two or more witnesses testified that they saw no light at the switch.

The issues and the responses thereto are as follow:

First. Was the plaintiff's intestate killed by the negligence of the defendant as alleged in the complaint? Answer: Yes.

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

Third. What damage is plaintiff entitled to recover of the defendant? Answer: Ten thousand dollars ($10,000).

The defendant appealed.

Herbert McClammy, J. O. Carr and George Rountree for plaintiff.
Davis & Davis and Stevens, Beasley & Weeks for defendant.

ALLEN, J., after stating the case: The first and second exceptions are to the refusal to allow a witness for the defendant, J. M. Donlan, an engineer, to answer the following questions:

First. If the jury shall find from the evidence that Mr. Boney's train had been running at six miles per hour at the time it collided with the train, and the other train with which it collided was running slowly in the same direction, what would have been the effect on the train and engine on which Mr. Boney was riding?

Second. If the jury shall find from the evidence that the engine and train which were being driven by Mr. Boney had (105) been running at the speed of six miles per hour or less at the time it struck the train of Conductor Cole, what would have been the effect of such collision and how greatly would it have damaged the train and imperiled the lives of those on board?

We do not think the ruling was erroneous. If the questions were

asked of the witness as an expert, there is no finding or admission that the witness was an expert. As was said by *Justice Manning,* in *Lumber Co. v. R. R.,* 151 N. C., 220: "We can not assume that his Honor, in this view, found the witness to be an expert, and then excluded the question and answer. In order that the witness might testify when objection is made, there must be either a finding by the court, or an admission or waiver by the adverse party that the witness was so qualified."

The questions were also not permissible to elicit the opinion of the witness, as he was not present at the time of the occurrence and the jurors were as competent to form an opinion upon the facts as he. *Taylor v. Security Co.,* 145 N. C., 385; *Wilkinson v. Dunbar,* 149 N. C., 20.

Again it does not appear that the defendant has been prejudiced by the refusal to permit the questions to be answered, as it is not shown in the record what would have been the answer of the witness, or what the defendant expected to prove by him.

The fourth, fifth and sixth prayers for instruction requested by the defendant were as follows:

Fourth. If the jury shall find that Boney was running his train at a greater rate of speed than six miles per hour at the time he passed the switch, then he was guilty of contributory negligence, and the jury will answer the second issue, Yes.

Fifth. If the jury shall find that Boney did not obey the rule set forth in the time-table, that he must approach the middle-yard cross-over and the switch where the accident occurred with his train under full control and expecting to find the track occupied, but in disregard of this rule approached the said switch and cross-over without having his train under full control, then he was guilty of contributory negligence, and the jury must answer the second issue, Yes.

Sixth. Even though the jury shall find that the defendant was
(106) guilty of negligence, yet if they shall also find that Boney did not obey the rule set forth in the time-table as to the rate of speed and manner in which he should approach the middle-yard crossing and switch where the accident occurred, then he was guilty of contributory negligence, and the jury must answer the second issue, Yes.

His Honor gave these instructions, except he added to each the element of proximate cause, which we think he ought to have done. The question of proximate cause will be considered in discussing other exceptions appearing in the record. The defendant relied principally on its motion to nonsuit, and the exceptions to the refusal to give the following instructions:

Seventh. That if the jury shall find from the evidence that at the

time No. 82, the train being run by Boney, deceased, was approaching the switch into which he ran and the switch had no lights, either red or white, and Mr. Boney knew there were no lights, either red or white, as a signal at the switch at the time, and he failed to slacken his speed and stop his engine, then he was guilty of contributory negligence, and the jury will answer the second issue, Yes.

Ninth. That it was the duty of Mr. Boney, engineer, to know the situation and location of the switches leading into the main line of the South Rocky Mount yards, and to observe whether the said switches were lighted and the signals indicated by it, and if the jury shall find from the evidence that the switch lamp at the place of accident was not lighted either with red or white lights, then it became the duty of Mr. Boney, deceased, to stop his engine and ascertain the cause, and to ascertain if it was safe to pass over the track at that point, and if he failed to do so, he was guilty of contributory negligence, and the jury will answer the second issue, Yes.

There are several reasons for refusing to give these instructions:

1. The answer does not allege that the plaintiff's intestate was guilty of contributory negligence in that he failed to perform the duties imposed upon him in the instructions, and a defendant must allege and prove contributory negligence. *Stewart v. R. R.*, 137 N. (107) C., 690. A liberal construction of the answer discloses that it alleges two acts of contributory negligence and no other.

(1) That the intestate was disobeying a rule by running in excess of six miles an hour.

(2) That he failed to stop when the lantern was waved.

2. The instructions imposed the duty without qualification to know the exact location of the switch in the absence of a light, and to note that the light was not there. The injury occurred in the night on a yard of the defendant where there were numerous tracks and switches, and it was for the jury to say, under these circumstances, whether he could, by the exercise of ordinary care, have discovered the absence of a light in time to stop the train.

3. They omit the rule of the prudent man. If the intestate knew there was no light at the switch, he also knew that he was running a first-class train on the main line, and that it was the duty of the defendant to have the track clear five minutes before his train reached the switch, and if there was danger to turn the red light to the main line. He had the right to assume that these duties had been performed, and under the circumstances the question was raised as to whether he acted as a man of ordinary prudence, which it was for the jury to decide. The instructions require the court to decide, as matter of law, that the facts embodied in them constitute contributory negligence.

4. They omit the element of proximate cause. If the intestate knew there was no light at the switch and was running in excess of six miles an hour, he was negligent, but it is not every act of negligence, on the part of the plaintiff, that is contributory negligence in its legal sense.

It is not contributory unless it is the real cause of the injury, nor is it so if the defendant, by the exercise of ordinary care, can avert the injury, notwithstanding the negligence of the plaintiff. There was evidence that an employee of the defendant was at the switch and knew it was broken when the plaintiff's intestate was distant one and one-fourth miles, that this employee could have turned the red light to the main line and failed to do so; that if he had done so,
(108) it could have been seen in time for the intestate to stop his train at the rate he was going.

If so, there was evidence that the failure to turn the red light to the main line was the proximate cause of the death of the intestate, and that notwithstanding the negligence of the plaintiff in failing to stop if he knew there was no light at the switch, that the defendant, by the exercise of ordinary care, could have averted the injury. It may be said that under the rules of the defendant, the absence of a light at the switch is notice of danger, and that if the intestate did not regard this, the display of a red light would not have caused him to stop. There is force in this view, but there may be a difference of opinion as to the conclusion. We think it would not be unreasonable to accept the other view, and conclude that if the intestate knew there was no light at the switch, he also knew it was the duty of the defendant to keep the track clear five minutes before his train reached the switch, and to display the red light if there was danger, and knowing these facts, he might proceed in the absence of a light, when he would not do so in the face of a red light, giving positive notice of danger.

The absence of a light would ordinarily indicate nothing except a failure to light the lamp, while a red light is a signal of danger.

"The law does not presume contributory negligence. It must be alleged and proven, and the defendant must show such facts, either omissions of such cautions or the doing of such acts, from which only one inference, to wit, the plaintiff's negligence, can be drawn, by men of ordinary reason and intelligence." *Farris v. R. R.*, 151 N. C., 489.

We also conclude that the motion to nonsuit ought to have been denied. The open switch and the collision raise a presumption of negligence (*Stewart v. R. R.*, 137 N. C., 689, and cases there cited), and where such a presumption is raised or a *prima facie* case is established, the jury is justified in finding negligence, unless "satisfied upon

all the evidence in the case that in fact there is no negligence," (109) as was said by *Justice Walker, Kornegay v. R. R.*, 154 N. C., 389.

There is also other evidence of negligence on the part of the defendant; two switches open or broken; the failure to maintain lights at the switch; the failure to keep the track clear, and the failure to notify the plaintiff's intestate of danger, as he approached the switch.

There is also evidence of negligence on the part of the intestate.

Under these circumstances, the fact upon which the decision of the case turned was proximate cause, and if there was a phase of the evidence that would justify the jury in finding that, although the plaintiff was negligent, the defendant had the last opportunity, the last clear chance to avoid the injury, it was the duty of the judge to submit the question to them. *Edge v. R. R.*, 153 N. C., 215, and cases there cited.

We have seen that the evidence presented this question. The jury could find from the evidence that an employee of the defendant was at the switch, and knew it was broken, and appreciated the danger to the approaching train when it was distant one and one-fourth miles; that he could have turned the red light to the main line in an instant, and that this would have been a warning of danger; that he failed to do so; that if he had done so the plaintiff's intestate could have seen the red light in time to stop the train before it reached the switch; that instead of doing so, he gave no signal until the train was in twenty-five yards of the switch, and then by waving a lantern some distance from the track and not across it, and if so, the jury could find that the negligence of the defendant was the proximate cause of the death of the intestate.

The jury could also reasonably find from the evidence that Rule 27, saying that "the absence of a signal at a place where a signal is usually displayed must be regarded as a stop signal," did not affect the right to recover because there was evidence that there was a light at the switch, and that the white light, a notice of safety, was turned to the main line. The plaintiff's intestate was killed about 2 o'clock a. m. J. C. Mercer, a witness for the defendant, testified that he went to the switch at 8 o'clock a. m., and that the white glass was turned to the main line. Between 2 o'clock and 6 o'clock (110) the switch, lamps and yards were in the possession and under the control of the agents of the defendant, and no witness was produced to show any change in conditions or that the lamp was touched after 2 o'clock after the time Mercer saw the white glass turned to the main line.

The case was submitted to the jury with great care, and the conten-

tions of the defendant were fairly presented. The presiding judge, among other things, charged the jury:

"If the jury shall find that witness Cole waved his lantern across the track of the approaching train of which Boney was engineer and Boney saw the signal, or with the exercise of ordinary care could have seen it, it was his duty to have stopped the engine, and if he could have done so in time to avoid his injury, then he was guilty of contributory negligence, and the jury will answer the second issue, Yes.

"If the jury shall find that Boney was running his train at a greater rate of speed than six miles per hour at the time he passed the switch, and shall further find that this was the proximate cause of the injury, then he was guilty of contributory negligence, and the jury will answer the second issue, Yes.

"If the jury shall find that Boney did not obey the rules set forth in the time-table, that he must approach the middle-yard cross-over and the switch where the accident occurred with his train under full control and expecting to find the track occupied, but in disregard of this rule approached the said switch and cross-over without having his train under full control (and this was the proximate cause of the injury), then he was guilty of contributory negligence, and the jury must answer the second issue, Yes.

"Even though the jury shall find that the defendant was guilty of negligence, yet if they shall find that Boney did not obey the rules set forth in the time-table as to the rate of speed and manner in which he should approach the middle-yard crossing and switch where the accident occurred (and this was the proximate cause of the injury),
(111) then he was guilty of contributory negligence, and the jury must answer the second issue, Yes."

We have examined each exception and find

No error.

WALKER, J., dissenting: Without discussing other rulings of the Court which I think were erroneous and entitle the defendant at least to a new trial, I will notice a few which go to the very root of the case, and, in my opinion, are palpably wrong and work great injustice to the defendant. A railroad company would be grossly derelict in its duty, both to the public and its employees, if it failed to adopt such rules and regulations for the running and operation of its trains as make for safety, and it follows that the servant, for whose guidance in the discharge of his important and hazardous duties these rules are made, must obey them, and if he fails to do so and is himself injured by reason of his disobedience, he is to be regarded in law as the author of his own injury, and if thereby he injures others, the railroad

company is liable to them, under the rule *respondeat superior,* and he is liable to the company for all damages caused by his negligence. *Holland v. R. R.,* 143 N. C., 435; *Haynes v. R. R.,* 143 N. C., 154. The intestate's death was caused, not by the negligence of the defendant, but by his own glaring disobedience of express orders and regulations, which if observed would have carried him on his train safely to his destination. He was not only disobedient, but his conduct was reckless, and, in consequence of it, he rode to his death. I think this appears from the plaintiff's evidence and the undisputed facts. The tragedy is regrettable, but the law must be administered with cold neutrality. With slight change, we may well repeat what we said in *Holland v. R. R., supra*: "The intestate was the one to whose keeping had been committed the safety of his comrades in the company's service (of the passengers on the train) and of his employer's property, and he was more responsible for it than any one else. He failed in the performance of his duty at the very moment when his obedience to orders and his vigilance were most required to prevent the resulting catastrophe. His negligence was ever present and the efficient and, indeed, the dominant cause of his injury and death, reaching to the effect and, therefore, proximate to it. To subject the defendant to a (112) recovery in such a case does not seem to be equitable, and would certainly contravene established principles of law. Plaintiff's death was caused, not by the defendant's negligence, but by his own disobedience of instructions." If a servant disregards the express directions of his master, and pursues his own way in performing his duties, the resultant injury to himself, if any, the law imputes to his own willful or negligent act, as the proximate cause, if not the only cause thereof. *Whitson v. Wrenn,* 134 N. C., 86; *Hicks v. Mfg. Co.,* 138 N. C., 319; *Stewart v. Carpet Co.,* 138 N. C., 60; *Biles v. R. R.,* 139 N. C., 532. The intestate simply did something which he was told not to do. He substituted his own will for that of his employer and his case falls within the maxim *volenti non fit injuria. Patterson v. Lumber Co.,* 145 N. C., 42. These principles are directly applicable to this case.

1. I think the motion to nonsuit should have been granted and for the following reasons: I will assume in the beginning that the red light was not displayed at the switch, and there is no evidence that the white, or safety light, was, so that the case must be considered as if there was no light. But that of itself is made a signal of danger, as much so as if the red light had been shown, and the duty of the intestate, by the very terms of the rule, was to stop his train. This was the mandate of the rule as much so as if there had been a red light there to warn him of danger. The order was not even to slow down or bring his train under control, but to stop at once, and herein is to be found the error

in the opinion of the Court as to proximate cause. If he had obeyed the rule and stopped, seeing that there was no light at the switch, the accident would have been a physical impossibility, for two trains, one at rest and the other moving away from it, could never collide. This is so very evident that I presume the Court should take judicial notice of it. It is as much an axiom in physics as that a man can not be in two widely separated places at one and the same time, and as judges, we have no right to close our eyes to the existence of such a fact and refuse to take notice of it without proof and a finding of the jury.

We have the right to use our common sense, experience and
(113) observation as to certain matters, and this is one of them. It is said there is no evidence that Boney did see that there was no light at the switch. That is not the question. It was his duty to see —to keep a constant lookout—especially at this place, and if he failed to do so, it is the same in law as if he had looked and seen. *Arrowood v. R. R.*, 126 N. C., 629; *Whitesides v. R. R.*, 128 N. C., 229. We have so held in cases without number, when charging a railroad company with responsibility for the negligence of its engineer, and the decision must apply here, unless we recede from the position taken in those cases. In *Pickett v. R. R.*, 117 N. C., 616, it is said: "If he (the engineer) had looked and stopped the train, the collision would have been prevented, notwithstanding the previous want of care (or negligence) on the part of the boy who was killed." And again, after citing and referring to numerous cases of this Court, theretofore decided, on the same point, the Court says: "It was repeatedly declared in those cases that it was negligence on the part of the engineer of a railway company to fail to exercise reasonable care in keeping a lookout, not only for stock and obstructions, but for apparently helpless or infirm human beings on the track, and that the failure to do so, supervening *after the negligence of another* (the alleged negligence of Cole), where persons or animals were exposed to danger, would be deemed the proximate cause of any resulting injury." If he did not actually see, he would, in law be taken to have seen, when he can see by looking, for he is not permitted to say, under such circumstances, that he did not look and, therefore, did not see. By the rules of the company and of the law, it was made his duty to keep a watchful lookout, and if he had looked he would have discovered, long before he reached the switch, that there were no lights burning there. If there was one, he would, by all the testimony, have seen it, and not seeing it, he was under a peremptory order to stop. He had no discretion in the matter. His duty was simply and solely one of obedience, and had he obeyed, the accident would not have occurred. What becomes of the doctrine of proximate cause? He knew where the switch was, for the gave the

station blow two miles away as he approached it, and the switch was between his train and the station. We have seen that he was negligent, if he could have known there was no light at the (114) switch, and did not know. But General Burnett, witness for the plaintiff, who was in the cab with him, testified that the track was straight for at least two miles, and that he looked long before they reached the switch and saw no light there. Lights, red or white, were displayed at the switch before that time, and in all this he agrees with the other witnesses. He looked when Boney blew for the station, being then a half a mile from the switch, and saw no lights. There is no evidence to the contrary of this. No witness testified that he saw a white light, and the absence of such a light was a signal of danger and required Boney to stop his train. Speaking of a situation similar to this, the Court (*Connor, J.*), in *Haynes v. R. R.*, 143 N. C., at page 164, said: "Assuming that the light was out, or, as expressed by some of the witnesses, that the switch showed 'a dead light,' the rule imposed upon the plaintiff's testator the duty of treating it as a danger signal, and directed him how to act. The evidence was plenary that he knew the rule, and, if in force, *was under obligation to obey it.*" But he was forbidden to run his train there at a greater speed than six miles an hour, and if he had been running at that rate of speed, he could surely have discovered as he approached the switch, that there was no light there and have easily stopped his train before entering the switch at the cross-over, but at that very time his speed, according to all the proof, was at least thirty-five miles an hour. His death, in any view of the evidence, as there is really no disputed fact upon this branch of the case, was due to his own negligence in two respects: 1. He did not heed the danger signal at the switch, if he saw it. 2. If he did not see it, he was negligent in not looking for it, and, in law, the same result follows. 3. He was running his train at a reckless rate of speed, in open violation of the rule fixing the rate at six miles an hour and a further rule requiring "trains to approach junctions prepared to stop," and "all trains passing Rocky Mount to approach the passenger station, main yard cross-over and middle-yard cross-over under full control, expecting to find the track occupied," that is, impassable. If he had obeyed any one of these rules, the accident would not have occurred, but instead of doing so, he ran his train almost to its (115) speed limit and nearly seven times as fast as he was authorized to do. Is proximate cause, in a case like this, a question of fact or of law? One of these rules required that he should approach the switch with his engine under full control, as if expecting to encounter danger ahead, and another that he should be prepared to stop unless both switches and signals are right and the track is clear. These rules were

adopted to prevent just such a catastrophe as this one, and, too, for the engineer's safety, and yet this company is held liable to him for his own willful and daring violation of them. He took his life in his own hands, but the road must pay for it. It is impossible to consider the evidence, as the law regards it, without seeing at once that the intestate brought disaster upon himself. Suppose a man had been lying drunk and helpless on the track at the switch and was run over and killed, would we hesitate to say, under our decisions and the *admitted* facts of his case, that the negligence of the engineer was, in law, the proximate cause of his death? How can one rule be applied to the engineer, when representing the railroad, and another man is killed, and a different one when, under identically the same circumstances, he is killed—his negligence being the same in both cases? There is but one answer to this question. The same rule applies alike to the two cases, unless our former decisions are founded upon the wrong principle and should be overruled. We must exonerate the defendant in this case or reverse a long line of decisions by this Court.

I have so far discussed the case upon the motion for nonsuit and the admitted facts, or upon the plaintiff's own evidence, favorably construed for her, and when thus considered, there is still another view of the case which conclusively makes against the plaintiff and defeats her right to recover. H. T. Cole, the engineer of the other train, ran down the track about twenty-five yards, and with his lantern signaled Boney to stop. Boney knew it was a *stop* signal, because plaintiff's witness, General Burnett, testified that when 200 to 300 yards from the switch he answered it with two short blasts of the whistle, shut off steam and applied the emergency brakes. Do we need a jury to tell us
(116) that, if he had been running at the proper speed—six miles an hour—he could have stopped his train within 150 yards, yes, within fifty yards? We know it. The evidence is that he could have stopped it, with the appliances at hand, within fifty feet, and this was not denied on the argument. But the speed of the train was so excessive that he was unable to stop, and that was the only cause of the intestate's death. By the rule he was ordered to have his train well in hand, so that he could stop in any emergency, if switches or lights were wrong or the track was blocked. We *know* that he could have done so had he been so minded, but Burnett, plaintiff's witness, testified that Boney told him several weeks before the accident occurred that he had orders to run slow at that place, but that he increased the speed of his train from time to time until it reached the speed of thirty-five or forty miles an hour, at which it was running on the fateful night, and, too, by the switch with a danger signal displayed. After he had received and acknowledged the lamp signal he had, by Burnett's testimony, 200

yards within which to stop his train before reaching the switch, and 75 yards beyond the switch where the collision occurred. In all the cases heard by this Court since I have sat in it, and there are many of them, there has never been presented such an example of reckless indifference on the part of an engineer to his own safety and that of his passengers and fellow servants. He deliberately violated the rule of the company, after telling Burnett that it had been issued to him, and persistently continued to do so, and did it, too, almost with the very words of the rule on his lips when talking to Burnett and while passing that very place, and yet this defendant must pay a heavy penalty for his flagrant disobedience and, too, pay it to him or his representatives. This can not be law, *because it is not just,* and such a ruling is utterly at variance with well-considered decisions of this Court holding railroad companies liable to third persons for similar acts of negligence by engineers, but of not so grave, serious and pronounced a character. We have heretofore charged the company because such negligence we then considered to be the proximate cause of the injury, as in *Arrowood's case* and *Pickett's case,* and the long train of cases following them, and by this decision we discharge the engineer and, in effect, pay him for his own wrong. If in any one of the (117) cases just mentioned the road had sued the engineer, after being held responsible for his negligence and mulcted in damages, could it have been entitled to recover? I think so. We have so intimated, and even held, in several of the cases. If so, how can the engineer in this case recover?

2. But if the nonsuit should not have been granted, the court erred in refusing to give the instructions requested. I will lay special stress and emphasis on one only—the seventh: "If the jury shall find from the evidence that at the time No. 82, the train being run by Boney, deceased, was approaching the switch into which he ran and the switch had no lights, either red or white, and Mr. Boney knew there were no lights, either red or white, as a signal at the switch at the time, and he failed to slacken his speed and stop his engine, then he was guilty of contributory negligence, and the jury will answer the second issue, Yes." It is said in the opinion of the Court that this instruction should not have been given; first, because there is no averment in the answer upon which it can be based; and second, because it is predicated on the fact that the intestate *knew* there was no light, of which there was no evidence. We will consider these reasons in inverse order. As to the intestate's knowledge that there was no light at the switch, it must be remembered that the instruction asks the jury to find the fact of knowledge, and does not assume that Boney had such knowledge. The only question, therefore, is, was there any evidence of knowledge? We have

shown, I think, that it makes no difference, *in law,* whether he had actual knowledge or not, if by the exercise of the care exacted of him, he could have had it. But Burnett, plaintiff's own witness, testified that *he* looked and did not see any light. Could the jury infer from this fact and the further fact that it was Boney's duty to keep a lookout, that he did so, and if Burnett saw no light, that he saw none? But there is other evidence, far more than a scintilla, that Boney was looking, and what is it? He saw the signal lantern of Cole swaying to and fro, and he would not have seen it if he had not been looking. Another fact, he blew for the station as he saw its lights, and was, therefore, looking ahead. Boney was familiar with the line; he knew he was within (118) the yard limits, because there were several tracks and indications all around him showing that fact, and those on the engine showed by their testimony that they knew where the switch was with reference to the position of the approaching train. There are other facts and circumstances which tend to prove knowledge by Boney in regard to the light at the switch. A man knows as well when he does not see a thing, as when he does see it. Am I wrong in making this common sense statement? If the light was not in sight, it was his duty to stop, and his failure to do so was not only gross negligence, but the decisive and proximate cause of his death, for if he had obeyed the rule and stopped, there would have been no collision. *He* had the last clear chance. No light being as much of a danger signal as a red light, it was his plain duty to so regard it. It was for his employer to make this rule and for him to obey it. It turns out that it was a wise rule, and an observance of it would have saved Boney's life. We have held that, under such circumstances, the employer is not liable to the servant because the latter has seen fit to disregard orders and act upon his own judgment, and it would not be right to hold the master responsible for the consequences. *Patterson v. Lumber Co.,* 145 N. C., 42; *Whitson v. Wrenn,* 134 N. C., 86. It will not do to say that his failure to stop the train was not the proximate cause; in the first place, because it was as a matter of law; and in the second, because if there was any duty resting upon Cole to turn the red light, when no light was itself a danger signal, and I think there clearly was not, Cole did give him a signal equally as good and which he received in full time to stop his train if he had been running at a proper speed. He answered this signal and could easily have brought his train to a full stop after doing so, but for his willful disregard of orders as to speed. The company, by its rules, had prescribed a safe course for Boney to pursue, and it would have proved to be a most effective one. It was not required to provide more than one. If Boney had kept his engine under control, as if expecting to find the road blocked and the junction and switches in

a dangerous condition—and this was what he had been ordered, in plain language to do—he did not require any signal from Cole, as this duty was enjoined upon him without regard to the signal (119) lights at the switch. Not only did he have this peremptory order, but Burnett testified that a light at the switch could have been seen two miles away on this straight track and not seeing a light, as there was none there, his duty was to stop and ascertain the cause of this unusual situation. The opinion of the Court is based upon the erroneous hypothesis that Boney was entitled to have two signals of danger. *Edwards v. R. R.*, 132 N. C., 99. The company had the right to make the absence of a light a danger signal, and yet it is argued that even if Boney saw there was no light at the switch, he was entitled to have the red light turned to the track by Cole. The force of this reasoning is conceded in the opinion, and the answer to it is that Boney knew that, by the rules, the track must be kept clear five minutes before his train reached the switch. But that order was made in the interest of greater safety, and was to be executed by other employees, and Boney had no right to rely on its observance, for he was commanded to proceed with his train under control as if it had been violated and proper precautions had not been taken at the switch, and the track ahead was blocked so that he could not proceed on his way. By all the evidence, he ran in flagrant disobedience of orders, and at the rate of thirty-five miles an hour, into the switch and cross-over, and right by a danger signal. This is his case in a nutshell. The fallacy of the entire argument of the Court is that the premises are not justified by the admitted facts and the reasoning practically ignores the legal effect of the provisions of the rule, that the speed must not be in excess of six miles an hour; that no light shall be as much a danger signal as a red light, and that the engine must be kept under control, so that the engineer can guard against danger in any possible emergency. The instructions given by the court and copied in the opinion were erroneous because the first one required the jury to find that Boney could have stopped his train, then running at a high rate of speed, after seeing the signal of Cole, whereas they should have been told that if he was unable to stop it by reason of the excessive speed, and could have stopped it if he had been running at the prescribed rate, his own act in disobeying the rule as to speed was the proximate cause of the injury, for the Court so (120) held in *Norton v. R. R.*, 122 N. C., 911, and numerous other cases. The other instructions were faulty, in that they required the jury to find whether Boney's disregard of the rules was the proximate cause of his death, whereas the court should have told the jury that, as as he was warned of the danger by the absence of a light, his failure to stop was the proximate cause of his death, as much so as if a red

light had been displayed, and besides that, his failure to observe the rule requiring him to have his engine under control as if the track were blocked, and so that he could stop it if the track was not clear, was itself the direct cause of his death, for we have held in *Norton's case* and in many others that if the engineer deprives himself of the ability to stop his train by the disobedience of rules or because the train is being run at an excessive speed, it makes the company liable for any resulting injury to others, as the engineer's negligent act is "continuing" in its nature up to the very moment of the injury, and is, therefore, its proximate cause. If he had not been negligent in this way, he would have had the last clear chance to avoid the injury, and for this reason so would the company, his employer, when defendant has been charged with liability. *Edwards v. R. R.*, 129 N. C., 78. With greater reason does the law deny to him or his representatives the right of recovery, when his own negligent act caused the injury. My conclusion is that the plaintiff should, for the reasons stated, have been nonsuited, or that at least there should be a new trial, so that the case may again be tried according to correct principles; otherwise the defendant will be made to suffer vicariously for the fault of its engineer by compensating his representatives, contrary to the maxim of our law, *Nemo punitur pro alieno delicto.* Wingate's Maxims, 336.

But a difference is supposed to exist between a positive and a negative signal of danger. I think this is based upon a misapprehension of the rule, and that there can be no such distinction. The question is not what Boney thought the signal should be, but what it is. The "red light" and "no light" are made by the rule positive notice of danger.

(121) The mere fact that "no light" involves the negation of a fact does not change the character of the signal from a positive to a negative one, for the rule is plain, *positive* and peremptory in its mandate that whether there is a red light or no light, or even "a light imperfectly displayed," the engineer must stop and, in case there is no light, ascertain the cause and report to the superintendent. So that a red light, no light, or an imperfect light are all equally "positive" stop signals, and so declared to be in express and unmistakable terms. But if, under such a rule, an engineer could have any margin of discretion in the matter, that avenue to success is closed to the plaintiff by another mandatory order contained in Rule 106: "In all cases of doubt or uncertainty, the safe course must be taken and no risks run." So that if Boney had any room for doubt or uncertainty, he should have stopped his train. There are two other similar rules. No. 105: "Both conductors and enginemen are responsible for the safety of their trains and, under conditions not provided for by the rules, must take every precaution for their protection." No. 707: "The company does not

wish, nor expect, its employees to incur any risks whatever from which, by exercise of their own judgment and by personal care, they can protect themselves, but enjoins them to take time in all cases to do their duty in safety, whether they may, at the time, be acting under orders of their superiors or otherwise."

It is suggested that the defendant has not sufficiently pleaded the negligence of Boney in order to rely on it. This seems to me a very strained construction of the answer, one that is contrary to the express direction of the statute: "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties." Pell's Revisal, sec. 495 and notes. The common law rule is modified and every reasonable intendment is now made in favor of the pleader. *Wright v. Insurance Co.,* 138 N. C., 488. We strictly enforced this provision in favor of the plaintiff, when charging negligence, against the objection of the defendant in *Knott v. R. R.,* 142 N. C., 238, and the case is an authority here. The answer, perhaps, should have been more full and explicit, but I think it quite sufficient, under the statute, to present the defense. It distinctly avers that Boney had a copy (122) of the rules, regulations and schedule, knew, or should have known, their contents, and that it was his duty to observe and obey them, while he failed to do so, and was violating the rule when he was killed. It is true defendant pleads specially the failure to heed Cole's signal with the lamp, but the answer embraces within its general scope an averment of negligence in disobeying the rules, and this is all set up as a separate defense, the purpose of the defendant to plead such contributory negligence, if necessary to do so in this case, being apparent. This answer is certainly as comprehensive in its allegations as was the complaint in the *Knott case.* No such point is hinted at in the plaintiff's brief, nor was it mentioned in the oral argument. Why? Because plaintiff's counsel were well apprised by the answer of the true defense. Their brief shows it, for it deals with all the questions now raised by the defendant and as if properly pleaded. There was no objection to any of the evidence as being irrelevant because addressed to the defenses that there was a stop signal at the switch, and that Boney did not, under the admitted circumstances, handle his train as required by the rules. But whether his negligence in this respect is pleaded or not, all the questions are presented by the denial of the answer. If the breaking of the switch was not an unavoidable accident, Boney, under a known rule, was warned of the situation by a danger signal which he was as much bound to obey, as we have seen, as if the red light had been in plain view. The defendant had safeguarded the place and neutralized its negligence, if any, by displaying a danger signal, which Boney was

required to obey by stopping his train. If there had been a red light there, and Boney had disregarded it and been killed, would not his death be imputed to his own wrongful act as the proximate and sole cause thereof? I have shown that "no light" or an "imperfect light" was, by the very terms of the rule, as much a danger signal as a red light, and the same result must flow from his failure to so regard it. If the fireman had been killed at the same place, instead of Boney, would this Court listen to a plea, in an action against the defendant for causing his death, that Boney had failed to obey its rules, or that he was (123) not sufficiently acquainted with the road and surroundings to know that he was approaching the switch and middle-yard cross-over, where he was killed? I think not, for the reason that Boney's negligence, in such a case, would be held, in law, as the *decisive* and proximate cause of the fireman's death and the sole cause, however well the defendant had safeguarded the switch. There is no difference, in law, between the two cases.

It is further suggested that the witness, J. C. Mercer, testified that when he was there the white glass was turned to the track. This was not evidence that there was a white light burning at night. It tended to prove the contrary and, at most, was merely conjectural. *Byrd v. Express Co.*, 139 N. C., 273 (Anno. Ed.). It was no more evidence of a white light than the fact that the red glass was turned to the track would be of a red light. It is not the glass that gives the signal, but the light that is in it. Mercer did not say that there was a light in the glass, and if he had so stated, the plaintiff's own witness, General Burnett, testified that he saw no light there, and that a light could have been seen if one had been at the switch. *Edwards v. R. R.*, 129 N. C., 78. So in this conflict of testimony, if there is any as between Burnett and Mercer, the defendant was entitled to the finding of the jury as to whether there was a light or not, and if there was none, then to the other finding whether Boney knew it (or could have known it if he had looked, which is the same thing), for this was the form of the prayer. The defendant did not assume, in the requested instruction, that there was no light at the switch, nor that Boney knew there was none or could have known it, but asked that both inquiries be submitted to the jury for their finding of the truth in regard to it. Was it not plainly entitled to the instruction, even if the "white glass was turned to the track," and this is evidence that there was a light? It was not by any means conclusive and is not so treated in the Court's opinion.

My conclusion is that the plaintiff's intestate caused his own death by reckless conduct on his part. He did what his employer told him not to do, and however unfortunate the result, the defendant is not responsible for it, if we follow our former unanimous rulings. *Whitson v.*

Wrenn, and other cases, *supra.* They are all supported by many (124) cases in this Court and by numerous decisions in other jurisdictions.

BROWN, J., concurs in this dissenting opinion.

Cited: Kearney v. R. R., 158 N. C., 546; *Fry v. R. R.,* 159 N. C., 363; *Dellinger v. Electric R. R.,* 160 N. C., 542; *In re Smith,* 163 N. C., 466; *Steeley v. Lumber Co.,* 165 N. C., 30; *Boyd v. Leatherwood, ibid.,* 617; *Buchanan v. Lumber Co.,* 168 N. C., 47; *Horne v. R. R.,* 170 N. C., 650.

S. B. ALEXANDER, JR., v. NORTH CAROLINA SAVINGS BANK AND TRUST COMPANY.

(Filed 3 May, 1911.)

1. **Corporations—Subscriptions to Stock—Conditions—Collateral Agreement.**

Collateral agreement to a subscription of stock in the formation of a corporation which renders the subscription void unless the company has a paid-in capital in a certain sum is valid and binding.

2. **Same—Waiver.**

A waiver must be made with knowledge of the conditions under which it is sought to be established, so that the intention to waive a right may in some way appear, and when there is contradictory evidence as to such conditions and intention the question is a proper one for the jury.

3. **Same—Proxy.**

A subscriber to shares of stock in a corporation being organized upon agreement that his subscription will not be binding upon him if the capital be less than a certain amount, is not held to have waived his rights by subsequently being represented by proxy at a stockholders' meeting after the capitalization had been fixed in a less amount, when he was reasonably unaware of that fact and had been misled by the acts of the corporation.

CLARK, C. J., did not sit.

APPEAL by defendant from *Long, J.,* at November Term, 1910, of MECKLENBURG.

Thos. W. Alexander for plaintiff.
T. J. Gold and Stewart & MacRae for defendant.

PER CURIAM. This action was brought to recover the amount of a promissory note, two hundred and fifty dollars, which had been given by the plaintiff to the defendant in part payment of the (125)

purchase price of stock in the defendant company, and which was afterwards paid to it by the plaintiff, and also to have surrendered for cancellation a note for a like amount given by the plaintiff to the defendant for the balance of the purchase money. Plaintiff had contracted to buy the stock and to pay for it five hundred dollars, but, as he alleged, upon the express condition that liability on the notes should not accrue until the defendant had received actual subscriptions to its capital stock in the amount of two hundred and fifty thousand dollars, and that if that amount was not subscribed, the notes should be void and of no effect. This condition or stipulation plaintiff alleged was contained in a collateral and contemporaneous written instrument which had been lost, and the parties respectively offered proof as to its contents, the plaintiff's evidence tending to show that there was such a stipulation in the writing and the defendant's the contrary, and that the reference was not to subscribed but to authorized capital stock. The court submitted issues to the jury, which, with the answers thereto, are as follows: 1. Was the defendant, the North Carolina Bank and Trust Company, chartered by special act of the Legislature, and if so, when? Answer: Yes, by Articles of Association filed with the Secretary of State and certified by him 9 June, 1906, as per page one, book of company filed in evidence; and by Act of Assembly ratified 15 March, 1907; also see section 5 as amended and ratified, Special Session, Acts of General Assembly, 27 July, 1908, all of which is answered as set out in evidence. 2. Did the plaintiff subscribe for ten shares of the capital stock of the par value of $100 each, in the defendant company, and if so, at what time? Answer: Yes, July, 1906. 3. Did the plaintiff pay into defendant company $250 upon his subscription to the defendant and in response to the first call? Answer: Yes, on the 5th day of August, 1906. 4. Did the plaintiff execute note for $250 10 September, 1907, for second installment on subscription? Answer: Yes. 5. Did the plaintiff subscribe for stock in the defendant company upon the condition and assurance that the subscribed capital stock would be $250,000, and that his subscription thereto was not to be binding upon him unless (126) and until the $250,000 was actually subscribed to the stock of the company? Answer: Yes. 6. If so, did the plaintiff waive the alleged condition that the subscription to the capital stock should amount to at least $250,000? Answer: No. 7. Did the defendant company fail to secure the amount of $250,000 of *bona fide* subscriptions to the capital stock, and did the defendant reduce its capital stock from $250,000, as alleged in the complaint? Answer: Yes. 8. Did the defendant release *bona fide,* solvent subscribers to its capital stock without the knowledge or consent of the plaintiff, and after the plaintiff had made his subscription to the stock under the conditions set forth

in this complaint? Answer: Yes. 9. Has there been a fundamental change in the charter of incorporation of the defendant company since the date of plaintiff's subscription, without the knowledge or consent of the plaintiff? Answer: Yes. 10. In what amount, if any, is the defendant indebted to the plaintiff? Answer: $250, with interest from 5 August, 1906.

The defendant contended that if there was any such condition annexed to the subscription of the plaintiff, it had been waived by him in that, after he had learned that the defendant had not secured $250,000 of subscriptions to its stock, he appointed one Williamson, as his proxy, to represent him at a corporate meeting, and that he was so represented. At the meeting the stockholders of the company released certain subscribers, including the plaintiff, so that its stock was greatly reduced. At no time did the subscribed stock equal the stipulated amount or as much as half of it. The defendant contended that while he gave the proxy to Williamson, he had been induced, at the time, by correspondence with the defendant, to believe that $250,000 had been subscribed; that the defendant's letter-heads so indicated, and that relying upon this as the truth, he acted as he did. He also contended that there was no sufficient evidence to show that Williamson ever accepted the proxy and attended the meeting. The proxy was found among the papers of the defendant. His Honor, *Judge Long,* submitted the case to the jury upon the issues and conflicting evidence, under a charge exceptionally full, clear and just. The material issues involved largely matters of fact, and were peculiarly fit for the consideration and decision of the jury, there being but few, and they simple propo- (127) sitions of law. The jury found as facts that the plaintiff's subscription to the stock was conditional, and that there had been no waiver. There was nothing unlawful in the condition. The parties had the right so to contract if they so desired. This is frankly conceded in the defendant's brief. *Printing Co. v. McAden,* 131 N. C., 183; *Penniman v. Alexander,* 111 N. C., 428; *Kelly v. Oliver,* 113 N. C., 443. Upon the subject of waiver, the law seems to be well settled. "A waiver is an intentional relinquishment of a known right. Waiver is voluntary and implies an election to dispense with something of value, or forego some advantage which the party waiving it might, at his option, have demanded or insisted upon. A waiver of an agreement or of a condition may either be by word of mouth, or it may arise out of such acts and conduct of the party as would naturally and properly give rise to an inference that he intends to waive the agreement or condition. A waiver takes place where a man dispenses with the performance of something which he has a right to exact. A man may do that not only by saying that he dispenses with it, that he excuses the performance, or he may

do it as effectually by conduct which naturally and justly leads the other party to believe that he dispenses with it. There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other." Herman on Estoppel, sec. 825. "There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts which will enable him to take effectual action for the enforcement of such rights. No one can acquiesce in a wrong while ignorant that it has been committed, and that the effect of his action will be to confirm it. To constitute a waiver on the part of one party to a contract, of the performance of the contract on the part of the other party, it must be shown that the party alleged to have waived his rights had knowledge of what the other party had done contrary to the terms of the contract and what part thereof he had failed to perform; and if the contract is affirmed in ignorance of facts by which it is invalidated, there is no waiver of the right to rescind. . . . The burden of proving knowl-
(128) edge is on one who relies upon a waiver, and such knowledge must be plainly made to appear. Certainly a presumption of waiver can not be rested on a presumption that the right alleged to have been waived was known. The validity of a waiver requires that it shall have been made intentionally and voluntarily. Indeed, voluntary choice is of the essence of waiver, and the view that waiver is a legal result operating upon a certain state of facts, independent of intent, has been declared to be without foundation. It has been held that a waiver never occurs unless intended, or where the act relied on ought in equity to estop the party from denying it." 29 A. & E. Enc. of Law (2 Ed.), 1093. The conduct of a party may sometimes be such as to require the courts to treat it as a waiver, ratification or estoppel, without regard to actual knowledge of the facts, but we have no such case here.

We conclude that the case has been tried in, at least, substantial accordance with the law and, if any technical error there be, it was not prejudicial, and is not, therefore, such as entitles the defendant to a reversal of the judgment which was entered for the plaintiff upon the verdict. *Hulse v. Brantley,* 110 N. C., 134.

No error.

CLARK, C. J., not sitting.

A. COSTNER ET AL. v. PIEDMONT COTTON MILLS COMPANY.

(Filed 3 May, 1911.)

1. **Trusts and Trustees—Trust Funds—Wrongful Loan.**

A loan of a trust fund by a trustee to a business or manufacturing enterprise without order of court is wrongful.

2. **Same—Action of Debt—In Pari Delicto.**

A trustee who has wrongfully loaned his trust funds may maintain his action to recover the same.

3. **Same—Priorities—Borrower—Receivership—Rights of Creditors.**

A trustee who has loaned his trust funds to a manufacturing corporation, the funds being used by the latter to purchase raw material and in the payment of labor, can acquire no superiority of lien upon the assets of the corporation after insolvency or receivership.

4. **Trusts and Trustees—Trust Funds—Wrongful Loan—Subrogation.**

The right of subrogation does not exist in behalf of a trust fund which has been wrongfully loaned by a trustee to a corporation afterwards becoming insolvent.

5. **Same—Bankruptcy—Rights of Creditors.**

The *cestuis qui trustent* have their remedy against their trustee who has wrongfully loaned the trust funds, but neither they nor the trustee can recoup themselves for any loss at the expense of the other creditors of the borrower who has become insolvent and is in bankruptcy.

6. **Trusts and Trustees—Trust Funds—Wrongful Loan—Recoupment.**

The *cestuis qui trustent* can not follow funds wrongfully loaned by their trustee as against the rights of other creditors of the bankrupt borrower.

APPEAL by L. N. Rudisill and C. P. Anthony from *Long, J.,* (129) at September Term, 1910, of LINCOLN.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

A. L. Quickel for appellants.
W. C. Feimster for appellee.

CLARK, C. J. The plaintiff Costner loaned a trust fund of $1,400, which he held as trustee in bankruptcy, to the defendant Cotton Mills Company, of which he was secretary and treasurer and one of the directors. The defendant company becoming insolvent, was placed in the hands of a receiver, and this is an appeal from the order of the judge allowing the motion made by Costner to have the aforesaid sum of $1,400 declared a first lien to be paid out of the first proceeds in the hands of a receiver.

The investment of the trust fund by Costner was without the order of any court and was wrongful. We can not, however, assent to the proposition of the appellant that the plaintiff is entitled to recover nothing on account of said debt on the ground that the parties
(130) are in *pari delicto.* The defendant company received and used the money, and it would be against good conscience to hold that it is not liable for the debt. It borrowed the money and used it. It does not lie in its mouth to say now that the plaintiff had no right to lend it. *Wetmore v. Porter,* 92 N. Y., 76; *Zimmerman v. Kinkle,* 108 N. Y., 287.

On the other hand we know of no principle upon which the plaintiff, who has made a wrongful conversion of trust funds, is entitled to any priority in payment over other creditors of an insolvent debtor. This would be to reward him and save him harmless on account of his own wrongdoing. It is true that part of the money was used by the defendant company in the payment of employees, and a part in the purchase of coal which was sold by the receiver and part in the purchase of cotton, which has been spun up into yarn. The payment of the employees was made more than sixty days prior to the receivership, and even if there was right to subrogation there would be no priority as to that. But independent of that, the right of subrogation does not exist in behalf of a trust fund which has been wrongfully loaned by a trustee. It is simply a debt, which like any other debt must share in the distribution in its class, and the *cestuis que trustent* must look to the trustee to recover any shortage in the fund, resulting from his wrongful act. Neither they nor the trustees can recoup themselves for any loss at the expense of the other creditors of the debtor.

The right of a *cestui qui trust* to follow the fund exists only against the trustee himself or a third party who has the fund in hand, or against the property bought therewith. This right does not exist as against the other creditors of one who has borrowed the money and spent it. The right of subrogation is to subject the indebtedness due the trustee by reason of such loan in priority to other creditors of the trustee, but not in priority to other creditors of the debtor to the trustee. Here there can be no subrogation for the further reason that Costner has paid his *cestuis qui trustent,* and he has no right of subrogation because of any application made by the borrower of the money borrowed. His rights certainly are no greater nor less than if he had loaned his own
(131) money.

The judgment must be set aside and the cause remanded to the end that the debt may receive its *pro rata* part in the distribution of the assets of the insolvent corporation in the debts of its class.

Reversed.

J. W. ANDERSON v. AMERICAN SUBURBAN CORPORATION.

(Filed 3 May, 1911.)

1. **Written Contracts—Deeds and Conveyances—Bonds for Title—Misrepresentations of Improvements—Parol Evidence.**

Parol evidence that a development company induced the sale of lots platted on its land to purchasers under contract to convey, by guaranteeing certain improvements to be made within a year which would materially affect the desirability of the lots, is consistent with the written contract which specifies the terms of payment and the restrictions and stipulations under which they may acquire the deed.

2. **Written Contracts—Parol Evidence—Consistency—Interpretation.**

When the written and contemporaneous parol parts of a contract are consistent, and the law does not require the latter to be in writing, both will be considered in ascertaining what the entire agreement between the parties was.

3. **Same—Fraud—Rescission—Measure of Damages.**

Upon the failure of a development company to comply with its guaranteed promise of improvements to be made within a year, material to the desirability of its property platted off in lots and relied upon by a purchaser under a bond for title, the purchaser may maintain his action to set aside the contract and recover the money he has paid thereunder, with interest.

4. **Same—Deeds and Conveyances—Principal and Agent—Respondeat Superior.**

In this case advertisements of a city development company were put in evidence that certain improvements were to be made materially affecting the value of the lots offered for sale, and of instructions given to agents to that effect, which called upon would-be purchasers to get information from its agents, who would see them upon request and exhibit the property: *Held*, sufficient evidence of the agents' authority to bind the company by representations accordingly made.

5. **Deeds and Conveyances—Bond for Title—Assignment to Agent—Principal's Misrepresentation—Rights of Agent—Subrogation.**

When an agent of a land development company has honestly made representations as an inducement for the sale of its lots under a contract to convey, and his principal fails to perform its promise, he may have the purchaser assign the contract to him, upon a sufficient consideration, and maintain his action thereon against his principal.

APPEAL from *Daniels, J.*, at January Term, 1911, of GUILFORD. (132)

This issue was submitted: Is the defendant indebted to the plaintiff? If so, in what amount? Answer: Yes, in the amount of seven hundred dollars and six per cent interest from the time indicated in the complaint.

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

A. L. Brooks and C. A. Hall for plaintiff.
Justice & Broadhurst for defendant.

BROWN, J. There is evidence tending to prove that Dr. Z. T. Brooks contracted to buy ten lots of land of the defendant of a tract which the defendant had purchased and divided up in lots and was offering them for sale through its agent Anderson, the present plaintiff. The land was situated near the suburbs of Greensboro.

The agreement in writing is entitled "Bond for a Deed," and is signed by defendant and Z. T. Brooks. It contains a number of stipulations and restrictions which it is unnecessary to set out.

The plaintiff was permitted to offer evidence that he was the agent of the defendant, and that as such and with defendant's knowledge he guaranteed to Dr. Z. T. Brooks that if he would purchase said lots and give his obligation therefor that the defendant corporation would guarantee to build a street car line to and make certain improvements upon the property sought to be sold within twelve months from the signing of the contract, and that if the improvements were not so made that
(133) his money would be refunded and the contract canceled. With this understanding and agreement Dr. Z. T. Brooks entered into the contract for the purchase of the lots and paid $550 thereunder. At the expiration of twelve months the defendant corporation had not built the street car line as guaranteed, had not made the improvements connected with the lots, to wit: put in granolithic sidewalks, extended the water main and other improvements guaranteed, whereupon Dr. Z. T. Brooks demanded of the defendant the return of the money paid, $550, and a cancellation of the contract. The company refused this demand, and the plaintiff, J. W. Anderson, himself made demand upon the company to carry out its contract with Dr. Z. T. Brooks. Upon their refusal to do so he notified them that he would take an assignment of the contract from Dr. Z. T. Brooks, pay the additional $150 then due upon same, and sue the defendant company for the total amount of $700 unjustly held by them. Dr. Z. T. Brooks thereupon assigned these several contracts to the plaintiff, and with the knowledge of all the facts the defendant corporation accepted the assignment and substituted the plaintiff as assignee to all the rights of Dr. Z. T. Brooks under the contract.

There are eight assignments of error set out in the record, and we think six of them relate to the competency of the evidence tending to prove a parol contract or guarantee on the part of the defendant that if Brooks would buy the lots the defendant would build the car line and make the improvements referred to.

We are of opinion that the evidence admitted does not tend to con-

tradict or vary the paper-writing executed by Brooks and the defendant, the terms of which are confined to the payments, restrictions and stipulations under which Brooks was to hold the property.

The agreement to extend the street car line, put in granolithic walks and other improvements was a separate and distinct contract, or representation amounting to a contract, and was not required to be in writing. Such evidence did not in the least contradict or vary the terms of the written instrument, but is consistent with it and both can stand together.

The principle is well expressed in *Kernodle v. Williams,* 153 N. C., 475, citing *Nissen v. Mining Co.,* 104 N. C., 310, as fol- (134) lows: "While it is true that a contemporaneous parol agreement is not competent to vary, alter or contradict the 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."

These collateral agreements, which do not contradict the writing, but are entirely consistent with it, are generally enforceable, and may be proved by parol, notwithstanding the rule excluding parol evidence to vary or contradict the terms of the contract. *Evans v. Freeman,* 142 N. C., 61; *Penniman v. Alexander,* 111 N. C., 427; *Typewriter Co. v. Hardware Co.,* 143 N. C., 97; *Hughes v. Crocker,* 148 N. C., 318; *Kelly v. Oliver,* 113 N. C., 442.

The seventh assignment of error is that the court erred in charging the jury, as appears in exception number twelve, and in submitting to the jury the question as to whether the plaintiff was authorized to make Z. T. Brooks the representations which the plaintiff alleges he did make when there was not sufficient evidence to go to the jury that the defendant had authorized any such representations to be made.

There is abundant evidence to justify the court in submitting to the jury the question as to how far defendant's principal officers knew of and authorized such representations, such as newspaper advertisements by the defendant, printed cards and the like. As a sample of one advertisement we note the following: "Watch the new town grow. Look at Piedmont Heights lots before you purchase. Listen to our representatives who will call upon you to explain our proposition and tell you what we propose and guarantee to do, and it will make you money. Water pipes have arrived and will be distributed over the property in a few days and be laid. The cars will be running within twelve months or your money refunded. The company's representatives are R. Y. Zachary, E. W. Wilcox, J. W. Anderson, T. N. Ramsey, W. S. Mallory, D. R. Creecy, Jr. We are already making improvements to the lots equal to any in the heart of the city. Go out and investigate, it costs you nothing to look. Call up the office over phone No. 932, and

(135) the company's representatives will take you out and show you the property. Piedmont Heights Co., room 308, City National Bank Building."

There is also evidence that the president of defendant company gave to the plaintiff, who was then acting as its sales agent, a card for exhibition to purchasers which reads as follows:

Piedmont Heights. Lots $240 to $290. Terms $10 cash and $5 per month. No interest whatever, and no taxes until paid for in full. Free deed in case of death. Electric cars, city water, granolithic sidewalks, etc., guaranteed within 12 months. American Suburban Corporation, Room 308 City National Bank Building, Greensboro, N. C. Telephone 932. Presented by J. W. Anderson, agent.

The law would be untrue to itself if it permitted corporations engaged in developing and selling property to publish such advertisements and issue such cards, to sell the lots, receive the purchase money and then repudiate the acts of its agents as unauthorized.

As said by *Mr. Justice Rodman:* "A corporation can only act through its agents, and must be responsible for their acts. It is of the greatest public importance that it should be so. If a manufacturing or trading corporation is not responsible for the false and fraudulent representations of its agents, those who deal with it will be practically without redress and the corporation can commit fraud with impunity." *Peebles v. Guano Co.,* 77 N. C., 233; *Unitype Type Co. v. Ashcraft,* 63, *ante.* In this case the agent Anderson appears to have acted in good faith, and to have made the representations with the knowledge and authority of the principal officers of the defendant.

It can not be permitted to repudiate his acts and at same time retain the purchase money paid because of such representations.

The eighth assignment of error relates to the right of the plaintiff to maintain this action and is likewise untenable. This is clearly a contract that can be assigned, and the assignment by Dr. Brooks to the plaintiff vested in the assignee all the rights, title and interest of the assignor and the assignee has the legal right to maintain the action as the real party in interest.

No error.

Cited: Spencer v. Bynum, 169 N. C., 123.

(136)

R. W. FANN, ADMINISTRATOR OF M. E. FANN, v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 3 May, 1911.)

1. **Executors and Administrators—Clerk's Appointment—Collateral Attack.**

When acting within their jurisdiction and within the scope of their powers, the decrees of probate courts should be considered and dealt with as orders and decrees of courts of general jurisdiction; and where the jurisdiction over the subject-matter has been properly acquired, these orders and decrees are not, as a rule, subject to collateral attack.

2. **Same.**

It appearing that administrator of decedent had been appointed by the clerk, objection can not be taken to the legality of his appointment upon the question of residence of such administrator, etc. (Revisal, sec. 16), in an action for damages for his negligent killing, for the error, if any committed, must be corrected by proceedings instituted directly for the purpose.

3. **Same—Independent Action—Assets.**

A right of action to recover damages for the wrongful killing of an intestate constitutes assets; and it appearing that the appointment of the administrator was made in the county wherein the intestate resided and was domiciled at the time of his death, the clerk had full jurisdiction, and the letters of administration are not open to attack in the present suit.

4. **Executors and Administrators—Clerk's Appointment—Nonresident—Change of Domicile—Intent Evidence.**

In an action for damages for the wrongful killing of plaintiff's intestate, when objection is made to the clerk's appointment of the administration on the ground of nonresidence, evidence is relevant and competent which tends to show that the administrator was engaged in business in the county of his appointment, had property therein, and was a resident thereof, but had gone temporarily to another county in search of employment, with intent to return without changing his residence.

5. **Railroads—"Look and Listen"—Defendant's Negligence—Contributory Negligence—Ordinances—Evidence—Questions for Jury.**

At a public crossing where the defendant had four tracks, two for northbound and two for southbound trains, the plaintiff's intestate was killed by being run over by a northbound train while awaiting the passing of a southbound long freight train. A curve in the track just below shut off the view to some extent, and the passing freight was making a noise, which naturally interfered with the intestate's hearing the approach of the train that caused the injury. There was evidence tending to show that the speed of the latter train exceeded that allowed by a valid ordinance of the city, and that it had failed to give proper signals or warnings of its approach; also that an ordinance prohibited trains passing each other at the public crossing. On these facts, or evidence tending to establish them, the question of contributory negligence on the part of intestate was for the jury.

(137) APPEAL from *Daniels, J.*, at January Term, 1911, of GUILFORD.

Action for death of intestate caused by alleged negligence on part of defendant company. It appeared in evidence that on or about 5 June, 1909, in the city of Greensboro, the intestate was endeavoring to cross the tracks of defendant company on Jackson street, a public crossing, and was run down and killed by a train going north at the time, being the third or fourth section of No. 36, a train hauling fruit to northern markets. There were four tracks at the crossing. The first two, in the direction from which intestate was approaching, being sidetracks parallel to the main tracks, the third was the main track for trains going north, and the fourth was the main track for trains going south over defendant's road; that when intestate entered on crossing there was a long freight train of thirty or forty cars going south which was passing over the crossing at the time, and intestate having passed over the second sidetrack, was standing on the main track leading north waiting for the freight going south to pass. When in that position the third or fourth section of a fruit train going north ran over and killed intestate. There was evidence tending to show that the freight train going south was making quite a noise at the time; that the tracks curved just below the crossing, and the approach from the south was to some extent obscured by the freight train, and that no signal was given by the fruit train which killed intestate except several signal whistles when in twenty-five steps of deceased, and the train was running between twenty or

(138) thirty miles an hour, faster than ordinary freight trains. Plaintiff introduced two ordinances of the city of Greensboro in force at the time as follows:

"Section 282. That it shall be unlawful for any railroad company to allow two engines or trains to cross any street in the city at the same time from opposite directions."

"Section 284. That no railroad engine or train shall run or be propelled at a greater speed than twenty miles an hour within the city."

An issue having been raised as to the legality of plaintiff's appointment on the ground that he was a nonresident, there was testimony offered on part of plaintiff to the effect that he had gone to Danville in the panic of 1898 to get work temporarily, and continued in his employment there as cotton mill hand until November, 1910; that he could not at the time obtain employment in Greensboro, and his purpose in going to Danville was to stay there temporarily and try and save some money to return to the bakery business in Greensboro; that he left his property in Greensboro with a sister who lived there, a bureau, trunk, chairs and some clothing and a horse and wagon he had used in

the bakery business and was keeping for like work when he was able to resume that business, and that during his stay in Danville he returned to Greensboro every month or so, remaining at one time as much as six weeks. On this point plaintiff testified:

Q. Did you go to Virginia with intent to leave North Carolina, or did you consider that your home? A. This was my home. I just went there to work; my intention was to come back; my home was here.

Q. Did you go once with the intention of permanently remaining there? A. Just temporarily remaining there.

Q. For what purpose? A. To save up money to start a bakery.

This evidence as to the intent of plaintiff in leaving North Carolina, and of his purpose to return was admitted over defendant's objection, and exception was duly noted. There was evidence on part of defendant company that the train was only going ten or twelve miles an hour at the time, and all the usual signals were given; that the vision of engineer was obscured by reason of a curve below the (139) crossing. As soon as intestate was discovered on the track, additional signals were given, emergency brakes applied and everything possible done to avoid the result.

The court, under a full, clear and comprehensive charge, submitted the questions raised to the jury under the following issues:

1. Is the plaintiff the legally appointed and duly qualified administrator of M. E. Fann? Answer: Yes.

2. Was the intestate of the plaintiff killed by the negligence of the lessee of the defendant as alleged in the complaint? Answer: Yes.

3. Did the intestate of the plaintiff contribute to his death by his own negligence? Answer: Yes.

4. What damage is the plaintiff entitled to recover? Answer: One thousand dollars ($1,000).

Judgment on the verdict for plaintiff. Defendants excepted and appealed, assigning for error: 1. The ruling of the court on the question of evidence. 2. That the plaintiff should have been nonsuited for the reason chiefly that on the evidence intestate was guilty of contributory negligence.

John A. Barringer and T. H. Calvert for plaintiff.
Wilson & Ferguson for defendant.

HOKE, J., after stating the case: In this day and time and under our present system, it seems to be generally conceded that the decrees of probate courts, when acting within the scope of their powers, should be considered and dealt with as orders and decrees of courts of general jurisdiction, and where jurisdiction over the subject-matter of inquiry

has been properly acquired that these orders and decrees are not as a rule subject to collateral attack. The facts very generally recognized as jurisdictional are stated, in Revisal 16, to be that there must be a decedent; that he died domiciled in the county of the clerk where application is made, or that, having his domicile out of this State, he died out of the State, leaving assets in such county or assets have thereafter come into such county; having his domicile out of the State,
(140) he died in the county of such clerk, leaving assets anywhere in the State or assets have thereafter come into the State, and where, on application for letters of administration, these facts appear of record, the question of the qualifications of the court's appointee can not be collaterally assailed. That is one of the very questions referred to him for decision. But if a person has been selected contrary to the prevailing rules of law, the error must be corrected by proceedings instituted directly for the purpose. *Hall v. R. R.,* 146 N. C., 345; *Springer v. Shavender,* 118 N. C., 33; *Lyle v. Siler,* 103 N. C., 261; *Moore v. Eure,* 101 N. C., 11; *London v. R. R.,* 88 N. C., 585, and generally on the subject see *Dobler v. Strobler,* 9 N. Dakota, 104, with notes by the editor in 81 Amer. St., 530-535; Croswell on Exrs., 19 *et seq.* In the present case the deceased was killed in Greensboro, N. C., where he resided at the time and had his domicile. The cause of action is of itself assets. *Vance v. R. R., 138* N. C., 460. The clerk, therefore, had full jurisdiction and the letters of administration are not open to collateral attack in the present suit. The question, however, can hardly be said to arise in this case, for, under a correct charge, the jury have determined that the plaintiff was a resident of the State at the time of the appointment, and the evidence offered by plaintiff, and objected to by defendant, was clearly competent and directly relevant to the issue. *Watson v. R. R., 152* N. C., 215. Approaching then the principal question presented, this Court, in *Cooper v. R. R.,* 140 N. C., 209-221, endeavored to lay down certain general rules, applicable to injuries at railroad crossings as fair deductions from the cases considered, as follows:

"(1) That a traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty.

"(2) 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 doing so he could note the approach of a
(141) train in time to save himself by reasonable effort, is guilty of contributory negligence.

"(3) That where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence.

"(4) There may be certain qualifying facts and conditions which so complicate the question of contributory negligence that it becomes one for the jury, even though there has been a failure to look or listen, and a traveler may, in exceptional instances, be relieved of these duties altogether, as when gates are open or signals given by watchman, and the traveler enters on the crossing reasonably relying upon the assurance of safety."

And in another case, at same term, *Sherrill v. R. R.,* 140 N. C., 252, applying the general rule contained in the fourth clause, it was held, among other things: "Negligence having first been established, facts and attendant circumstances may so qualify the obligation to look and listen as to require the question of contributory negligence to be submitted to the jury, and in some instances the obligation to look and listen may be altogether removed." And the facts relevant are very correctly embodied in the fourth head note of the case as follows: "Where the testimony of the plaintiff tended to show that his duties by contract with the defendant railroad caused him to work almost on the track and frequently required him to be upon and across it, and that while so engaged he was run over by an engine of the defendant which had come upon him without any warning, and which warning was required both by the custom and rules of the railroad, and that he had just looked and listened both ways, and the way then appeared clear: *Held,* that a nonsuit was erroneous, as the question of contributory negligence must be left to the jury to determine under proper instructions." And the Court, in its opinion, said, quoting with approval from *Rodrian's case,* 125 N. Y., 526: "But where one has looked for an approaching train it would not necessarily follow as a rule of law that he was remediless because he did not look at the precise place and time when and where looking would have been of the most advantage." (142) Again, in *Morrow v. R. R.,* 146 N. C., 14, the same principle was illustrated and applied, the Court holding that: "It was not error in the court below, upon the question of contributory negligence, to refuse a motion as of nonsuit at the close of the evidence which tended to show that, after waiting at the railroad crossing on a public highway for about five minutes for defendant's freight train to pass, the plaintiff immediately proceeded to cross and was struck by a passenger train of defendant going in an opposite direction to the freight; that he

did not know of the approach of the passenger train, though he had looked and listened; that the noise and smoke of the freight train, and it being a dark and cloudy evening, about 5 o'clock, with a fog arising from the ground, covered with sleet, and there being no lights, prevented him from so doing." And like ruling was made in *Inman v. R. R.,* 149 N. C., 123, the revelant facts and decision in the case being stated as follows:

"1. While a person who had voluntarily gone on a railroad track, where the view was unobstructed, and failed to look and listen, can not recover damages for an injury which would have been avoided by his having done so, when the view is obstructed or other existing facts tend to complicate the matter, the question of contributory negligence may become one for the jury.

"2. Where there is evidence tending to show that a railroad company has several tracks in a city over which the plaintiff usually went in going to and from his work, and that the view of the track was obstructed, and plaintiff, having listened for warnings he had a right to expect, but which were not given, stepped upon the track and was injured by defendant's train running at a much greater speed than allowed by the town ordinance, and which was unsafe at the place indicated, the question of contributory negligence is properly submitted to the jury.

"3. When there is a town ordinance preventing the blowing of locomotive whistles within its limits, the bell should be rung continuously where there are numerous tracks and the conditions and sur-
(143) roundings render the running of trains continuously dangerous to pedestrians."

The same position has been reaffirmed and applied in *Wolfe v. R. R.,* 154 N. C., 569, where a watchman at a crossing was run on and injured by an engine which gave no signal of its approach, and when the watchman crossing the track in the discharge of his duty was engaged at the time in the effort to prevent a traveler from entering on the crossing under circumstances threatening danger. An application of these authorities and the principle upon which they rest to the facts presented fully support the ruling of his Honor below in submitting the question of contributory negligence to the jury. There was evidence on the part of plaintiff tending to show that at the precise time of the injury the plaintiff was standing on the main track for trains going north while a long freight train of defendant company was on the crossing moving south on the main track just ahead. A curve in the track, just below, shut off the view to some extent. The noise of the passing train naturally interfered with his hearing when he was run over and killed by the third or fourth section of a fast freight

train carrying fruit to the northern markets. There was evidence also on part of plaintiff to the effect that this train was running at a greater rate of speed than allowed by the city ordinance, and that no signals of its approach were given except the warning emergency blow when in twenty-five steps of intestate, and an ordinance of the city was also in evidence which prohibited this train from entering on the crossing at all till the freight train on the other track had crossed. In *Inman v. R. R., supra,* and in *Norton's case,* the existence of a city ordinance, directly bearing on the occurrence, was allowed much weight, the principle being stated in *Norton's case* as follows: "A city ordinance regulating the rate of speed of a railway train is presumably passed for the protection of the people, and when within the scope of the city charter has the force and effect of law, and a citizen has the right to expect that it will be respected and obeyed by the railroad corporation."

Under the circumstances, as stated, or evidence tending to establish them, the court, imposing on the intestate the duty of looking and listening for the approach of trains, and being careful for (144) his own safety, properly submitted the question of contributory negligence to the jury, and there is no error in the charge giving the defendant any just ground of complaint. We have quoted from our decisions bearing on the question more at length by reason of a suggestion in argument, at the present term, that they had been modified to some extent by later decisions of the Court, notably in *Mitchell v. R. R.,* 153 N. C., 116, and *Coleman v. R. R.,* 153 N. C., 322, but there is no conflict in the cases when properly understood, and as applied to the facts existent in each nor any change in the controlling principle. Adverting again to the third rule deduced from the authorities in *Cooper v. R. R.,* 140 N. C., 209: "That where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen and is induced to enter upon a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence." The same was applied in *Inman's case,* where a pedestrian, endeavoring to pass over a public crossing and having his view obstructed, stopped and listened for the accustomed signals, and hearing none he stepped from behind the car on to the track and was run over and struck by an engine which approached without any warning and at a greater rate of speed than allowed by the ordinance. There were "two steps" for him to walk after he came into view of the track, but the case was submitted to the jury, and in *Norton v. R. R.,* 122 N. C., 911, the fact appeared that the claimant had his view obstructed, had listened for signals and was misled to his injury by the failure

of defendant to give same. It may be well to note that these claimants were not relieved of the duty of properly caring for their own safety as a matter of law, but it was held only that the facts and circumstances attendant on the occurrence so qualified the obligation that the question of their conduct and its effect should be submitted to the jury. In *Coleman's case* the plaintiff testified, it is true, that he had both looked and listened, but he also stated that he had done this some distance back from the crossing where his view was obstructed by houses,

and that he afterwards, in daylight, drove in a buggy "with
(145) curtains buttoned down both sides and back across an open space

of sixty-five feet, affording full opportunity to see down the track the way the train came for three-fourths of a mile and without any effort to further look or listen." There was nothing here to qualify his obligation to care for his own safety, and recovery was denied. In *Mitchell v. R. R.,* 153 N. C., 116, a deaf and dumb negro, familiar with the schedule of the trains and a frequenter of the train yards, walking towards the crossing just at the time when a train was scheduled to arrive, stopped where a box-car obstructed his view and then, with eleven feet of clear space, walked across the track without looking just as a fast train approached and was struck and permanently injured. There was no evidence that plaintiff had listened for signals, and hearing none was induced to venture on the track for that reason, as in *Inman v. R. R.,* 149 N. C., 123, and in *Norton's case.* There was nothing shown to distract his attention. The fact that he was deaf should have quickened his obligation to look more carefully, as held in *Foy v. Winston,* 126 N. C., 381. Nothing appeared, therefore, to qualify the duty upon him to care for his own safety, and recovery in that case was also denied. As heretofore stated, on the precise facts existent in each case, our decisions are in accord on the question presented, and when properly applied sustain the trial judge in submitting the question of contributory negligence to the jury. There is

No error.

Cited: Batchelor v. Overton, 158 N. C., 398; *Shepard v. R. R.,* 166 N. C., 545; *Davidson v. R. R.,* 170 N. C., 284; *Penninger v. R. R., ibid.,* 475; *Lutterloh v. R. R.,* 172 N. C., 118; *Starnes v. Thompson,* 173 N. C., 472.

JOHN McWHIRTER, ADMINISTRATOR, v. T. A. McWHIRTER ET AL.

(Filed 3 May, 1911.)

1. **Deeds and Conveyances—Wife's Money—Purchaser—Title to Husband—Resulting Trusts—Proof Required.**

When a resulting trust for the wife is sought to be established upon the allegation that the husband purchased land with her money and took a deed to himself which is absolute in form and conveys the legal and equitable title to him, it is necessary that the trust be established by clear, strong and convincing proof.

2. **Same—Instructions Conflicting.**

When the judge, in an action to declare a resulting trust in favor of the wife in lands purchased by the husband with her money, taking title by conveyance to himself, instructed the jury that the proof must be clear, strong and convincing, and, in another part of the charge, that a preponderance of the evidence is sufficient, the charge is conflicting and erroneous.

3. **Deeds and Conveyances—Resulting Trusts—Proof Required—Conflicting Instructions—Presumptions—New Trial.**

When the judge in one part of his charge instructs the jury correctly and in another part incorrectly, as to the question of proof, it will be assumed that the jury acted upon the erroneous part, and a new trial will accordingly be awarded.

APPEAL by plaintiff from *Long, J.*, at October Term, 1910, of (146) MECKLENBURG.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

Maxwell & Keerans for plaintiff.
McCall & Smith for defendant.

WALKER, J. This action was brought by the plaintiff, as administrator of W. C. McWhirter, for the purpose of having sold certain land, which is described in the complaint and alleged to belong to his estate, for the payment of debts. The defendant, Mrs. R. J. McWhirter, answered the complaint and averred that the land did not belong to W. C. McWhirter, although he had the legal title thereto, for that he had bought the same with her money and for her benefit, and he, therefore, held it in trust for her. An issue was submitted to the jury as to the existence of the alleged trust, express or resulting, and the verdict was in favor of Mrs. McWhirter, the jury finding that W. C. McWhirter had purchased the lands with her funds and held the legal title in trust for her, having taken a deed for the land to himself, instead of to her,

as he should have done. Judgment was entered upon the verdict and the plaintiff brings the case here by appeal to review the rulings of the Court, which he deems erroneous.

It is necessary to discuss but a single question, as there is an error in the charge of the court which entitles the plaintiff to another trial.

The court at first charged the jury correctly that as the deed
(147) to W. C. McWhirter was absolute in form, and upon its face conveyed the legal and equitable title to him, the defendant must establish the trust by clear, strong and convincing proof. *Lehew v. Hewett,* 138 N. C., 6; *Taylor v. Wahab,* 154 N. C., 219; *Cobb v. Edwards,* 117 N. C., 253. If the learned judge had stopped there, the charge, in this respect, would have been free from error, but he afterwards told the jury when instructing them again upon the quantum of proof required to establish the trust, that a preponderance of the evidence in favor of it is sufficient. These two instructions were conflicting, and the jury are not supposed to be capable of deciding, as between them, which is the correct one, and we must, therefore, assume that they were influenced in coming to a verdict by the erroneous one. *Edwards v. R. R.,* 132 N. C., 99 (Anno. Ed.); *Cressler v. Asheville,* 134 N. C., 314; *Williams v. Haid,* 118 N. C., 481; *Tillett v. R. R.,* 115 N. C., 662; *Edwards v. R. R.,* 129 N. C., 78; *Jones v. Insurance Co.,* 151 N. C., 56. For this error a new trial is ordered.

As to the trust, the law is well settled. "Where land is bought with the money of one person and is conveyed to another, the latter is trustee for the lender to the extent of the money so paid, without any express agreement to that effect." *Holden v. Strickland,* 116 N. C., 185. But in *Clements v. Insurance Co., ante,* 57, we said that there is a strong presumption in favor of the correctness of a deed or other instrument as written and executed, and this fair and reasonable presumption will prevail, unless the party who alleges that it does not express the truth overcomes the presumption and shows to the contrary by satisfactory evidence which is clear, strong and convincing. It is for the jury to say whether the evidence is of this character. *Lehew v. Hewett, supra.* The rule which calls for that kind of evidence in such a case was adopted and was necessary for the safety of titles, and in order that contracts, deeds and other solemn instruments should not be lightly set aside or changed. The doctrine, as we have seen, has been extended and applied to a case in which it is attempted to show a parol trust, and thus virtually to nullify the deed, or, if the entire beneficial interest is not claimed, to amend or reform it in some way.

The error of the court as to the quantum of proof is to be
(148) found in the defendant's third prayer for instructions, which was given to the jury. The judge modified the first and second

prayers in this respect and stated the correct rule, but inadvertently, we suppose, failed to amend the third prayer. However this may be, the jury were left with two conflicting instructions, and may have been misled by them. There are other errors assigned by the plaintiff, but we will not discuss them, as they may not be presented again.

New trial.

Cited: *Ray v. Patterson,* 170 N. C., 227; *Champion v. Daniel, ibid.,* 333; *Grimes v. Andrews, ibid.,* 423.

VIRGINIA-CAROLINA PEANUT COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 3 May, 1911.)

1. **Carriers of Goods—Delay in Shipment—Damages—Contract—Tort—"Party Aggrieved."**

   On negligent delay in the shipment of goods, with common carrier acting under a *quasi*-public franchise, the person injured may sue in contract or tort; and in case of tort, the damages may be awarded under facts and conditions existing and relevant at the time the same is committed.

2. **Same—Notice After Shipment—Reasonable Opportunity to Deliver.**

   In such action, evidence tending to fix the carrier with notice or knowledge of special circumstances affecting the question of damages, and under conditions affording fair and reasonable opportunity to avoid further delay, is competent and relevant; and the rejection of such evidence by the trial court constitutes reversible error.

3. **Same—Principal and Agent—Undisclosed Principal.**

   In such case an undisclosed principal holding the business rights and interests under the contract of shipment may sustain the action, subject to the limitations and restrictions ordinarily prevailing in such relationship.

BROWN, J., concurring in result; WALKER, J., concurring in the opinion of MR. JUSTICE BROWN; ALLEN, J., concurring.

APPEAL from *Peebles, J.,* at the December Term, 1910, of (149) MARTIN.

Action to recover damages for negligent delay on the part of the defendant company in conveying a lot of machinery shipped over defendant's road. On the trial it appeared that plaintiff was a corporation doing a general business in manufacturing and cleaning of peanuts, at Williamston, N. C., and that in the latter part of August, 1907, Eli

Gurganus, acting for said company, but without having informed the company of this fact, so far as the evidence shows, ordered from the Appomattox Iron Works, at Petersburg, Va., a carload of machinery for equipment of plaintiff's mill at Williamston, N. C., and had same shipped over defendant's road, taking a bill of lading therefor in his own name; that the machinery, consisting of peanut-shellers, drums, shakers and shafting, etc., and described in detail in the testimony, was mostly of a heavy order, weighing something like 8,000 pounds, and was shipped in an open car; that the distance between the two points by rail was about 140 miles, the time about two or three days, and there was negligent delay in the carriage, the machinery having been shipped 29 August, and not arriving at Williamston until 16 September. It appeared, further, that the Appomattox Iron Works were manufacturers of machinery for this purpose, at Petersburg, Va.; that the defendant road extends through Eastern North Carolina and Virginia, and large quantities of peanuts are annually shipped from this place, Williamston, over defendant's road; that from the time the machinery should have arrived plaintiff had a house rented in which to place it for the purpose of manufacturing, and a lot of hands, two of them experts, awaiting to install and operate the same, and these hands were drawing wages and necessarily kept idle for the time of the delay, and that the capital invested in the machinery was about $2,000. On the question of notice, plaintiff offered the following evidence by the witness, Gurganus: "On the first day of September, 1907, I went to the agent of the Coast Line at Williamston and notified him of the carload of peanut machinery being shipped from Petersburg, Va., and told him that the company had hired men to install this machinery, and told him that the men were on the ground ready for work, and that
(150) the peanut company would hold the Coast Line for damage for all delay. I continued to go to the agent each day, till the 19th, when machinery came, and repeated the same thing." On objection by defendant, this evidence was excluded and plaintiff excepted. Plaintiff then offered the following evidence by J. G. Staton, president of plaintiff company: "On the first of September, 1907, I went to the agent of the defendant company at Williamston, N. C., and notified him that this carload of machinery had been shipped; told him that plaintiff company had men hired to install this machinery, and that company would hold defendant liable for any further delay. I told him that the men were on the ground ready for work, and that the plant was idle. I went to see agent every day from the first to the 15th of September about it, and repeated the same thing to him. I helped agent wire for machinery on the 15th of September, and we located it in Wilmington, N. C." This was likewise excluded and plaintiff ex-

cepted. The court charged the jury that "in no event could they, on the evidence, allow any more than nominal damages." Plaintiff excepted. Verdict awarding nominal damages, judgment, and plaintiff excepted and appealed.

Martin & Critcher, Winston & Matthews for plaintiff.
F. S. Spruill and Harry W. Stubbs for defendant.

HOKE, J., after stating the case: In *Harper v. Express Co.*, 148 N. C., 87-90, the Court, in speaking to the question of damages, recoverable by reason of wrongful delay in shipment of goods, said: "Where the goods shipped have a market value, and there is nothing to indicate the specific purpose for which they were ordered, these damages are usually the difference in the market value of the goods at the time for delivery, and that when they were in fact delivered. We have so held in *Development Co. v. R. R.*, 147 N. C., 503, and *Lee v. R. R.*, 136 N. C., 533, is to the same effect. When, however, the goods are ordered for a special purpose or for present use in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or the use indicated. And it is not necessary always that those facts should be mentioned in the negotiations, or in express terms made a part of the con- (151) tract, but when they are known to the carrier under such circumstances, or they are of such a character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages," citing Moore on Carriers, 425, and Hutchinson on Carriers, sec. 1367. The modification of the general rule, suggested in this excerpt, is not infrequently called for in shipments of machinery, and, under several decisions of our Court on this subject, it may be that the facts now in evidence require that the question of substantial compensatory damages, arising by reason of notice or knowledge of special circumstances had at the time of shipment, should be submitted to the jury. *Lumber Co. v. R. R.*, 151 N. C., 23; *Sharpe v. R. R.*, 130 N. C., 613; *Rocky Mount Mills v. R. R.*, 119 N. C., 693. Without final determination of this matter, however, we are of opinion that there was error in excluding the testimony offered by plaintiff to show definite notice of special circumstances given after shipment made. True, the bill of lading was issued to the witness, Gurganus, but it is also true that he had no personal interest in the goods or their shipment, but was acting, at the time, for the plaintiff company, "which had purchased the machinery, paid for it, received it upon arrival at Williamston and there paid the freight charges thereon and installed same in its plant." From these facts we

see no reason why the plaintiff company, as undisclosed principal, did not acquire and hold the general business rights and interests arising from the contract and under the general principles obtaining in case of such a relationship. *Nicholson v. Dover,* 145 N. C., 20; *Barham v. Bell,* 112 N. C., 131; Clark & Skyles on Agency, 1155; Tiffany on Agency, 304, 305. In *Barham v. Bell, supra,* it was held: "Where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same position, at the time of the disclosure of the real principal, as if the agent had been the real contracting party," and in more general
(152) terms in *Clark & Skyles, supra,* it is said: "It is held, therefore, that where a person enters into a simple contract, other than a negotiable instrument, in his own name, but in fact as agent for an undisclosed principal, the principal may come in and sue the third party on the contract, and that this is true, not only where the agent disclosed the existence, but not the name of the principal, but also where he does not even disclose the existence of the principal." A principle undoubtedly correct, where, as in this case, neither the personality of the agent nor the claims of the third party against him, personally, require consideration. This then being the position of the parties, if the nominal consignee and the president of the plaintiff company gave the notice embodied in the proposed evidence, and there was negligent delay on the part of the defendant, after being afforded full and reasonable opportunity to correct the wrong, such negligence would constitute a tort, giving the plaintiff right to recover damages on facts as they then appeared. This is one principal difference in the elements of damages, obtaining in breach of contract and consequential damages arising from a tort. In the one case damages are recovered, as a rule, on relevant facts in the reasonable contemplation of the parties at the time the contract is made, and in the other on the facts existent or as they reasonably appeared to the parties at the time of the tort committed. The obligation of diligence imposed by the law on common carriers is continuous during the entire course of the carriage, and a negligent failure to perform such duty, causing special damage to a passenger or shipper of freight, is a tort arising whenever the same occurs. We must not be understood as holding that this consequential damages, to arise by reason of special circumstances, would commence at the very instant the notice was given to some local agent of the company. The notice, as indicated, must be such as to afford fair and reasonable opportunity to avoid further delay under conditions as they existed when the notice was received, and damages arising thereafter might then be properly estimated under the circumstances which the notice discloses. There is

suggestion, from authoritative sources, that in these continuous contracts of carriage, notice of special circumstances, given during the course of performance would be relevant as affecting the question of the amount of damages even when the action could only (153) be considered as one for a breach of contract. This was made by *Bramwell, Baron,* in *Gee v. R. R.,* H. & N., 2116 (Exch.), and referred to in Wood's Mayne on Damages, 35. This suggestion was applied by a Texas court, in *R. R. v. Gilbert,* and was at first affirmed on appeal, but was afterwards rejected, the Court of Civil Appeals holding, on a rehearing, that notice given, after contract, of shipment made should not be allowed to affect the question. *R. R. v. Gilbert,* 4 Texas Civil Appeals, 366. In a subsequent case, however, and on a different state of facts the Supreme Court of Texas seems to have modified this ruling. *Bourland v. R. R.,* 99 Texas, 407. The digest of this case as it appears in 122 Am. State Reports, being in part as follows: "The rule that damages of a special or exceptional kind for delay in the shipment of goods can not be recovered in the absence of notice to the carrier at the time of making the contract of carriage of the particular conditions under which the damages are likely to arise as the result of the delay is not *unbending* nor applicable to *every case.*" The question is not free from difficulty, nor is it necessary to determine it on the present appeal, for numerous and well considered decisions in this jurisdiction are to the effect that for breach of duty in reference to a contract of carriage, on the part of common carrier doing business under a corporate franchise, one having a right by contract to enforce performance, may recover damages for a tort and have the relief administered and his rights determined as in that class of actions. *Williams v. R. R.,* 144 N. C., 498-505; *Purcell v. R. R.,* 108 N. C., 414; *Bowers v. R. R.,* 107 N. C., 721. In *Purcell's case,* and on this question, it was held: "1. It is the duty of a common carrier to provide sufficient means of transportation for all freight and passengers which its business naturally brings to it, and an unusual occasion by which a greater demand upon it is temporarily made will not relieve it of the obligation, if by the use of reasonable foresight, it could have been provided for. 2. A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains as required by the statute (Code, sec. 1963), may bring an action on contract, or in tort, independent (154) of the statute."

And in *Bowers' case, supra,* the ruling was as follows: "1. A complaint alleging that the defendant, a common carrier, failed to safely carry certain articles of freight according to contract, and 'so negligently and carelessly conducted in regard to the same that it was greatly

damaged,' states facts sufficient to constitute a tort," and in *Williams' case, supra, Associate Justice Walker,* for the Court, said: "It is established, therefore, by the authorities that when the carrier has wrongfully set the passenger down short of or beyond his destination, or has failed to stop for him, and has thereby imposed upon him the necessity of reaching his destination by other means, the carrier must respond in damages for the wrong, whether the action be brought for the breach of the contract or for the tort, and the rule applies in this case if the plaintiffs presented themselves at the proper place and gave the required signal at such time as enabled the engineer to stop the train for them at the station," citing 3 Hutchinson on Carriers (3 Ed.), sec. 1429. There is nothing in the record which confines the plaintiff to recovery for a breach of contract. On the contrary, the entire facts are set out by the pleader, including specific statement of the special damages claimed. And in various sections of the complaint the delay is alleged to have been caused by the carelessness and negligence of the defendant company and its agents. In such case the plaintiff, if the facts justify it, may recover on the theory of tort or contract. Speaking to this question, in *Williams' case, supra,* it is further said: "All forms of action are abolished, and we have now but one form for the enforcement of private rights and the redress of private wrongs which is denominated a civil action, and the Court gives relief according to the facts alleged and established." In *Hansley v. R. R.,* 117 N. C., 570, a case much relied upon by the defendant, the Court chiefly considered and passed upon the right of a passenger, on a breach of contract of carriage by a common carrier, to punitive or exemplary damages and the question involved in this appeal was not directly presented. While the reasoning of the principal opinion in *Hansley's case* is favorable to de-
(155) fendant's position, the decision of the Court, reaffirming, as it did, *Purcell's case, supra,* which was an action in tort for like cause, is in support of our present ruling. The plaintiff then had a right to sue in tort, and, if his cause of action is established, recover damages under circumstances existent at the time the same was committed, and the evidence offered, tending as it did to show conditions affecting the measure of his recovery, should have been received. There is nothing here said which is intended to militate against the ruling of this Court, in *Helms v. Telegraph Co.,* 143 N. C., 386, and other cases to same effect, "That a party who is not mentioned in a telegraph message or whose interest therein is not communicated to the company, can not recover substantial damages for mental anguish." In *Helms' case* the contract had been finally broken and the same was no longer in the course of performance, and the question at issue being the amount of damages for "mental anguish," the personality of the party and his

relationship to the subject of the message was of the substance and must be made to appear. But the principle does not necessarily obtain when redress is sought for breach of a business contract in which, as stated, the personality of the nominal parties in no way affects the matter. In such case, as heretofore said, the rights of the parties may be shown and dealt with under the ordinary doctrine that an undisclosed principal may avail himself of rights acquired by the contract of his agent. For the error in rejecting the evidence offered, the plaintiff is entitled to a new trial and it is so ordered.

New trial.

BROWN, J., concurring in result: The damages recoverable in an action for a breach of contract are such as naturally flow from the breach and such special and consequential damages as are reasonably presumed to have been within the contemplation of the parties at the time the contract was entered into. *Williams v. Telegraph Co.*, 136 N. C., 82; *Johnson v. R. R.*, 140 N. C., 574. And the same rule is applied in actions for the negligent omission in the performance of a public duty growing out of contract. *Lee v. R. R.*, 136 N. C., (156) 533, delay in transportation of freight; *Williams v. Telegraph Co.*, 136 N. C., 82, negligence in transmitting and delivering message; *Hansley v. R. R.*, 115 N. C., 602, delay in carrying passenger. But a different rule is applicable when the cause of action is based upon a *pure tort* resulting in a wrongful invasion of plaintiff's rights of person or property. Then he may recover all such damages either direct or consequential, as flow naturally and proximately from the trespass. *Johnson v. R. R., supra; Gwaltney v. Timber Co.*, 115 N. C., 579; *Hatchell v. Kimbrough*, 49 N. C., 163.

In an action based upon such a tort, reasonable foresight is essential to original liability, but it has no place in determining to what consequences the liability shall attach. *Drum v. Miller*, 135 N. C., 204.

In *Lewark v. R. R.*, 137 N. C., 383, an action for damages resulting from delay in transportation, this Court states the rule to be: "When one violates his contract he is liable for such damages as are caused by the breach, or such damages, as being incidental to the breach as the natural consequence thereof, may have been in contemplation of the parties when the contract was made." In *Development Co. v. R. R.*, 147 N. C., 503, *Mr. Justice Hoke* says: "Consequential damages are only recoverable when they are the natural and probable consequences of the carrier's default. And ordinarily such damages are only considered natural and probable when they may be reasonably supposed to have been in contemplation of the parties at the time the contract was made." This was said in an action for negligent delay in transportation

of freight, which was treated by the learned judge as a breach of contract, or tort growing out of contract, as was done in *Lee's case,* in *Lewark's case* and numerous other cases decided by this Court.

The error in the opinion of the Court in the present case, I think, is in assuming that notice by the plaintiff of the particular damages and subsequent delay created a liability independent of the contract entered into by Gurganus and the defendant. The plaintiff's right to sue is determined upon principles of the law of agency in the creation of a contract, and yet it is suggested by the court that the dam-
(157) ages should be assessed upon the basis of a pure tort resulting from the breach of an independent duty owed plaintiff. Plaintiff's rights having grown out of the contract, the amount of damages recoverable should be determined by the rule laid down by this Court in actions based upon tort growing out of contract. Applying that rule plaintiff could only recover such damages as were in the contemplation of the parties at the time the contract was entered into. All the cases since *Hadley v. Baxendale,* 9 Exch., fix the time the contract was made as the time when notice of special damages should be given. *Lee v. R. R.,* and cases cited *supra.* In *Hansley v. R. R.,* 115 N. C., 602, which by express terms overrules *Purcell v. R. R.,* 108 N. C., 414, quoted in the Court's opinion in this case, it is held that: "The amount recoverable for a breach of contract of carriage is limited to the damage supposed to have been in contemplation of the parties and actually caused by such breach; and the measure of damage is ordinarily not materially different whether the defendant fails to comply with the contract through inability or willfully disregards it." And this is said by the Court, in that case, to be the rule whether the passenger sues for a breach of contract or in tort for the disregard of the duty of the carrier to the public. The result reached in *Purcell v. R. R.,* was subsequently approved in *Hansley v. R. R.,* 117 N. C., 565, on petition to rehear. "But the judgment in that case," says the Court, "should be put upon the ground that the defendant treated Purcell with indignity and contempt in rushing by the station at faster speed, when there was room for the passengers, or at least when there was evidence tending to show this."

The former decision in the *Hansley case,* that for negligent failure to transport a passenger to his destination, the passenger's right of action is *ex contractu* and not in tort, is affirmed.

In *Kennon v. Telegraph Co.,* 126 N. C., 232, the present *Chief Justice* says: "It is immaterial under our system of practice whether the action is in tort for the negligence in the discharge of a public duty or for breach of contract for prompt delivery, for the recovery in either case is compensation for the injury done the plaintiff

and which was reasonably in contemplation of the parties as the (158) natural result of the breach of the contract or default in discharging the duty undertaken."

The plaintiff's action in this case, being based upon breach of contract or tort growing out of contract, and the damages being restricted to such as were in the contemplation of the parties when the contract was made, the evidence of notice of special damages was properly excluded. Such notice can not affect the liability of the parties after the performance of the contract has been entered upon. But if such evidence is admitted the same result must follow, because it would be the duty of the court to instruct the jury that the notice given was insufficient to charge the defendant with liability for special damages. Where the testimony with regard to notice is uncontradicted and is clear and distinct, the question of the sufficiency of the notice is for the court. *R. R. v. Johnson,* 116 Tenn., 624.

"It may be stated as the well settled rule," says Hutchinson on Carriers, sec. 1367, "that special damages can be recovered from the carrier when the transportation has been delayed only where it is shown that the shipper informed the carrier, *at the time the contract was made,* of the special circumstances requiring expedition in shipment. And although the carrier may have been notified of such special circumstances in time to have prevented a delay, if such notice was given after the contract of transportation had been entered upon, it would not operate to modify the contract or subject the carrier to liability for special damages arising from a subsequent delay. The fact that the carrier was notified of the special circumstances demanding greater diligence is thus seen to be a crucial one, and that the carrier was so informed must be alleged and proved."

"Notice to a carrier, after goods have been shipped, of circumstances which render special damages a probable result of a delay in their delivery, does not operate to modify the original contract so as to render the carrier liable for such damages, even in the event of a subsequent unreasonable delay." *Bradley v. R. R.,* 94 Wis., 44.

In *R. R. v. Johnson,* 116 Tenn., 624, *Chief Justice Beard* says: "Notice to the carrier, after goods have been shipped, of circumstances which render special damages a probable consequence (159) of delay, does not affect the original contract so as to render the carrier liable, although the subsequent delay is unreasonable." Upon facts similar to those presented in our case, the Wisconsin Court, in *Bradley v. R. R., supra,* says: "It is only necessary to apply a familiar principle of law in order to answer these questions. No principle of law is more firmly established than that actual damages for a breach of contract are limited to such as may be reasonably considered to have

been in contemplation by the parties *at the time of such contract, as the probable result of a breach of it.* Such principle rules this case unless there is some exception thereto which will fit the special circumstances found by the jury and expressed in the questions submitted. That was obviously the view the learned circuit judge took of the matter; hence the necessity for the second question, *i. e.,* Did notice to the appellant of the circumstances which rendered the damages found by the jury a probable result of the late delivery operate to modify the original contract between the parties so as to make the appellant liable in damages? Counsel for the respondent failed to bring to our attention any authority to sustain such exception to the general rule, and, indeed, we are satisfied that none can be found, and that the exigency of this particular case is not sufficiently serious and pressing to warrant us in disturbing the settled law regarding the subject, as counsel suggests that we should do."

Bourland v. R. R., 99 Texas, 407, is not authority for the position suggested in the opinion of the Court. It is held in that case that where notice of such circumstances as will occasion special damages is given the carrier after the contract to carry has been performed, and after the goods have accordingly arrived at their destination and are ready to be delivered, he will be liable for such special damages if he negligently fails to make delivery of the goods. In this case the Supreme Court of Texas accepts the decision in *R. R. v. Belcher,* 89 Texas, 428, as containing a correct statement of the law upon the question of liability for special damages where notice is given after the contract has been made and transportation commenced, but before the shipment reaches destination. In the *Belcher case* it is held that such
(160) notice is insufficient to charge the carrier with special damages.

Justice Williams, writing the opinion in *Bourland v. R. R.,* adverts to the suggestion made by *Baron Bramwell,* in *Gee v. R. R.,* 6 H. & N., 217, referred to in the opinion of the Court and says: "The decisions have been to the contrary in cases of this character which have come to our attention, where it became necessary to pass upon the point." This dictum in the *Gee case* is referred to in section 158 of Sedgewick's work on Damages, and after quoting the language of *Baron Bramwell,* the author says: "The majority of the Court, however, took a different view. And, however reasonable the view may be in itself, another rule is firmly established. *Hadley v. Baxendale,* as we have seen, held that damages for breach of contract were limited to such as were either normal or communicated at the time of the contract." Sedgewick further says, sec. 159: "Notice must form the basis of a contract. It appears that the notice must be more than knowledge on the defendant's part of the special circumstances. It must be of such a

nature that the contract was to some extent based upon the special circumstances. This appears from the language of the courts in many cases where the subject is discussed. In *Smeed v. Foord, Campbell, C. J.*, doubted whether notice could have any effect in changing the rule of damages, unless it formed part of the contract. In *British Columbia S. M. Co. v. Nettleship, Willes, J.*, said: "The mere fact of knowledge can not increase the liability. The knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." In *Booth v. Spuyten Duyvil R. M. Co., Church, C. J.*, stated, as his opinion, that notice of the object of the contract would not, of itself, change the measure of damages, "unless it formed the basis of an agreement." Proof of notice, of course, can not be received to vary the contract, which always speaks for itself; it is merely an attendant circumstance, which, like any other matter in evidence, affects the consequences of the breach and the measure of recovery.

Hadley v. Baxendale lays no stress on the question whether the contract was founded upon or influenced by the notice; but (161) the weight of recent authority seems to be in accordance with these opinions, to the effect that the notice must be such as that the contract was in some degree founded on it. The defendant sold goods to rig a vessel, and damages were claimed for loss of use of the vessel. The Supreme Court of Michigan said: "To create such extraordinary liability, there must in every case be something in the terms of the contract, read in the light of the surrounding circumstances, which show an intention on the part of the vendor to assume an enlarged engagement, a wider responsibility than is assumed by the vendor in ordinary contracts for the sale and delivery of merchandise."

In this case the defendant is notified, after entering upon the performance of the contract, that the special damages would result, and was for the first time notified that such damages would result to a company whose name nowhere appears in the contract of shipment and whose existence was probably unknown to the defendant. If such notice is sufficient to charge the defendant with liability for special damages, then the great case of *Hadley v. Baxendale* has power only to vex unsuspecting parties who regard its principles as established and enforcible in our courts.

The facts are not sufficient to bring this case within the decision of *Lumber Co. v. R. R.*, 151 N. C., 23, and other cases in this Court, charging the carrier with special damages for delay upon the ground that the character and circumstances of shipment were sufficient to give notice of such damages. There was nothing about this shipment to

give the defendant the slightest intimation that the plaintiff company intended to conduct a peanut-cleaning business, and had employed hands to install and operate the machinery and had rented a house for that purpose. It was reasonable for the defendant to suppose that Gurganus was receiving the machinery for sale to another party, or that he was receiving it as agent for the shippers. In fact the purpose for which the shipment was intended was a pure matter of conjecture to the defendant.

The *Lumber Company case* presented the following combina-
(162) tion of facts which this Court said was sufficient to go to the jury upon the question of notice of special damages: (1) Plaintiff's name, indicating the character of business engaged in by it; (2) the nature of the article shipped, to wit, an edger, a machine used by saw mills, weighing about 1,000 pounds, indicating an article not of general use, but for particular purpose; (3) that the machine was shipped unboxed, uncovered and open, and thus observable by the defendant; (4) being a single machine, indicating that it was intended to be used in conjunction with other machinery; (5) the destination, being a section in which lumber was manufactured. A mere enumeration of these conditions destroys that case as an authority upon which to submit to the jury the question of special damages in this case.

For wrongful delay in the transportation of goods having a market value the damages usually supposed to be in contemplation of the parties is the difference in value of the goods at the time when they should have been delivered and when they were delivered. In the absence of appreciable loss, the interest on the money invested in the goods themselves for the time of the delay would be the correct measure. *Lee v. R. R.*, 136 N. C., 533; *Development Co. v. R. R.*, 147 N. C., 503. If the jury should find in this case that the plaintiff has been injured by the negligence of the defendant, the measure of damages should be fixed by the principle of these cases. Upon the evidence as now presented the plaintiff is not entitled to special damages. However, his Honor was in error in instructing the jury that the plaintiff could recover only nominal damages, for which there should be a new trial.

WALKER, J., concurs in this opinion.

ALLEN, J., concurring: A bill of lading is "a written acknowledgment by the common carrier of the receipt of certain goods and an agreement, for a consideration, to transport and to deliver the same at a specified place to a person named or to his order." 4 Elliott on R. R., sec. 1415.

It is then both a receipt and a contract, and there are but two stipulations in the contract: 1. To transport. 2. To deliver.

If, therefore, the shipper must rely upon the written contract and can only sue for breach of its obligations, he is without (163) remedy if his goods are injured, or if he suffers loss by delay, if they are finally transported and delivered.

The law, however, recognizes that railroad property is in some measure devoted to a public use, and is, therefore, subject to public regulation. As was said by *Rodman, J.*, in *Branch v. R. R.*, 77 N. C., 349: "They are granted great privileges in consideration of the performance of certain duties to the public. They enjoy a virtual monopoly of the carriage of freights within a certain distance. There could not be a clearer case of private property devoted, for a valuable consideration, to a public use, and consequently subject to public regulation."

"He (the common carrier) exercises a public employment, and has duties to the public to perform." *York Co. v. R. R.*, 70 U. S., 112.

"Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the public at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." *Munn v. Illinois*, 94 U S., 113.

"Railroads are common carriers and owe duties to the public." *Joy v. R. R.*, 138 U. S., 51.

These duties to the public are sometimes enforced by statute and sometimes by the principles of the common law, and they are independent of contract.

"The duties of the common carrier as such do not rest upon contracts, but are imposed by law." 4 Elliott on R. R., sec. 1454.

"The liability of a common carrier does not rest in his contract, but is a liability imposed by law. It exists independently of contract, having its foundation in the policy of the law, and it is upon this legal obligation that he is charged as carrier for the loss of property intrusted to him." *Merritt v. Earle*, 29 N. Y., 122.

What then are the duties imposed by law on a common carrier, who has received freight for transportation?

There are two: (1) To carry safely. (2) To deliver within a (164) reasonable time.

The extent of the liability as to the first duty is clearly stated by *Justice Brown* in *Hollingsworth v. Skelding*, 142 N. C., 247. He quotes the following extract from the opinion of *Chief Justice Faircloth*, in *Daniel v. R. R.*, 117 N. C., 602: "Carriers of passengers are insurers as to their passengers, subject to a few reasonable exceptions. They are held to exercise the greatest practicable care, the highest degree of

prudence, and the utmost human skill and foresight which has been demonstrated by experience to be practicable. They are so held upon the ground of public policy, reason and safety to their patrons. The exceptions are the act of God and the public enemy. If these be the proximate cause, and without any neglect on the part of the carrier, the carrier is not liable. He is against all perils bound to do his utmost to protect and prevent injury to his passengers," and after holding that this is erroneous as applied to passengers, he says: "The rule laid down by the late *Chief Justice* applies to the transportation of freight and all classes of inanimate objects only." It should be added that there is no liability on the carrier if the injury is caused by the negligence of the shipper, or is due to the inherent qualities of the articles transported.

The second duty imposed by law is to deliver within a reasonable time, and a failure to do so is negligence. *Boner v. Steamboat Co.*, 46 N. C., 216. The distinction as to the degree of liability in the performance of these duties is clearly stated by *Pearson, Chief Justice,* in *Boner v. Steamboat Co., supra.* He says: "It is said that the defendants are common carriers, and in regard to them the law makes an exception, and holds them liable as insurers, except against the act of God, and the King's enemies. This is so; and the question is, does their liability as insurers extend to the *time* of delivery? or is it confined to the *safe delivery* of the goods? The case before the Court, when *Lord Holt* delivered his famous opinion, concerned the *safe delivery* of goods, and nothing was said in regard to the *time* of delivery; so that our
(165) question was left open. The reason for making an exception in regard to the safe delivery of goods, in the case of a common carrier is, that it was a matter of public policy, in order to guard against fraud and conspiracy, by which, through 'covin and collusion' the carrier might 'contrive to be robbed and divide the spoils.' It is evident that the reason for holding the common carrier liable for the *safe delivery* of goods has no relevancy or bearing upon the question of his liability as to the *time* of delivery; so there is no rule of policy making an exception in regard to the time of delivery. That falls under the general rule by which, when both parties are benefited, the bailee is liable for ordinary neglect."

On account of the fact that the goods are in possession of the carrier, and the shipper can not go with them, and can not know what the conduct of the carrier is, proof of delay makes out a *prima facie* case of negligence, and it is incumbent on the carrier to excuse the delay. *Parker v. R. R.*, 133 N. C., 340.

We have then in the case of a shipment of freight, a contract between the shipper and the carrier, by which the carrier has agreed to transport

and to deliver, and the law has imposed on the carrier the duty to carry safely, and to deliver within a reasonable time, and our next inquiry is, What is the remedy for a breach of the duty imposed by the law? I think the shipper may, at his election, sue in contract or in tort. He may treat the obligations imposed by law as entering into and becoming a part of the contract of carriage, in which event his action would be for breach of contract, or he may sue for a breach of the public duty, which has caused him special damage, and his action would be in tort. 4 Elliott on R. R., sec. 1693, says: "Where there is a breach both of contract and of duty imposed by law, as in case of loss or injury by a common carrier, the plaintiff may elect to sue either in contract or in tort."

We are not without authority in our State that an action for a breach of duty imposed by law is in tort, and that in many cases, on the same facts, a party may sue in tort or contract.

In *Robinson v. Threadgill,* 35 N. C., 41, and in *Bond v. Hilton,* 44 N. C., 308, *Nash, Chief Justice,* says: "Where the law, from a given statement of facts, raises an obligation to do a particular act, and there is a breach of that obligation, and a consequential (166) damage, an action on the case founded on the tort is proper," and in *Williamson v. Dickens,* 27 N. C., 265, although the plaintiff could have sued in contract, he was allowed to sue in tort, and thereby avoid the defense of a discharge in bankruptcy.

These cases are approved in *Solomon v. Bates,* 118 N. C., 315.

It appears, therefore, that the property of the common carrier is affected with a public use; that out of this grows the power to regulate the performance of its obligations; that in the exercise of this power the law has imposed the duty when it undertakes to transport freight to carry safely and to deliver within a reasonable time; and that an action to recover damages for a breach of duty imposed by law is in tort.

This duty, as it seems to me, does not arise out of contract, but is imposed because the carrier has devoted its property in part to a public use. If so, I think the rule laid down in the opinion of the court is just, and with the limitations imposed, no hardship can arise from its application.

It requires notice to be given to the carrier, while the goods are in its possession, of the facts out of which the special damages will arise, and gives it a reasonable time after notice within which to deliver, and the carrier is not liable for the special damages unless, after notice and under the conditions then existing, it negligently fails to deliver.

The expressions in different opinions opposed to this view are based

upon *Hadley v. Baxendale,* which has been quoted with approval so often that it approaches rashness to question it.

I may suggest, however, that it is stated in the opinion in that case that "the only circumstances here communicated by the plaintiff at the time the contract was made were that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill," while the report of the case, as contained in 5 Eng. Rul. Cases, 503, shows that "the plaintiff's servant told the clerk that *the mill was stopped and that the shaft must be sent immediately,* and in answer to the inquiry when the shaft would be taken, the answer (167) was, *that if it was sent up by 12 o'clock any day, it would be delivered at Greenwich the following day.* On the following day the shaft was taken to the defendant before noon, and at the same time the defendant's clerk *was told that a special entry, if required, should be made to hasten delivery.*"

It was held that the notice was not sufficient to charge the defendant with special damage. I doubt if this ruling would be sustained today, and think the evidence indicated that there was a contract to deliver within a particular time. The decision was rendered in 1854, within thirty years after the first steam railway began to operate in England, when railroading was in its infancy, and the facilities for transportation were limited, and while the rule adopted as to damages for breach of contract generally ought to be adhered to, it is doubtful if it was intended to apply to the contracts of common carriers under the conditions existing today.

It was then important for the carrier to know, at the time the goods were received, the circumstances requiring diligence, that it might prepare to meet them, while today the carrier is required to receive goods tendered for shipment and to be prepared to transport.

The carrier has the goods in its possession; is in the performance of a duty that is continuous until delivery, and has or ought to have the facilities for transporting, and it has the opportunity of avoiding loss by exercising reasonable diligence. It would seem that it ought to be held to this degree of responsibility.

Cited: Cheese Co. v. Pipkin, post, 401; *Currie v. R. R.,* 156 N. C., 434; *Carmichael v. Telephone Co.,* 157 N. C., 27; *Thomason v. Hackney,* 159 N. C., 302; *Penn v. Telegraph Co., ibid.,* 309; *Mule Co. v. R. R.,* 160 N. C., 220; *Fountain v. Lumber Co.,* 161 N. C., 38; *Hartsell v. Asheville,* 164 N. C., 195; *Hardware Co. v. Banking Co.,* 169 N. C., 750; *Rawls v. R. R.,* 173 N. C., 8.

ROBERTSON AND CREED ET AL. v. S. E. MARSHALL ET AL.

(Filed 3 May, 1911.)

1. **Arbitration and Award—Scope of Submission—Void Arbitration.**

An award may not extend beyond the meaning and scope of the submission unless waived by the voluntary introduction of testimony or some other recognized method of enlarging the inquiry, and when thus extended is void as to the excess.

2. **Excess—Dependent Conditions.**

If the matters awarded in excess of the meaning and scope of the inquiry submitted are on matters not independent and severable, the effect may be to render the entire award invalid.

3. **Arbitration and Award—Courts—Favorable Consideration—Intent.**

Courts favor arbitrations, and will always put as liberal and comprehensive a construction upon agreements to submit as the apparent intention of the parties will allow.

4. **Arbitration and Award—Scope—Evidence.**

The plaintiff having purchased from the defendant two sawmills, referred to respectively as the big and the little mill, had several disagreements respecting the terms of purchase, it having been agreed, among other things, that payments were to be made in sawing defendant's lumber. The plaintiff contended that the defendant failed in its agreement to supply the lumber to be sawed, etc. Under agreement between the parties, the defendant took back and credited the plaintiff with the little mill, and proceeded under the original agreement as thus changed, but upon another disagreement submitted the matter to arbitration under a writing stating all matters of difference and disagreement growing out of the contractual and trade relations and dealings, and all matters incident thereto should be passed upon by the arbitrators and the award should be final and binding. Accordingly, an award was rendered, canceling the plaintiff's note given for the balance of the purchase price and giving defendant damages in a certain sum: *Held*, (1) the award was within the scope of the terms of the arbitration, and binding upon the parties; (2) it was also within the scope of the arbitration, under defendant's own evidence, that all matters relating to the business dealings were to be considered, including those relating to the big as well as to the little mill.

5. **Arbitration and Award—Possible Conditions—Hypothecated Note.**

An award directing the cancellation of certain notes which the payee, a party thereto, had hypothecated with a bank for security for borrowed money is not void as impossible of performance, the repossession of the notes being possible by the payment of the note for which the security was pledged.

6. **Appeal and Error—Arbitration and Award—Partiality—Allegation—Too Late on Appeal.**

An award will not be set aside on appeal for partiality claimed on the part of an arbitrator when it is not pleaded or assailed in the trial court upon that ground.

(169) APPEAL from *E. B. Jones, J.*, at August Term, 1909, of SURRY.

Action to recover on a bond of $2,000 given by defendant S. E. Marshall to secure performance of an award. It appeared that defendant, S. E. Marshall, had sold plaintiffs two sawmills, referred to as the big and the little mills, the first at the price of $2,000 and the latter at $1,000, the sale being partly on credit, and the mills, which were then placed on or near the lands of defendant, were to be paid for in lumber, sawed by plaintiff at said mills and from certain described lands of defendant; that defendant entered into a contemporaneous agreement to supply the mill with logs up to and including 1907; that some differences having arisen between the parties, in the effort to adjust the same, defendant agreed to and did take back the little mill, the purchase price being credited and the parties proceeded in recognition of the contract obligations under conditions produced by the change. Further differences having arisen among others the plaintiff complaining that defendant had failed to supply logs as stipulated. The parties, having entered into a bond of $2,000 to secure performance, agreed to submit all matters in dispute between them to arbitration, and this was done under the following written agreement:

"That, whereas, certain matters of difference or disagreement have arisen between the parties to this agreement on account of their contractual and trade relations and their dealings with each other entered into and had in Surry County, North Carolina, and Patrick County, Virginia, relating to the lumber business and all else incident thereto; and, whereas, the parties hereto have agreed, and by these presents they do contract and agree, to submit all such matters of disagreement or difference to arbitrators, and have agreed so to do:

"Now, therefore, the said J. A. Creed and C. L. Robertson, of the first part, and S. E. Marshall of the other part, in consideration of the premises and the sum of one dollar by each party to the other paid, do agree, the party of the one part to the party of the other part, as follows:

"That all matters of difference and disagreement growing out of the aforesaid contractual and trade relations and dealings entered
(170) into and had by the parties hereto, and all matters incident thereto, shall be submitted to the settlement of three men in the persons of F. E. Marshall, C. F. Taylor and W. L. Reece, which three persons shall take such evidence and testimony bearing upon all matters of difference between the parties, as above specified, as they may deem proper; and upon such testimony and evidence they shall make their findings and award, which finding and award when made shall be final, and shall conclude all parties to this agreement. It is

further agreed that the finding and award of a majority of the three arbitrators shall be the award of the body and shall be final."

The arbitrators met, pursuant to notice, heard the evidence, and made a full award, deciding, among other things, that the trade about the big mill be also canceled, and that four of the plaintiff's notes outstanding therefor for $750 each be surrendered or no longer considered binding between the parties, stated the account between them on that basis and awarded plaintiff $350, balance due as the result of all dealings between them. The defendant answered and admitted the agreement to arbitrate and the award setting aside the mill trade and the balance found to be due, but denied liability on the ground chiefly that the question of the trade for the big mill and the notes given therefor were not matters in dispute and, therefore, not embraced within the terms of the submission. Issues were submitted and responded to by the jury:

1. Did the agreement to arbitrate embrace the consideration of the sale of the big mill? Answer: Yes.

2. Did the arbitrators, in the absence of S. E. Marshall, admit and consider the evidence offered by Robertson and Creed? Answer: No.

3. In what amount, if anything, are defendants indebted to plaintiffs? Answer: $2,000.

Defendant resisted recovery further on the ground that it appeared in evidence on the hearing that two of the notes had, with other collateral, been hypothecated with a bank as security for a loan of $500, and were not then in possession and control of defendant. There was judgment on the verdict for $2,000 to be discharged on payment of $350; second, that the four notes of plaintiff, outsanding for the mill trade be surrendered subject to any right the bank of Mt. (171) Airy may have therein. Defendant excepted and appealed.

Watson, Buxton & Watson and R. L. Haymore for plaintiff.
W. F. Carter for defendant.

HOKE, J., after stating the case: As a legal proposition, defendant is correct in contending that an award may not extend beyond the meaning and scope of the submission, unless waived by the voluntary introduction of testimony, or some other recognized method of enlarging the range of inquiry. Such action on the part of the arbitrators is void, certainly as to the excess, and if not on matter independent and severable its effect may be to render the entire award invalid. *Stewart v. Cass,* 16 Vermont, 663; *Cox v. Jagger,* 2 Cowen, 633; 3 Cyc., 537. The facts in evidence, however, do not bring defendant's cause within the principle. It is said to be the general rule "That courts favor arbi-

trations and will always put as liberal and comprehensive construction upon agreements to submit as the apparent intention of the parties will allow," 2 A. & E., 605, and the authorities here and elsewhere are in support of the statement. *Bryan v. Jeffreys,* 104 N. C., 242; *Bryant v. Fisher,* 85 N. C., 70; *Crawford v. Orr,* 84 N. C., 246; *Masters v. Gardner,* 50 N. C., 298; 6 Lawson Rights and Remedies, sec. 3317. The terms of this submission, "That whereas certain matters of difference or disagreements have arisen between the parties to this agreement on account of their contractual and trade relations and their dealings with each other, entered into and had in Surry County, N. C., and Patrick County, Va., relating to the lumber business and all else incident thereto . . . therefore it is agreed that all matters of difference and disagreements growing out of the contractual and trade relations and dealings entered into and had between the parties and all matters incident thereto," shall be submitted, etc., are very broad and comprehensive, and if they do not of themselves include this trade about the big mill, as we are inclined to hold, they are without doubt sufficiently definite and certain to constitute a valid submission and to permit of parol evidence to fit them to the subject matter. *Osborne*
(172) *v. Calvert,* 86 N. C., 171; *Shackleford v. Parkett,* 9 Ky., 435; Morse on Arbitration, 61. The verdict on the first issue puts this matter beyond question, and there is ample evidence to support the verdict. While defendant testified that there was no dispute between them about the trade for the big mill, the account filed by him before the arbitrators contained the four notes as items of charge in his favor. C. L. Robertson, speaking to this matter, testified: "Sam Marshall came and asked us if we had agreed to take into consideration the mill notes and everything else. We told him yes, and he said he would then go into the agreement to arbitrate, and we all signed the paper. I was at the arbitration sworn, and so were all the others. I told them the agreement with the big mill and notes were to go into arbitration. Marshall was present. The disagreement grew out of our sawing contract. There was but one contract in writing. He discussed the purchase of the mill, then put it into writing." And J. A. Creed said: "When we agreed to arbitrate, we were to bring in the mill notes and everything, and he agreed to it, and I took it for granted that it covered the whole thing. We put up in evidence that the big mill, lumber and all, was to be considered." On the testimony and findings therefore we are of opinion, and so hold, that the award was within the scope of the admission, that it was adequate, sufficiently definite and final and no reason appears for disturbing the result.

Defendant further insists that no recovery should be had because it appeared upon the hearing that two of the notes directed to be returned

had, with other collateral, been hypothecated with the bank of Mt. Airy, and were not, therefore, in the ownership, possession or control of the defendants or either of them. Undoubtedly it is one of the requisites of a valid award that its performance be possible, but in reference to the question presented, this principle is only held to exclude awards impossible of performance in the nature of things, as "a direction to execute a conveyance on or before a day that had already passed," or "to do or obtain something which the party had no legal right to procure or enforce," as to "give some third person as surety" on whom the party had no claim. 8 Wait's Actions and Defenses, 527-540, but in this case, as shown, the notes, with other collateral, were only hypothecated to the bank to secure an indebtedness of $500. The defendant, (173) S. E. Marshall, had the legal right to redeem the notes, and the award, in this instance, is no more impossible than an order to pay a sum of money or do any other lawful act within the power of the defendant. The judgment, as a matter of form, protects the rights of the bank in the two notes, but this, while eminently proper, would seem to be unnecessary, as the bank, not being a party, could assert whatever rights it had, notwithstanding the judgment.

The position that the award should be set aside because one of the witnesses testified to facts which tended to show partiality in one of the arbitrators is without merit. There was evidence in full denial of the statement and in the absence of any pleading or application of any kind in the court below, assailing the award on that ground, the question may not be considered here. *Bryant v. Fisher, supra.* There is

No error.

Cited: Creed v. Marshall, 160 N. C., 395; *Cutler v. Cutler,* 169 N. C., 484.

J. T. WILSON v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 3 May, 1911.)

1. **Insurance—Parol Evidence—Policy—Merger—Cancellation—Reformation.**

An acceptance of a policy of insurance merges all prior parol agreements and inducements leading up to it, and parol agreements may not vary, alter or contradict the written terms of the policy unless and until reformed or set aside in an action for mistake or fraud.

2. **Insurance—Policy—Fraud or Deceit—Equity—Justice's Court—Jurisdiction.**

A policy of life insurance may not be reformed on the ground of fraud or deceit in a court of a justice of the peace, the remedy sought being equitable, and the justice of the peace having no jurisdiction thereof.

3. Same—Appeal—Superior Court.

When the plaintiff seeks only equitable relief in a court of a justice of the peace, no jurisdiction can be acquired over the subject-matter by the Superior Court on appeal, the proceedings being void *ab initio*.

4. Insurance—Justice's Court—Jurisdiction—Contract—Tort.

An action brought by an insured to recover money due to him by an insurance company under its policy, whether in contract or tort arising in the transaction, is cognizable in a court of a justice of the peace where the recovery sought does not exceed the sum of $50 and no equitable remedy is sought.

5. Contracts—Fraud and Deceit—Evidence.

Evidence considered and held insufficient to establish actionable fraud or deceit.

CLARK, C. J., concurs in the result.

(174) APPEAL from *Daniels, J.*, at January Term, 1911, of DURHAM.

Appeal from justice of the peace tried before *Daniels, J.*, and a jury, at January Term, 1911, of DURHAM. Evidence was offered, and on the argument before the court, the jury, the court having intimated an opinion that on the evidence, if believed, plaintiff was not entitled to recover, in deference to such intimation, plaintiff duly excepting, submitted to a nonsuit and appealed.

Manning & Everett; Branham & Brawley for plaintiff.
Bryant & Brogden for defendant.

HOKE, J. There was no error in the ruling of the court below. It appeared that on 21 March, 1898, plaintiff took out a life insurance policy in defendant company, insuring his life for a period of ten years on payment of weekly premiums, and at the end of the specified time the policy contained several options looking to a continuance of the same on certain terms and also one numbered four in words as follows:

"4. Surrender this policy and draw the entire cash value, that is, the legal reserve computed according to the actuaries table of mortality and four per cent interest, together with the dividend." The premiums having been paid for ten years and plaintiff having elected to terminate the contract relation under the fourth option set out above, the claim was calculated and the amount due under the provisions of said option $3.62 was duly tendered plaintiff and refused. Plaintiff made the refusal on the ground that the agent of the company during the bargain about the policy assured plaintiff that at the end of ten years he would

(175) get back the premiums and interest thereon at four per cent and on the trial testified to that effect.

We have said in *Floars v. Insurance Co.*, 144 N. C., 232-235: "It is

also accepted doctrine that when the parties have bargained together touching a contract of insurance and reached an agreement, and in carrying out, or in the effort to carry out, the agreement a formal written policy is delivered and accepted, the written policy, while it remains unaltered, will constitute the contract between the parties, and all prior parol agreements will be merged in the written instrument; nor will evidence be received of prior parol inducements and assurances to contradict or vary the written policy while it so stands as embodying the contract between the parties. Like other written contracts, it may be set aside or corrected for fraud or for mutual mistake; but, until this is done, the written policy is conclusively presumed to express the contract it purports to contain," citing Beach's Laws of Insurance, secs. 495, 496; Vance on Insurance, 163, 348; *Insurance Co. v. Mowry,* 96 U. S., 547. This position being well recognized and the policy not providing for any such settlement or adjustment of plaintiff's claim as he now demands, a recovery could only be had by reformation of the policy or on the ground of fraud or deceit. The action having originated in the court of a justice of the peace and that court having no equitable jurisdiction in actions for reformation of written instruments, the first ground of relief is not open to plaintiff. *Berry v. Henderson,* 102 N. C., 525; *Dougherty v. Sprinkle,* 88 N. C., 301; *Fisher v. Webb,* 84 N. C., 44. And the demand can only be maintained, if at all, on the second ground stated, for fraud or deceit. The suit being for no more than fifty dollars, there is no defect of jurisdiction in this aspect of the case whether the action be considered as one in tort or in contract. *Stroud v. Insurance Co.,* 148 N. C., 54; *Duckworth v. Mull,* 143 N. C., 461.

We concur in the opinion, however, that the evidence is not sufficient to sustain an action for fraud or deceit. Nor would it justify a reformation of the policy on that ground. True, plaintiff testified that defendant's agent assured him in general terms that the investment was as good as a savings bank and told him that under this clause four (176) he would get his premiums back with interest at four per cent, but these representations were not of a kind nor under circumstances that justified plaintiff in relying upon them, nor would they uphold the view that an actionable fraud had been perpetrated. The testimony showed that plaintiff was a man of fair intelligence and some business experience. He could read and write, had worked for about twelve months in a furniture store, taking written leases from purchasers; that he also worked in a grocery store five or six years, selling goods on time and entering up the items of charge in the credit department of the business, and in a hardware store for some months, where he had done the same thing; that plaintiff and defendant's agent, who solicited the insurance, had worked in a mill together, and there was nothing to show any dis-

parity between them either in intellect or information, and the case, we think, comes clearly under the class considered and passed upon in *Cathcart v. Insurance Co.*, 144 N. C., 623, and *Clements v. Insurance Co., ante*, 57.

There is no error and the judgment of nonsuit is

Affirmed.

CLARK, C. J., concurs in the conclusion and in the opinion, but dissents from the following dictum: "The action having originated in the court of a justice of the peace, and that court having no equitable jurisdiction in actions for reformation of written instruments, the first ground of relief is not open to plaintiff."

1. The Constitution, Art. IV, sec. 1, provides: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished; and there shall be in this State but one form of action, for the enforcement or protection of private rights or the redress of private wrongs which shall be denominated a civil action." This provision is not restricted to the Superior Court, but applies to all courts. Section 27 of the same article confers upon justices of the peace jurisdiction "of civil actions founded on contract wherein the sum demanded does not exceed $200; and wherein the title to
(177) real estate shall not be in controversy"; and authorizes the General Assembly to confer upon justices of the peace "jurisdiction of other civil actions wherein the value of the property in controversy does not exceed $50." Accordingly the Legislature has conferred such additional jurisdiction in Revisal, 1420. The phrase, "property in controversy," has been held to mean the value of the injury complained of or the amount in controversy. *Malloy v. Fayetteville*, 122 N. C., 480; *Watson v. Farmer*, 141 N. C., 453; *Duckworth v. Mull*, 143 N. C., 464. There is nothing therefore in either the Constitution or the statute which denies a justice of the peace jurisdiction of a controversy within the amounts above specified on the ground that an action is equitable in its nature, the only exception is "when title to real estate is in controversy." It has been held that the justice has jurisdiction of an equitable defense within the prescribed amount. *Levin v. Gladstein*, 142 N. C., 494. If so, he necessarily has jurisdiction of an equitable cause of action within that limit.

2. Even if the justice of the peace did not have jurisdiction, the case having gone by appeal to the Superior Court, that court has full jurisdiction. This has been held in *McMillan v. Reeves*, 102 N. C., 559, wherein *Smith, C. J.*, says: "It is not material to inquire into the question of the jurisdiction invoked in initiating the suit, since any objection on this account is obviated by the removal of the cause into the

Superior Court presided over by the judge, and the submission of all the parties thereto to his exercise of jurisdiction in the premises, as fully as if the action had there originated. As, then, the court, assuming to exercise jurisdiction, did possess it fully over the subject-matter of the action and the parties to it, in which all the heirs were represented by counsel, the cause was, in a strict sense, *coram judice,* on the ruling in *West v. Kittrell,* 8 N. C., 493; and *Boing v. R. R.,* 87 N. C., 360, even without the aid of Laws 1887, ch. 276, which sustains the jurisdiction thus acquired and authorized the court 'to proceed and hear and determine all matters in controversy in such action,'" etc.

In *Boing v. R. R.,* 87 N. C., 363, it was held that where the subject-matter of the action is one of which the court of the justice of the peace and the Superior Court have concurrent jurisdiction, (178) and the case is carried by appeal to the Superior Court, the latter will retain jurisdiction though the proceedings in the court of the justice of the peace are void for irregularity. This can only be sustained upon the ground that the case having gotten into the Superior Court which has jurisdiction, the notice of appeal has the same efficacy as the service of a summons in bringing the defendant into court. In *West v. Kittrell,* 8 N. C., 493, it was held that where a case was irregularly carried to the Superior Court from the county court the former will retain jurisdiction, if it was a subject-matter of which the Superior Court would have had jurisdiction if the action had originally been instituted in that court.

The jurisdiction of the Superior Court is fixed by the Constitution, and when it has jurisdiction of the controversy, upon the above authorities, it has it fully, regardless whether the cause originated in a lower court or in the Superior Court. The doctrine of derivative jurisdiction (though sustained by some cases), whereby a case brought by appeal to that court is dismissed in order that it may straightway be brought back by a summons, has no foundation in the Constitution or in reason.

No plaintiff will subject himself to the delay and expense of bringing an action before a justice of the peace when the jurisdiction is clearly in the Superior Court. A judgment by a justice of the peace when he has no jurisdiction would be a nullity. But when by appeal the cause gets into the Superior Court, nothing is to be gained by dismissing the action. The trial should proceed. If amendments, or the defense set up, bring in matters of which the justice would not have had jurisdiction, that is no reason why the Superior Court having obtained jurisdiction, by the notice of appeal, should not proceed with the trial.

Cited: Cheese Co., post, 396; *Grover v. Ins. Co.,* 157 N. C., 564; *S. v. McAden,* 162 N. C., 578; *McIver v. R. R.,* 163 N. C., 547.

(179)

ANDERSON JONES v. A. F. WILLIAMS ET AL.

(Filed 11 May, 1911.)

1. Lis Pendens—Mortgages—Suit of Foreclosure—Situs of Property.

One who buys a note, and a mortgage of land securing it, during the pendency of a suit and for the foreclosure of another mortgage on the same land in the county wherein it is situated, and after proper complaint is filed therein, acquires his interest in the note and mortgage so purchased by him subject to any judgment that may be obtained in the pending action, the doctrine of *lis pendens* being applicable.

2. Same—Formality.

When a suit is brought for the foreclosure of a mortgage in the county where the lands embraced therein are situated, it is sufficient notice to those dealing with the mortgagor in respect to the land; and the filing of a formal *lis pendens* is not required to charge a purchaser with such notice.

3. Mortgages—Liens—Equities—Legal Title—Foreclosure—Parties.

A junior mortgagee is not bound by the judgment obtained in a suit by a senior mortgagee for the foreclosure of a mortgage on lands unless he has been made a party to that suit, and he will not be barred of his right to redeem, though not for some purposes a necessary party thereto; and it can make no difference that, in this State, the legal title passes to the mortgagee, and the mortgage is not regarded as a mere security.

4. Decisions—Rights Acquired—Reversal.

Titles or vested interests acquired upon the faith of decisions of this Court will not generally be disturbed or the parties prejudiced by a subsequent reversal thereof.

5. Mortgages—Junior Mortgagee—Rights—Parties—Decrees, Effect of.

The doctrine that junior mortgagees will not be bound by a judgment obtained in a suit for the foreclosure of a senior mortgage, unless they were made parties thereto, has reference only to such as may have had their mortgages recorded under our registration laws.

6. Mortgages—Power of Sale—Equitable Procedure.

The equitable power of a court to foreclose a mortgage is not derived from the power of sale contained therein; and when the mortgagee applies to the court to foreclose, the court pursues its own course of practice without restraint, so as to administer the rights of the parties according to law and its own procedure.

7. Mortgages—Transfer—Legal Title.

The mere transfer of a note and mortgage securing it does not transfer the legal title to lands, or the power of sale contained in the mortgage.

8. Mortgages—Legal Title—Power of Sale—Equity—Foreclosure.

When the legal title of mortgaged lands, upon which there were several mortgages, is in the first mortgagee, who was not a party to a suit for

foreclosure, a sale under the decree of foreclosure can not have the same force and effect as if it had been made under the power contained in the instrument.

9. Foreclosure Sales—Equity—Bidder—"Proposer"—Confirmation—Party—Decree.

One who bids in property at a sale under a decree of foreclosure is a mere proposer until his bid is legally accepted and confirmed, and when made a party after his bid and before confirmation, to a prior suit for foreclosure of which he had constructive notice, he is subject to and bound by the final decree in that suit.

10. Mortgages—Foreclosure Sales—Legal Title—Parties—Equities—Account.

When a junior mortgagee is not a party to a foreclosure suit in equity brought by the assignee of a senior mortgage, the effect of the decree is not to deprive him of his equity of redemption, and the purchaser at the sale under such a decree takes subject to his lien for whatever sum may be due him, and to his right of redemption; and in order to ascertain the status and amount of the several claims an account may be taken.

11. Mortgages—Foreclosure—Third Parties—Equity—Interested Persons—Hearings.

Where there is the foreclosure of a mortgage under a power of sale therein contained, third parties must be vigilant to protect their interest, as it is not a judicial proceeding, but simply a method adopted by the parties to enforce the lien.

APPEAL from *Whedbee, J.*, at the November Term, 1910, of (180) DUPLIN.

Action brought by the plaintiff to foreclose a mortgage on a tract of land, containing originally 245 acres, executed to him by the defendants, Rufus Branch and wife, to secure a debt of $379.50 therein described. The other defendant, Fred Martin, trading under the name and style of E. J. Martin & Son, was made a party, as Rufus Branch and wife had also mortgaged the land to him and he had assigned his notes and mortgages to his codefendant, A. F. Williams. The (181) following facts appear in the case: Summons was issued on 24 December, 1903, in behalf of the plaintiff and against Fred Martin, trading under the firm name and style of E. J. Martin & Son, Rufus Branch and wife, Christiana Branch, and was served 18 January, 1904, on Rufus Branch and wife, Christiana Branch, and 15 January, 1904, on Fred Martin. Complaint and answer were duly filed, and at the March Term, 1904, upon affidavit, A. F. Williams was made a party defendant, he having purchased the two mortgages of E. J. Martin & Son. At August Term, 1904, an order was made directing summons to issue to A. F. Williams, and on October, 1904, summons was served upon him. The plaintiff, Anderson Jones, prior to 1890, sold to the defendant Rufus Branch a tract of land containing 245 acres, and the

latter made various payments up to 16 January, 1902, on which date Rufus Branch and wife executed to Anderson Jones their mortgage upon the tract of land to secure the balance of the purchase money of $379.50, which mortgage was duly recorded on 24 October, 1902. In part payment of the purchase price on said tract of land, Rufus Branch and wife, on 23 November, 1901, reconveyed to Anderson Jones forty-six of the 245-acre tract of land by deed, which was duly recorded on 17 November, 1902. On 30 October, 1901, Rufus Branch and wife executed a mortgage deed to Fred Martin, trading as E. J. Martin & Son, to secure an indebtedness of $328 on the 245-acre tract of land, which mortgage was duly recorded on 2 November, 1901. On 16 January, 1902, Rufus Branch and wife executed to Fred Martin, trading as aforesaid, a mortgage upon the 245-acre tract of land to secure an indebtedness of $250, which was duly recorded 25 January, 1902. On 3 March, 1904, A. F. Williams commenced an action in the Superior Court of Duplin County against Rufus Branch and wife, to foreclose the mortgage assigned to him by Fred Martin, and Branch and wife filed no answer. At the August Term, 1904, the court rendered a judgment ordering the land to be sold, and the land was sold by a commissioner and bought by A. F. Williams, and a final decree entered at the November Term, 1904, confirming the sale and authorizing the pur-
(182) chase price of the land to be credited on Williams' judgment and directing a deed to be made to him for the land. A deed was made and registered 26 November, 1904.

Anderson Jones alleged in his complaint that the defendant, Rufus Branch, executed to him the mortgage on the land to secure the purchase money, and was indebted to him on that account in the sum of $544.50, and also alleged that he had purchased the forty-six acre tract, describing it by metes and bounds, and paid him $150 for the same, and received a deed therefor. He also alleged that the defendant, Rufus Branch, executed to E. J. Martin & Son the notes and mortgages hereinbefore described, and that the defendant A. F. Williams purchased the notes and mortgages after they were due and since the institution of this action and while the same was pending, and that the defendant A. F. Williams went into the possession of all the land except the forty-six acres, and received the rents and profits therefrom, and asked for an accounting and a sale of the land to pay off both debts. It is admitted that the defendant A. F. Williams became the owner of the notes and mortgages of Fred Martin, executed to him by Rufus Branch and wife, after the maturity of the notes and mortgages. It is also admitted that A. F. Williams has been in possession of the 199 acres of land since the notes and mortgages were signed to him by Martin, receiving the rents and profits. The evidence showed the annual rental value of the 199

acres of land was $100, and the annual rental of the forty-six acres was $35.

It was admitted that A. F. Williams commenced the action against Rufus Branch and wife after he had been made a party to this suit by order of the court, although summons was not served upon him until 5 October, 1904. The court submitted to the jury certain issues, which with the answers thereto are as follows:

1. What amount, if anything, is due Anderson Jones on account of his notes and mortgage executed by Rufus Branch and wife? Answer: $379.50, with interest from 1 November, 1902, subject to credit of $16.24 made 1 November, 1902.

2. What sum, if anything, is due upon the mortgage assigned to A. F. Williams by E. J. Martin & Son? Answer: $250, with (183) interest at six per cent from 16 January, 1902, until paid, subject to a credit of $13.91 made 31 December, 1902; $164, with interest at six per cent from 30 October, 1901; and $328, with interest at six per cent from 30 October, 1901, until paid.

3. Is the defendant A. F. Williams the owner and entitled to the possession of all the land described in the complaint? Answer: Yes.

4. What is the annual rental value of the forty-six acres of land mentioned in the complaint? Answer: $35.

The first two issues were submitted at the request of the plaintiff, and to the third and fourth he excepted and tendered the following additional issue: What is the annual rental value of the 199 acres of land which has been in the possession of the defendant A. F. Williams? The court refused to submit this issue and held, and so adjudged, that in no view of the evidence was the plaintiff entitled to recover with respect to the forty-six acres, either the land or any interest therein, and charged the jury that, if they believed the evidence, they should answer the third issue, Yes. The court further held, as matter of law, that the plaintiff was not entitled to a foreclosure and the defendant Williams was not liable to account for the rents and profits which he had received while in possession of the 199 acres of land. Exceptions were duly taken by plaintiff to the several rulings of the court. It was adjudged upon the verdict that A. F. Williams is the owner of all the land, that is, the 245 acres, and that he recover possession of the same from the plaintiff, with $175, the rental value of the forty-six acres. Plaintiff excepted and appealed.

Stevens, Beasley & Weeks for plaintiff.
W. S. O'B. Robinson & Son for defendant.

WALKER, J., after stating the case: We think it may fairly be inferred from the record that A. F. Williams bought the notes and the mort-

gages from Fred Martin during the pendency of this action and after the complaint had been filed therein. If so, he acquired his interest in them subject to any judgment rendered herein, for this suit would be a complete *lis pendens*. *Lord Bacon* stated the common law rule (184) to be that "no decree bindeth any that cometh in *bona fide* by conveyance of the defendant before the bill exhibiteth, and is made no party, neither by bill or order; but when he comes in *pendente lite*, and while the suit is in full prosecution, and without any order of allowance or privity by the court, then regularly the decree bindeth. This rule had its origin in the civil law, and was pungently stated in the legal maxim, *pendente lite, nihil innovetur.*" 4 Bacon's Works, 515. *Sir William Grant* said in *Bishop of Winchester v. Paine*, 11 Vesey, 194-201, that "he who purchases during the pendency of the suit, is bound by the decree that may be made against the person from whom he derives the title; the litigating parties are exempted from the necessity of taking any notice of a title so acquired; as to them it is as if no such title existed, otherwise suits would be interminable, or, which would be the same in effect, it would be the pleasure of one party at what period the suit should be determined. The rule may sometimes operate with hardship, but general convenience requires it." Wiltsie Mortgage Foreclosures, sec. 41 and notes. It may therefore be taken as well settled that a judgment in an action *in rem* or one to foreclose a mortgage binds not only the parties actually litigating and their privies, but also all others claiming or deriving title under them by a transfer *pendente lite*. The filing a formal *lis pendens* is not required for the application of this recognized principle when the suit is brought in the county where the land is situated. *Dancy v. Duncan*, 96 N. C., 111; *Collingwood v. Brown*, 106 N. C., 362; *Overton v. Hinton*, 123 N. C., 2; *Harris v. Davenport*, 132 N. C., 697; *Morgan v. Bostic, ibid.*, 743; Pell's Revisal, sec. 460 and notes; Wiltsie, sec. 40. While the facts relating to the *lis pendens* are not very clearly set out in the record, we think it sufficiently appears that A. F. Williams was a purchaser *pendente lite*, and must be held bound by the judgment in this action, but there is another question raised in the case which we think was erroneously decided. Our decision is based upon both grounds.

The defendant Williams failed to make the plaintiff, who was a junior encumbrancer, a party to the foreclosure suit brought by him against Rufus Branch, the mortgagor. The plaintiff is therefore (185) not bound by the proceedings and judgment in that case and his lien upon the land was not affected thereby. In treating of this question, Wiltsie, in section 60, says that persons who have acquired an interest in the equity of redemption by encumbrance, such as a mortgage, subsequent to the execution of the mortgage under foreclosure, are

necessarily parties to the foreclosure suit in order to extinguish their claims. "The theory of the law is, that such an encumbrance is a pledge of the equity for the debt, and gives the lienor an equitable interest in the mortgaged premises. As the owner of the equity may, by an absolute conveyance, transfer his entire interest, and thereby make his transferee a necessary party, as we have seen, so he can on the same principle pledge, by a mortgage, judgment or otherwise, a part or the whole of his interest in the premises, and thereby render the encumbrancer a necessary party in order to wipe out his interest. Though a lienor does not acquire the fee title to the equity, he acquires an interest in the premises which the statutes of the various States have long established, and which the courts have long recognized and sustained; and which parties, dealing with the premises, cannot ignore, except at their own peril." He thus sums up the law upon the subject: "All authorities in all countries where mortgages are foreclosed by equitable actions, are agreed that subsequent and junior mortgagees are necessary parties to the foreclosure of a prior mortgage in order to extinguish and cut off their liens. The action can be sustained without them, but a defective title would be offered at the sale which no court would compel a bidder to accept. The rule has long been settled that in a bill to foreclose a mortgage, the rights of encumbrancers not made parties to the suit, are not barred or affected by the decree. If a junior mortgagee is omitted as a party, his remedy is to redeem from the sale under foreclosure." Wiltsie, sec. 61. He cites numerous and well considered cases to sustain his views. In *Gage v. Brewster,* 31 N. Y., 218, a case much like ours, the Court said: "The plaintiff was not affected by the foreclosure suit upon defendant's mortgage, to which he was not made a party. He was, therefore, entitled to redeem, precisely as though no such action had been brought, namely, by paying the mortgage debt and interest. . . . When seeking to extinguish the equity of redemption and to bring the (186) premises to a sale, it was his duty to ascertain to whom that equity of redemption belonged. It was the subject of transfer by sale or mortgage, and it had been actually mortgaged to the plaintiff, and his mortgages were on record." So it was said in *Gould v. Wheeler,* 28 N. J. Eq., 541: "The complainant would be entitled to a decree of foreclosure and sale, but for the fact that it appears by her bill that there is a subsequent encumbrancer, a mortgagee, who is not made a party to the suit. That mortgagee is a necessary party. A mortgagee who comes into court for foreclosure and sale of the mortgaged premises, is not at liberty to omit, as parties to the proceedings, those who hold encumbrances subsequent to his own. The general rule is, that the holders of all encumbrances existing at the time of commencing the suit must be made parties. Story's Eq. Pl., sec. 193; *Ensworth v. Lambert,* 4 Johns.,

ch. 605; *Adams v. Paynter,* 1 Col. C. C., 530; I Fisher on Mortgages, 554, 555, 556. It is true that if they be not made parties, the proceedings are of no avail against them, but that is no reason for making a suit for foreclosure and sale of mortgaged premises an exception to the general rule of equity, which requires that all persons in interest be parties to the suit. It is manifestly unjust to all persons interested in the proceeds of the sale of the mortgaged premises, that the sale be made subject to an outstanding right to redeem, for that invariably and inevitably prejudices the sale. The bill must be amended by making the holder of the mortgage given by Stewart (the third mortgage) a party, and he must be brought into court, and the cause be proceeded in regularly as against him. In the meantime the suit will be stayed." Cases directly in point are *Murphy v. Farwell,* 9 Wis., 102; *Carpenter v. Brenham,* 40 Cal., 221; *Johnson v. Hosford,* 110 Ind., 572; *County of Floyd v. Cheney,* 57 Iowa, 160; *Stewart v. Johnson,* 30 Ohio St., 24; *Johnson v. Hambleton,* 52 Md., 378; *Watson v. Investment Co.,* 12 Oregon, 474; *Rogers v. Holyoke,* 14 Minn., 220; *Smith v. Chapman,* 4 Conn., 344; *Hodgen v. Gutlery,* 58 Ill., 431. The case last cited is strikingly like the case at bar in its facts. In *Hall v. Hall,* 11 Texas, 547 (approved afterwards in *Mills v. Traylor,* 30 Texas, 7), it is
(187) said: "All persons having an interest in the equity of redemption should be made parties to a bill of foreclosure. If such encumbrancers, whether prior or subsequent, are not made parties, the decree of foreclosure does not bind them, as also a decree of sale would not. The prior encumbrancers are not bound, because their rights are paramount to those of the foreclosing party. The subsequent encumbrancers are not bound, because their interest would otherwise be concluded, without an opportunity to assert or protect them. In the case now under consideration, the lands were sold to the appellees subsequent to the mortgage to appellants, and it may be held, that the appellees took the property subject to that encumbrance. They should, however, not have been precluded or affected by a proceeding had in their absence and without notice." In *Crane v. Cotrell,* 48 Neb., 646, the Court applied the principle and said: "The plaintiffs were not made parties to the foreclosure suit, and were not bound by those proceedings. The mere fact that they had notice of its pendency did not make them parties or bind them by the decree. This is elementary. The foreclosure and sale were therefore utterly ineffectual to bar plaintiff's mortgage. A junior mortgagee who has not been made a party to the proceeding foreclosing the senior mortgage has thereafter a right to redeem from such senior mortgage (the purchaser at the judicial sale). (*Renard v. Brown,* 7 Neb., 449.) Therefore, when this foreclosure was properly pleaded in the present case, the facts demanded that the plaintiffs, instead of

merely having their mortgage reëstablished, should be permitted to redeem the Stoddar mortgage. Why the court denied this relief and denied plaintiffs any relief, the record does not inform us. . . . If he (Stoddar) did not know of plaintiff's rights when he took the mortgage, he learned them within a very few days thereafter. At the time of the foreclosure sale this very suit was pending in which he is a party. He had full notice of all the facts. A mistake of law would not protect him." The Court, in *Howard v. R. R.*, 101 U. S., 837, held that while the senior mortgagee can proceed by suit to foreclose against the mortgagor alone, and in that sense a subsequent lienor or encumbrancer is not a necessary party, the decree is not binding upon the latter so as to supersede or displace his lien, but it left him still the (188) right, as a second encumbrancer, to redeem, which he may do if his right is not lost by laches or lapse of time. "Subsequent encumbrancers," says *Justice Clifford,* who delivered the opinion, "when not made parties to a bill for foreclosure or sale, are not bound by the decree; nor is that rule violated in the least degree when it is held that the title of the defendants is paramount, as that consequence flows from the fact that the lien of the judgment under which the defendants claim is prior to that under which the plaintiff claims his title. Whatever rights the plaintiff had prior to the sale in equity which gives the defendants the paramount title, he still has, wholly unimpeached by that sale or by any other cause, unless they are barred by lapse of time or laches. Process against the plaintiff under that decree could not affect his rights, as he was not a party to the proceeding, consequently the lien of his judgment still remained in full force. Even if the plaintiff had been made a party to that proceeding, the only effect would have been to cut off his equity of redemption, and as he was not made a party, his equity of redemption is not extinguished." The counsel of defendant Williams, Mr. John Robinson, in his excellent brief, and also at the bar in his well prepared and forceful argument, relied on the following cases: *Kornegay v. Steamboat Co.,* 107 N. C., 115; *Lumber Co. v. Hotel Co.,* 109 N. C., 658; *Williams v. Kerr,* 113 N. C., 306, and *Gammon v. Johnson,* 126 N. C., 64; and contended that it had been decided by them that a second encumbrancer is not a necessary party to a foreclosure suit by the first lien-holder or mortgagee. This may be conceded, and yet the deduction drawn therefrom, that he will be barred of his right to redeem, is not warranted. We have said he is not a necessary party, in the sense that the decree will be void without him as to those who are parties, but he is clearly entitled to redeem and we think that the Court, in *Williams v. Kerr* and *Gammon v. Johnson,* approves the principle as we have stated it. In the case last mentioned he is said to be a necessary, or at least a proper, party in order to have a com-

plete adjustment of the rights of all interested persons, and further, that the court should *ex mero motu* require him to be brought in by
(189) process so as to conclude him. In *Williams v. Kerr* the assignee of the mortgagor was held, for special reasons, to be affected by the foreclosure suit, as a *lis pendens,* and to be bound by its orders and decrees. In the *Kornegay* and *Lumber Company cases,* the Court had under consideration the priority of a lien, under the statute, of a mechanic or material-man. In none of those cases, as we read and understand them, was the precise question raised which is now before us for decision, and we think that all those cases may be reconciled with what we have hereinbefore said as to the effect of a decree upon a junior encumbrancer not a party to the foreclosure sale. *Pitt v. Moore,* 99 N. C., 85. There is nothing decided in *Hinson v. Adrian,* 86 N. C., 61, that militates against the views we have so far expressed, but the decision rather coincides with them. The Court says: "While there is some diversity of opinion as to the practice in requiring the presence of prior and posterior mortgagees in a foreclosure suit, the *preponderance* of authority favors the propriety, if not the necessity, of their being parties, in order to a full and final adjustment of all the equities involved." It is true that, when referring to certain authorities upon the subject, it is casually said that, if not made a party, the second encumbrancer would be concluded without an opportunity to assert his rights or protect them, but this was an inadvertence, we think, and not justified by the cases, and directly opposed to the overwhelming weight of authority, and it was not at all necessary to the decision of the case. Nor do we think it is sustained by the authorities cited. It was merely stated for the purpose of showing how unjust it would be to bind without a hearing. The court, in that case, ordered the junior encumbrancer to be made a party. We think there is nothing decided in those cases in conflict with our present ruling, but if anything had been so decided, we would unhesitatingly refuse to follow it, in view of the great weight of authority the other way, unless compelled to do so because it may involve a question of title. But we are not confronted by any such situation. If we have decided in any case the very question not presented contrary to what we now decide, the precedent will be controlling so far as to protect
(190) any titles or vested interests which have been acquired upon the faith of it. Parties have the right to act upon the decisions of this Court in acquiring titles, and such titles will not be disturbed or the parties prejudiced by a subsequent reversal of the decision. We have so held in two recent cases: *Hill v. R. R.,* 143 N. C., 539; *Hill v. Brown,* 144 N. C., 117. Such a rule is based upon an ancient maxim of the law, is a just one and should be perpetuated. Broom Legal Maxims (8 Ed.), 34, 35. Further, we will say that the principle of

this decision will not apply to a subsequent mortgagee whose mortgage is not registered. This application of the rule to such a case would be intolerable. If parties withhold their deeds from registration, they must take the consequences of their own neglect. The law abhors secret liens, and it is now the firmly established policy of this State, and has been since 1885, to require the registration of deeds and other instruments and to protect innocent purchasers against the claims of those who have not complied with the law. Pell's Revisal, sec. 979-981 and notes; Acts of 1885, ch. 147.

It is suggested that the rule applied in this case does not obtain in States where the legal title is held to pass by the conveyance to the mortgagee, as in this State, but only in those where a mortgage is considered merely as a lien, or a security for the payment of the debt. But an examination of the authorities will disclose that they recognize no such distinction. In the States of New Jersey, Connecticut, Maryland, Illinois, Ohio, and others, from the reports of which we have cited cases, it has been held that the legal title passes to the mortgagee. 20 A. & E. Enc. (2 Ed.), 900 and note 5. The rule rests upon the reasonable assumption that the junior encumbrancer has an interest which should be protected by the courts, and which can not be taken from him or impaired without notice and an opportunity to be heard. "It has long been the received rule (expressed in the maxim *audi alteram partem*), that no one is to be condemned, punished or deprived of his property in any judicial proceeding, unless he has had an opportunity of being heard." Broom Legal Maxims (8 Ed.), 112.

The defendant Williams further contends that he had as good a title as if he had foreclosed under the power of sale, as the court in the foreclosure suit was merely selling in accordance with the (191) power by substituting a commissioner in the place of the mortgagee, and that therefore *Dunn v. Oettinger,* 148 N. C., 276, where the trustee sold under the power, applies. But this contention is squarely met by our recent decision in *McLarty v. Urquhart,* 153 N. C., 339, in which *Justice Brown* says: "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. Helen,* 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." The court acts under its general equity jurisdiction and proceeds to grant relief irrespective of the stipulations contained in the power of sale. It pursues its own course and practice without any restraint by reason of the power of sale contained in the deed, so as to administer the rights of the parties according to law and its own equitable procedure, acting under its own powers and jurisdiction and not by virtue of any contractual power given in the mortgage or deed of trust. But it must not be overlooked that the defendant Williams did not acquire the legal title to the land by the assignment of the notes and mortgages to him. The notes were transferred and the mortgage, but without any conveyance sufficient to transfer the legal title of the mortgagee. *Williams v. Teachey,* 85 N. C., 402; *Dameron v. Eskridge,* 104 N. C., 621; *Hussey v. Hill,* 120 N. C., 312; *Morton v. Lumber Co.,* 144 N. C., 31 (*S. c.,* 152 N. C., 54); *Modlin v. Insurance Co.,* 151 N. C., 35. "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.
(192) 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." *Lumber Co. v. Hudson,* 153 N. C., 96. This being so, and it is conceded in the defendant's brief that it is so, the assignment of the note and mortgage did not vest the legal title to the land in Williams, nor the power of sale as incident of it. *Norman v. Hallsey,* 132 N. C., 6; *Williams v. Teachey, supra.* The legal title and power, therefore, remained in Fred Martin, the mortgagee, and he was not a party to the foreclosure suit. It follows that the court was not proceeding under the power contained in the deed when it ordered a sale of the land. The person having the legal title and power is a party to this suit, and was at the time that Williams took the assignment, and Williams himself was made a party by the service of process before his bid at the sale had been accepted by the court and the sale confirmed. He was a mere proposer until it was accepted and confirmation took place. *Joyner v. Futrell,* 136 N. C., 301, and cases cited. The sale and deed of the commissioner had no more than the effect of foreclosing the equity of redemption, leaving the legal title outstanding in Fred Martin, the mortgagee. Under all these circumstances, Williams must be adjudged to be bound by the orders and decrees in this suit, so far, at least, as may be necessary to a satisfaction of the plaintiff's claim by foreclosure of his mortgage or otherwise. In other words, whatever rights or interest Williams has, he acquired subject to the plaintiff's lien and the latter may redeem as against him, if his debt has not already been paid or satisfied, and in order to ascertain the

status of the several claims an account may be taken, if necessary. We will not even suggest upon what principle the account should be taken, as that must be decided first by the court below, and besides, we can not anticipate what the evidence will be. But we may safely say that the plaintiff is not entitled to recover any more than the amount of his debt, or such portion of the original debt as remains unsatisfied.

There is no analogy between this case and those where sales are made under a power contained in a mortgage or deed of trust, or under an execution issued upon a judgment, for in the former case (193) when the party acts under a power he is proceeding out of court, and in the case of an execution sale he is proceeding under a statutory power or mandate, and the court is not called upon to exercise its equitable jurisdiction and do what is manifest justice as between all parties interested. The plaintiff is merely enforcing a right acquired at law by legal process in accordance with the statute, and that is all. In such cases, third parties must be vigilant and take care of their interests. But when a court of equity or a court having equitable jurisdiction, is invoked to grant relief quite a different case is presented. It strives to do justice and will not deprive a party of his property without a hearing. The distinction is too familiar and manifest to require further elucidation. *Menzel v. Hinton,* 132 N. C., 660; *Cone v. Hyatt,* 132 N. C., 810.

Our conclusion is that the court erred in its rulings. The verdict will be set aside and a new trial granted, the case to proceed further in the court below, in accordance with the law as herein declared.

New trial.

CLARK, C. J., dissenting: It has always been held for law in this State that a purchaser at a sale under a second mortgage acquires the property subject to the lien of the first mortgage, but that the purchaser at a sale under the first mortgage acquires the property absolutely free from the liens of subsequent mortgages. Purchasers at such sales are required therefore to examine only for prior encumbrances not as to subsequent ones.

In *Gambrill v. Wilcox,* 111 N. C., 42, it was held that the purchaser at the execution sale under a junior docketed judgment acquires the property subject to the lien of prior docketed judgments, but that the purchaser at an execution sale under a senior docketed judgment acquires the property free from the liens of all junior judgments. This is put upon the express ground, therein stated, that "the lien of a docketed judgment is in the nature of a statutory mortgage." This case has been cited since in *Baruch v. Long,* 117 N. C., 511; *Bernhardt v. Brown,* 118 N. C., 710, and other cases.

When the sale is made under a power of sale contained in the (194)

mortgage there is no opportunity to make subsequent mortgagees parties, nor has it ever been required that notice be given to them. The second mortgagees are fixed with notice of the prior recorded mortgage by statute, and they take only the equity of redemption.

When the sale is made under foreclosure proceedings, the purchaser is not required to examine for subsequent encumbrances. He takes with notice only of the judgment which adjudges the validity of the mortgage and decrees the sale thereunder. He is not required to examine for subsequent encumbrances, any more than a purchaser at a sale under a docketed judgment or a purchaser at a sale under a mortgage with power of sale.

It has been repeatedly and most explicitly declared by this Court, *Kornegay v. Steamboat Co.,* 107 N. C., 117; *Lumber Co. v. Hotel Co.,* 109 N. C., 658; *Williams v. Kerr,* 113 N. C., 311; *Gammon v. Johnson,* 126 N. C., 66; that in a proceeding for foreclosure it is not necessary that the holders of junior mortgages be made parties. But if the purchaser could not get a good title at such sale unless subsequent mortgagees are made parties, then they would be necessary parties beyond question. Those decisions hold that it is advisable to make such junior mortgagees parties, and even that the court may add them *ex mero motu.* The reason given is that thereby they may have opportunity to participate in the surplus, if any, derived from the sale over and above the payment of the first mortgagee and the cost of proceedings, which surplus the mortgagor might otherwise dissipate. This reason looks to the convenience and advantage of the second mortgagees, but does not affect the title acquired by the purchaser.

It has been held in many cases that a docketed judgment, though a lien upon the land, does not divest the estate out of the debtor nor transfer his title and does not even make the land primarily liable for the debt. *Dysart v. Brandreth,* 118 N. C., 968, and cases cited in Clark's Code (3 Ed.), 592. If therefore in such case, where the title and the estate still remain in the judgment debtor, the purchaser at the execution sale under a senior judgment takes the property divested of the lien of subsequent docketed judgments without any notice being (195) given to the holders of the sale, for a stronger reason when the land is sold under a decree of foreclosure the purchaser must take without notice of any subsequent encumbrances which are not recited in the judgment because by the first mortgage the title and the estate is transferred to the mortgagee subject only to the sale and return of the surplus, if any, to the mortgagor.

The subsequent mortgagees take only a mortgage upon the equity of redemption. The legal title and the estate are in the first mortgagee

and the purchaser at the sale under the first mortgage can be no more affected by any subsequent liens than the first mortgagee himself. Indeed the purchaser at such sale is in a better condition than the mortgagee, for he takes the legal title which was vested in the mortgagee discharged of the trusts thereto attached. The purchaser is not required to see to the application of the purchase money. He has discharged his duty when he has paid the money into court at a sale under a decree of foreclosure, or has paid it to the mortgagee at a sale under power of sale, and has taken his deed.

In foreclosure proceedings, as the Court has always held, *Gammon v. Johnson,* 126 N. C., 66, and other cases above cited, it is advisable to make subsequent mortgagees parties that they may look to their liens upon the surplus. If not made parties in the summons, they can ask to be joined, or the court *ex mero motu* can make them parties. But their not being parties can not impair the title of the first mortgagee who by virtue of his prior contract holds the legal estate, nor can it affect the purchaser who acquires the estate and title of the first mortgagee.

For the above reasons this Court has always held that junior mortgagees are advisable parties to foreclose proceedings upon a prior mortgage, but not necessary parties. Hence, if they are not made parties the purchaser at the sale acquires, nevertheless, a good title.

It will place a new burden upon purchasers at such sales to impair their title by a constructive notice of junior encumbrancers whom the court ordering the sale has not seen fit to make parties.

The purchaser at the foreclosure sale under the first mortgage (196) in this case had a right to rely upon the uniform decisions of this Court that it was not necessary to make subsequent encumbrancers parties. But if, notwithstanding, his title is held defective, and that, too, not by setting aside the sale by motion in that cause, but in a collateral proceeding to foreclose under the junior recorded mortgage, certainly in this proceeding it is necessary to make the senior mortgagee a party. At such sale under the junior mortgage, the first proceeds must be applied to the payment of the lien of the first recorded mortgage, after payment of costs.

If, as is suggested, the assignment by the first mortgagee is defective, the assignee (who was also purchaser at the foreclosure sale) must be made a party, and the decree should direct a repayment to him of the purchase money out of so much of the proceeds of the sale, now to be made, which are to be applied to the discharge of the lien of the first mortgage.

The foreclosure sale under the first mortgage was either valid or invalid. If valid, the purchaser got a good title. If invalid, then at the

foreclosure sale under the second mortgage the lien of the first mortgage must first be paid off out of the proceeds of the sale. The first registered mortgage can not be deprived of its priority given by statute.

Cited: *Lee v. Giles,* 161 N. C., 548; *Grimes v. Andrews,* 170 N. C., 525.

THE TOWN OF SHELBY AND W. H. JENNINGS v. CLEVELAND MILL AND POWER COMPANY.

(Filed 11 May, 1911.)

1. **Water and Watercourses—Sewers—Pollution—Statutory Regulation—Constitutional Law.**

Revisal, sec. 3051, regulating sewers discharging into "any drain, creek or river from which a public drinking-water supply is taken," etc., is within the police power of the Legislature, enacted for the public health, and is constitutional and valid.

2. **Water and Watercourses—Sewers—Pollution—Statutory Regulation—Prescription—Vested Rights.**

No right by prescription can be acquired so as to defeat the operation of a statute made for the preservation of the public health, as, in this case, the right to continue in maintaining a sewerage system which empties into a drain or stream from which a public water supply is obtained, in violation of the terms of a statute. Revisal, 3051.

3. **Same—User and Nonuser.**

No title can be acquired against the public by user alone, nor lost to the public by nonuser, unless by legislative enactment, and Revisal, sec. 3051, being passed in the interest of the public health for regulating sewers emptying into waters from which the public drinking supply is taken, no prescriptive right can be available which would exempt the one claiming it from the operation of the statute.

4. **Water and Watercourses—Sewers—Pollution—Statutory Regulation—Nuisance.**

Emptying sewers into such streams as are prohibited by statute, Revisal, sec. 3051, is a nuisance, and the courts will not inquire as to whether the facts in any particular case result in the pollution of the stream, as such matters are well within the regulation of the Legislature in the exercise of its police powers for the benefit of the public health, and the language of the statute is controlling.

5. **Police Powers—Legislative Powers—Subsequent Legislation.**

No Legislature can bind a subsequent one in its exercise of the powers conferred in regard to the pollution of streams from which the public drinking supply is taken. Revisal, sec. 3051.

6. Police Powers—Legislative Powers—Waiver.

The right to exercise its police powers for the general good is inherent in the State for the protection of the people and is of such character that the State may not waive or divest itself thereof.

7. Water and Watercourses—Sewers—Pollution—Statutory Regulations—Lawful Taking of Property.

As no prescriptive right can be acquired by one in emptying sewers into streams from which a public drinking-water supply is obtained, there can be no taking of property for public use under the inhibition of Revisal, 3051, and nothing to compensate for it, the State only prescribing the conditions under which the stream may be used for sewer purposes.

APPEAL from *Biggs, J.*, at Spring Term, 1911, of CLEVELAND. (197)

The plaintiff seek to enjoin the defendant from turning its raw sewage into the Broad River some eight miles above the intake of the Shelby Water Works System.

The defendant answers, admitting the material allegations of (198) the complaint, and that it does empty the raw sewage from its mills and water-closets into said river, and claims prescriptive right to do so, and further avers that the water supply of the plaintiff town is not contaminated thereby. The plaintiffs demur to the answer. The court sustained the demurrer and gave judgment against the defendant, which excepted and appealed.

Bickett & White, Webb & Mull for plaintiffs.

Burwell & Cansler, John F. Schenck, and Ryburn & Hoey for defendant.

BROWN, J. The plaintiffs do not rely upon the principles of the common law, but rest their case solely upon section 3051 of the Revisal of 1905, which reads as follows: "No person or municipality shall flow or discharge sewage into any drain, brook, creek, or river from which a public drinking-water supply is taken, unless the same shall have been passed through some well-known system of sewage purification approved by the State Board of Health; and the continual flow and discharge of such sewage may be enjoined upon application of any person." A violation of this statute is made a misdemeanor, punishable by fine and imprisonment by section 3858.

The defendant contends, as a matter of law, that it can not be restrained from emptying its raw sewage in the river in question, because that, prior to the enactment of the statute forbidding it, it had acquired the prescriptive right to do so, and that consequently the statute, if it was ever intended to apply to such a case, is void to the extent that it undertakes to deprive the defendant of a valuable property right without making compensation therefor.

The propositions sought to be maintained in their brief by the learned counsel for defendant are:

(1) Whether the right to pollute a stream can be acquired by prescription; and, if it can,

(2) Whether, when such right has been acquired, it can be destroyed by a statute, making no provision for compensation therefor.

(199) The statute upon which this action is founded is one of several laws enacted in pursuance of what appears to be an intelligent purpose upon the part of the General Assembly to protect the health and well-being of the citizens of the State by guarding the watersheds and public water supplies of the cities and towns of the State from contamination, as far as possible.

The value and wisdom of such legislation is established by experience and needs no defense at our hands, even if it was a subject within our domain. It is in line with the most enlightened legislation of Great Britain and of States of this Union. The preservation of the public health, as well as public morals, is a duty devolving on the State, the discharge of which is denominated an exercise of the police power, and it is under such power that such legislation is sustained and enforced.

This particular statute was considered by this Court in *Durham v. Cotton Mills,* 141 N. C., 615, and 144 N. C., 706, and its constitutionality sustained at all points in well-considered opinions by *Mr. Justice Walker,* in which practically all the authorities are cited and discussed. It is unnecessary to review them here.

The only point not considered in those opinions is the contention of the defendant that by over twenty years continuous usage it has acquired a prescriptive right to empty its raw sewage into the river, with which the State has no power to interfere without making provision for compensation.

There are authorities to the effect that as against a private individual lower down on the stream the right to pollute it to a greater extent than is permissible at common law may be acquired by prescription by an upper riparian owner. But we are not now dealing with the rights of riparian owners, but with the rights of the public at large as represented by the General Assembly.

It is well settled that, unless by legislative enactment, no title can be acquired against the public by user alone, nor lost to the public by nonuser. *Commonwealth v. Moorehead,* 4 Am. St., 601, and cases cited, 22 A. & E., 1190. Public rights are never destroyed by long-continued encroachments or permissive trespasses. If it is in the power of the General Assembly, in the exercise of its police power, as we have held in the *Durham case,* to enact this law and make its violation a misdemeanor it necessarily follows that the defendant could not acquire

a right by prescription which would exempt it from the operation (200) of the statute.

Whether the pollution of this stream by emptying raw sewage into it was a nuisance at common law, it is unnecessary to consider.

Since the passage of the statute it may be classified as a public nuisance unless the provisions of the act be complied with. The learned counsel properly admits that if a stream should be polluted to the extent and under such circumstances as to create a public nuisance, then no prescription would justify such nuisance.

The power of the General Assembly to pass all needful laws, except when barred by constitutional restrictions, is plenary, and the Legislature has the power to declare places or practices to the detriment of the health, morals or welfare of the community, public nuisances, although not such at common law.

This seems to be well settled. *Mugler v. Kansas,* 123 U. S., 623; *Lawton v. Steel,* 119 N. Y., 226; *S. v. Tower,* 68 L. R. A., 406.

The right which the State is seeking to enforce through this statute is a public right, a right to protect the health of the people of the State. As against such public rights, prescription can not run. There is no such thing as a prescriptive right to maintain a public nuisance. Joyce on Nuisances, sec. 51; 29 Cyc., 1207; Jones on Easements, sec. 178; McMoran & Willis on Sewers and Drains, 233.

In *Com. v. Upton,* 6 Grey (Mass.), 473-476, the Court says: "It is therefore immaterial, so far as the government is concerned, in the administration of the law for the general welfare, how long a noxious practice may have prevailed or illegal acts been persisted in. Easements may be created in lands and the rights of the individuals may be wholly changed by adverse use and enjoyment if it is sufficiently protracted, but lapse of time does not equally affect the rights of the State." See, also, cases collected 3 A. & E. Ann. Cases, 25. The General Assembly can not grant a right to maintain a public nuisance of this character which a succeeding General Assembly could not (201) repeal.

The State can not divest itself of the right to exercise its police power for the general good. Such power is conceded to be one inherent in the State for the protection of the public, and of such character that the State may not waive or divest itself of the right to exercise it. *S. v. Holman,* 104 N. C., 861; 1 Abbott on Mun. Corp., 209; *In re O'Brien,* 1 A. & E. Ann. Cases, 373; *Portland v. Cook,* 48 Or., 550; *Miles City v. Board of Health,* 25 L. R. A., 591.

As said by the Supreme Court in *Stone v. Mississippi,* 101 U. S., 841, "All agree that the Legislature can not bargain away the police power of the State."

It follows, from these and many other authorities, that the defendant could not acquire any right by prescription or otherwise which would prevent the General Assembly of the State at any time from exercising its police power to regulate the discharge of sewage into the French Broad River.

The issue attempted to be raised by the pleadings that the stream is not dangerously polluted by the raw sewage poured into it from a large mill settlement working hundreds of operatives can be of no avail to defendant.

That is a matter for the judgment of the Legislature. Such legislation is preventive, and to limit it to cases where actual injury is shown to have occurred would be to deprive it of its most effective force. To be of value such laws must be able to restrain acts which have a tendency to produce public injury.

The police power of a State is to be exercised for the general good, and every intendment is to be made in favor of the lawfulness of regulations, such as the statute under consideration, intended to protect the public health and safety. It is not the province of the judicial authority, except in clear cases, to obstruct or interfere with the exercise of such power.

The General Assembly, chosen biennially by the people, are better judges than we are of what regulations are necessary to promote the public health and comfort of the citizens of the State.

The Supreme Court of the United States, which has always
(202) upheld every reasonable exercise of the police power of the States, has said: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not an unrestricted license to act according to one's own will." *Crowley v. Christensen,* 137 U. S., 86. If a regulation enacted by the Legislature for the protection of the public health bears, as this does, a real and substantial relation to that object, the courts will not strike it down, although it may appear to bear hard upon some individual.

The second proposition of the defendant, that the right to drain its raw sewage into the river can not be taken from it without compensation, necessarily falls with the first.

As the defendant could acquire no vested right of the character claimed, there is no taking of property for a public use, and nothing to compensate the defendant for.

The State takes no right from the defendant, but only prescribes the conditions upon which it may use the river for its private purposes.

The present case is governed by principles that do not at all involve an exercise of the power of eminent domain. As said by the Supreme Court of the United States in *Mugler v. Kansas,* 123 U. S., 623: "The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, can not be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they must sustain by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community." See, also, Sedgewick on Statutory and Const. Law, 434, 435; *Reduction Co. v. Sanitary Works,* 199 U. S., 307; *Durham v. Cotton Mills,* 141 N. C., 640.

The judgment of the Superior Court is

Affirmed.

Cited: Lenoir v. Crabtree, 158 N. C., 360; *Board of Health v. Comrs.,* 173 N. C., 253, 254; *Lawrence v. Nissen, ibid.,* 362; *S. v. Perley, ibid.,* 786.

(203)

J. F. JENKINS AND WIFE v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 11 May, 1911.)

1. **Railroads—Crossing—Duty of Pedestrian—"Look and Listen."**

Before crossing a railroad track at a public crossing it is the duty of one traveling along the street or highway to look and listen and to take every reasonable precaution to avoid collision.

2. **Railroads—Crossings—Warnings—Duty of Engineer.**

It is the duty of an engineer approaching a railroad crossing with a street or highway to blow his whistle or ring his bell at a reasonable distance therefrom to warn those traveling upon the street or highway of the danger of crossing the railroad at that time.

3. **Same—Negligence.**

A railroad is held to be negligent and liable for the consequent damages in its train not giving the customary warnings in approaching a crossing of its track by a public road or street, whereby a horse of a traveler upon the highway, without negligence upon his part, becomes frightened by the close passage of the train, and consequently injures the traveler.

4. **Same—Contributory Negligence.**

When there is evidence tending to show that the plaintiff looked and listened and took proper precautions for his safety before attempting to cross defendant's railroad track at a public crossing, and was injured by

reason of the failure of defendant's engineer on a passing train to give the customary warnings, the view of the track being obstructed in the direction of the approaching train, the question of contributory negligence is a proper one for the jury.

APPEAL from *Justice, J.*, at January Special Term, 1911, of LENOIR.

Action to recover damages for alleged negligence in frightening the *feme* plaintiff's pony, whereby she was thrown from a buggy and injured.

The usual issues were submitted and answered in favor of the plaintiff and her damages assessed at five hundred dollars. The defendant appealed.

Emmett Wooten and Murray Allen for plaintiff.

Rouse & Land for defendant.

(204) BROWN, J. The *feme* plaintiff was driving in a buggy with her father, and as they approached within ten or twelve feet of McIlwaine street crossing, for purpose of passing over the defendant's track, an engine and train rushed over the crossing and badly frightened the pony, causing him to swerve suddenly and throw the *feme* plaintiff from the buggy, injuring her.

The motion to nonsuit presents two questions:

1. Is there any evidence of negligence? The evidence of plaintiff, as well as her father, appears to be quite positive that the engineer gave no signal, either by bell or whistle, as he approached the crossing. The plaintiff states that she listened and could have heard the signal of an approaching train, but that none was given. The plaintiff's father says with equal positiveness that no signal was given, no whistle blown or bell rung, but that the train ran on the crossing without warning.

It has been repeatedly held in this State that it is the duty of a person approaching a railroad crossing to look, listen and to take every reasonable precaution to avoid a collision; and that it is likewise the duty of the engineer to blow his whistle or ring his bell at a reasonable distance from the crossing, in order to enable travelers approaching the crossing for the purpose of passing over the tracks to avoid danger. *Gilmore v. R. R.*, 115 N. C., 657; *Hinkle v. R. R.*, 109 N. C., 472; *Russell v. R. R.*, 118 N. C., 1098; *Butts v. R. R.*, 133 N. C., 82.

2. Does the evidence introduced by the plaintiff make out a case of contributory negligence? This evidence, if taken to be true, establishes that when she turned into McIlwaine street the view of all that part of the track from whence the train approached was entirely obstructed by a building 75 yards long and situated within 25 feet of the track, so that neither she nor her father could see the train; that both looked up and down the track at the last available point; that the pony was gentle and they were driving very slowly; that the pony saw the train first

when within ten feet of the track, and swerved suddenly and threw plaintiff out. The evidence is positive and unequivocal that the plaintiff and her father looked for approaching trains at the last available moment before approaching the track.

It was, of course, the plaintiff's duty, as well as that of her father, who was driving the pony, to listen for approaching (205) trains, and especially so, as the view of the track was obstructed by the house. After reading their evidence, we do not think that the inference is necessarily to be drawn from it that they did not listen for the train signal.

On the contrary, from many of the answers it would seem that the plaintiff listened for train signals and is positive none were given. While the plaintiff's evidence upon this phase of the case is not as clear as it should have been made, we do not think, as matter of law, a motion to nonsuit could have been properly sustained upon the ground that in any view of it the plaintiff contributed by her own negligence to her injury.

It is true, as contended by defendant, that a railroad company is not liable for injuries received from horses becoming frightened upon a highway at the mere sight of its trains or the noises necessarily incident to the running of the train and the operation of the road. 3 Elliott R. R., 1264, and cases cited. But the basis of plaintiff's cause of action is the negligence of the defendant in failing to give a signal in reasonable time to warn her of the approach of its train to a public crossing. If it had been given, she avers, she would have heard it and stopped before getting in such dangerous proximity to the track, and thereby avoided injury.

Taking the evidence as a whole, we think the case was properly submitted to the jury in a charge which followed the settled decisions of this Court.

No error.

A. B. BROWN v. MRS. J. F. HUTCHINSON ET AL.

(Filed 12 May, 1911.)

1. **Processioning Act—Title—Term of Court—Procedure.**

When the issue of title is raised before the clerk of the court under the Processioning Act, Revisal, 326, an order of the clerk transferring the cause for trial to the Superior Court, in term, is a proper one.

2. **Deeds and Conveyances—Delivery—Title—Registration—Limitation of Actions.**

The delivery of a deed to land passes title to be perfected as to subsequent purchasers and creditors by registration, as to which there is no limitation of time. Revisal, 980.

3. Deeds and Conveyances—Unregistered Deeds—Title—Evidence.

An issue of title being raised in proceedings for processioning, and the cause properly transferred to the term of the Superior Court for trial, it is not necessary that a party claiming title under a deed should have had his deed recorded before the commencement of the action if he had theretofore acquired it, and it becomes evidence if recorded before or at the trial.

4. Deeds and Conveyances—Registration Relates Back.

Registration of a deed relates back to the date of its execution as between the original parties.

5. Deeds and Conveyances—Prior Deeds—"Color"—Registration—Title—Evidence.

The trial judge having excluded prior deeds in plaintiff's chain of title, sufficient to show "color," and the one directly to him, the latter for want of registration prior to the commencement of the action involving title, evidence of possession was not necessary to his taking a nonsuit and appeal.

6. Deeds and Conveyances—Probate Sufficient—Certificates—Signature of Officials.

It is not necessary to the validity of the probate of a deed that the signature of the name of the justice before whom it was acknowledged should be recorded at the end, when it appears from the certificate as recorded and from the clerk's adjudication thereon that his name appeared in the first line, and that in fact he properly took the acknowledgment.

7. Deeds and Conveyances—Registration—Order Continuous—Registration—Corrections.

The order of registration by the clerk is a continuous one, with which the register may subsequently comply upon inadvertently having omitted to copy the words it contained upon his book.

8. Deeds and Conveyances—Probate—Registration Erroneous—Original Deed—Evidence.

The original deed may be shown in evidence to correct an omission by the register of deeds of the signature of the justice of the peace before whom the deed was acknowledged.

(207) APPEAL by plaintiff from *Long, J.*, at January Term, 1911, of WILKES.

The facts are sufficiently stated in the opinion by *Mr. Chief Justice Clark.*

Finley & Hendren and W. W. Barber for plaintiff.

F. D. Hackett, Haynes & Jones and Hackett & Gilreath for defendants.

CLARK, C. J. This was an action brought originally before the clerk under the Processioning Act (Rev., sec. 326) to establish a boundary

line. The issue of title being raised by the answer, the cause was properly transferred for trial to the Superior Court at term. *Smith v. Johnson,* 137 N. C., 43; *Stanaland v. Rabon,* 140 N. C., 202; *Davis v. Wall,* 142 N. C., 452; *Woody v. Fountain,* 143 N. C., 69; *Green v. Williams,* 144 N. C., 63.

The first exception is that the judge refused to permit the plaintiff to introduce in evidence a deed from Absher to Brown, executed in December, 1859, as a part of the plaintiff's chain of title, on the ground that it was not recorded till after the commencement of the action. The exception is well taken.

While it is unquestionably true that the plaintiff must have title at the commencement of the action as well as at the time of the trial (*Burnett v. Lyman,* 141 N. C., 501), it is not indispensable that the deed should be recorded at the commencement of the action. The delivery of the deed conveys the title, which will be perfected by registration. It is well settled that the plaintiff in ejectment may recover upon an equitable title, though it was otherwise on the law side of the docket under the former system of procedure. *Condry v. Cheshire,* 88 N. C., 375, and numerous cases approving that case cited in the Anno. Ed., among them *Taylor v. Eatman,* 92 N. C., 610; *Geer v. Geer,* 109 N. C., 682; *Arrington v. Arrington,* 114 N. C., 118. In *Respass v. Jones,* 102 N. C., 11, the Court says, citing *Condry v. Cheshire, supra:* "After the execution and delivery of a deed the estate passes out of the grantor and vests in the grantee, to be legally perfected by registration. If, before registration, the deed is lawfully destroyed, such loss or destruction does not restore the estate to the grantor (*Dugger v. McKesson,* 100 N. C., 1)," adding that, though "the legal estate is not perfected till registration, when (208) registered it relates back to its date of execution," citing *McMillan v. Edwards,* 75 N. C., 81, and other cases. See, also, *Phillips v. Hodges,* 109 N. C., 251.

Chapter 147, Laws 1885, now Revisal, 980, contains no limitation as to the time when a deed shall be registered. It simply provides that it shall not be valid against purchasers or creditors, except *from the registration thereof. Cozad v. McAden,* 148 N. C., 11; *Halyburton v. Slagle,* 130 N. C., 484.

It is true that the instrument must be probated and registered to be competent as evidence of title. *Jennings v. Reeves,* 101 N. C., 450, which quotes with approval *Phifer v. Barnhardt,* 88 N. C., 333, and *Walker v. Coltrane,* 41 N. C., 79, that "it is an error to say that an unregistered deed conveys only an equity. It is a legal conveyance, which, although it can not be given in evidence until it is registered, and is, therefore, not a perfect legal title, yet has an operation as a deed from its delivery." The doctrine laid down in *Phifer v. Barnhardt, supra,* is affected by

the act of 1885, ch. 147, now Revisal, 980, to this extent only, that a junior registered deed is valid from its registration in priority to a senior deed which is registered later.

His Honor's action was based upon the ruling in *Morehead v. Hall,* 132 N. C., 122, which is not in point. In that case, when the action was begun the grant from the State, issued in 1765, through which the plaintiff claimed, not only had not been registered, but could not have been legally registered at that time. Therefore, the plaintiff could have no title when he began his action. A subsequent act authorized the registration of the grant which at the time of the trial had been registered, but the Court held that the registration could not relate back prior to the passage of the act and validate a cause of action which did not exist when summons issued. Here the deed from Absher to Brown was valid as between them without registration and could have been recorded at the time the action was begun. When it was registered it related back to the delivery of the deed. The only exception to the effect of such relation back would be as to purchasers claiming under the same chain of title, or creditors.

(209) It has been not uncommon practice, as the profession knows, that when a deed offered in a chain of title has not been registered, and, therefore, can not be admitted in proof, for the parties to probate it then and have it registered during the trial. Among many cases in which this has been recognized are *Cawfield v. Owens,* 129 N. C., 286; *Cook v. Pittman,* 144 N. C., 531. This is sometimes done after trial begun, during a recess of the court, and there have been instances where the presiding judge, to prevent a defect of justice, in his discretion has granted the parties time to go down to the clerk's office to probate the deed and have it registered that it may be offered in evidence.

In this case the plaintiff had already introduced a grant from the State to Eli Brown, dated October, 1846, and duly registered. He could therefore have shown seven years' possession under color. *Gilchrist v. Middleton,* 107 N. C., 663. The deeds from Eli Brown to Absher in 1855 and of Absher to Elijah Brown in 1859, and the deed from the latter's executors in 1862, recorded in 1885, were competent to show color of title. In *Janney v. Robbins,* 141 N. C., 400, it is held that the principle under our present registration law (1885, ch. 147, now Revisal, 980), that an unregistered deed does not constitute color of title, does not extend to a claim by adverse possession held for the requisite time under a deed foreign to the title under which the opposite party claims. It is true that the plaintiff did not offer proof of possession, but he was excluded from offering the above deeds and from showing that they covered the *locus in quo.*

The plaintiff offered to introduce in evidence a deed from the execu-

tors of Elijah Brown to himself for the *locus in quo* executed in 1862 and registered in 1885. The court refused to admit the same because the record of the certificate of the justice of the peace had omitted the signature of the justice. The certificate as recorded was as follows:

I, F. M. Adams, a justice of the peace, do certify that James W. Brown, the subscribing witness to the foregoing deed of conveyance, came before me this day and maketh oath in due form of law that he saw the foregoing deed signed and delivered in his presence.

Given under my hand and private seal, this 15 April, 1885.

North Carolina—Wilkes County. (210)

The foregoing certificate of F. M. Adams, a justice of the peace of Wilkes, is adjudged to be correct. Let the said deed, with these certificates, be registered.

Filed 15 April, 1885, and registered.

The plaintiff then offered the deed itself to show that the justice had actually signed the certificate, and insisted that the register of deeds should then and there make the correction in the record. His Honor refused to admit the record or the deed itself, though he inspected the deed and saw that the justice of the peace had signed the certificate of probate.

The exceptions to the above refusals constitute the second and third assignments of error, and, we think, are well taken. The name, "F. M. Adams, a justice of the peace," is written in the certificate, though it is not subscribed at the end thereof, and the certificate of the clerk adjudges that the certificate of "F. M. Adams, a justice of the peace," is correct. Under the maxim, *"Omnia presumuntur rite esse acta,"* the certificate is valid. *Kidd v. Venable,* 111 N. C., 535; *Etheridge v. Ferebee,* 31 N. C., 312. Revisal, 1002, does not expressly require the certificate by the justice to be subscribed by him, but provides that the form therein given shall be "in substance." The justice's name is written in the first line and the clerk has duly adjudged the certificate to be correct. It has been often held that a will need not be subscribed by the testator, but it is sufficient if his name is written in the body thereof in his own hand, the execution in other respects being duly proven. The probate of a deed is a judicial act, and the presumption is that the probate and registration are correct. *Cochran v. Improvement Co.,* 127 N. C., 386.

In *Heath v. Cotton Mills,* 115 N. C., 202, the certificate recited that the deed had been duly proven, and the attestation clause recited that the deed was duly signed, sealed and delivered. The registration thereof did not show a copy of the seal nor any device representing it, but the

court held that if the record represented on its face in another way, as by recitals or otherwise that the deed was sealed and it was in fact duly sealed, this was sufficient.

(211) Besides, the order of the clerk for the registration of the deed was a continuous order, and it was the duty of the register to act at any time till the deed should be fully recorded. *Sellers v. Sellers,* 98 N. C., 13, in which *Merrimon, J.,* says that "a re-registration of the deed was unnecessary. If the register fails at first to completely execute the order of registration, it continues in force and is mandatory until it is completely executed, and it continues to be the register's duty to execute it until he has completely done so. If he find he has by inadvertence omitted a word, a sentence, a paragraph, or a scroll representing a seal, we think he might, in good faith, complete the registration in these respects. Of course, he could not have authority to *interpolate* anything that was not in the deed or other instrument at the time the probate was made."

The court further erred in excluding the original deed when offered to show that the certificate was in fact duly signed by the justice of the peace. *Strain v. Fitzgerald,* 130 N. C., 600; *Smith v. Lumber Co.,* 144 N. C., 47; *Edwards v. Supply Co.,* 150 N. C., 175; *Royster v. Lane,* 118 N. C., 156.

The fourth exception is to the refusal of the court to permit the plaintiff to show that the *locus in quo* was embraced in the grant and in the deeds above shown. Upon this refusal the plaintiff excepted and took a nonsuit. The validity of the last exception depends, of course, upon the other three. The defendant moved to dismiss the appeal upon the ground that the nonsuit was not justified in that state of the case; that the plaintiff should have gone on and offered evidence of possession under the deed. But as his claim of title and proof that his deeds covered the *locus in quo* had been rejected, evidence to show possession would have been useless.

Error.

Cited: Whitaker v. Garren, 167 N. C., 661; *Thompson v. Lumber Co.,* 168 N. C., 229; *Herbert v. Development Co.,* 170 N. C., 625; *Rhodes v. Ange,* 173 N. C., 27.

(212)

SHELL & SOUTHERLAND v. J. H. AIKEN ET AL.

(Filed 11 May, 1911.)

1. **Partnership—Contracts—Counterclaim—Breach of Covenant—Credit on Note.**

Defendant partnership, consisting of man and wife, were sued on a note given for the purchase of a livery business, the subject of the partnership. The husband claimed damages for breach of warranty in the purchase of a surrey plaintiff subsequently sold him for the partnership, as a counterclaim: *Held*, the note being joint and several, the damages allowed on the breach of warranty to the husband in the judgment was a proper credit on the note.

2. **Damages—Contract—Breach of Warranty—Tort—Waiver.**

A counterclaim for damages for a breach of warranty arises out of contract and can properly be set up in an action thereon, and the defendant may waive the tort and sue in contract.

APPEAL by plaintiff from *Long, J.*, at February Term, 1910, of CATAWBA.

A. A. Whitener for plaintiffs.
W. A. Self and C. L. Whitener for defendants.

CLARK, C. J. The plaintiffs, Shell & Southerland, a partnership, sold their livery business to the defendants, who were husband and wife, taking a note, signed by them both, in the sum of $600, upon which this action is brought. The husband pleaded as a counterclaim that subsequently to the above sale the plaintiffs sold him a surrey for $142 and warranted the same; that the surrey proved to be worthless, and he sets up damages for the breach of warranty as a counterclaim. The jury assessed the counterclaim at $100, which was deducted from the amount which was admitted to be due upon the note.

The plaintiffs present several exceptions, but in their brief they are practically reduced to two propositions. They contend that the counterclaim was due to the husband only, and, therefore, judgment should have been rendered against the wife for the full amount of the note. But, as the note was joint and several, any credit allowed thereon in the judgment rendered against one of the obligors will, of course, be a payment as to the other. The note sued on was due to the (213) partnership, and the counterclaim was owing by the partnership, and was, therefore, properly allowed as a counterclaim.

The second contention of the plaintiffs is that the counterclaim was for a tort, and inasmuch as it did not arise out of the same transaction

it could not be set up as a counterclaim. Revisal, 481. The answer to this is that the damages for breach of warranty arise out of contract, and are, therefore, a proper counterclaim. Even if the counterclaim had been for fraud and deceit, and, therefore, an action *ex delicto* under the old procedure, the defendant could waive the tort and sue in contract. *Bullinger v. Marshall,* 70 N. C., 526.

No error.

MRS. ORA J. YOUNT, GUARDIAN, v. P. C. SETZER.

(Filed 11 May, 1911.)

1. **Equity—Injunction—Personal Property—Damages—Remedy at Law.**

Ordinarily, the equitable jurisdiction of the court can not be invoked to restrain the sale or other disposition of personal property when an action at law may be maintained to recover the property, or when the act sought to be enjoined has been committed.

2. **Same—Insolvency.**

An allegation of defendant's insolvency is generally necessary when a remedy by injunction is sought, except when dispensed with by statute, in cases where compensation in damages affords an adequate remedy.

3. **Equity—Injunction—Personal Property—Remedy at Law—Inadequacy.**

If irreparable injury can be shown by the commission of an act without proof of insolvency a court of equity will intervene by injunction in proper instances.

4. **Same—Note—Transfer Before Maturity—Innocent Purchaser—Guardian and Ward.**

When sureties on a guardian's bond have become such upon agreement with the guardian that the securities taken for investments should remain in their hands for their protection, and it is shown by affidavits that the guardian had sold the lands of the ward and received a note for the deferred payments secured by a lien on the land, which the defendant took from the guardian, and that it had not yet reached maturity, a remedy by injunction in favor of the guardian and sureties is proper to restrain the negotiation of the note by defendant until the hearing, so that it may not get into the hands of an innocent purchaser for value.

5. **Equity—Notes—Injunction—Trust Funds.**

A note received by a guardian for moneys invested for the ward are in the nature of a trust fund, and where there is evidence that a third person has induced the guardian to part with the note without a consideration before maturity, so as to raise serious issues to be passed upon by the jury respecting it, the matter comes within the peculiar province of a court of equity in its jurisdiction over trust funds, and an order restraining the negotiation of the note until the hearing is properly granted.

6. Equity—Injunction—Notes—Third Persons—Transfer—Innocent Purchaser—Evidence.

A restraining order upon defendant against the negotiation of a note will not be refused on the ground that the act anticipated has been committed, when it appears that it was given for moneys of a ward invested by the guardian which defendant wrongfully induced from him and transferred to the bank without suggestion that it was for value, particularly when the bank makes no claim to the note.

APPEAL from order continuing restraining order to hearing, (214) heard at chambers, 28 February, 1911, by *Long, J.* From CATAWBA.

The plaintiffs are Ora J. Yount, guardian of George Hoke, and E. C. Burns and T. L. Henkel, sureties on the guardian bond.

The plaintiffs allege in their affidavit: "That from about thirty to forty days ago, the plaintiff, Ora J. Yount, applied to the said E. C. Burns and T. L. Henkel to become her sureties upon a guardian bond, so that she might file a petition and procure the sale of some of the real estate left by her first husband at the time of his death and which was inherited by her said son, George Hoke. That said sureties agreed to become such upon her bond if she would agree that the amount which the land would bring, less the cash payment, should be held by T. L. Henkel, one of said bondsmen, so that the said bondsmen might (215) be protected and indemnified against loss or defalcation by reason of their suretyship.

"That the said Ora J. Yount acceded to the terms of the bondsmen and agreed that if they would become such that the said T. L. Henkel, one of them, should hold the proceeds arising from the sale of the lands that were to be sold, except the cash payment, and thereupon the said Henkel and the said Burns, said sureties, signed the said bond. That immediately after the said bond was filed, the plaintiff, Ora J. Yount, qualified as guardian as aforesaid. She filed a petition in the Superior Court of Iredell County and procured the sale of a portion of the real estate left by her said husband to his son, George Hoke, and at such sale one Lee Bradford, of Iredell County, became the purchaser at the price of $1,600, of which amount the sum of $500 was paid down, and the residue secured by a note and mortgage, the mortgage being duly registered in Iredell County, the said guardian, Ora J. Yount, having first made to the purchaser a deed to the land in accordance with the order of the court. That after said sale was made, the said Ora J. Yount, guardian, as aforesaid, neglected turning over the said note and mortgage to T. L. Henkel as agreed, and that a short time after receiving it, to wit, about a week or ten days ago, the husband of the said Ora J. Yount procured said note and mortgage from her and turned the same

over to P. C. Setzer, who now holds the same, claiming that he holds it as collateral security or indemnity to himself on account of a transaction between said Setzer and said C. J. Yount, the facts being, as affiant avers, that prior to the time when said note and mortgage was turned over to said Setzer by the said C. J. Yount, that said Setzer had become surety for said Yount at the bank for a sum of money, and the said Setzer required that said Yount turn said paper over to him as indemity, as aforesaid. That at the time said note and mortgage was so turned over, said Setzer knew, as affiant is informed and believes, that the same had been obtained by her from the sale of the land of her ward, George Hoke, and that the mortgage deed was taken back upon the land so sold by her as guardian.

"That said note and mortgage were not turned over by her (216) voluntarily to her said husband, and that she only surrendered it to him after she had been importuned to do so by him. Affiant further avers that her said husband has become involved in debt and is insolvent, and that she is not solvent or responsible in law, and that if said note is collected and the funds used by the said P. C. Setzer, defendant, that the bondsmen will be compelled to meet any defalcation that she may make, and she verily believes that she will not be able to respond to her obligation and pay over the funds which have come into her hands as guardian for her son.

"That the said Setzer, since he has procured said note, as affiant is informed and believes, has been trying to sell and dispose of the same, and is claiming his right to hold the same, and refuses to surrender the same, although he has been asked to do so. That plaintiffs have commenced a civil action in Catawba Superior Court by the issuance of summons for the recovery of the possession of said note and mortgage."

The note referred to in the affidavit was exhibited to the court, and it is negotiable and not due. It is payable to the order of Ora J. Yount and is endorsed in blank by her. The defendant filed an affidavit, denying all the material parts of the affidavit of the plaintiffs, and, among other things, alleges: "It is not denied that the defendant, P. C. Setzer, undertook to sell and dispose of the note and mortgage hereinbefore mentioned, and this defendant respectfully showeth to the court that before the issuing and serving of the restraining order herein, that he had transferred and assigned the said note to the First National Bank of the city of Hickory."

A restraining order was issued, and on the return day it was continued to the final hearing, and the defendant appealed.

The defendant denies the right of the plaintiffs to a restraining order:

1. Because the action is to recover personal property and there is an adequate remedy at law.

2. Because there is no allegation that the defendant is insolvent.

3. Because it appears that the note was transferred before the restraining order was issued.

Councill & Yount, W. A. Self and C. L. Whitener for plain- (217) *tiffs.*

A. A. Whitener for defendant.

ALLEN, J., after stating the case: It is true, as contended by the defendant, that ordinarily the equitable jurisdiction of the court can not be invoked to restrain the sale or other disposition of personal property when an action at law may be maintained to recover the property (*Baxter v. Baxter,* 77 N. C., 119; *Kistler v. Weaver,* 135 N. C., 391), and it requires no authority to sustain the proposition that if the act has been committed it can not be restrained.

It is also true that an allegation of insolvency is necessary, except where dispensed with by statute, in cases where compensation in damages affords an adequate remedy. *McKay v. Chapin,* 120 N. C., 159; *James v. Markham,* 125 N. C., 145; *Porter v. Armstrong,* 132 N. C., 66; *Kistler v. Weaver,* 135 N. C., 388.

We do not think, however, that these principles are applicable to the facts of this case.

The subject-matter of the controversy is a negotiable instrument that has not been dishonored, and it may be assigned to an innocent purchaser. If so assigned, the holder would become the owner and could enforce payment (Revisal, secs. 2201 and 2206), and the right of the plaintiffs to recover the property would be thereby defeated, while in the ordinary action by the owner to recover personal property a sale by the defendant would not have this effect.

It is also, if the allegations of the plaintiffs are true, a trust fund, which belongs to the ward, George Hoke, and the plaintiffs, who seek to recover it, are the guardian and the sureties on her bond.

Nor does it appear that the note is beyond the control of the defendant. He says it has been transferred and assigned to the bank, but he does not allege that the assignment was for value, and there is no pretense that it was a gift. He knows the facts, and it was his duty to disclose them. If he remains silent, we are justified in concluding that his assignment is not beyond recall, and particularly when the bank makes no claim to the note.

The failure to allege insolvency is not decisive of the right to (218) a restraining order, although in many cases it is material. *R. R. v. Mining Co.,* 112 N. C., 662. It is no more than evidence on the question of irreparable injury, and if such injury is shown without proof of insolvency a court of equity will intervene.

Irreparable injury is frequently dependent on the nature of the subject-matter.

Chief Justice Marshall, in *Osborne v. Bank,* 9 Wheat., 845, speaking of the grounds on which the jurisdiction of the court of equity to restrain may be placed, says: "One, which appears to be ample for the purpose, is that a court will always interpose to prevent the transfer of a specific article, which, if transferred, will be lost to the owner. Thus the holder of negotiable securities, endorsed in the usual manner, if he acquired them fraudulently, will be enjoined from negotiating them, because, if negotiated, the maker or endorser must pay them. Thus, too, a transfer of stock will be restrained in favor of a person having the real property in the article. In these cases the injured party would have his remedy at law. . . . But it is the province of a court of equity, in such cases, to arrest the injury and prevent the wrong. The remedy is more beneficial and complete than the law can give."

The doctrine is stated accurately and clearly in Pom. Eq. Jur., secs. 1339 and 1340, as follows:

"Sec. 1339. The jurisdiction to grant injunctions restraining acts in violation of trusts and fiduciary obligations, or in violation of any other purely equitable estates, interests or claims in and to specific property, is really commensurate with the equitable remedies given to enforce trusts and fiduciary duties, or to establish and enforce any other equitable estates, interests or claims, with respect to specific things, whether lands, chattels, securities or funds of money, or to relieve against mistake or fraud done or contemplated with respect to such things. In all such cases the question whether the remedy at law is adequate can not arise; much less can it be the criterion by which to determine whether an injunction can be granted, for there is no remedy at law."

(219) "Sec. 1340. Among the instances in which equity will grant an injunction, preliminary or final, in pursuance of the general doctrine as stated in the foregoing paragraph, the following are some of the most important, and they fully illustrate and establish the doctrine itself, in all its generality, and the grounds upon which it rests: To prevent the transfer of negotiable instruments, at the suit of the defrauded maker or acceptor, or of the party claiming to be the true owner, or who have an interest in them; or the transfer, under like circumstances, of stocks or other securities not strictly negotiable."

The rule was applied in *Caldwell v. Stirewalt,* 100 N. C., 205, and a restraining order granted, although there was no allegation of insolvency. See, also, *Mfg. Co. v. Summers,* 143 N. C., 102.

There is a serious controversy in this action between the plaintiffs and defendant, and issues are raised which must be settled by a jury, and under such conditions the restraining order should be continued to

the hearing. *Hyatt v. De Hart,* 140 N. C., 270; *Tise v. Whitaker-Harvey Co.,* 144 N. C., 507.

Zieger v. Stephenson, 153 N. C., 528, in which the same rule is stated, is in many respects like the one we have under consideration, but it is chiefly valuable for the learned discussion of the distinction between common and special injunctions by *Justice Walker.*

We find no error.

Affirmed.

HOKE, J., not sitting.

COMMISSIONERS OF LEXINGTON v. ÆTNA INDEMNITY COMPANY OF HARTFORD, CONN., ET AL.

(Filed 11 May, 1911.)

1. Principal and Surety—Indemnity—Judgment—Evidence—Primary and Secondary Liability—Admissions of Record—Appeal and Error.

When a city and its contractor for work on the former's street have both been held liable for a negligent act causing injury to a pedestrian on the street, without adjudicating as to which was primarily liable, the judgment is not evidence of such liability in a subsequent action brought by the city to recover damages against the contractor and his indemnitor, but, in this case it appears from the record that, upon the undisputed facts, the city was only secondarily liable, and the Court so adjudges without further inquiry.

2. Principal and Surety—City—Indemnity—Supervision—Negligence—Primary and Secondary Liability—In Pari Delicto.

A city and a construction company are not *in pari delicto* as to a negligent act of the latter directly causing injury to a pedestrian on the street, though the city may also be liable to the pedestrian in not exercising the supervision over its streets required by law, and thus averting the consequence of such negligence.

3. Same—Evidence.

When it appears of record that a city and its contractor for public improvements had been held in damages in a former suit by a citizen caused directly by the contractor's negligent act without any participation by the city, the primary liability of the contractor, as between him and the city, is established, notwithstanding the city was negligent in permitting the continuance of the contractor's negligent act.

4. Cities and Towns—Contracts—Public Works—Indemnity—Scope.

An indemnity company entered into an agreement with a city to save it harmless from any negligence of a contractor in the performance of certain work upon the city's street and from damages recovered in all suits against it for any injuries sustained by any person by or from any

cause under its control while in the construction of the streets, or by reason of any negligence in guarding the same, etc.: *Held*, the contract, by its very terms, embraced an injury caused to a pedestrian upon one of the city's sidewalks at night by reason of his falling into an unguarded trench, left by the contractor without a light or other signal of warning.

5. Same—Instructions—Harmless Error.

A city being indemnified against loss caused by the negligent acts of its contractor for public improvements upon its streets, was sued with the contractor, and damages against both recovered. It appearing of record, upon facts admitted, that the primary liability of the contractor was established, it was harmless error for the trial judge to instruct the jury that the primary liability of the construction company should be determined by the terms of the indemnity bond.

6. Cities and Towns—Contracts—Indemnity—Former Judgment — Secondary Liability—Judgment—Admitted Facts—Recovery.

It appearing from the admitted facts in this case, which was brought by a city against its contractor and the company which had agreed to indemnify it from all loss by reason of his negligence, that the city was secondarily liable, as between itself and its contractor, for his negligent act in causing damage to a pedestrian upon its streets, and that a judgment for damages against both had been recovered, the city, having paid the judgment, can recover the same from the indemnity company, under the terms of the bond of indemnity.

7. Cities and Towns—Public Work—Contracts—Public Policy.

It is lawful and not against public policy to indemnify a city against loss sustained by the negligent act of one who contracts with it to improve its public streets.

(221) APPEAL from *Daniels, J.*, at November Term, 1910, of DAVIDSON.

The West Construction Company contracted with the town of Lexington to do certain work in grading, paving, macadamizing and otherwise improving its streets, according to plans and specifications furnished, and to secure the faithful performance of the work in a proper and careful manner it executed to the town its bond, with the other defendant, Ætna Indemnity Company, as surety, by which it agreed to indemnify the town and save it harmless "from all suits, actions, proceedings of every name or description, in law or equity, brought against the said town or any officer or officers, agents or servants thereof, for or on account of any injuries or damages received or sustained by any person, structure or property, by or from said contractor, his servants or agents, and also to indemnify and save harmless the said (town) from all suits or actions for any injuries or damages sustained by any party or parties by or from any causes under the control of said contractor while in the construction of the streets or any part thereof, or any negligence in guarding the same, or by or on account of any act of omission of said

contractor or his agents or employees." The construction company, while in the prosecution of the work, caused a trench to be dug across a sidewalk and piled earth and rocks near it, which made it very dangerous to the public using the street, and failed to place lights or barriers around it, so as to warn pedestrians and render the use (222) of the sidewalk safe. C. M. Clodfelter, while walking along the sidewalk at night, fell into the excavation, without any negligence or fault on his part, and was seriously injured. He brought an action against the town and the construction company, alleging substantially the foregoing facts, and further that he was injured by the negligence of the construction company in digging the trench and not properly safeguarding it, and by the negligence of the town, in that the latter did not cause the trench to be thus safeguarded by lights or barriers, in order to prevent injury to persons passing along the sidewalk. There was a recovery in that action against the town and the construction company upon issues and a verdict of the jury, which found that Clodfelter had been injured by the negligence of the construction company and the town, as alleged in the complaint; that is, that the construction company was negligent in not putting up lights or barriers at the trench to prevent injury to pedestrians, and that the town was negligent for the same reason. The jury assessed Clodfelter's damages at $1,700, and judgment was entered upon the verdict for that amount, which was paid by the town. The indemnity company was duly notified of the pendency of that action and requested to come in and defend the same. This action was brought against the construction company and the indemnity company, as its surety upon their bond, to recover the amount of damages sustained by the plaintiff, and costs. Issues were submitted to the jury and found in favor of the plaintiff. Judgment was rendered upon the verdict for the damages assessed, and the defendant appealed.

Emery E. Raper for plaintiff.
Walser & Walser for defendant.

WALKER, J., after stating the case: As a general rule, when indemnity is sought by one who has been adjudged liable for damages arising from negligence for which another, as between themselves, is primarily liable, the judgment in the action against the former is evidence in the action brought for indemnity that the defendant in the first action, plaintiff in the second, was liable for the damages, and when notice has been given to defend, of the amount of the damages arising from the injury, but it does not establish which of the wrongdoers is pri- (223) marily liable, unless that question was involved in the issue and decided. *Mayor v. Brady,* 70 Hun, 250; *Nav. Co. v. Espanola,*

134 N. Y., 461. But in this case we are of the opinion that the judgment in the first action must be given greater effect than it would have under the ordinary rule, as by referring to the record in that case, which was in evidence, we can see clearly, by reading the verdict in connection with the pleadings, that the jury have found such facts as establish the primary liability of the West Construction Company for the injury to Clodfelter; and, besides, the undisputed facts in this case show the same liability. The facts are that the construction company dug the trench and failed to place lights there or to erect barriers around the trench to warn persons using the walk. It was the author of the injury and the principal wrongdoer. As between it and the town, the latter has committed no wrong. An illustration of the rule will be found in *Mayor v. Brady, supra,* where it is said: "The right to lay the pipe carried with it to the contractors the obligation to so protect and guard it as to warn passers-by and thus save them from injury. Consent by a municipal corporation to a person to do a lawful act merely permits it to be done in a careful, prudent and lawful manner, and when it is performed in any other manner, and injury to third persons ensues, the author of the injury is liable therefor. Had the contractors performed their full duty by so guarding the pipe as to warn travelers of its presence on the walk, there could have been no recovery in the action of Cruikshank against the city." So, in *Port Jervis v. Bank,* 96 N. Y., 550, it was said: "It is well settled that a municipal corporation which has been compelled to pay a judgment recovered against it for damages sustained by an individual through an obstruction, defect or excavation in the sidewalk or street of such corporation, has an action over against the person who negligently or unlawfully created the defect which causes the injury. (*Rochester v. Montgomery,* 72 N. Y., 67, and cases there cited.) This liability grows out of the affirmative act of the defendant and renders him liable not only to the party injured, but also mediately liable to any party who has been damnified by his neglect. Liability in such a case is predicated upon the negli-
(224) gent character of the act which caused the injury and the general principle of law which makes a party responsible for the consequences of his own wrongful conduct. (*Clark v. Fry,* 8 Ohio St., 359; *Ellis v. Gas Co.,* 75 Eng. C. L., 767.) Consent given by a corporation to a citizen to make an excavation in a public street does not vary the rights or liabilities of the parties in respect to such a cause of action when it is based upon the wrongful and negligent manner in which the act was done, and not upon its unlawfulness. Upon receiving a license from the body authorized to grant it to dig in a street, the licensee impliedly agrees to perform the act in such a manner as to save the public from danger and the municipality from liability." The town of Lex-

ington had a right to suppose that the construction company would guard the excavation it had made, so as to prevent injury to the public. "Under such circumstances, the parties can not be said to be *in pari delicto*. It is true that the plaintiffs thereby became liable to the party who suffered injury in consequence of this neglect, but they were under no obligation to shield the defendants from the consequence of their own omissions. The decisions in *Swansey v. Chace,* 16 Gray, 303, and other cases above cited, fully sustain the position that the party which placed the obstruction in the highway can not resist the claim of the town to indemnity for damages paid, on the ground that the neglect of the town to remove the obstruction contributed to the injury." *Woburn v. R. R.,* 109 Mass., 283. But more to the point is the decision in the leading case of *Lowell v. R. R.,* 23 Pick., 24, where the principle was thus stated and applied: "The distinction in all these cases is the same. The parties are not *in pari delicto,* and the principal offender is held responsible. This distinction is manifest in the case under consideration. The defendants' agent, who had the superintendence of their works, was the first and principal wrongdoer. It was his duty to see to it that the barriers were put up when the works were left at night; his omission to do so was gross negligence, and for this the defendants were clearly responsible to the parties injured. In this negligence of the defendants' agent the plaintiffs had no participation. Their subsequent negligence was rather constructive than actual. The most that can be said of it is that one of their selectmen con- (225) fided in the promise of the defendants' agent to keep up the barriers, and by this misplaced confidence the plaintiffs have been held responsible for damages to the injured parties. If the defendants had been prosecuted instead of the town, they must have been held liable for damages, and from this liability they have been relieved by the plaintiffs. It can not, therefore, be controverted that the plaintiffs' claim is founded in manifest equity. The defendants are bound in justice to indemnify them so far as they have been relieved from a legal liability, and the policy of the law does not in the present instance interfere with the claim of justice. The circumstances of the case distinguish it from those cases where both parties are *in pari delicto,* and one of them, having paid the whole damages, sues the other for contribution." The case of *Waterbury v. Traction Co.,* 74 Conn., 152, presented facts very similar to those in this case, and the Court held: "The primary cause of the accident was the act and fault of the defendant in taking down the railing and failing to restore it, assuming that the defendant took it down, as alleged. As between the plaintiff and defendant, there was no coöperation in the act of negligence which caused the injury. The plaintiff did not permit the defendant to leave the railing down.

If the defendant took it down, it promised, impliedly, if not expressly, to do so in a way not to endanger public travel, and to put it up again. If it failed to keep that promise, it can not justly charge the plaintiff with negligence, either in having relied upon such promise or in having failed to compel its performance. If the defendant removed the railing and left it down, as alleged, the fact that the plaintiff had knowledge of the defect and neglected to repair it, although it had a fair opportunity to do so, will not prevent a recovery in this action." The subject was discussed to some extent in *Gregg v. Wilmington, ante,* 18, and the two cases, while not precisely alike, have some features in common.

The jury in this case, under the instructions of the court, found that the injury was caused by the negligence of the West Construction Company, and that, as to Clodfelter, the town of Lexington concurred in that negligence, but that the construction company was (226) primarily liable, as between it and the town. This is the meaning of the verdict, when it is read in the light of the evidence and the charge of the court. So far as the liability of the construction company to the town is concerned, the fact that the city did not guard against the consequences of the negligent act committed by the construction company by lighting the dangerous place or erecting barriers there, does not prevent its recovery against that company for its primary negligence. The original wrong, which caused the injury, was done by it and not by the town, and, as between the two, it can not be correctly said that the town participated in its wrong or was codelinquent or a joint *tort feasor.* If the town was under the obligation to see that the negligence of its contractor was so guarded against as to prevent injury to pedestrians, and to take proper measures of precaution for that purpose, before it could recover from him such damages as it had been compelled to pay to a person injured by his negligence, the doctrine we have stated would be of little or no practical value for the protection or indemnification of the town. If the construction company had given proper warning to Clodfelter as he approached the trench, by lights, or had erected sufficient barriers there to prevent his falling in it, the accident would not have happened, whether the town had lighted its streets or not. The wrong done to Clodfelter is, therefore, traceable directly to its negligence in having an unguarded trench in the sidewalk. It had promised with its surety that the work of construction should be performed carefully and that the town should be indemnified from "all suits against it for any injuries or damages sustained by any person by or from any cause under its control, while in the construction of the streets or any part thereof, or any negligence in guarding the same, or by or on account of any act or omission of said contractor or its agents or employees." This provision is certainly broad enough

in its terms to cover this case and to entitle the plaintiff to full indemnity from loss by reason of the negligence of the construction company, which caused the injury to Clodfelter. The judge may have erred when he told the jury that the primary liability of the construction company should be determined by the terms of the indemnity bond, but this is not such an error as will vitiate the trial, for the reason (227) that it appears from the entire case and the real facts, which are not disputed, that the primary liability did exist in law, and consequently that the defendants are liable to the plaintiff. We would grant a new trial for this error if we thought it was a substantial and prejudicial one, but we do not think so. The main question upon which the case was contested in the court below and in this Court by the defendants we have decided against them, and if the case should be returned to the court below for another trial the result upon the facts must inevitably be against the defendants. It would therefore serve no useful purpose to do so. In *Cherry v. Canal Co.,* 140 N. C., 422, *Justice Hoke* thus states the rule which should prevail in such cases:

"In 2 A. & E. Enc. Pl. & Pr., 499, we find it stated that 'appellate courts deal with judicial acts, and it would not avail to reverse a ruling or judgment correct on the record, though it may be founded on an erroneous reason.' And, again, in the same volume, at page 500: 'This system of appeals is founded on public policy, and appellate courts will not encourage litigation by reversing judgments for technical, formal or other objections which the record shows could not have prejudiced the appellant's rights.' The decided cases in this and other jurisdictions support this position. In *Butts v. Screws,* 95 N. C., 215, *Ashe, J.,* for the Court, says: 'A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant.' See also, *Ratliff v. Huntley,* 27 N. C., 545; *Fry v. Bank,* 75 Ala., 473. The rule also finds support in *Shackleford v. Staton,* 117 N. C., 73." The verdict and judgment, upon the merits of the case, were right. *Rochester v. Montgomery,* 9 Hun, 394; *Brookville v. Arthurs,* 130 Pa. St., 501; *Seattle v. Regan,* 52 Wash., 262; *Milford v. Holbrook,* 9 Allen, 17. But we think the instruction of the court on the sixth issue, as to the primary liability of the construction company, may be sustained as a correct one, in the following view of it. It must, of course, be considered and construed with reference to the pleadings, the facts of the case and the issues. The construction company, as we have shown, committed the original wrong, which caused the injury, and the city was not, in a legal sense, *particeps delicti.* It was liable to Clodfelter, because it failed to discharge the duty of keeping (228) the walk in proper repair and preventing injury to others from the wrong of the construction company. This brought the case within

the terms of the indemnity bond, and by its very words the construction and indemnity companies are liable over to the town for what it has paid under the judgment, with reasonable attorney's fees and costs. The question of primary and secondary liability, as between the plaintiff and the construction company, depend upon whether they were joint tort feasors, and not upon the fact that a bond had been given to indemnify the town; but as it appears that they did not unite in committing the wrong, the construction company being the active and principal offender, the court properly instructed the jury that the defendants were liable upon their undertaking to indemnify the plaintiff from "any negligence in guarding the trench" or from the consequences of "any act or omission of the construction company," and directed the jury to answer the issue in the affirmative, as the execution of the bond was admitted. This was correct, even if they were not otherwise liable.

The contract of indemnity between the plaintiff and defendants was a lawful one. There is no stipulation in it which is contrary to public policy. *R. R. v. News Co.*, 151 Mo., 373; *R. R. v. Indemnity Co.*, 60 N. J. Law, 246. We find

No error.

Cited: *Sircey v. Rees, post,* 300; *Doles v. R. R.*, 160 N. C., 322.

NICHOLAS JENKINS v. JOHN H. JONES.

(Filed 11 May, 1911.)

Appeal and Error.

In this case no reversible error is found.

APPEAL from *Cline, J.*, from CALDWELL, January 13, 1911.

Mark Squires and Lawrence Wakefield for plaintiff.
Edmund Jones for defendant.

(229) PER CURIAM. Without approving the construction placed upon the deeds by the court below, we are of opinion that there is no error of which the plaintiff (appellant) can complain, and the judgment is therefore.

Affirmed.

O. L. HOLLAR v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

(Filed 7 May, 1911.)

1. **Negligent Burning—Master and Servant—Notice—Dangerous Conditions—Respondeat Superior.**

The defendant telephone company occupied plaintiff's house as a tenant, and while thus occupied it caught fire and burned on 13 November. In an action for damages for the loss alleged through defendant's negligence, it was competent, upon the issue of negligence and to fix defendant with the knowledge of the careless manner in which the lamp was used by its employees occupying the house, for the plaintiff to show by defendant's ex-manager that in August preceding they used the lamp on a bracket shelf close to a low pine ceiling, dangerous as to fire, and that the witness had told the employees not to do so.

2. **Negligence—Evidence Circumstantial—Nonsuit.**

Evidence in this case of a circumstantial character held sufficient upon motion to nonsuit.

APPEAL from *Long, J.*, at February Term, 1911, of ALEXANDER.

Action by plaintiff to recover damages from defendant for negligently setting fire to and burning the house of plaintiff, which was occupied by defendant as a tenant.

These issues were submitted:

1. Was the plaintiff's building destroyed by fire by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: One thousand dollars.

From the judgment rendered the defendant appealed.

J. H. Burke and L. C. Caldwell for plaintiff. (230)
W. D. Turner for defendant.

PER CURIAM. The record presents only two assignments of error.

1. A witness, Linto Lyon, former manager for defendant, was permitted to testify that in August preceding the burning of the house on 13 November, a large kerosene lamp was used by the defendant on a bracket shelf on the wall, close to a low pine ceiling; that it made the wall dangerously hot, and that he had instructed the operators not to use it there, but place it on the table.

We think this evidence was competent upon the first issue to prove negligence and to fix defendant with knowledge of the careless manner in which the lamp was used by its employees.

2. The other assignment of error is as to refusal to allow motion to

nonsuit upon the ground that there is no sufficient evidence of the origin of the fire. While the proof is not direct and positive that the fire originated from the negligent placing of the lamp on the shelf and so close that it set the ceiling and wall on fire, yet there is circumstantial proof of that fact of sufficient probative force to fully justify the judge in submitting the question to the jury.

No error.

(231)

J. W. REID v. HANS REES' SONS COMPANY, INCORPORATED.

(Filed 17 May, 1911.)

1. **Master and Servant—Safe Tools and Appliances—Duty of Master.**

The master owes a duty to its employee to furnish him proper tools and appliances with which to do the work required by his employment.

2. **Same—Inspection—Simple Tools and Appliances—Notice of Defect—Promise to Repair.**

The distinction drawn with reference to inspection owed by the master between simple and complicated tools and implements which he has furnished his employees for the purpose of their work has no application when a defect, which approximately caused an injury, had theretofore been called to the master's attention, and he had promised to repair it, and the injury occurred within a reasonable time thereafter.

3. **Same—Contributory Negligence—Questions for Jury.**

Upon evidence tending to show that a master had furnished his servant a ladder for the performance of his duty in cleaning out a vat at a tannery, which had become worn and rounded at the ends and was dangerous for the purpose, without slats or stops on the slippery bottom of the vat to keep the ladder from sliding, and that it was customary for ladders so used to have spikes to avoid this danger, contributory negligence, as a matter of law, is not shown by the continued use of the ladder by the servant after notifying the master of the defective ladder and under promise of the master to make it safe with spikes.

4. **Same—Assumption of Risk—Nonsuit.**

Upon a motion to nonsuit upon the evidence, the evidence must be taken in its most favorable light to the plaintiff, and upon evidence tending to show that the defendant had furnished an improper ladder for the servant to clean out vats within a tannery, and which caused the injury complained of subsequent to notice of the defect given the defendant, and while the servant continued to do the work for a short time under the plaintiff's promise to repair or make the ladder safe: *Held*, it was for the jury to say whether the servant continued in the service for an unreasonable time after the promise to repair had been broken, or that the danger in using the ladder was so obvious and imminent as to charge him with having assumed the risk, or with contributory negligence.

5. Master and Servant—Defective Tools and Appliances—Duty of Servant.

A servant who has been furnished a defective tool or appliance by the master with which to do his work is required to prevent any consequent injury by the exercise of ordinary care, and if his negligent use therein proximately causes an injury he is barred of his recovery therefor.

6. Master and Servant—Nonsuit—Defective Tools and Appliances—Safe and Unsafe Methods—Questions for Jury.

The plaintiff was injured in the course of his duty as employee of defendant by using a defective ladder the latter had furnished him for the purpose of cleaning out a vat at a tannery, and there was evidence tending to show that plaintiff was a tall man and that the use of the ladder was unnecessary: *Held*, though the ladder proved to be dangerous and caused damages in this instance, it will not be adjudicated as a matter of law that plaintiff should have climbed out of the vat, so as to sustain a motion as of nonsuit.

APPEAL by plaintiff from *Lane, J.*, at January Term, 1911, of (232) McDOWELL.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

Hudgins, Watson & Johnston for plaintiff.
Bourne, Parker & Morrison for defendant.

WALKER, J. Plaintiff brought this action to recover damages for injuries received while working in the defendant's tannery in Asheville. His duty was to clean out the vats, and in the performance of this duty he was required to go into the vat and throw out the ginned bark, which was placed between the hides for the purpose of tanning them. In order to go into and come out of the vats it was necessary to use a ladder which was furnished by the defendant. This ladder had become worn at the ends which rested on the floor, so that they had a round instead of a flat surface, and as the bottom of the vat was oozy and slick, the ladder was liable to slip when plaintiff was using it. The top ends of the ladder rested against the wall of the vat. Ladders used for this purpose in tanneries have spikes at the bottom to prevent slipping, but this one had no spikes, nor were there any slats or stops on the floor to brace or prop the ladder. The defective condition of the ladder was called to the attention of T. E. Brice, the foreman of defendant, by the plaintiff, and he promised to have it remedied, but failed to do so, when he was again requested to have the ladder spiked so as to make it safe for the plaintiff in doing his work, and he promised to do so, but again failed to keep his promise, and the plaintiff, while using the ladder in cleaning out the vat, was seriously injured by the fall of the ladder, due to its said defective condition. The court entered judgment of nonsuit upon the evidence, and plaintiff appealed.

The case should have gone to the jury. It is true that the master does not insure the safety of his servant in the performance of his (233) work, but it is a familiar and an elementary doctrine in the law of negligence, with reference to this relation, that he owes a duty, which he neglects at his peril, to furnish proper tools and appliances to his servant with which to do his work. We said as much in *Marks v. Cotton Mills,* 135 N. C., 287, and added: "He meets the requirements of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable." The rule as thus stated was approved in *Avery v. Lumber Co.,* 146 N. C., 595; *Cotton v. R. R.,* 149 N. C., 227; *Nail v. Brown,* 150 N. C., 533; *West v. Tanning Co.,* 154 N. C., 44; *Mercer v. R. R.,* 154 N. C., 399. *West v. Tanning Co., supra,* involved the same principle and substantially the same facts as does this case, and we there held that there was evidence of negligence. In *Mercer's case* there is a distinction made, with reference to the duty of inspection, between simple and complicated tools and implements, but we need not consider it, as it appears that the plaintiff in this case gave the defendant notice of the defect in the ladder and the latter promised to remedy it.

As to the duty of the employer, which requires him to furnish to his employee reasonably safe and suitable tools and appliances with which to perform his work, even though they may be simple in their construction, we need only refer to the cases of *Orr v. Telephone Co.,* 130 N. C., 627 (*S. c.,* on rehearing, 132 N. C., 691), and *Cotton v. R. R.,* 149 N. C., 227, both decided in favor of plaintiffs. In the former cases the plaintiff was hurt by the failure of the defendant to see that he used the proper implements in doing his work, lowering a telephone pole for the purpose of removing it, the implements required for the purpose being "spiked poles" and "dead men"; and in the latter the servant was furnished with a defective truck for transferring baggage, the pin which kept the wheel on the spindle having been bent so that the wheel fell from the spindle on which it revolved while the plaintiff was trucking baggage, and he was injured.

Plaintiff testified that the foreman told him the ladder had been used for some time and was safe, and that in reliance upon this assurance and the promise to repair it, which was once repeated, (234) he continued to use the ladder. The plaintiff remained in the service a little longer, expecting daily a compliance with the promise. We can not say, as matter of law, upon the evidence as it now appears, that the plaintiff continued in the service for an unreasonable time after the promise to repair had been broken (*Pleasants v.*

R. R., 95 N. C., 195), or that the danger in using the ladder was so obvious or imminent as to charge him with having assumed the risk or with contributory negligence. *Pressly v. Yarn Mills,* 138 N. C., 410. The evidence must be construed most favorably for the plaintiff in considering a nonsuit, and whether he acted as a prudent man would have done under the circumstances is a question which is peculiarly for the jury to decide. The duty to exercise reasonable care in furnishing a ladder suitable and safe for the servant's use in cleaning the vat was a primary and absolute one, and was therefore not delegable. If the master leaves the performance of this duty to another who takes his place, he must be held liable for any negligence on his part, as much so as if he had undertaken himself to perform it. He can not thus shift his responsibility. The plaintiff had no choice in the selection of ladders, but could only use the particular one furnished. The defendant had been told of the defect and the danger attending the use of this ladder, and it was its duty to provide one reasonably safe, which it neglected to do. *Mercer v. R. R., supra.* It would be going beyond the decisions of this Court to hold that the plaintiff was guilty of negligence in law because he continued to use the ladder for a short time, when the defendant had promised to put it in safe condition, but failed to do so, and he had the right to rely upon this promise being kept. It was at least a question for the jury. If the plaintiff could have prevented the injury by the exercise of ordinary care, he was obliged to do so, and his negligence, if there was any, would bar his recovery if it was the proximate cause of the injury. In *Pressly v. Yarn Mills, supra, Justice Hoke* said: "The employee is not in such instances absolved from all obligation to act with reasonable care and prudence, and if there is negligence on his part, concurring as the proximate cause of the injury, he can not recover." But to avail itself of this principle, the defendant must, upon evidence, show that there has been such negligence as bars the action. The defendant argues that the plaintiff (235) is a very tall man and should have climbed out of the vat. But the ladder was supplied by the defendant for going into and coming out of the vat, and it had been safely used for this purpose, with the assurance that it was still safe and would be made safer, upon which the plaintiff relied. We can not say, upon this evidence, that the plaintiff was required to climb out of the vat, even if the other method, in the single instance, proved to be dangerous, and for that reason the nonsuit was in proper.

Our conclusion is that the case should have been submitted to the jury, with proper instructions as to the law, and there was error in dismissing the action.

New trial.

Cited: *Harmon v. Contracting Co.*, 159 N. C., 28; *Thorp v. Traction Co.*, 159 N. C., 35; *Mincey v. R. R.*, 161 N. C., 471; *Lynch v. Veneer Co.*, 169 N. C., 172; *Smith v. R. R.*, 170 N. C., 186; *Wright v. Thompson*, 171 N. C., 92; *Rogerson v. Hontz*, 174 N. C., 29.

J. LUTHER ELLIOTT v. SOUTHERN RAILWAY COMPANY.

(Filed 17 May, 1911.)

1. **Carriers of Goods—Penalty Statutes—Title—Subject to Inspection—Party Aggrieved.**

When, by the contract or agreement between a vendor and vendee of goods, the goods are to be "received, inspected and weighed" by the vendee before any part of the purchase price is payable, the title does not vest in the vendee, and the vendor is the "party aggrieved" under the meaning of Revisal, sec. 2632, in an action against the railroad for delayed transportation.

2. **Same—Consignor and Consignee—Agreement—Public Policy—Notice to Carrier.**

In an action brought by the consignor for the penalty for delayed transportation by a railroad company of a shipment of logs under Revisal, sec. 2632, it appeared that the consignee was to "receive, inspect and weigh" the logs under a contract between the consignor and consignee, of which the carrier had no notice: *Held*, (1) By the terms of the agreement between consignor and consignee, the legal title to the logs did not pass to consignee until they were inspected and measured, there being no evidence of the amount of the purchase price; (2) the statute being passed in the interest of public policy for the prompt shipment of goods generally, it was not necessary to the recovery of the penalty that the carrier should have had notice of the agreement.

(236) APPEAL by plaintiff from *Lane, J.*, at January Term, 1911, of McDOWELL.

The facts are sufficiently stated in the opinion of *Mr. Justice Walker.*

Pless & Winborne for plaintiff.
S. J. Ervin for defendant.

WALKER, J. This action was brought to recover a penalty under Revisal, sec. 2632, for delay by defendant in transporting a car load of chestnut wood from Glenwood, N. C., to the United States Leather Company at Old Fort, N. C. The shipment was made under an open bill of lading, but the contract between the plaintiff and the consignee, United States Leather Company, provided that the wood was not to be paid for until it had been "received, inspected and weighed" at

Old Fort, and of this stipulation the defendant had no notice. By consent of the parties, the judge found the facts and held that plaintiff was not the "party aggrieved," within the meaning of the statute. Judgment was rendered dismissing the action, and plaintiff appealed.

If the stipulation as to "receiving, inspecting and weighing" entitled the plaintiff, as the "party aggrieved," to sue for the penalty, it can make no difference that the defendant had no notice of it. *Rollins v. R. R.*, 146 N. C., 153; *Cardwell v. R. R.*, 146 N. C., 218. We held in *Stone v. R. R.*, 144 N. C., 220, that, "When goods are delivered to a common carrier for transportation and the bill of lading issued, the title, in the absence of any direction or agreement to the contrary, vests in the consignee, who is alone entitled to sue as the 'party aggrieved' for the penalty." This decision was approved in *Cardwell's case, supra,* and followed in *Gaskins v. R. R.*, 151 N. C., 18, and *Buggy Corporation v. R. R.*, 152 N. C., 119. But in each of those cases the bill of lading was an open one, and there was nothing in the contract of sale, except in *Cardwell v. R. R.*, which prevented the title of the goods vesting in the consignee upon delivery by the consignor to the carrier, and there was nothing to distinguish them from the case of an ordinary and unconditional sale and shipment under (237) an open bill of lading. All of the title and interest of the consignor was divested, and there was no reason why he should be held to have been damaged or aggrieved by the delay in the carriage of the goods to their destination. But not so in this and other cases of a like kind. It is said in *Summers v. R. R.*, 138 N. C., 295: "As to the position that no recovery at all can be had, the Court is of opinion that on the facts of this case the plaintiff is the party aggrieved and the only person who had the right to enforce the penalty for delay. These penalties are not given solely on the idea of making a pecuniary compensation to the person injured, but usually for the more important purpose of enforcing the performance of a duty required by public policy or positive statutory enactment. As said in *Grocery Co. v. R. R.*, 136 N. C., at 404: 'The object in providing penalties is clearly to compel the common carrier to perform its duty to the public.' They are sometimes enforcible only by the State; sometimes they are given to any one who shall sue for them; and, again, the recovery is confined, as in this instance, to the party aggrieved, the person having a peculiar and special interest in enforcing the performance of the duty. In giving the penalty to the party aggrieved, the statute simply designates the person who shall have a right to sue, and restricts it to him who, by contract, has acquired the right to demand that the service be rendered. The party aggrieved, in statutes of this character, is the one whose legal right is denied, and the penalty is enforcible independent of pecuniary

injury. Ordinarily in case of a shipment of goods by a railway to a person who has ordered them, on delivery to the railway the company receives them as the agent of the vendee or consignee, and such person would be the aggrieved party by delay in forwarding. But in this case, by the terms of the agreement between the plaintiff and Ward & Son, the plaintiff was not to get credit for the returned goods till they were received by Ward & Son," citing *Grocery Co. v. R. R.,* 136 N. C., 396; *Switzer v. Rodman,* 48 Mo., 197; *Qualls v. Sayles,* 18 Texas Civ. App., 400. In *Cardwell's case* a package of harness had been shipped to be delivered at Efland. The delivery at the place
(238) designated being an essential part of the contract of sale, it was held that the consignor, as the party aggrieved, could recover the penalty for delay in the transportation, and also any damages he had sustained by reason of the wrongful act of the carrier. To the same effect, and alike in its facts, is *Davis v. R. R.,* 147 N. C., 68. In *Cardwell v. R. R.,* 146 N. C., 218, the delivery was to be made at Efland; in the *Davis case,* at Gastonia; the lumber not to be paid for until delivery at that place was made. In this case, the delivery of the chestnut wood was to be made at Old Fort and to be measured, weighed and inspected there before any part of the purchase price should be due and payable. We can not distinguish the case from those we have cited. It is not stated in the findings of fact very clearly whether the provision for weighing, measuring and inspecting was inserted for the purpose, not only of ascertaining whether the lumber was as represented by the plaintiff, but of fixing the price for the same, but it is fairly to be inferred therefrom that it was intended for both purposes, as the price agreed to be paid for the lumber is not stated. "As a general rule, where there is a contract for the sale of specific goods which are in a deliverable state, but it is necessary to weigh, measure, test, or do some other act with reference thereto, for the purpose of ascertaining the price to be paid, the property in the goods, unless a contrary intention appears, does not pass until such act is done, and this rule is particularly applicable where the goods are to be paid for when delivered." 35 Cyc., 283; *Devane v. Fennel,* 24 N. C., 36; *Porter v. Bridgers,* 132 N. C., 92. If the facts are as we have indicated, the authorities cited will apply, and in that event, the plaintiff would certainly be the "aggrieved party."

We might pass upon the other question raised in the brief and argument before us, if the court had clearly found all the facts required for a determination of the amount of defendant's liability. The judgment of the court below dismissing the action is reversed. So far as we can now see, the plaintiff is entitled to recover the penalty, and the

amount of his recovery will depend upon the facts as found by the jury, or by the court if the parties so agree. We merely declare there was error in the ruling of the court, and set aside the judgment (239) of nonsuit, or judgment against the plaintiff, and order a new trial of the case in accordance with the principle herein stated.

Having decided that the plaintiff is entitled to the penalty upon the facts relating to the liability as they now appear, it may be that the parties can settle without further litigation, and will prefer that course, there being a very small difference in amount between them.

Error.

Cited: *Tilley v. R. R.*, 172 N. C., 365.

C. F. YOUNCE v. BROAD RIVER LUMBER COMPANY.

(Filed 17 May, 1911.)

1. Evidence—Deposition—Presumptions—Regularity—Commissioner's Relationship.

The presumption is that a deposition has been properly taken when it appears thereon that it was taken by one named in the commission on the day and at the designated place; and a motion to quash the deposition will be denied when the motion is put upon the ground that the certificate of the commissioner was irregular in failing to state that he was of kin to neither party, the burden being upon the movant to show that he was.

2. Corporations—Officers—Declarations—Hearsay Evidence.

Declarations of officers of a corporation are competent as evidence against the corporation only when made in the line of their official duty and while discharging it in reference to a transaction for the company complained of; declarations otherwise made are hearsay and objectionable as evidence against the principal.

3. Evidence—Expert Witness—Sawing Lumber—Cost.

In an action to recover damages for cutting lumber for defendant in a certain county, laid as the difference between the contract price therefor and the cost of cutting, evidence as to the cost of cutting by a witness who has had experience in cutting lumber in that county under conditions like those existing at the location in question is competent, though the witness has had no experience in such work at the exact place.

APPEAL from *Webb, J.*, at August Term, 1910, of RUTHER- (240) FORD.

Action to recover damages for an alleged breach of contract entered into between the plaintiff and defendant by which the plaintiff undertook to cut and saw certain timber for defendant and manufacture it into lumber. These issues were submitted:

1. Did the plaintiff saw the timber for defendant in accordance with the contract made between them? Answer: Yes.

2. Did the defendant wrongfully prevent plaintiff from performing his contract with it as alleged? Answer: Yes.

3. What damage, if any, is plaintiff entitled to recover? Answer: Eight hundred ($800).

From the judgment rendered the defendant appealed.

McBrayer, McBrayer & McRorie for plaintiff.

S. Gallert and Justice & Broadhurst for defendant.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Brown.*

BROWN, J. The defendant moved to quash the deposition of J. Middleby, Jr., a witness for plaintiff, upon the ground that the certificate of the commissioner was irregular in that it failed to state that the commissioner was of kin to neither party. Rev., 1652.

It is not necessary that this should appear upon the face of the certificate, although it is a requirement of the statute in the selection of a commissioner. It is ground for quashing the deposition unless waived by previous conduct of a party, and the burden of proof to establish the relationship would be on the one making the motion.

It appearing that the deposition was taken on the day fixed, at the place named and by the person designated in the order, the presumption, in the absence of evidence to the contrary, is that all things were done rightly. *Gregg v. Mallet,* 111 N. C., 76; *Street v. Andrews,* 115 N. C., 421.

The second and third exceptions are to the ruling of the court in allowing the witness Middleby, whose deposition was taken, to
(241) testify to a conversation in Reading, Pa., with one Clements, vice-president of the defendant company.

We are of opinion that the testimony was both incompetent and prejudicial to the defendant. It was not a declaration by an officer of the company made in the line of his official duties while acting for the company in the particular transaction, nor was the alleged statement any part of the transaction between plaintiff and defendant.

It is hearsay testimony, and falls within no exception to the rule that such evidence is incompetent.

It is well settled that the declarations of officers of a corporation

are competent only when made in line of declarant's official duty and while discharging it in reference to a transaction for the company. 20 Century Digest, "Evidence," sec. 916; 16 Cyc., 1020; 10 Cyc., 947.

It is said in *Smith v. R. R.*, 68 N. C., 114: "But if his right to act in the particular matter has ceased, his declarations are mere hearsay which do not affect the principal. Cases in support of this proposition may be found in abundance with but little industry." See also *Williams v. Williamson*, 28 N. C., 281; *Howard v. Stubbs*, 51 N. C., 372; *McCombs v. R. R.*, 70 N. C., 178; *Rumborough v. Imp. Co.*, 112 N. C., 751.

The fourth and fifth exceptions relate to the issue of damages.

The plaintiff's alleged damages were measured by him between the contract price of sawing the timber into lumber and what he contended was the cost of doing so.

The defendant offered, as a witness on the cost of doing the work, a man who had eighteen or twenty years of experience in the saw-mill business, and was so engaged in 1906 and 1907, the year in which the breach is alleged to have occurred, and had manufactured lumber in some smooth and some rough land in the western part of Rutherford County.

We think his Honor erred in excluding the evidence. It is true the witness had never been on this particular land, but he had expert knowledge of the cost of sawing and manufacturing lumber upon both smooth and mountainous lands in Rutherford County. It was proper for him to state the average cost of sawing and manufacturing lumber as a fact in his experience to be considered by the jury (242) and given such weight as in their opinion it was entitled to. *Wilkerson v. Dunbar*, 149 N. C., 28, and cases cited; McKelvey on Ev., 230.

New trial.

Cited: Lytton v. Mfg. Co., 157 N. C., 332; *Seward v. R. R.*, 159 N. C., 254; *Barnes v. R. R.*, 161 N. C., 582; *Westerman v. Fiber Co.*, 162 N. C., 296; *Morgan v. Benefit Society*, 167 N. C., 265.

ELIZABETH A. SMITH v. C. H. MILLER.

(Filed 17 May, 1911.)

1. Appeal and Error—Supreme Court—Retention of Cause—Superior Court—Final Judgment—Procedure.

The Supreme Court having held on a former appeal in this case that an investment or reinvestment of certain funds ordered by the Superior

Court was void and not within the meaning of Revisal, sec. 1590, and that a hotel in the erection of which the funds had been invested be sold and the heirs to whom the funds belonged be reimbursed, preserving the legal rights of claimants or creditors therein until the sale and final hearing, upon the reports of commissioners appointed to the court below, an application by a former commissioner to have the Supreme Court consider and pass upon certain exceptions noted by him in the progress of the case in the court below as to the superiority of payment of his commissions will be refused, as the cause is in the court below and will not be considered here except on appeal from final judgment.

2. Certiorari—Error of Counsel—Appeal and Error—Final Judgment—Former Record.

A *certiorari*, except possibly under very exceptional circumstances, will not issue to bring up an appeal from the lower court on account of error of counsel. In this case it appearing that no final judgment has been entered, the petitioner may preserve his exceptions for review in the Supreme Court upon final judgment, and on this appeal the record in a former appeal may be again used.

3. Appeal and Error—Execution, Stay of.

The motion for *certiorari* being refused in this case, should petitioner appeal from final judgment of the court below, as pointed out, a stay of execution can be obtained under Revisal, 598.

(243) *A. S. Barnard for petitioner.*
No counsel contra.

HOKE, J. This is an application by C. H. Miller, a former commissioner, to have the Court consider and pass upon certain exceptions noted by him in the progress of the case in the court below, on the ground that on appeal the cause had been retained and was now in this Court for the purpose indicated. The appeal referred to is reported in 151 N. C., 620, and again in 152 N. C., 314, on a petition to rehear, filed by the present applicant, and from a perusal of the record and the opinions in the case it appears that this was a proceeding, under sec. 1590 of the Revisal, to sell land for reinvestment, the sale involving the disposition of contingent interests and in which all the parties *in esse* were before the court. That during the progress of the cause, in the court below, decrees and orders were made directing present applicant, C. H. Miller, who was at that time commissioner, to sell a portion of the land in question and to construct and equip a hotel on another portion, a lot in the city of Asheville; that the cost of the hotel, authorized and estimated, was to be not less than $193,350.53, with an additional expenditure recommended increasing the cost of the proposed building to $225,000. Commissioner, having sold a part of land, proceeded with the construction of the hotel, expended thereon something like $30,295.28 and contracted a large indebtedness to various parties for labor and mate-

rial, etc., and the enterprise, having come to a standstill, and various creditors having filed accounts, claiming liens, etc., on the structure, the cause was referred and report made to June Term, 1908, of BUNCOMBE, when it was heard on exceptions before *Peebles, J.* On the hearing, among other things, it was made to appear that it would require at least $100,000, in addition to what had been already spent and contracted, to complete the hotel, and, for various reasons stated, it was not to the interest of the owners that any further sale of land be made, and the judge held that this being a proceeding involving the disposition of contingent interests, the power of the court was only that contained in the statute, and the law contained no provision authorizing any such scheme of expenditure as had been made in this case, and that such lack of power, appearing of record, all creditors (244) were affected with notice, and judgment was entered that the hotel in question, or so much of it as was then built, together with the lot, be sold, and out of the proceeds, the original value of the lot, together with the amount of the heirs' money improperly invested in the improvement, be restored to them, and the court having ruled on exceptions filed by various claimants and others, including some filed by the present applicant, adjudged that the surplus, if there was any, should be distributed amoung the claimants according to the rulings made. On appeal to this Court, 151 N. C., *supra,* the construction of the statute as made by his Honor was approved and the judgment affirmed, in so far as it directed a sale of the property and a restoration of the money belonging to the heirs. It appearing probable, however, as it subsequently turned out, that the proceeds of sale would no more than suffice for this payment to the heirs and that there would therefore be no surplus to distribute, this Court, reserving all other questions which were presented and preserved by exceptions noted of record, directed the decision to be certified down that the sale should be had and the cause proceeded with. When this order had been duly complied with the present applicant, concluding that the decision might be construed as a final disposition of the case so far as his rights were concerned, filed a petition to rehear, and the Court, in denying the petition—152 N. C., 314—again distinctly declared that the cause was in the court below; that a sale should be had and final judgment entered, and that all rights or questions properly noted by exceptions for review would be preserved and dealt with on appeal from such final judgment. Speaking to this question *Associate Justice Walker* said: "The only question to be decided by us at the last term (151 N. C., 620), was as to the power of the court to order an investment of the proceeds of sale before any sale of the property had been made, and before it could be ascertained, with any degree of certainty, whether the said proceeds would be sufficient for the improvement of the

other property, as contemplated by the former order of the court. We therefore, merely directed a sale of the property by the com-
(245) missioner, W. R. Whitson, and a report of the sale to the court, and it was not our purpose to deprive the petitioner in this case of any rightful claim or lien he has upon the fund to be realized, as between him and the heirs or the owners of the property which is to be sold. Our decision was, it is true, that the heirs should be reimbursed; but if, as contended by the petitioner, he is entitled to a lien upon the fund, as against the heirs, or to be preferred in the distribution of the proceeds of the sale, on account of commissions justly due him, or by reason of any other claim he has preferred and which constitutes a prior lien upon such proceeds, he is not deprived by that decision of asserting such prior lien, and his exceptions, as we said in the former opinion, will be considered without reference to the fact that we have merely ordered a sale of the premises and a report to the court, and refused to pass upon the exceptions until the clear amount of the proceeds of the sale could be ascertained." And further: "Our conclusion is that the former decision is sufficiently explicit to show that the petitioner and the other parties, who claim that they have a lien upon the fund, will not be prejudiced hereafter by reason of our refusal to pass upon their exceptions at the time we made the decision. If the property in the hands of the heirs is, as between them and any of the claimants, subject to a charge or lien for its preservation, or for the payment of taxes or any other encumbrance of a like nature, this question will be open for consideration and decision in the court below when the report of the commissioner, W. R. Whitson, is made to the court." And again: "We do not reverse or modify our former decision, but simply declare, by this opinion, that the legal rights of the claimants, who have excepted, shall be preserved until the land is sold and the final hearing is had upon the report of the commissioners." It will thus be seen that the position now contended for by defendant was directly presented and passed upon in the petition to rehear, and it was expressly decided that the cause was in the court below and that the exceptions of present applicant were preserved for consideration on appeal from the final judgment. This is the orderly course which should obtain in these refer-
ence proceedings, and is in accord with numerous decisions in our
(246) Court on the subject. *Riley v. Sears,* 151 N. C., 187; *Pritchard v. Spring Co.,* 151 N. C., 249; *Brown v. Nimocks,* 126 N. C., 808; *Haley v. Gray,* 93 N. C., 195; *Jones v. Call,* 89 N. C., 188. In *Pritchard case, supra,* it was held: "An appeal is premature from the judgment of the lower court modifying the report of a referee, declaring the indebtedness and priorities among defendant's creditors, and ordering a reference as to one of them, and it will be dismissed without prejudice;

for when a reference has been entered upon it must proceed to its proper conclusion, and an appeal will only lie from a final judgment, or one in its nature final." And delivering the opinion, the Court said: "If a departure from this procedure is allowed in one case it could be insisted upon in another, and each claimant conceiving himself aggrieved could bring the cause here for consideration, and litigation of this character would be indefinitely prolonged, costs unduly enhanced and the seemly and proper disposition of causes prevented."

In *Brown v. Nimocks,* 126 N. C., 808, it was held: "The intent and policy of the statute allowing appeals (Code, sec. 548), are to present for review the exceptions taken and questions of law arising upon the whole case, and fragmentary appeals will not be entertained when no substantial right is put in jeopardy by such refusal." 2. "A party can preserve his rights by having his exceptions noted in the record and bringing them forward on the final hearing." And in *Jones v. Call, supra,* it was held: "An appeal from an order sustaining some of the exceptions to a referee's report and overruling others, and recommitting the report with instructions to correct the same in conformity to the ruling of the court is premature and will be dismissed. Upon the coming in of the report and the rendition of a final judgment, all the exceptions can be noted and passed upon in one appeal." And *Merrimon, J.,* delivering the opinion, said: "It is settled that an appeal does not lie at once from every order or judgment that may be made in the progress of an action. Generally, in the order of procedure, it lies from final judgment, and then it brings up, all together, the exceptions that may have been taken and noted in the record from time to time, and the whole are heard together. An action might easily be protracted indefinitely if an appeal could be taken at (247) once from every order or judgment, however unimportant or inconclusive, entered in the course of its progress, suspending, unnnecessarily, its progress pending the determination of successive appeals in this Court. The due administration of justice does not require such a course of practice, even if a fair construction of the statute providing for appeals to this Court would allow it, as it certainly does not." It will thus be seen that every question raised by exceptions, on the part of the applicant, were and are preserved to him; that they are open for consideration, on appeal from the final judgment, and that the court acted by analogy to approved precedents, and on express authority, with us, *Gray v. James,* 147 N. C., 139, in remanding the case on the original appeal and in holding, on the petition to rehear, that the entire cause was in the court below, to be proceeded with to final judgment. It is no answer to this position, that the price realized at the sale is without result on claims of plaintiff, and that the final judgment in no way

affects them. This may be true, as a matter of form, but in entering the final judgment the right of appeal at once arises and the applicant is entitled to have the positions indicated by his exceptions reviewed on such appeal.

For the reasons stated the application on the part of C. H. Miller must be denied.

Motion denied.

Cited: *S. c.*, 158 N. C., 100.

E. A. SMITH v. C. H. MILLER.

(Filed 17 May, 1911.)

1. Appeal and Error—Certiorari—Judgment—Counsel.

A *certiorari* will not be granted to bring up an appeal to the Supreme Court from final judgment in the lower court on the ground of *laches* of counsel, except, possibly in an exceptional case.

2. Appeal and Error—Certiorari—Substitute—Interlocutory Order—Former Record—Subsequent Appeal.

A *certiorari* will not be granted as a substitute for an appeal from an interlocutory judgment. In this case so much of the former record on appeal as is relevant may be used should the applicant for the *certiorari* appeal from the final judgment.

(248) *A. S. Barnard for petitioner.*
No counsel contra.

CLARK, C. J. This is a petition for *certiorari* by C. H. Miller. The facts have been fully stated in an opinion just filed by *Mr. Justice Hoke* denying Miller's motion to consider his exceptions without the necessity of an appeal. He now asks for a *certiorari* to bring up his appeal, alleging that he failed to appeal from the final judgment rendered at the December Term below on account of the error of his counsel.

The Court has often held that this would not be ground for a *certiorari* except possibly under very exceptional circumstances. *Barber v. Justice*, 138 N. C., 21; *Cozart v. Assurance Co.*, 142 N. C., 524; *Harrill v. R. R.*, 144 N. C., 544. Besides we find upon examination of the judgment at December Term, 1910, below, that it is not a final judgment, but the cause is "retained for further orders," and there is no judgment disposing of the costs or directing payment of them. If the ground for a *certiorari* were sufficient in other respects, it could not be granted as a

substitute for an appeal when the judgment was interlocutory and no appeal lay.

At the next term of the court below the petitioner can move for final judgment in the action, and on his appeal therefrom the exceptions heretofore taken by him will be brought up and reviewed. As it will be expensive, and entirely unnecessary to reprint the voluminous record which was here on the former appeal, on the appeal from the final judgment, the record which was brought here on the former appeal, 151 N. C., 629, and which fully presented the petitioner's exceptions, can be used without reprinting. It will only be necessary in making out the record on the appeal from the final judgment to set out so much of the proceedings since the former appeal as is necessary to present such orders as affect C. H. Miller and other appellants, if there shall be others. And it will be necessary only to print such additional record. (249)

Should there be an appeal from the final judgment there will be a stay of execution as to such of the parties as appeal, upon compliance with the requirements of Revisal, 598.

Certiorari denied.

Cited: S. c., 158 N. C., 98.

HENRIETTA MILLS v. ROY McDANIEL ET AL.

(Filed 17 May, 1911.)

Deeds and Conveyances—Registration—Defective Probate—Wife's Separate Examination—Findings—Evidence—Appeal and Error.

Findings of fact by the clerk and adopted by the judge upon a petition to correct an alleged defective probate of a deed, in that it did not show the privy examination of the wife of the grantor, etc., under allegation that the original correctly showing the probate had been lost, will control on appeal when there is evidence to sustain such findings; and when they are adverse to the claim of the petitioner, he is bound by them.

APPEAL from *Lane, J.*, at chambers, 28 April, 1911. From RUTHERFORD.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Pless & Coleman for plaintiff.

McBrayer & McBrayer, W. C. McRorie and R. S. Eaves for defendant.

CLARK, C. J. This was a petition filed before the Clerk of the Superior Court alleging that in October, 1869, William Butler and his wife executed to I. J. Spurlin a deed for the tract of land described in the petition, and that in January, 1870, said Butler and his wife appeared before J. B. Carpenter, who was at that time the probate judge and clerk of the Superior Court of Rutherford, and then and there the said William Butler duly acknowledged the execution of such deed before the said clerk and the privy examination of the wife of said Butler was duly taken by said officer. The petition further alleged that said clerk either failed to write out and attach to said deed the certificate of
(250) probate as aforesaid which had been taken by him, or the said certificate has since been lost or misplaced by some of the successive owners or custodians of said deed, and the petitioner asked that such certificate of probate be now written out and attached to such deed, and that the records of the court be amended to show that said acknowledgments and privy examination were duly had in January, 1870, as above duly alleged, and that such correction should be adjudged to take effect, *nunc pro tunc,* as of 8 January, 1870, at the time the acknowledgment and privy examination and the certificate of probate thereon were in reality had.

The grave questions of law intended to be presented and which would have been presented if the facts had been found in accordance with the allegations of the complaint do not arise because the clerk found as a fact and adjudged, "That the said deed was not duly and legally proven as alleged in the petition, and that no privy examination of the wife of said Butler was taken or had as alleged in the petition or at any other time or before any other officer." On appeal to the judge he adopted the finding of fact of the clerk and approved his judgment dismissing the proceeding. There was evidence which justified such finding of fact. In such case the action of the court below is not reviewable. *Leak v. Covington,* 99 N. C., 559; *Brafford v. Read,* 125 N. C., 311.

The judgment of the court below is therefore

Affirmed.

Cited: S. c., 161 N. C., 114.

LONNIE SHERRILL v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 17 May, 1911.)

1. **Telegraphs—Death Message—Funeral Delayed—Evidence.**

Damages being claimed for a delayed telegram in an action against a telegraph company, the message reading, "Ma died today; if any of you can come, will delay funeral," it is competent for the plaintiff to show by his evidence that if the message had been duly received he would have sent an answer requesting a delay of the funeral, which would have enabled him to attend, and that the funeral would have been thus delayed at his request.

2. **Telegraphs—Death Message—Funeral—Train Schedules—Evidence Sufficient.**

In an action upon a delayed telegram wherein it is alleged that damages were caused plaintiff in not being able to attend a funeral, where a long journey by rail was necessary, with certain connections, it is sufficient evidence to go to the jury as to plaintiff's ability to reach his destination in time that he could have done so by regular schedule, and it was not upon him to prove that at the time the trains did not run behind, or that the connections were actually made.

3. **Telegraphs—Death Message—Funerals—Absence Explained—Evidence—Elements of Damage.**

Plaintiff having testified that if a message announcing a death had been duly delivered he would have taken train to destination, and would have attended the funeral, the failure to so attend being the ground for damages alleged, it is competent to show that he did not go when the message was actually delivered on account of the shock it gave his mother, when the purpose is to show the reason of his not going and not as an element of damages; and harmless when it appears that it was then too late for him to have gone in time to attend the funeral.

4. **Telegraphs—Relationship—Proof of Affection—Evidence—Measure of Damages.**

While damages will not be presumed from the relationship of aunt and nephew, in a suit upon a delayed telegram by the latter which proximately prevented him from attending the funeral of the former, and laid as the ground for the damages, it is competent to show the affectionate regard in which they held each other, and thus prove the damages alleged.

5. **Telegraphs—Death Message—Unreasonable Delay—"Mental Anguish"—Evidence.**

An unreasonable delay in the transmission and delivery of a message relating to a funeral, which causes a relative to be absent from the funeral, is sufficient for a recovery of damages for mental anguish in proper instances.

6. **Telegraphs—Death Message—Duty of Plaintiff—Contributory Negligence—Evidence—Instructions.**

In an action for damages sustained by being prevented from attending a funeral by the negligence of the defendant telegraph company in delay-

ing a telegram announcing a death and asking if plaintiff would attend the funeral, an instruction is proper, when the grounds for damages are correctly laid, that if plaintiff, after receiving the message, made every reasonable effort to reach his destination in time, and by reason of the delay in the message and without fault on his part he could not do so, he is entitled to recover damages.

7. Telegraphs—Death Message—Measure of Damages—Common-Sense View—Instructions.

The plaintiff suing for damages in not being able to attend the funeral of a relative, where the affectionate relation is shown to have existed, and which was caused by an unreasonable delay in a telegraph company of a message announcing a death, etc., a charge held correct in this case which differentiates the grief naturally caused by the death and that caused by not being able to attend the funeral, making the defendant only answerable in damages for the latter, and stating that the jury should apply "reasonable common-sense methods such as reasonable business men would apply" in awarding the amount of verdict.

(252) APPEAL by defendant from *Lane, J.*, at January Term, 1911, of MCDOWELL.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Pless and Winborne for plaintiff.
Geo. H. Fearons and Alf. S. Barnard for defendant.

CLARK, C. J. This is an action to recover damages for mental anguish because of the failure to deliver promptly the following message, which was filed at Johnson City, Tenn., 3 P. M., 21 December, 1909, addressed to the plaintiff at Old Fort, N. C.: "Ma died to-day. If any of you can come, will delay funeral."

Though the plaintiff lived within sight of defendant's office and was known to its agents and to the people generally at Old Fort, this message was not delivered till 11 o'clock next morning when the plaintiff happened to go into defendant's office. The deceased was the aunt of the plaintiff; they had lived together at various times, and he testified if the message had been delivered promptly he would have gone to Marion on the 8.20 train next morning, and thence to Johnson City over the C. C. & O. R. R., and would have sent a message asking that the funeral be delayed, and that it would have been delayed till
(253) he could have been present; that if he had taken the first train after the message was delivered he would have had to have gone around by way of Morristown and could not have reached Johnson City till late at night, and knowing that the funeral could not then be delayed till the next day, which would have been the third day, he wired the relatives that he could not come.

The above statement of facts established negligence beyond controversy. Exceptions 1 and 2 were because the plaintiff was allowed to testify that if the message had been received by him the day it was sent he would have gone to Johnson City the next morning on the 8.20 train, and that he would have sent a message asking that the funeral be delayed, and exception 9 was to the admission of the testimony of J. G. Pulliam, the sender of the message to plaintiff, that if the plaintiff had sent such message that he would have been in time for the funeral, and that it would have been delayed on that day until his arrival. The most earnest contention of the defendant is that the 8.20 train might have been behind time and that the plaintiff might have missed connection at Marion. But the evidence of both plaintiff and Pulliam is that if the plaintiff had left on the 8.20 train, and had wired as he said he would have done, the funeral would have been delayed that day till his arrival. This testimony is uncontradicted. There is no presumption of law or of fact that the train was behind time or that plaintiff would have missed connection or that the funeral would not have been delayed till his arrival if he had. It does not appear how many trains passed over C. C. & O. R. R. each day nor the length of time between the arrival of the train from Old Fort at Marion and the departure of the train at that point for Johnson City. The evidence of plaintiff and Pulliam is simply that if he had left Old Fort on the 8.20 train that day, sending the message he said he would have sent, the funeral would have been delayed till his arrival.

Exceptions 3 and 4 are because the plaintiff was allowed to testify that the delay in the message till the next day caused such a shock to his mother that he could not have left on the next day after receipt of the message. This was not submitted to the jury as an element of damages and was competent as one of the reasons why he could (254) not have left after the receipt of the message at 11 o'clock next day. It was harmless, for the evidence was that if he had left after the receipt of the message he could not have reached Johnson City till late at night and the funeral could not have been postponed then till next day.

The next four exceptions were to the admission of evidence as to the relationship and feeling existing between the plaintiff and the deceased. It has been long settled that feelings of affection are presumed in the very near relations of life, but between more distant relatives such feelings must be shown by evidence. *Cashion v. Tel. Co.*, 123 N. C., 267; *Harrison v. Tel. Co.*, 136 N. C., 383; *Luckey v. Tel. Co.*, 151 N. C., 553.

Exceptions 10, 11, 12 and 13 are to the refusal of the court to tell the jury that the plaintiff was not entitled to recover damages for mental anguish. This scarcely needs consideration. The delay in the telegram

was unreasonable. A letter by mail would have gone from Johnson City to Old Fort in less time. The evidence is that the plaintiff would have gone in time to have been at the funeral if the telegram had been delivered before the 8.20 train next morning; that he could have gone in time if he had left by the first train, 1.10 P. M., after the receipt of the message, and there was evidence of affection between the plaintiff and deceased, in addition to the relationship.

Exceptions 14 and 15 are to the instructions of the court that after the plaintiff received the message he should have made every reasonable effort to reach Johnson City in time for the funeral, and if by reason of the delay in delivering the message he could not after making such efforts have reached Johnson City in time for the funeral, and there was no fault on his part, he was entitled to recover damages. In this there was no error.

The sixteenth and last exception is to the instruction of the court upon the question of damages, as follows: "If you come to the issue as to damages, you should assess the damages at such a figure as would be reasonable, fair and just compensation for the injury, and on arriving at it you should apply reasonable common sense methods such as reasonable business men would apply. You should not consider the
(255) grief and anguish natural to the loss of the relative. You should separate the grief at the aunt's death from the grief and anguish at not being at the funeral. It is natural to suppose that a man who loses a near relative suffers grief, and you should not consider that, but only consider the anguish and suffering he may have undergone by reason of the fact that he did not attend the funeral, if you find such failure was proximately caused by defendant's negligence." We do not see that the defendant can complain of this.

The defendant company is granted its franchise that it may serve the public by the prompt dispatch and delivery of messages whose urgency requires more speedy transmission and delivery than can be had by the ordinary course of the mail. When by the selection of inefficient agents, or inefficient supervision of them, such messages are unreasonably delayed, the telegraph company has failed in its duty and the plaintiff who has sustained damages by reason of such negligence is entitled to recover therefor. It is in the power of the defendant to avoid all such actions as this by proper attention and the faithful discharge of its duties. The telegraph company has no cause to complain of any one but itself that such actions arise. It is in its power to prevent them and it is its duty to do so.

No error.

Cited: Penn v. Telegraph Co., 159 N. C., 315; *Hedrick v. Telegraph Co.*, 167 N. C., 238.

JOYNER & LONG v. SCOTTISH FIRE INSURANCE COMPANY.

(Filed 17 May, 1911.)

Insurance—Fire—Cancellation of Policy—Delivery After Damage—Nonsuit—Parties to New Action.

Insured and defendant's agent agreed that the former should lapse a fire insurance policy on his store and goods, and that the same should be reissued in another company in its exact reproduction, excepting the change of the insured to a partnership which had been formed; but the policy as delivered did not have this agreed change, and of this the insured wrote the agent with request for correction. The agent then wrote, canceling this policy and enclosed a policy in a different company of the same tenor and amount, which was received by the insured on a day following a loss by fire: *Held*, (1) An action for damages against the defendant which issued the policy and delivered it after the fire was properly nonsuited; (2) the judgment of nonsuit will not prevent the joinder of defendant in another action against the company canceling the policy, the latter of which would seem to be liable on the record now presented.

APPEAL from *Biggs, J.*, at the January Term, 1911, of MECK- (256) LENBURG.

The plaintiff, Joyner, held a policy of insurance on his store and goods in the Atlantic Fire Insurance Company. W. A. Stone, agent for the Virginia State Insurance Company, asked him to take instead a policy in that company, which he agreed to do, telling said agent to make out the policy exactly like the other, merely changing the name to Long & Joyner, as he had sold a half interest in the business to Long. By mistake Stone sent the policy made out, as before, in the name of Joyner alone. This policy took effect 22 September, 1908. On discovery of said mistake, Joyner notified Stone to make the correction. On 24 October Stone, who was also agent for the Scottish Fire Insurance Company, mailed a letter to Joyner telling him that he was directed by the Virginia State Insurance Company to cancel the policy, as they did not wish to carry insurance upon country property, and enclosing a policy of the same tenor and amount in the Scottish Fire Insurance Company. This letter, with policy enclosed, was put in the mail, addressed to Joyner, on Saturday, 24 October, 1908, and was received by him on Monday morning following. In the interval, late Saturday night, the property was destroyed by fire. The policy of the Virginia State Company contained no provision that it could not be canceled without giving notice of five days to the insured.

There was a judgment of nonsuit, from which the plaintiff appealed.

L. T. Hartsell and J. F. Newell for plaintiff.

C. W. Tillett, Jr., and J. F. Flowers for defendant.

PER CURIAM. The judgment of nonsuit is affirmed. An examination of the record indicates that the Virginia State Insurance Company is liable to the plaintiffs, but we refrain from expressing an opinion (257) in regard thereto until it has the opportunity of being heard.

It is clear that the plaintiffs cannot recover on both policies, but equally clear, upon the evidence before us, that one of the insurance companies should be required to pay.

The judgment of nonsuit will not prevent the joinder of the defendant in this action with the Virginia State Insurance Company in a new action, as was done in *Lee v. Ins. Co.*, 154 N. C., 446.

Affirmed.

PIEDMONT LUMBER COMPANY AND A. C. BIRDSALL v. J. W. CHRISTENBURY AND WIFE.

(Filed 24 May, 1911.)

1. Mortgages—Collateral—Foreclosure—Special Provisions—Vendor and Vendee—Payment with Services—Advances—Balances.

The male defendant purchased a logging outfit from the plaintiff and mortgaged the same to secure the purchase price, which was agreed to be paid for in service in a stipulated manner. As collateral to this transaction, the *feme* defendant and her husband executed to the plaintiff a mortgage on her lands. The plaintiff made advancements in provisions and money to male defendant from time to time to enable him to perform his contract, always in excess of the amounts earned by him under the contract, and eventually the latter surrendered to the former the property, with the exception of a horse which had died, and received credit on his purchase price, leaving a balance due the plaintiff in excess of two hundred dollars. The mortgage on *feme* defendant's land provided that the first payment of two hundred dollars on the purchase price of the outfit should cancel her mortgage: *Held*, (1) The mortgage on *feme* defendant's land, being collateral to the chattel mortgage given by her husband to secure the payment of the purchase price of the logging outfit, was entitled to no credits, under the circumstances, for the money earned by her husband under his contract of payment; (2) there is no evidence in this case that any payment had been made in exoneration of the mortgage on the *feme* defendant's land.

2. Principal and Surety—Release—Indulgence—Agreement.

Mere indulgence of the principal debtor, without any binding agreement to do so, will not release the surety.

(258) APPEAL from *Webb, J.*, at Fall Term, 1910, of BURKE.

Action heard on exceptions to report of referee at Fall Term, 1910, of BURKE.

Plaintiff company holding a mortgage with power of sale on the land of the *feme* defendant, to wit: One-eighth interest in the Christopher Shuffler place, as collateral security to the amount of $200 for a debt held by the company on her husband for $800, which last debt had been secured by a mortgage on personal property, advertised and sold land pursuant to the terms of the mortgage and same was bid in by plaintiff A. C. Birdsall; deed was made pursuant to sale, which purported to convey the said land to the purchaser. Action was instituted to have said Birdsall declared the owner according to the terms of the deed. Defendants answered, claiming that the $200, the portion of the debt which the mortgage was given to secure, had been paid, and prayed judgment that this fact be declared and the land released of the lien.

The cause having been duly referred, the referee heard the evidence on a full finding of fact, held in effect that the mortgage debt had not been paid, but same and any part thereof was justly due; second, that the plaintiff Birdsall had not bought the land outright for himself, but had bid the same in for the company, and that plaintiff company was entitled to judgment of foreclosure. The court reversing conclusion of the referee, gave judgment for the *feme* defendant to the effect that as to her the debt secured by mortgage on her land had been paid. To this judgment plaintiffs, having duly excepted, appealed.

John T. Perkins for plaintiff.
J. F. Spainhour for defendant.

HOKE, J. On the hearing it was made to appear that the male defendant, J. W. Christenbury, having undertaken to do some logging for the plaintiff company, said company sold him a logging outfit, including four horses at the price of $800, and took a note therefor, secured by a mortgage on the property, bearing date 31 July, 1906, payable 1 December, 1906, with interest from date, and plaintiff company was to make advancements to said J. W. Christenbury in provisions and money to enable him to perform his part of the contract; that at (259) the time of said sale or shortly thereafter, J. W. Christenbury and wife N. L. Christenbury executed a mortgage to the company with power of sale on the lands of the *feme* defendant, said mortgage containing the stipulation as follows: "This deed is to be collateral security to a chattel mortgage of eight hundred dollars, and the first payment of two hundred dollars on the same is to cancel this mortgage, then this deed to be null and void, otherwise to be in full force and effect." That defendant J. W. Christenbury entered on the performance of the contract and did a large amount of logging for the company, but the advancements made to him in provisions and money were and continued

to be largely in excess of the amount earned even after allowing him fifty cents per thousand more for logging than the amount agreed upon, and defendant J. W. Christenbury having become indebted to plaintiff company over and above any sum earned to the amount of six or seven hundred dollars, and one of the horses worth one hundred and seventy-five to two hundred dollars having died in the meantime, plaintiff company some time in 1907 took back the remainder of the personal property of value at the time five hundred and eighty-seven dollars, leaving as balance due on the mortgage debt of more than two hundred dollars, and thereupon plaintiff company advertised and sold the land as heretofore stated.

On these facts, and it clearly appearing that plaintiff Birdsall bid in the land for the company, we think the referee correctly held, "As a matter of law, that no payment as contemplated in the contract has ever been made which would operate as a release or discharge of the mortgage debt of two hundred dollars, and that J. W. Christenbury as principal and N. L. Christenbury as surety to his debt of two hundred dollars, are due the Piedmont Springs Lumber Company the sum of two hundred dollars, with interest thereon from 17 July, 1906, and that the plaintiff lumber company is entitled to a foreclosure of the said mortgage to satisfy the said debt, interest and costs."

"2. I find as a matter of law that no title passed to the plaintiff A. C. Birdsall at the mortgage sale."

(260) The mortgage on the land in express terms purports to be collateral security to the chattel mortgage. This in ordinary acceptation should be an additional security to the property contained in the mortgage. It does not appear at all that the personal property was taken back in cancellation of the trade; the horse that died was the loss of the purchaser and owner, J. W. Christenbury, and to hold, as defendant contends, that the value of the personal property taken back should be received in exoneration of the mortgage on the realty would be in effect to hold that this last amounted to nothing. Nor is there any merit in the position that the *feme* defendant is relieved by delay on the part of the company in enforcing its claim under the chattel mortgage. The authorities are to the effect that mere indulgence of the principal debtor without any binding agreement to do so, will not release the surety. *Jenkins v. Daniels,* 125 N. C., 161; *Deal v. Cothran,* 66 N. C., 269; *Thornton v. Thornton,* 63 N. C., 211.

There was error in the judgment of the court below, and on the facts established plaintiff company is entitled to judgment of foreclosure and it is so ordered.

Reversed.

SUSIE F. WILLIAMS v. SOUTHERN RAILWAY COMPANY.

(Filed 24 May, 1911.)

1. Carriers of Passengers—Acceptance of Baggage—Notice.

To fix the responsibility for lost baggage upon a railroad company, either as a common carrier or warehouseman, a delivery, actual or constructive, including an acceptance by the company, is necessary; and in order to a valid delivery the general rule is that when baggage is taken by others to the station, and to places where baggage is usually received, some kind of notice must be given to the agent authorized to receive it.

2. Same—Custom—Modification of Rule.

The requisites of the general rule to affect delivery of baggage of a passenger to a railroad company in order to hold the company liable may become modified by a custom of the latter to consider and treat baggage as received when left at a given place, without further notice.

3. Same—Apparent Agency.

To establish liability by a railroad company for the loss of a passenger's trunk, there was evidence on plaintiff's part tending to show that she had sent her trunk to defendant's depot by a drayman who, in the absence of the regular baggage man, placed it under the direction of one who apparently had charge at the time, where trunks were usually accepted; that the one giving directions for placing the trunk had on regular citizen's clothes, with the exception that the vest had brass buttons on it like those of defendant's conductors or employees, and that he went where the baggage men usually went, and appeared to be acting as a baggage agent for defendant; that plaintiff did not find her trunk, and after some conversation with defendant's acknowledged baggage agent the latter agreed to send her trunk on a following train and gave her a check for it: *Held*, (1) Error of the trial court to refuse plaintiff's prayer for special instruction, that if the trunk was left by the drayman at the time and place where baggage was received, in charge of the baggage man, or in *care* of *any one* whom *defendant* held out to the public to be in charge of the baggage room, such would be sufficient delivery; and, further, *held*, error (2) to a modification of the special instruction that in order to a valid delivery the trunk should have been left at the time and place with the knowledge and consent of defendant's baggage man or other *authorized agent* of the defendant company.

4. Same—"Agency by Estoppel."

When a railroad company by its acts has left a person in its baggage room apparently in charge of the baggage, notice given to him of the delivery of a trunk of a passenger is notice and may amount to an acceptance by the company, under the principle of "agency by estoppel," and render the company liable in damages for the loss of the trunk.

5. Issues—Discretion of Court.

The framing of issues is a matter which is left very largely in the discretion of the trial judge, the limitation being that the issues must be sufficiently responsive to the pleadings and determinative of the rights of the parties involved therein.

6. **Issues—Carriers of Passengers—Immediate Transportation—Definition—Surrounding Circumstances—"Reasonable Time."**

The plaintiff, on Sunday afternoon, having purchased a ticket over defendant's railroad, sent her trunk to the depot to be received and transported by it as baggage, intending to take her train to destination on Monday morning following. There was evidence tending to show the acceptance of the trunk as baggage on Sunday afternoon, and of the custom of the railroad company to receive baggage to be transported in accordance with plaintiff's intent. In an action for damages for the loss of the trunk, *held*, it was proper to submit the issue, "Was said trunk received by defendant for immediate transportation?" but thereon the jury should be instructed that the meaning of the word "immediate" in this connection was "reasonable time," having due regard to the nature and circumstances of the case.

7. **Carriers of Passengers—Baggage—Liability as Common Carrier—Acceptance—Reasonable Time.**

In order to fix a railroad company responsible for baggage as a common carrier, the same must be delivered by the passenger and accepted for transportation within a reasonable time before he takes his intended train.

8. **Same—"Custom"—Warehouseman—Questions for Jury.**

When, in accordance with a custom of the carrier, it accepts baggage one afternoon for a train leaving the following morning, which the passenger intended to and did take to her destination, in the absence of some reasonable regulations restrictive of the company's duty, the company would be liable, in case of loss of the baggage, as a common carrier, and held as an insurer. In the absence of such custom, the liability of the company would only be for ordinary care as a bailee for hire; and on conflicting evidence as to the custom, the question would be for the jury to determine under proper instructions.

9. **Carriers of Passengers—Baggage—Liability as Carriers—As Warehouseman—Legal Excuse—Burden of Proof.**

When a railroad company accepts a trunk of its passenger for transportation, on failure to deliver it it is held responsible as a common carrier or warehouseman, with the burden on the carrier, in an action for damages, to render legal excuse for the failure.

(262) APPEAL from *Long, J.*, at October Term, 1910, of MECKLENBURG.

Action to recover value of plaintiff's trunk and its contents.

There was evidence on part of plaintiff tending to show that on or about 30 August, 1908, on Sunday afternoon, at Charlotte, N. C., plaintiff, having purchased a ticket over defendant's road via Statesville, N. C., sent her trunk to the station of defendant company in

(263) Charlotte to be received as baggage for transportation over defendant's road, plaintiff intending to take the train leaving Charlotte on Monday morning following, 31 August. The trunk was first

given in custody to Robert Ramsaur, a drayman working for the Black Transfer Company, at the house where plaintiff was then staying, with directions to take same to the station for the purpose indicated, and no check or receipt for same was given by Ramsaur, that not being the custom; that the trunk was taken to the station, as directed, the defendant company duly notified, and same was left at the accustomed place, and, by direction of an agent of defendant company, in apparent charge of the baggage-room and baggage business at the station. Plaintiff went to station Monday morning for purpose of taking train and to baggage-room to check her trunk, and she and the baggage agent walked immediately to a new steamer trunk and check was placed on same and duplicate given plaintiff. As this was handed plaintiff the agent asked her if she was positive that it was hers, and witness said: "No, I am not positive; I borrowed the trunk from Mrs. Hook." He said, "Is there a name on it?" I looked over the trunk and found no name on it. Then he said, "Well, just open the trunk and see if it is yours." I took my key and opened the trunk, and it contained a gentleman's clothes. He said, "This won't do, it can't be yours." And of course I knew it was not mine, and I said, "What will I do? I am going to Blowing Rock and will need my clothes." And he said, "I will send your trunk to you just as soon as it comes." I said, "Suppose this is not my trunk that you send to Blowing Rock to me, what will I do; I will need my clothes?" I said, "If my trunk is lost what will I do?" And he said they very rarely lost a trunk. He said, "If a gentleman has your trunk he will send it back here, and I remember distinctly shipping a new steamer trunk Sunday afternoon." He said there was an overflow of baggage from the flood, and he said, "Where are you going?" And I told him I was going to Green Park Hotel, Blowing Rock, and he gave me a check and I put it in my purse. When I took the train I had the check given me by Mr. Harrill. I went to Blowing Rock. I have not received the trunk or the contents or the value thereof (264) from the Southern Railway Company. I made a list of the contents about ten days after my trunk was lost.

There was evidence offered, also, tending to show that the trunk was left at the place where unchecked baggage for transportation was usually placed, a covered archway, between the baggage-room proper and Gresham's dining-room, in the main station building, and that it was not customary to receive baggage for transportation on Sunday afternoon for trains leaving Monday morning from station. It was proven or admitted that neither the trunk nor its contents had ever been restored to plaintiff and that the check given by the company for same had been destroyed or lost. Percy Shaw, the agent of defendant company, having charge of baggage-room and business concerning baggage at the Char-

lotte station and attending to same, usually in the day time, and J. H. Harrill, his assistant, having like charge usually at night, were examined for defendant company, and on matters more directly relevant to the questions presented, testified that the trunk claimed by plaintiff was never delivered to them at the time nor for the purpose stated, either by Ramsaur or any other person. Percy Shaw, as witness, speaking especially to this question, testified: "I live in Charlotte. I am baggage agent at the Southern depot. Yes, I was baggage agent in August, 1908. I went on duty at 7 A. M. and left at 7 P. M. I was succeeded at night by Mr. Harrill. No one else there had authority to receive trunks. No, I did not at any time receive a trunk belonging to Miss Susie Williams. No, on 30 August I did not leave any employee there at the baggage-room, with a blue vest on, with brass buttons, to take my place. Conductors running on the train are the only employees on the Southern road who wear such a uniform. (Cross-examination of Percy Shaw.) On 30 August I came on duty at 7 A. M., I suppose. I can't remember whether I came exactly at 7 o'clock or not. No, I did not leave any conductor in my place that day. No, I did not leave any one in my place that day." J. H. Harrill testified to like effect, and gave evidence tending to contradict plaintiff's account of the circumstances under which he gave the check. On the question of whether the trunk was actually delivered to defendant company by Robert Ramsaur, he
(265) testified as follows: "I live at 810 E. First street, Charlotte. I work on transfer wagon. Yes, I know Miss Susie Williams. Yes, on or about 30 August, 1908, I took her trunk from Mrs. Hook's house, 305 East Morehead street, to Southern Railway station. I took the trunk to the Southern station and asked some railroad man there. No, I don't know who I was talking to. It was a man in the baggage room. No, I don't know who the man was I had the talk with. He was a tall, slim-looking man. No, I don't think he had charge of the baggage room there. Yes, I know Mr. Percy Shaw."

Q. What took place between you and a man in the baggage room?

I asked him could I set the trunk inside the baggage room. He said, "No," to put it in the alleyway, where they put trunks. I put it in the alleyway. There is a gate there now, but there wasn't none there then. I have worked for Black about two years in all.

Q. Did you know what the custom is about placing trunks there for next morning's trains? Did you put that trunk there? Yes.

Cross-examination of Robert Ramsaur: Yes, I have been hauling trunks for about two years. Yes, I was working for the Black Transfer Company at that time. Yes, Black sent me to Miss Williams' to get the trunk. No, I don't carry claim checks for trunks. The transfer man at the depot has them. Yes, I went there some time in the evening

before sunset. Yes, I got this trunk and loaded it on the wagon. Yes, I know Mr. Percy Shaw. No, he was not the man I was talking to in the station—in the baggage room there. Yes, Mr. Shaw was the baggage master there. No, I did not see him there at that time. No, I did not say anything to him. Yes, he was the baggage master. Yes, he was the man who received the trunks at the station, if you could find him when you took trunks there. Yes, this tall, slim man was a white man. He was standing just beyond the scales in the baggage room. I put the trunk in the passage way, between the baggage room and Gresham's dining room. Gresham has a dining room there.

Q. And wagons drive up next to the kitchen? (266)

Yes, I first pulled the trunk inside the baggage room, and the man in the baggage room told me, "No," to put it back there where trunks belong. Yes, I put it back out there. No, I said nothing to any one about it. No, I did not tell whose trunk it was. If the baggage man had been there I would have told him.

And, being recalled, this witness testified further:

"The man I saw there in the baggage room had on citizens' clothes—all but his vest. He had on a railroad vest—a railroad porter or something's vest. When he told me to take the trunk out of the baggage room he walked out of the place where Mr. Shaw and them checked the baggage. I asked him if I could put it there, and he said, 'No,' to put it outside where the trunks belonged. He came from the office where Mr. Shaw stayed. He was doing business, and I asked him if I could put the trunk there, and he said, 'No.' I don't know whether any one except the baggage agents come from there. Yes, the baggage room door was open when I went in there."

"Yes, he was doing the things what the baggage man does. When I seen him, he was coming out the gate, and he had got beyond the scales when I saw him. I seen him doing nothing."

Q. So, all you know is that you saw a man in there who had on a blue vest with brass buttons, with "Southern" marked on the buttons, and you asked him if you could put the trunk in there, and he said "No," to put it out there. Had you ever seen the man before?

A. I think I had seen him once before. I have never seen him since. No, it was not Mr. Percy Shaw, nor Mr. Harrill.

Q. State whether or not when you took trunks there to the station Mr. Shaw or Mr. Harrill was always there, or whether they got other people to stay in their places sometimes.

A. There were other men in there besides Mr. Harrill and Mr. Shaw. I have seen baggage agents on the Southern Railway in there, checking baggage.

A paper-writing, containing a written statement of this witness in

direct contradiction of the principal portion of his testimony as to delivery of the trunk, was introduced by defendant.

The jury rendered the following verdict:

(267) 1. Did the defendant company receive the trunk of the plaintiff on Sunday evening, 30 August, 1908, as alleged in the complaint, as baggage for transportation? Answer: No.

2. Was said trunk received by defendant company for immediate transportation? Answer: No.

3. Was the trunk delivered by the defendant company to the plaintiff? Answer: No.

4. What amount, if any, is plaintiff entitled to recover from defendant on account of the alleged loss of said trunk? Answer: Nothing.

Judgment for defendant, and plaintiff excepted and appealed.

E. R. Preston and Neill R. Graham for plaintiff.

W. B. Rodman for defendant.

HOKE, J,. after stating the case: To fix the responsibility for lost baggage on a railroad company, either as common carrier or warehouseman, there must have been a delivery of same, including an acceptance by the company, either actual or constructive; and in order to a valid delivery, the general rule is that when baggage is taken by others to a railroad station, and even to the place where baggage is usually received, some kind of notice must be given to some agent of the company authorized to accept the same. Hutchinson on Carriers, sec. 105; Fetter on Carriers, sec. 610; *R. R. v. Beckley,* 119 Tenn., 528; *Gregory v. Webb,* 89 S. W., 1109 (40 Tex. Civ. App., p. 360); *Wright v. Caldwell,* 3 Mich., 51; *Merriam v. R. R.,* 20 Conn., 354; *Transfer Co. v. Gurley,* 107 Ala., 600. This rule is at times modified where a custom of a company is established to consider and treat baggage as received when left at a given place and without further notice. Fetter on Carriers, *supra; Green v. R. R.,* 41 Iowa, 410; *Green v. R. R.,* 38 Iowa, 100; *R. R. v. Foster,* 104 Ind., 293. There is no objection open to plaintiff, by reason of his Honor's charge on the last position, for it was dealt with as plaintiff requested; but in reference to the first, plaintiff, admitting that his Honor stated the rule in general terms sufficiently correct, insists that there was reversible error committed, to his prejudice, in so modifying a prayer for instructions, on the first issue, as to exclude from consideration a view in his favor properly arising

(268) on the evidence, and this in especial reference to the testimony of the witness, Robert Ramsaur, and corroborative facts tending to show a delivery of the baggage at the proper place and notice duly given. As heretofore shown, Robert Ramsaur, in effect, testified that,

having charge of the trunk, he took it to the passenger station on Sunday afternoon and to the baggage room, and asked a man in there if he could put it in the room, and the man replied, "No, put it in the alley-way where they put the trunks," and witness then placed the trunk as directed. The man was a white man in citizen's clothes, except that he had on a railroad company vest; that he was the only man there in the office. Recalled on this point, the witness testified further: "When he told me to take the trunk out of the baggage room, he walked out of the place where Mr. Shaw and them checked baggage. He came from the office where Mr. Shaw stayed. He was doing business, and I asked him if I could put the trunk in there, and he said 'No.' He was doing things what the baggage men does." The witness further said that he had seen this same man once before, and that there were at times other men in there besides Mr. Shaw and Mr. Harrill, and the witness had seen baggage agents on the Southern Railway in there, checking baggage. On the part of the defendant, Mr. Shaw and Mr. Harrill testified that they had charge and control of the baggage room, and that neither of them had received the trunk claimed by plaintiff, nor had they authorized the man referred to by the witness, Ramsaur, nor any other man, to receive it or to accept notice concerning it. The witness, Shaw, however, stated that he was at times temporarily out of the office. In view of this testimony and supporting facts on either side, the plaintiff requested the court to charge the jury: "That if it was the custom of railroad companies to receive baggage Sunday afternoon or evening before for transportation on the next morning train, and that trunks or baggage should be left at defendant's passenger station at such times in care of the baggage man in charge of defendant's baggage room, or of any agent or servant of the company in charge of defendant's baggage room, or in care of *any one* whom the company *held out to the public to be in charge of the baggage room,* and should the jury find that the trunk, having been put in charge of the drayman for the (269) purpose, was left by him at defendant's baggage room or in what was known as the baggage alley, with the knowledge and consent of the agent or servant in charge of defendant's baggage room, as aforesaid, then in any of those events, the court instructs the jury, the compliance with such a custom, existing at the time, by the transfer man, with the knowledge and consent of the defendant's baggage man or other agent of the defendant, as aforesaid, would be an acceptance of plaintiff's trunk, and such acceptance would be a delivery of plaintiff's trunk to defendant." The court gave the prayer generally as requested, but modified same by saying that if the plaintiff's trunk was left at defendant's station at the customary time and place, with the knowledge and consent of defendant's baggage man or other *authorized* agent of the company,

etc. The case further states that the jury, having received the charge in the forenoon of Wednesday, 5 October, 1910, considered the case, and on Thursday morning stated they had been unable to agree on what was a legal delivery of the trunk, and, at their request and without objection, the typewritten instructions of the court were given them. The jury, having further considered the case until Friday morning, again came into court, when his Honor gave them further charge on the question of delivery, as follows: "As I understand you, you say you are troubled as to what constitutes an agent at the depot of the defendant to receive baggage. The defendant is a corporation. The defendant, therefore, conducts its business through and by its employees or agents. As the plaintiff in this case has alleged that she caused her trunk to be delivered to the defendant company, it is necessary for her to offer evidence that satisfies the jury, by the greater weight of the evidence, that some person authorized by the defendant corporation to act for it was acting for it at the time that she alleges that she delivered her trunk, or caused it to be delivered through her agent. Nothing short of a fair delivery of the baggage to the carrier or its agent will render the carrier liable for a non-delivery. That is to say, the plaintiff in this case, upon all of the evidence, must satisfy the jury, by the greater weight of it, that the trunk was delivered to some person authorized to act for the de-
(270) fendant company as baggage to be transported over the defendant's line as such, and the agent of the defendant company must have received the baggage," plaintiff duly excepting to the modification of this prayer and to the additional charge as *given*. In thus modifying plaintiff's prayer for instructions, and more emphatically in the additional charge as given, the court intended to and did withdraw from the jury the view arising on the testimony that if the baggage was placed at the customary time and place with the assent and knowledge of "one held out by the company as being in charge of its baggage room," there was a proper delivery to the company, and in this we think there was reversible error, to plaintiff's prejudice, which entitles her to a new trial of the issue. True, the witness, Ramsaur, testified that he knew both Percy Shaw and J. H. Harrill, and knew also that they were the baggage agents at defendant's station, but a perusal of the entire testimony of this witness presents a permissible interpretation for the consideration of the jury, that, while he knew Shaw and Harrill were the company's agents in general charge and control of the baggage business, yet the man he found in sole occupation of the baggage room when he asked to place the trunk in the room was the company's agent, then in charge, for the time being, and, if not so in fact, he was allowed by defendant company to hold himself out as such, and for that reason a notice to him may have been sufficient evidence of delivery. This

agency, by allowing one to appear as such, or agency by estoppel, as it is usually termed, has an important place in this branch of the law. It is very well stated in Clark and Skyles on the Law of Agency, sec. 55, as follows: "It is a well-established doctrine that if a person by his words or conduct expressly or impliedly represents to another that a certain state of facts exists, and thereby induces the other to act in reliance on such representation, he will be estopped to deny the truth of the representation to the other's prejudice. And by the application of this doctrine, an agency may be created or arise by estoppel, irrespective of the actual intention, and even though it may be conceded that there was no agency in fact. The general rule is this: If a person knowingly permits another to act for him in a particular transaction, or otherwise clothes him, either intentionally or by negligence, with apparent authority to act for him therein, (271) he will be estopped to deny the agency as against third persons who, in good faith and in the exercise of reasonable prudence, deal with the apparent agent in the belief that his apparent authority is real." Tiffany on Agency is to like effect, and innumerable decisions here and elsewhere recognize and apply the principle. *Gooding v. Moore,* 150 N. C., 195; *Bank v. Hay,* 143 N. C., 326; *Morrow v. R. R.,* 134 N. C., 92-96; *Harrell v. R. R.,* 106 N. C., 258; *Ouimit v. Hinshaw,* 35 Vermont, 605; *Minter v. R. R.,* 41 Mo., 503; *Battle v. R. R.,* 70 S. C., 329; *Rogers v. R. R.,* 2 Lans., 269, N. Y. Supreme Court; affirmed 56 N. Y., 620; *Ins. Co. v. R. R.,* 144 N. Y., 200. Some of these decisions, and many others could be cited, were on facts very similar to those presented here, making them apt authorities in support of plaintiff's position as embodied in his prayer. In *Morrow's case,* on a question whether defendant company knew that one had entered its trains for the purpose of assisting a passenger, the fact that an employee of the company was standing near, in a position to observe and note the circumstances, was held evidence from which knowledge on the part of the company could be inferred. *Associate Justice Walker,* speaking for the Court, said: "Whether the person who stood near the steps of the coach was the conductor or some other employee, charged in law or fact with the duty of providing for plaintiff's safety, while exercising the lawful right of assisting the company's passengers, is a proper subject of inquiry for the jury," etc. In *Battle's case, supra,* it was held: "That delivery of baggage to the only person in charge of the station, who is at the time engaged as a telegraph agent, depositing it at a place indicated by him, description of trunk and directions as to checking, and that owner would soon appear and attend to it, is delivery to the carrier." In *Ouimit's case, supra,* it was held that a passenger has a right to regard as agent of a railroad company a

person who handles and takes charge of baggage upon arrival of train at a station, and notice to such person by a passenger is notice to the company. And in the case of *Rodgers v. R. R.,* it was held as follows: "The owner of a trunk sent it to the defendant's depot by an express-
man, who placed it within the depot beside the baggage crate,
(272) which was locked, and upon inquiring of persons there engaged
in handling freight, was referred to the ticket agent as the person who took charge of baggage; he went to the ticket agent's office and told him that there was a trunk outside; the agent said that it was all right, and immediately sent two men to take care of it. When the owner inquired for the trunk on purchasing his ticket later in the day, it could not be found, though the ticket agent said hee had seen one a short time before answering to its description. Employees of the defendant also said that it had been delivered upon presentation of a check. In an action to recover the value of the trunk and its contents, *held,* that there was sufficient evidence of delivery, and a nonsuit was wrong."

Stating the proposition in a negative way in 6 Cyc., 671, it is said: "But the carrier will not be liable for the acts of its servants not authorized *nor held out* as authorized to receive baggage." On authority, therefore, the plaintiff was entitled to have this latter view presented to the jury, and to have his prayer for instructions given substantially as requested.

Plaintiff excepted further that the court submitted the second issue as to the receipt of the trunk for *immediate transportation.* We have frequently held that the framing of issues is a matter which is left very largely in the discretion of the trial judge, the limitation being that the issues must be sufficiently responsive to the pleading and determinative of the rights of the parties involved therein. And the statement is not infrequently made in the books that in order to charge transportation companies as common carriers, making them liable as carriers, the goods or baggage must be left with them for "immediate" transportation. It it becomes necessary, therefore, in order to make full determination of the rights of these litigants, that decision should be made whether this trunk was received and held as common carrier or warehouseman, it is well enough to submit the issue as framed. If this is done, however, the jury should be instructed that the term "immediate," in this connection, does not have its more usual meaning of "instantly, forthwith, nothing intervening either as to place, time
or action," given in 4 Words and Phrases, 3393, as Worcester's
(273) definition, but it means, rather, "reasonable time," having due
regard to "the nature and circumstances of the case," cited in Words and Phrases as Bouvier's definition. The controlling idea being

that in order to fix upon a company responsibility for baggage, as a common carrier, the same must be delivered by the passenger and accepted for transportation within a reasonable time before taking his intended train. There is a decision (*Goodbar v. R. R. Co.*, 53 Mo. App., 434) which tends to hold that this must be the next train, but we doubt if this is a correct statement of the general rule, and certainly not where a custom is established on the part of the company to accept baggage for transportation on a subsequent or later train. The true rule, we think, is very fully stated by Elliott on Railroads, (2 Ed.), sec. 1651, as follows: "The liability of the company as a common carrier begins, as a rule, at the time the baggage is delivered to it for transportation, unless the time of such delivery be an unreasonable length of time before the owner's intended departure. In order that the liability as a common carrier should exist, it is not always necessary that the passenger should have purchased a ticket, nor that he should even make the journey which he intends to make. As persons often become entitled to the rights of passengers before the purchase of a ticket, so the liability of a carrier for baggage sometimes begins before the purchase of a ticket, or even before the company becomes liable to the owner of the baggage as a passenger. Where a person in good faith intends to take passage on a railway train, or the like, and delivers his baggage to the company a reasonable time in advance of the anticipated journey, it seems that the company will be liable for such baggage as a common carrier from the time of such delivery and acceptance. And in such cases the company may be liable, although the person does not purchase a ticket or make the proposed journey, as, for instance, where he is prevented from so doing by the fault of the carrier and the loss or destruction of the baggage before the journey begins," and well-considered decisions are in support of the statement. *Hickock v. R. R.*, 31 Conn., 281; *Mfg. Co. v. Ullman*, 89 Ill., 244; *R. R. v. R. R.*, 104 Ind., 293; *Ins. Co. v. R. R.*, 144 N. Y., 200; *Woods v. Devin*, 13 Ill., 747. And, as relevant to the question more directly involved (274) in this position, *Hickock v. R. R., supra*, holds as follows: "A railroad company is presumed to receive baggage for transportation and not for storage, and its liability commences as soon as the baggage is delivered to and is received by the agent, notwithstanding the fact that it was not checked at the time it was received and would not be for several hours, nor until fifteen minutes before the train started, and that the passenger was so informed.

"2. Delivery or nondelivery of check for baggage is of no importance as affecting the liability of the carrier, it being merely in the nature of a receipt and intended as evidence of the ownership and identity of the baggage, and this is the rule generally obtaining in the absence

of some specific and reasonable regulation restrictive of its liability."

As the cause goes back for a new hearing, we consider it well to advert to another exception insisted on for plaintiff, that his Honor charged the jury, as requested by defendant, as follows: "If the jury find from the evidence that the plaintiff, Susie E. Williams, purchased a ticket over the defendant's line from Charlotte to Statesville, on Saturday morning, and on the following Sunday evening sent a trunk to the depot, giving no instructions for shipment and no instructions for it to be checked, and did not intend for the same to be checked until the following morning, then the company, even if it received the trunk for storage, was merely a gratuitous bailee and liable only for its gross negligence. There being no evidence that the trunk was lost by the gross negligence of the defendant company, the jury will answer the fourth issue, 'Nothing.'"

As heretofore stated, if the trunk was delivered and accepted by the company in the afternoon for transportation on the following morning, and it was customary to receive baggage for transportation in that way, in the absence of some reasonable regulations restrictive of the company's liability they would take as common carriers and could be held as insurers in case the trunk is lost; but if no such custom existed and the trunk was only received for storage for one
(275) intending to become a passenger, and until he claims the trunk and has the same checked, in such case the company is ordinarily regarded as bailee for hire and is responsible for ordinary care. It is the same rule of responsibility obtaining where baggage reaches its destination and is not called for in a reasonable time. After such time the carrier holds the baggage as warehouseman and is responsible for lack of ordinary care. Elliott on Railroads, secs. 1463-1533. In making this charge, the court was no doubt influenced to some extent by expressions in the opinion in *Kindley v. R. R.*, 151 N. C., 207, to the effect that in certain aspects of that case the defendant company was a gratuitous bailee, and as such responsible only for gross negligence. But the statement of the law and expressions referred to must be considered and construed in reference to the facts presented and in view of the rights there involved. In *Kindley's case* a passenger took the train at Fayetteville, N. C., intending to go through to Charlotte, the route lying over the Atlantic Coast Line to Maxton and over the Seaboard from Maxton to Charlotte. At Maxton the passenger determined to return to Fayetteville and notified the Coast Line conductor of such intent, with a request that the baggage be also returned. The trunk was carried on to Charlotte and when it was returned to the owner, some time thereafter, it was found to have been entered and some of the contents stolen. The appeal involved only the liability of the

second carrier, and the decision in *Kindley's case* was placed on the ground that the intended passenger had never become such in reference to the second or connecting carrier, and that nothing had ever been paid or tendered such carrier, either for carrying the passenger or storing the trunk, and in that view only the second carrier considered and dealt with as gratuitous bailee. In *Kindley's case,* too, weight was given to the language of the statute bearing on the subject (section 2624), which makes carriers responsible "for baggage of passengers from whom they have received fare." The principle, however, does not apply to the facts presented here, in any aspect of them, for if it should be established under proper ruling that until the trunk was claimed and checked for baggage it was held for storage only and not for immediate transportation, as heretofore explained, on authority, the company is chargeable as bailee for hire and responsible (276) for ordinary *care.* If received and held, either as common carrier or warehouseman, on failure to deliver, the burden is on defendant to render legal excuse for the failure. In Fetter on Carriers, at p. 1557, it is said: "With respect to baggage in possession of a railroad company as warehouseman, evidence that it failed to deliver the property to the owner, when demanded, *prima facie,* establishes negligence and want of due care, and the onus of accounting for the default lies with the carrier." There is error, which entitles plaintiff to a New trial.

Cited: Barefoot v. Lee, 168 N. C., 90.

H. M. ROBERTS v. JOHN J. BALDWIN.

(Filed 24 May, 1911.)

1. **Appeal and Error—Former Appeal—Adjudication—Finality.**

When a case is sent back to the Superior Court for a new trial for errors committed, matters therein decided on the former appeal to the Supreme Court will not be considered on a subsequent appeal of the same cause of action.

2. **Water and Water Courses—Surface Waters, Diversion of—Limitations of Actions—Evidence—Questions for Jury.**

When there is conflicting evidence upon an issuable question regarding the statute of limitations in an action for damages against an upper proprietor for diverting surface waters from their natural flow to the injury of the lower proprietor, the court can not say, as a matter of law, whether or not the statute is in bar.

3. Water and Water Courses—Surface Water—Wrongful Diversion—Continuous Trespass—Measure of Damages—Limitation of Actions.

In an action for damages caused to the lands of the lower proprietor by the alleged wrongful diversion of the flow of water by the upper proprietor through a ditch on the lands of the latter, issues tendered by the defendant restricting the inquiry upon the statute of limitations to the length of time the ditch had been dug is erroneous, as the ditch may have been dug and used continuously for more than three years and have caused damage within that period.

4. Same—Instructions.

Damages being sought by the lower proprietor in his action against the upper proprietor for the wrongful diversion of surface water through a ditch on the latter's lands, which had been dug for more than three years, it is proper for the trial judge to confine the jury in awarding damages to the injury inflicted within the three years.

5. Issues—Court's Discretion.

The form of issues is within the discretion of the lower court, provided they are sufficient to determine the rights of the parties and to support the judgment.

6. Waters and Watercourses—Surface Water—Wrongful Diversion—Measure of Damages—Crops.

A lower proprietor may recover damages to his crops in addition to that to his lands in an action against the upper proprietor for wrongfully diverting the flow of surface water.

7. Same—Duty of Lower Proprietor.

A lower proprietor is not required to aovid the damage to his land by digging ditches to carry off surface water wrongfully diverted from its natural flow by the upper proprietor to the injury of the former.

8. Objections and Exceptions—"Charge as a Whole"—Appeal and Error.

A broadside exception to a charge as a whole is untenable on appeal.

(277) APPEAL from *Councill, J.*, at May Term, 1910, of HENDERSON.

This is an action to recover damages for the wrongful diversion of rain or surface water from the lands of the defendant to the lands of plaintiffs by means of a ditch cut by the defendant. The cause was tried at a former term of the Henderson Superior Court, and the appeal, which was taken at that time, was heard and considered by this Court at Fall Term, 1909. See *Roberts v. Baldwin,* 151 N. C., 407.

The plaintiffs allege that said ditch was cut about five years before the commencement of the action; that by means thereof a large quantity of surface water was collected and thrown on the lands of the plaintiffs, and that this had continued up to the commencement of the
(278) action. This is denied by the defendant. The defendant, among other things, pleads the statute of limitations of three years.

The plaintiffs offered evidence to sustain the allegations of the complaint, and evidence to the contrary was offered by the defendant.

The defendant moved for judgment on the pleadings before evidence was introduced, and for judgment of nonsuit at the conclusion of the evidence. Both motions were refused, and the defendant excepted as to each.

The same reason was assigned in support of each of these motions, to wit: That the complaint alleged that the injury was continuous, and that it originated more than three years before the commencement of the action, and that therefore the action was barred by the statute of limitations.

The defendant tendered the following issues, which were refused, and the defendant excepted:

1. Was the ditch complained of by plaintiff dug by defendant more than three years before the commencement of this action?

2. Was the ditch dug by defendant operated and used continuously to carry the surface water from defendant's land for more than three years before the commencement of this action?

3. Did the plaintiff, by her negligence, or of those acting under or for her, contribute to the damage claimed by the plaintiff?

4. Was the negligence of plaintiff, or those acting under or for her, the proximate cause of damage to plaintiff's lands?

5. Have the lands of the plaintiff described in the complaint been damaged by the defendant by reason of the ditch cut by him, causing water on defendant's land to be diverted from its natural course and to overflow plaintiff's land, and if so, how much?

The court submitted the following issues:

1. Did the defendant, by the use of the ditch cut by him, divert the natural flow of the water on the lands of the plaintiff? Answer: Yes.

2. What damage has the plaintiff sustained by reason of such diversion of the water? Answer: $150.

The defendant contended that the plaintiffs, if entitled to recover damages, could not recover for injury to crops in addi- (279) tion to injury to the lands.

The defendant also requested the court to give the following instruction on the issue of damages, which was refused, and the defendant excepted:

"In any event, if you should find all of the issues in favor of the plaintiffs, then in that case you are instructed that the measure of plaintiffs' damages would be the amount that it would cost the plaintiffs to dig a ditch from B to C of sufficient capacity to carry off the water from B."

Charles F. Toms, Staton & Rector, O. V. F. Blythe and J. W. Pless for plaintiff.

Shipp & Eubank and Smith & Schenck for defendant.

ALLEN, J., after stating the case: 1. The first and second exceptions to the refusal to enter judgment for the defendant upon the pleadings, or to nonsuit on the evidence, can not be sustained.

The same question was presented and considered on the former appeal in this action (151 N. C., 408), and the Court then said: "The defendant pleaded the three-years statute of limitations and relied upon Revisal, sec. 395 (3): 'Action for trespass upon real property. When the trespass is a continuing one, such action shall be commenced within three years from the original trespass, and not thereafter.' His Honor erred in sustaining the plea. This is not a continuing trespass. It is irregular, intermittent and variable, dependent upon the rainfall as to quantity of water poured upon the plaintiff's land, and in frequency of occurrence. It is true the ditch, which was dug more than three years before suit brought, has been continuously there, but that is on the defendant's land. The trespass is the pouring-down of water upon the plaintiff's land, which comes down at irregular periods and in varying quantities, to the injury of his crops and land. The plaintiff can recover for any injury, caused by water diverted from its natural course, within three years before the action began."

It has been repeatedly decided that a judgment of this Court (280) can not be reviewed by a second appeal. *Pretzfelder v. Ins. Co.*, 123 N. C., 164; *Harris v. Quarry Co.*, 137 N. C., 204; *Green v. Green*, 143 N. C., 410.

If, however, there was merit in the contention of the defendant, and it had not been heretofore considered, there are no facts appearing on the record, or admitted by the pleadings on which the Court can declare, as matter of law, that the cause of action is barred by the statute of limitations. The defendant denies the allegation that he had committed a continuous trespass, which commenced more than three years before the commencement of the action, and should not complain if the Court declines to act upon the allegation as a fact in the case.

Oldham v. Rieger, 145 N. C., 258, in which the distinction is clearly drawn between the cases in which the Court may decide the plea of the statute of limitations, as matter of law, and when it can not do so, is in point. *Justice Walker*, speaking for the Court, says: "When the complaint sets out a cause of action which is clearly barred, and the facts *are admitted* by the answer, and, in addition to the admission, the statute is pleaded or relied on, then the Court may decide the question as a matter of law. This was the case, as will appear by reference to the statement of the facts in *shackleford v. Staton*, 117 N. C., 73, and *Cherry v. Canal Co.*, 140 N. C., 426, in the last of which cases *Justice Hoke* says: 'The facts are uncontroverted.' But when the

complaint states a cause of action apparently barred, and the answer properly denies the facts or the cause of action, and then sets up the bar of the statute, the Court can not dismiss upon a demurrer *ore tenus* or a motion to nonsuit, for when such a motion is made it must be decided upon the pleadings of the plaintiff or of the adversary of the party who makes the motion, and the Court has no right to look at the pleading of the opposing party, except to see if the facts are admitted, so as to present merely a question of law."

The defendant did not ask that an issue be submitted on the plea of the statute. The first and second issues tendered may have been so intended, but they did not embody sufficient facts. The ditch may have been dug and used continuously for more than three years before the commencement of the action, and the injury to the (281) plaintiffs may have occurred within the three years.

In *Hocutt v. R. R.*, 124 N. C., 218, the ditches complained of had been cut and in use for more than twenty years, but it was held that the action was not barred because the right of action did not accrue until the plaintiff was injured.

The case seems to have been tried on this theory, as the plaintiffs confined their evidence to injuries sustained within three years, and the court charged the jury: "You can not consider any damage either to crops or to the land of the plaintiffs prior to three years next before bringing this suit. You can go back three years from the time the summons was issued in this case and assess damages both to the land and the crops for that period. You can not go beyond that in arriving at damages either as to the injury to the land or crops."

2. The issues adopted by the court were sufficient to enable the defendant to present his contentions and to develop his case, and this is all he was entitled to. The form of the issues is within the discretion of the judge of the Superior Court, provided they are sufficient to determine the rights of the parties and to support the judgment. *Kimberly v. Howland,* 143 N. C., 398; *Clark v. Guano Co.,* 144 N. C., 71.

3. There was no error in allowing the plaintiff to recover damages for loss of crops in addition to injury to the land. *Ridley v. R. R.,* 124 N. C., 38; *Beasley v. R. R.,* 147 N. C., 366.

The action in *Ridley v. R. R., supra,* was commenced in 1892, before the act providing for the assessment of permanent damages against railroads, and was decided under the general law, and it was there held that the plaintiff was entitled to a judgment of $800 upon a verdict finding the damage to the land to be $500 and the damage to the crops $300, and it was approved in *Beasley v. R. R., supra.*

4. We do not think the rule requiring a party injured by the wrongful act of another, to do what he reasonably can to decrease the damages,

should be extended, as the defendant contends. To do so would set a premium on illegal conduct and would render useless many of the drainage acts of our State. If the prayer for instruction refused by the court embodies a correct legal principle, it is unnecessary (282) for the upper proprietor to institute legal proceedings to drain through the lands of the lower proprietor.

He may cut his ditches when and where he pleases; may collect and divert water and pour it on the lands of the lower proprietor, and then require him to cut ditches on his land to take care of this water, or, failing to do so, his damages are limited to the expenses he would have incurred in cutting the ditches.

But the instruction as framed could not have been given in any event. The instruction limits the recovery to the cost of digging a ditch from B to C, of sufficient capacity to carry off the water from B. There is evidence in the record that there are ditches on the lands of the plaintiffs between C and the creek, and that the effect of keeping open a ditch from B. to C would be to fill up these ditches.

One witness said:

Q. Wouldn't it be a good thing to keep the ditch, B-C, open? A. I think it would be a big mistake; it would fill up all Robert's ditches between there and the creek.

If the law imposed on the plaintiffs the duty of taking care of the water, surely it would not deny to them the cost of enlarging the ditches from C to the creek, made necessary by the acts of the defendant. The instruction would do so, and, if given, this evidence referred to could not be considered.

5. There were several instructions prayed for that are not set out, because none of them were directed to the issues, and conclude, "the plaintiffs can not recover." *Bradley v. R. R.*, 126 N. C., 740; *Foy v. Winston,* 135 N. C., 440; *Earnhardt v. Clement,* 137 N. C., 93.

We think, however, the substance of them, where pertinent, was embraced in the charge.

6. The exception to the charge as a whole is untenable. *Sigmon v. R. R.*, 135 N. C., 181. The case is similar to the case of *Briscoe v. Parker,* 145 N. C., 14, and has been correctly tried.

No error.

Cited: Carson v. Bunting, 156 N. C., 30; *Riley v. Sears, ibid.,* 269; *Duval v. R. R.*, 161 N. C., 450; *Barefoot v. Lee,* 168 N. C., 90; *Barcliff v. R. R., ibid.,* 270; *Cardwell v. R. R.*, 171 N. C., 367; *Hux v. Reflector Co.,* 173 N. C., 100; *LaRoque v. Kennedy, ibid.,* 461; *Borden v. Power Co.,* 174 N. C., 74; *Talley v. Quarries Co., ibid.,* 449.

(283)

SMATHERS ET AL. v. WESTERN CAROLINA BANK ET AL.

(Filed 24 May, 1911.)

1. Banks—Shareholders—Individual Liability—Interpretation of Statutes—Contracts.

The provisions of chapter 298, Laws 1897, that stockholders in a bank "shall be held individually responsible . . . for all contracts, debts and agreements" thereof "to the extent of the amounts of the stock therein at the par value thereof in addition to the amount vested in such share," creates an additional liability upon the stockholders as a matter of statute, and not by contract.

2. Same—Married Women.

Revisal, sec. 2094, restricting the executory contractual rights of married women, does not relieve her property from the liability imposed by Laws 1907, ch. 298, upon the stockholders of the bank, when she owns such stock in her own name and right, the liability under Laws 1907 being statutory and for the benefit of the bank's creditors, and not arising by contract.

3. Same—Trusts and Trustees.

Under the express provisions of Public Laws 1893, ch. 471, funds in the hands of a trustee, and not the trustee, shall be liable when he holds bank stock for the *cestui que trust*, and when a certificate of bank stock was issued to the husband as trustee for his wife, and was so held up to the time of insolvency of the bank, without evidence tending to show that she was not the beneficial owner, the husband, as trustee, can not be under the statute. Laws 1907, ch. 298.

4. Husband and Wife—Banks—Shareholders—Trusts and Trustees—"Proxy"—Evidence—Fraud.

Certificates of bank stock, upon their face, appeared to be issued to a husband as trustee for his wife. The husband was the president of the bank, and it became insolvent: *Held*, the mere fact that the husband had acted in stockholders' meetings as hi swife's proxy is no evidence of fraud, and will not, of itself, rebut the beneficial ownership being in the wife, when it appears upon the face of the certificate, so as to hold him liable under the statute. Laws 1907, ch. 298.

APPEAL from *Councill, J.*, at Fall Term, 1910, of BUNCOMBE.

(284)

Charles E. Jones for W. W. Jones.

J. H. Merrimon, T. F. Davidson and Bourne, Parker & Morrison for Mrs. Lauretta Maddux.

CLARK, C. J. This action was begun against the Western Carolina Bank, which was chartered by the State, for a receiver, and to wind up the affairs of the bank, which had become insolvent. The present plaintiff, receiver of the bank, appealed from so much of the judgment as

adjudged that Lauretta Maddux and L. P. McLoud were not liable to the creditors for double the amount of their stock, as provided by the statute (chapter 298, Laws 1897), by reason of the fact that they were married women. The administrator of Lewis Maddux appealed from the ruling of the court that his estate was responsible for the stock liability upon the shares which stood in his name as trustee.

PLAINTIFF'S APPEAL.

Laws 1897, ch. 298, entitled "An act to regulate the liabilities of stockholders in banks chartered by the State," etc., provides: "Section 1. The stockholders of every bank or banking association now operating by virtue of any charter or law of North Carolina, or that may hereafter operate by virtue of any charter or law of North Carolina, shall be held individually responsible, equally and ratably and not for one another, for all contracts, debts and agreements of such association to the extent of the amounts of the stock therein at the par value thereof, in addition to the amount vested in such share." This statute was construed in *Smathers v. Bank,* 135 N. C., 410.

(1) The liability of stockholders is statutory, and attaches by virtue of the statute to the owners of the stock. There is no exemption as to married women. A married woman incurs liability by virtue of the statute as owner of the stock, and not by contract. The liability is imposed by statute for the benefit of depositors and creditors.

(2) Married women consequently are liable out of their individual estate just as they are for debts contracted for necessaries or for the support of the family, or to obtain money to pay ante-nuptial debts, as to which execution would be issued against and collected out of her individual property as if she were a *feme sole.* Revisal 1905, (285) sec. 2094. The provision of our statute of 1897 (chapter 298), above quoted, is copied *verbatim* from Rev. St. U. S., 5151 (U. S. Comp. St., 1901, 3465), originally National Banking Act 1864, s. 12 (Act Cong., June 3, 1864, ch. 106; 13 Stat., 103), under which it was held that "a married woman who owns stock in a national bank is not exempt on account of coverture from the liability imposed upon all stockholders in such banks." *Anderson v. Line* (C. C.), 14 Fed., 405; Witters v. Sowles (C. C.), 32 Fed., 767. In the latter case the stock was owned by a married woman in Vermont, in which at that time the contract of a married woman was wholly void. The above cases and others hold that this liability is not contractual on the part of the stockholder, but is statutory and imposed for the benefit of creditors, and hence a married woman, when she becomes the owner of the stock, assumes the same liability as all other stockholders. *Scott v. Latimer,* 89 Fed., 843 (33 C. C. A., 1); *Aldrich v. Skinner* (C. C.), 98 Fed., 376.

Even if the liability of the stockholder had been contractual, our Constitution contains no provision imposing any disability upon a married woman to contract. And the disability imposed, with certain exceptions, by statute (Revisal 1905, sec. 2094), would not apply to this case, where the statute imposes liability upon all owners of stock without excepting married women. The liability of the bank in creating the debt is contractual, but the liability of the stockholder is statutory. *Bernheimer v. Converse,* 206 U. S., 533; 27 Sup. Ct., 755; 51 L. Ed., 1163.

DEFENDANT'S APPEAL.

(3) Certificate for $14,000 stock was issued to "Lewis Maddux, trustee for Lauretta Maddux, his wife." This stock was subscribed for by Lewis Maddux, but the certificate therefor was issued to Lewis Maddux, "trustee for Lauretta Maddux," and was so held up to the time of the insolvency of the bank. There is no evidence of fraud, and nothing to rebut the beneficial ownership thereof being in Lauretta Maddux, as appears upon the face of the certificate. It nowhere appears that she did not receive the dividends, and that it was not in all respects her property. The mere fact that her husband voted the stock (286) and was president of the bank is no evidence of fraud. Nothing would have been more natural and in the ordinary course of events than that as her proxy or as her agent he so voted it. Laws 1893, ch. 471, sec. 1, provides: "No person holding stock in any corporation in this State, as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder in such corporation (but the person pledging such stock shall be construed as holding the same and shall be liable as a stockholder accordingly), and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be liable in like manner and to the same extent as the testator or intestate or the ward or the person interested in such fund would have been had he been living and competent to act and hold the stock in his own name." This act is conclusive as to the non-liability of the trustee, Lewis Maddux, for the stock liability upon the shares of which his wife was the beneficial owner. There being no evidence to rebut the ownership of the stock being in Mrs. Maddux, according to the tenor of the certificate, the holding of the court that Lewis Maddux was the owner, viewed as a finding of fact, is reviewable, and, considered as a conclusion of law, is erroneous. *Bank v. Cocke,* 127 N. C., 467, to which we were cited by counsel, does not conflict with what we have just said. In *Bank v. Cocke* the stockholders in a meeting assumed liability for $75,000, for which they agreed to become liable. The Court held that this was a contractual liability, for which the guardian became indi-

vidually liable, and could not bind his wards, for he had no authority to create such debt for them or to charge their stock. But the liability which attaches to the ownership of the stock, which was held by him as a guardian, is statutory, and therefore would bind the estate of the wards in his hands. The Court in that opinion points out this very distinction in the nature of the two liabilities.

In both appeals the judgment below is

Reversed.

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(287)

O. C. BERRY v. CAROLINA, CLINCHFIELD & OHIO RAILWAY.

(Filed 24 May, 1911.)

1. **Railroads—Pleadings—Cause of Action—Passengers—Assault—Ejection from Train.**

A complaint sufficiently alleges a cause of action against a railroad company which sets forth that the plaintiff was a passenger on defendant's train, and while riding as a passenger defendant's agents willfully, maliciously and in utter disregard of his rights assaulted him and wrongfully ejected him from the car and caused him to be arrested upon a criminal charge, for which he had been acquitted before the commencement of his civil action.

2. **Railroads—Passengers—Assault—Ejection—False Arrest—Continuous Tort.**

Allegations of the complaint that the defendant railroad company, through its agent, assaulted the plaintiff without provocation, wrongfully and maliciously ejected him, while rightfully a passenger, from its train, caused his arrest and trial for a crime of which he has since been acquitted before the bringing of the present suit, avers a series of acts constituting one continuous tort, for which the defendant is liable.

3. **Principal and Agent—Corporations—Respondeat Superior.**

Corporations are liable for the acts of their agents while engaged in the business of their principals in the same manner and to the same extent that individuals are liable under like circumstances.

4. **Railroads—Passengers—Ejecting from Train—Anticipated Consequences.**

A conductor on a passenger train is not obliged to wait until a passenger thereon has committed an act of violence before ejecting him from the train, for he may anticipate violent and offensive conduct when the condition of the passenger is such as to indicate that he will become offensive to other passengers.

5. **Railroads—Principal and Agent—Passengers—Torts—Wrongful Ejecting—Evidence of Agency—Conductors.**

Defendant railroad's traveling passenger agent was on an excursion train assisting the conductor in his duties of collecting fares, etc., and by his bearing and other circumstances evincing his authority over the conductor: *Held*, sufficient evidence to go to the jury of the scope of his agency to bind his principal, the railroad company, by his acts in wrong-

fully and maliciously causing a passenger to be assaulted and ejected from the train, and the passenger's immediate arrest and trial for a criminal offense.

APPEAL from *Lane, J.*, at January Term, 1911, of McDOWELL. (288)

Action to recover damages for an alleged tort.

1. Was the plaintiff arrested and prosecuted as alleged in the complaint? Answer: Yes.

2. Was the same without probable cause? Answer: Yes.

3. Was the same done with malice? Answer: Yes.

4. Was the act of the agent of the defendant company, as alleged in the complaint, done willfully or wantonly or in utter disregard of the rights of the plaintiff? Answer: Yes.

5. Has the criminal action terminated? Answer: Yes.

6. What damage, if any, has plaintiff sustained thereby? Answer: $850.

From the judgment rendered the defendant appealed.

John Gary Evans, Pless & Winborne for plaintiff.

J. Norment Powell and James J. McLaughlin for defendant.

BROWN, J. The defendant assigns as error:

1. Overruling defendant's demurrer *ore tenus* to the complaint.

2. Overruling defendant's motion to nonsuit at the close of the evidence.

We are of opinion that the demurrer was properly overruled. The complaint alleges "that at or near the station of Marion, in the State of North Carolina, while plaintiff was riding peaceably as a passenger on said train, the agents of the defendants willfully, wantonly, carelessly, maliciously, negligently and in utter disregard of the rights of the plaintiff, assaulted the plaintiff and committed a battery upon his person, and with violence and a strong arm ejected the plaintiff from its car, where he had a right to be, and caused the plaintiff to be arrested and charged as a criminal before a justice of the peace in the State of North Carolina."

The complaint further avers that the plaintiff was discharged and that the prosecution has terminated. (289)

It requires no citation of authority to prove that a cause of action is stated by those words, and one for which, if sustained, the plaintiff may recover damages.

The complaint not only alleges the wrongful ejection of plaintiff, a passenger, from defendant's train, but that it was done willfully, wantonly and in utter disregard of plaintiff's rights. *Holmes v. R. R.*, 94 N. C., 324.

The error of the learned counsel for defendant is in regarding this as an action for a prosecution solely for a supposed past offense, as was the case in *Minter v. So. Express Co.*, 153 N. C., 507, and *Daniels v. R. R.*, 136 N. C., 517.

In the former case the complaint charged that the defendant's night watchman swore out a warrant against the plaintiff for the larceny of whiskey from the express company. The complaint was held to be demurrable, in the absence of an allegation that the express company authorized or ratified the act of the night watchman, the act charged not being within the general scope of his authority.

In the latter case the cashier in the local office of a railroad company caused the arrest of a person whom he suspected of having stolen money from the office of the company. In the absence of proof that the act of the cashier was authorized or ratified by the corporation, it was held that the plaintiff could not recover.

The difference between those cases and the one at bar is obvious. In the two former the sole purpose was to punish the offender for a past unlawful act upon his part and thus to vidicate justice.

That was no part of the agent's business and did not come within even an implied authority, much less the actual scope of his agency.

"There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything (290) done with reference to the property; it is done merely for the purpose of vindicating justice. And in this respect there is no difference between a railway company, which is a corporation, and a private individual." *Allen v. R. R.*, L. R. 6, Q. B. 65, quoted in *Daniels v. R. R., supra.*

In this case we have a very different state of facts stated in the complaint and admitted by demurrer.

The tort consists, not in prosecuting the plaintiff for a past offense for the purpose of vindicating justice, but in having him illegally arrested while a passenger on defendant's train and entitled to its protection, taken from the car and delivered into custody, all of which is alleged to have been done by and at the instance of defendant's agent. The series of acts constituted one continued tort, for which the defendant is responsible.

It is well settled that corporations are liable for the acts of their servants while such servants are engaged in the business of their principals, in the same manner and to the same extent that individuals are liable under like circumstances. *Bank v. Graham*, 100 U. S., 699.

As to whether the arrest and ejection of the plaintiff was actually within the scope of Mandell's authority can best be considered in passing on the motion to nonsuit, as the agency is alleged and of course admitted by demurrer.

We are of opinion that the motion to nonsuit was properly overruled. The entire evidence was introduced by the plaintiff, the defendant offering none, and tends to prove these facts:

There was an excursion train operated on 28 December, 1909, from Spartanburg, S. C., beyond Spruce Pine, N. C., on defendant's road. Plaintiff, being a passenger thereon, was arrested in this State by two police officers of Spartanburg, who were on the train, at the direction and command of Charles T. Mandell, the traveling passenger agent of the defendant, removed from the train and delivered into the custody of a constable and a justice of the peace at Spruce Pine, when a warrant was issued at the instance of Mandell.

The plaintiff was taken under arrest to Marion, in McDowell County, Mandell accompanying the officer, and tried by a justice of the peace and discharged. The evidence shows that Mandell prosecuted the case and insisted on plaintiff being imprisoned without bail.

The motion to nonsuit brings up two inquiries: Was the plain- (291) tiff wrongfully arrested, removed from the train and prosecuted? If so, is the defendant liable for Mandell's acts?

That a passenger may forfeit his rights as such by his misconduct, and that he may be lawfully ejected from the train on that account by the carrier, is undeniable. The conductor is responsible for his train, and it is not only his right, but it is his duty to eject a drunken or disorderly passenger.

In doing this the conductor is necessarily bound to act upon appearances, and all that the law requires is that he shall use reasonable care and caution not to make a mistake.

The conductor is not obliged to wait until some act of violence has been committed by the passenger before exerting his authority. He may anticipate violent and offensive conduct when the condition of the passenger is such as to indicate that he will become offensive to other passengers. 2 Hutchinson on Carriers (3 Ed.), sec. 978.

The answer avers that the plaintiff was arrested in his car because of his violent threats and participation in an affray on the train, which resulted in the serious wounding of one of the participants.

While there is evidence of a fight in one of the cars, there is no evidence that the plaintiff participated in it. We find nothing whatever in the record which justifies or even excuses the arrest and prosecution of the plaintiff. From the plaintiff's evidence and the other testimony offered by him it is manifest that Mandell (who was not ex-

amined) acted with precipitation, violence and an entire disregard of plaintiff's rights.

In fact, it is not contended in defendant's brief or upon the argument that the arrest, expulsion and prosecution of plaintiff is justified by any evidence in the record, but defendant's counsel rest their defense exclusively upon the contention that the defendant is not liable for Mandell's acts.

We are of opinion that such contention can not be sustained.

The evidence discloses that this was a large excursion train, carrying many passengers; that Mandell, admitted to be the traveling passenger agent of defendant, was on the train; that he was assisting the
(292) conductor to manage the train, which evidently needed more than one person to conduct it properly.

The attitude of the conductor and all on the train towards Mandell shows that his authority was supreme and extended throughout the train.

As Mandell, the passenger agent of defendant, was assuming this authority openly on the train, it must be presumed to have been within the scope of his temporary authority and with defendant's consent, especially when the defendant offers no evidence to the contrary.

When Mandell ordered the arrest and expulsion of defendant from the train, and followed it up by delivering plaintiff into the custody of the law and prosecuting him, he committed a tort for which the defendant is liable.

The prosecution was not for a past offense which plaintiff had committed, as in the cases we have quoted, but it was a continuation of the same tort committed by Mandell when he ordered the arrest on the train.

As he had the legal authority to order the arrest of plaintiff upon proper provocation, the act was within the scope of his general authority, and if he exercised such authority wrongfully, wantonly and with utter disregard of plaintiff's rights, as is alleged in the complaint and found by the jury, the defendant is liable for his conduct.

The act was committed in the course of Mandell's employment at the time, in furtherance of the defendant's business, and was apparently within the scope of his authority. The principle laid down in the *Daniels* and *Minter cases* has no application to the facts of this case. It falls rather within the principle laid down in *Jackson v. Telegraph Co.*, 139 N. C., 354; *Marlowe v. Bland,* 154 N. C., 140; *Hussey v. R. R.,* 98 N. C., 34; *R. R. v. Harris,* 122 U. S., 597.

No error.

Cited: Bucken v. R. R., 157 N. C., 447; *Brown v. R. R.,* 161 N. C., 576.

(293)

CALVIN EPLEE v. SOUTHERN RAILWAY COMPANY.

(Filed 24 May, 1911.)

1. **Master and Servant—Proper Tools—Duty of Master.**

It is the master's duty to furnish the servant such tools as are reasonably safe and suitable for the work in which he is engaged, and in general use.

2. **Same—Defective Drill—Negligence—Evidence.**

A power drill furnished by the master to the servant for boring holes in iron plates, leaving an exposed set-screw thereon dangerous in operating the drill and which are usually covered or countersunk, is not a proper tool for the purpose, and the master is liable in damages proximately caused by the defect, without fault on plaintiff's part.

3. **Same—Instruction to Servant—Contributory Negligence—Evidence—Rule of the Prudent Man.**

A servant in the course of his employment was drilling holes in iron plates with an electric drill consisting of a vertical shaft, at the lower end of which was a head or socket into which a drill of the kind and size desired was inserted and held in place by a set screw. This screw head projected three-fourths of an inch, and was neither covered nor countersunk at the time of the injury, which, from the evidence, was customary. This plaintiff was new to the machine and was put to work there by the defendant's foreman, who started the drill and assured plaintiff that he could work it, and left him there without instructions in its use, except to pour water on the plates when they became hot from the drilling. While drilling the holes and attempting to pour water on the plates as directed, plaintiff's coat sleeve was caught in the exposed head of the set screw, causing serious injury, for which he demands damages: *Held*, the question of contributory negligence was properly submitted to the jury under the rule of the prudent man.

4. **Pleadings—"Assumption of Risk."**

The defense of "assumption of risk" must be sufficiently pleaded to be available. Revisal, sec. 2646, has no application.

APPEAL from *Webb, J.*, at March Term, 1911, of BUNCOMBE.

Action to recover damages for personal injury, alleged to have been caused by the negligence of the defendant.

These issues were submitted:

1. Was the plaintiff, Calvin Eplee, injured by the negligence of the defendant Southern Railway Company, as alleged in the (294) complaint?

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer?

3. 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, One thousand dollars.

From the judgment rendered the defendant appealed.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Brown.*

Craig, Martin & Thompson for plaintiff.
Moore & Rollins and W. B. Rodman for defendant.

BROWN, J. As the basis of his action the plaintiff alleged that defendant furnished him with which to do his work a drill that was unsafe and negligently constructed, in that from the upright revolving shaft thereof there projected a set screw, dangerous to the person operating the machine and which the defendant negligently allowed to project from the shaft, instead of having it covered or countersunk.

Defendant denied that it was negligent, and pleaded contributory negligence.

Defendant, in its shops at Asheville, operated an electric drill, which consisted of a vertical shaft, at the lower end of which was a head or socket, and into this socket a drill of the size and kind desired to be used was inserted and held in place by a set screw. This screw head projected three-fourths of an inch and was neither covered nor countersunk at the time of the injury.

The plaintiff was drilling a hole in a piece of iron, and in order to keep the iron cool, from time to time water would have to be applied to the hole which was being drilled. The plaintiff was standing on the left side of the drill, holding the iron, and there was a can of water near by, so that he could pour the water on the iron as needed. The plaintiff had put water on the iron twice before the accident happened, and when last using the can of water had set it on the table to the right of and near the drill. In reaching for the can of water plaintiff's coat sleeve caught in the set screw which held the drill in the socket, (295) and he was seriously injured.

The assignments of error, relied upon and discussed in the defendant's brief, present three questions for determination:

1. Is there any evidence of negligence? It was the duty of defendant to furnish plaintiff with a drill reasonably safe and suitable for the work in which he was engaged and such as is in general use. *Hicks v. Mfg. Co.*, 138 N. C., 319; *Lloyd v. Hanes*, 126 N. C., 359.

There is abundant evidence tending to prove that for the protection of the operator such set screws in drills are usually covered or countersunk. In answer to counsel for defendant upon cross-examination, plaintiff further testified that two days after he was injured he saw this

drill and defendant had drilled out the set-screw hole and sunk the head flush with the drill shaft, so it could not injure any one.

That there is evidence of negligence to be submitted to the jury is settled by a multitude of decisions. *Pressly v. Yarn Mills,* 138 N. C., 410, and cases cited.

2. Was the plaintiff, in any reasonable view of the evidence, guilty of contributory negligence?

The evidence tends to prove that in the progress of plaintiff's work it was necessary to drill holes in an iron bar. He went to the foreman of the shop and asked where the man was that operated the drill. The foreman said he was not there, and that the plaintiff would have to do the work himself. The plaintiff stated to him that he did not want to take the responsibility of operating the drill. The foreman then went with him to the drill, adjusted it, started it running and left him to operate it alone. The foreman told the plaintiff to hold the iron plate and when it became too hot to pour water on it. The plaintiff told him that he was unaccustomed to the machine and did not understand it. He had never operated the machine before and did not know how to adjust it. There is no evidence that the foreman called the attention of plaintiff to the set screw or cautioned him.

It is manifest, upon this evidence, the court could not hold the defendant guilty of contributory negligence as matter of law.

A man engaged in such work to which plaintiff was assigned, even if a skilled operator, can not always be on guard against damage from exposed set screws and the like. His mind is concentrated (296) on his work, and when plaintiff reached for the water can, it was almost a mechanical act.

In submitting plaintiff's conduct to the judgment of the jury under the rule of the "reasonably prudent man," the court gave defendant all it was entitled to.

3. It is unnecessary to discuss the proposition contended for in defendant's brief, that owing to the character of the work in which plaintiff was engaged, the provisions of section 2646, Revisal 1905, do not apply, and that the defense of assumption of risk is open to defendant, for the reason that such defense is not pleaded in the answer. *Dorset v. Mfg. Co.,* 131 N. C., 254.

Had it been pleaded, the court could scarcely hold as matter of law that in any view of the evidence the plaintiff assumed the risk of the work at the drill in which he was temporarily engaged at the direction of the foreman. *Marks v. Cotton Mills,* 138 N. C., 401.

The brief of the learned counsel for defendant concludes as follows: "These several assignments of error are intended to raise and present

to this Court for its decision this question: Upon plaintiff's own evidence, is he entitled to maintain this action?

We are of opinion that he is.

No error.

Cited: *Lloyd v. R. R.,* 166 N. C., 37.

W. R. SIRCEY v. HANS REES' SONS.

(Filed 24 May, 1911.)

1. **Pleadings—General Order for Filing—Cause Excepted—Notice—Judgment Set Aside.**

When the trial judge has made a general order to file pleadings in causes returnable to that term, he may except any cause from the provision of the order upon notice to the parties; and when a party defendant, having a meritorious defense, has relied upon the general order and filed no answer to the complaint under the statute, and judgment has been rendered by default at that term without notice to him, it is proper for the judge holding the subsequent term of the court to set the judgment aside.

2. **Same—Excusable Neglect.**

When a general order has been made to file pleadings, it is not sufficient notice to a party whose case was not excepted that judgment was signed in open court when his attorney was present, without calling to his attention the fact that the judgment was then being rendered, and without his knowledge of the fact.

3. **Damages—Release—Meritorious Defense.**

A valid release given to one of two joint tort feasors by the plaintiff in an action for damages is a good and meritorious defense for the other.

4. **Damages—Personal Injuries—Joint Tort Feasors—Release—Evidence—Nonsuit.**

There can be but one satisfaction recovered for injury arising from a joint tort; and when it appears that the plaintiff in his action for damages for a personal injury has released from liability one tort feasor, the release operates as a discharge of the other, and a motion for nonsuit should be allowed.

5. **Same—Master and Servant—Third Persons—Joint Participants.**

A switchman of a railroad company was struck by a pile of tan bark near the track while employed on a train which was being backed for the purpose of leaving a car on defendant's private siding, for the latter's accommodation, and brought his action for damages alleging that the defendant was negligent in placing the tan bark so near the track as to

cause injury to those on passing cars: *Held*, the railroad and the defendant were joint participants in the wrong as alleged, and being joint tort feasors, a release from liability for damages given by the plaintiff to the railroad operated to release the defendant.

APPEAL by plaintiff from *Councill, J., at December Term,* 297) 1910, of BUNCOMBE.

Fortune & Roberts and Charles E. Jones for plaintiff.
Bourne, Parker & Morrison for defendant.

WALKER, J. This action was brought to recover damages for an injury received by plaintiff, who was employed by the Southern Railway Company as a switchman, while moving a car of coal along a side track laid on defendant's premises for its accommodation. The particular allegation is that the plaintiff was required to mount the car while in motion in order to perform his duties, and that in (298) doing so he was caught between the side of the moving car and a pile of tan bark which had been placed so near the track as to endanger the employees of the railway company when moving cars on the siding. Plaintiff did not know the bark was there at the time he was hurt. He alleges that he was injured by the negligence of the defendant, though the facts stated in the complaint are also sufficient to show a case of negligence against the railway company as well, or, in other words, that the injury resulted from the joint negligence of the two companies.

It appears that at February Term, 1909, which was the return term, judgment by default and inquiry was entered, but after an order had been made extending the time to file answers due at that term for thirty days after the final adjournment of the court. The judgment was handed to the judge and signed by him without any notice to defendant or its counsel of the same, and the latter relied upon the order of the court extending the time for filing answers, and therefore made no inquiry as to the order, as they were ignorant that one had been made. Defendant's counsel, as soon as they were notified of the judgment, moved to set it aside upon the ground that the court had no power to make it without notice to defendant; and, secondly, because of excusable neglect. The judge set aside the judgment, and, we think, very properly. It should not have been applied for or entered without notice. It was competent for the court to have excepted this or any other case from the general order, but, having made a general order, counsel could not be expected to anticipate that it would be violated in this way, or that judgment would be entered without notice to them. The rendition of the judgment was not even announced in open court, but the

judgment was merely delivered to the judge and signed by him. Calling out the defendant, when his counsel did not hear the call, is not sufficient to withdraw the protection of the law from him. Such a thing was not looked for. One of defendant's counsel was in court, but did not know of the judgment and was not called upon to take notice of it under the circumstances. If there was any neglect (299) at all, and we think there was not, it was certainly excusable. *Branch v. Walker,* 92 N. C., 87; *Griel v. Vernon,* 65 N. C., 76 (Anno. Ed. and cases cited); *Long v. Cole,* 74 N. C., 267; *Wynne v. Prairie,* 86 N. C., 73; *Taylor v. Pope,* 106 N. C., 267; Clark's Code (3 Ed.), sec. 274, and note, especially p. 312 *et seq.* We are satisfied the judge would not have signed the judgment had he known the facts. The defendant had a meritorious defense, because he defeated the plaintiff in the trial of the case. This is a very fair test of a good defense. Cases cited by plaintiff's counsel are not in point. In all of them the facts were different. We can not agree with the learned counsel that the plea of a release is technical and does not present a meritorious defense. Plaintiff thereby acknowledged full satisfaction of his claim, and he is entitled to have no more. Nor can we assent to the suggestion that a plaintiff should be allowed two satisfactions for one and the same demand. Such a doctrine would shock the moral sense and violate a cardinal maxim of the law, if not the defendant's constitutional right. Plaintiff excepted to the order setting aside the judgment by default, and appealed from the final judgment dismissing the action. We have treated the case as if he had preserved his exception, and it is not necessary to decide whether he should have appealed at once from the order of vacation.

At the trial the defendant relied on a release given by the plaintiff to the Southern Railway Company. The execution and validity of the release were admitted, and thereupon the court, on motion of the defendant, dismissed the action, and plaintiff appealed.

There was no error in the judgment. With reference to the plaintiff, the defendant and the railway company were joint tort feasors, and, besides, the evidence shows that they jointly participated in the wrong and were codelinquents. Even if the tort of the railway company was one growing out of contract for the plaintiff's services, the rule that the release of one tort feasor will discharge the other will nevertheless apply. Whether the plaintiff had sued in tort, or had waived the tort and sued on the contract, if he could do so, can make no difference. He has received what he regarded as full compensation for his injury, and the law will not give him more than he said was enough, (300) whatever may be the technical form of the action he might have

brought against the railway company. Hale on Torts, 195, 196; *Eastman v. Grant,* 34 Vt., 387.

We have had occasion to consider this rule, as to the effect of a release, at the present term. *Howard v. Plumbing Co.,* 154 N. C., 224; *Gregg v. Wilmington,* 155 N. C., 18. It is true that in the case last cited the release was alleged to have been given by the plaintiff to Wolvin, who, as between himself and the city, was primarily liable, but in the former case *Justice Brown* says: "Assuming that this defendant is jointly liable with Ayers to the plaintiff, she has released Ayers for a valuable consideration paid to her by him, and that releases this defendant. She can not be allowed to recover two compensations for one injury. If she recovers of one, she can not recover of the other. It is immaterial, so far as plaintiff is concerned, to consider which joint tort feasor is primarily liable. The question of primary and secondary liability is for the offending parties to adjust between themselves. The injured party has his remedy against either. *Dillon v. Raleigh,* 124 N. C., 188; Buswell on Personal Injuries, sec. 190. It is well settled that a release of one or more joint tort feasors, executed in satisfaction for an injury, is a discharge of them all on the ground that the party can have but one satisfaction for his injury. 24 A. & E. Enc., 306, where cases from nearly all the American courts are collected. *Brown v. Louisburg,* 126 N. C., 701; 78 Am. St., 677; *Burns v. Womble,* 131 N. C., 173." For a general discussion of the liability of tort feasors, see *Raleigh v. R. R.,* 129 N. C., 265, and *Lexington v. Indemnity Co., ante,* 219.

Cooley, J., on Torts, relying on many English and American authorities, thus states the rule: "It is to be observed in respect to the point above considered, where the bar accrues in favor of some of the wrongdoers by reason of what has been received from or done in respect to one or more others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar to all. And so a release of one releases (301) all, although the release expressly stipulates that the other defendants shall not be released. And this rule is held to apply, even though the one released was not in fact liable. It does not lie in the mouth of such plaintiff to say that he had no cause of action against one who paid him for his injuries, for the law presumes that the one who paid committed the trespass and occasioned the whole injury." 1 Cooley on Torts (3 Ed.), 234 *et seq.* While separate suits may be brought against the wrongdoers, the plaintiff having the right of election as to whether he will sue them separately or jointly, the liabilities

being joint and several, and while there may be recovery against each there can be but one satisfaction. It is immaterial whether the satisfaction is obtained by judgment and final process in execution of it, or by amicable adjustment without any litigation of the claim for damages. The essential thing is satisfaction. Hale on Torts, 195. The wronged party may elect whom he will sue or *de melioribus damnis,* but the full payment of one judgment satisfies the cause of action, for it is the same cause against all the tort feasors, so far as he is concerned. Hale on Torts, 192; *Babcock v. Pioneer Iron Works,* 43 Fed., 336. Coke (sec. 376) thus states the principle, as laid down by Littleton, in his quaint language: "Also if two men doe trespass to another, who releases to one of them by his deeds all actions personalls, and notwithstanding sueth an action of trespasse against the other, the defendant may well shew that the traspasse was done by him, and by another, his fellow, and that the plaintife by his deed (which he sheweth forth) released to his fellow all actions personalls, and demand the judgment (in his favor) and yet such deed belongeth to his fellow, and not to him. But because hee may have advantage by the deed, if he will shew the deed to the court, he may well plead this." Coke, in commenting on this passage, says: "If two men doe trespass to another, etc. Here by this section it is to bee understood that when divers doe a trespass, the same is joynt or severall at the will of him to whom the wrong is done, yet if he release to one of them, all are discharged, because his own deed shall be taken most strongly against himself, but otherwise it is in case of appeals of death, etc. As if two men bee joyntly (302) and severally bounden in an obligation, if the obligee release to one of them, both are discharged; and seeing the trespassers are parties and privies in wrong, the one shall not plead a release to the other without shewing of it forth, albeit the deeds appertaine to the other." Referring to Cocke's statement, it is said in *Babcock v. Pioneer Iron Works, supra*: "This seems to be good law to this day. 2 Greenl. Ev., sec. 30; *Eastman v. Grant,* 34 Vt., 387. A plaintiff is entitled to but one satisfaction of his cause of action, whether but one or many may be liable, or whatever the form of action may be. *Fowell v. Forrest,* 2 Saund. 48a; *Lovejoy v. Murray,* 3 Wall., 1. If the damages are actually paid by one, that is a sufficient satisfaction for all. If such payment is acknowledged by deed, the actual consideration can not be inquired into. If the plaintiff had brought suit against the Pioneer Iron Works alone, on the proofs in this case, as here understood and considered, judgment would have been recovered for all the infringement involved. After the satisfaction of such judgment no action could be maintained against the Safety Steam Generator Company for the same infringement, because the plaintiff would be fully

satisfied for that. The infringement by one is the same as that by the other; and when satisfaction is made for that the whole is satisfied." The idea is well expressed in the leading case of *Eastman v. Green,* 34 Vt., 387: "The principle is well settled, and is not controverted by counsel in this case, that a *release* of one or two or more joint trespassers is a release of all, but to have such effect it must be a *technical release,* that is, by an instrument under seal. The reason why a *release* of one discharges all is that it legally imports full payment, and being under seal, its consideration can not be inquired into, so that it is conclusive, even though it was given without consideration in fact. The rule is the same whether the claim is based upon a tort or a contract. Indeed the rule as to the effect of a release, is but another method of stating the universal rule, that full payment by one who is jointly liable with others is a discharge of all. In the one case the law regards the claim as paid, and will not allow the party to deny it by proof. In the other it is paid in fact. The effect upon the rights of all is the same in both cases." And again at page 390: "The plaintiff's claim rested (303) solely in damages. There was no criterion by which the amount could be definitely determined. It was a matter of mere estimation, based on opinion and judgment, not of computation based on any fixed data. If the question were submitted to a jury, they could determine it only by estimation. Here the plaintiff and the Bowens got together and determined the matter for themselves; they estimated the damages and fixed upon the amount of the plaintiff's claim against them, and they paid it, and were discharged. What further claim could the plaintiff have upon them, even though no discharge had been given them? Clearly not any. There is nothing in the case to indicate that the amount paid was not the full amount of the damages and the extent of the plaintiff's claim upon them. If the plaintiff had brought his action against the Bowens, and had received two hundred dollars damages, and they had paid the judgment, that clearly would have discharged all. If these parties agree upon the amount without the intervention of a court or jury, and the amount is paid, the effect we apprehend must be the same. The plaintiff's claim is the same against all the parties engaged in the trespass. He may pursue them jointly or severally to enforce it, but when that claim is once paid it is canceled as to all the parties." The rule has been approved in the following well-considered cases: *Tompkins v. R. R.,* 66 Cal., 165; *Seither v. Traction Co.,* 125 Pa. St., 397; *Chicago v. Babcock,* 143 Ill., 358. In *Seither's case, supra,* the Court, referring to the allegations of the plaintiff that the party to whom he gave the release was not really in fault, and, therefore, it did not affect his right to recover against the defendant, says: "A case so unique as this might be supposed to stand alone in the books. *Tompkins*

v. R. R., 66 Cal., 165, is, however, its exact counterpart. There a woman was injured by a collision of street railway cars. She received compensation from the carrying company and executed a release. She then sued the other railway company, contending that her release was not intended as a satisfaction, but was given because the carrier was without fault, and the existing defendant was the real wrongdoer. The Court held, in a vigorous opinion, that she could not recover. So we (304) say here. The plaintiff was not entitled to recover, and the learned court below was entirely right in directing a verdict for the defendant." Satisfaction by one joint tort feasor, or whatever is equivalent to it, will, necessarily, release the others. 1 Jaggard on Torts, p. 344, sec. 117.

The case was ably and learnedly argued, with well-prepared briefs, but upon a review of it, in the light of the facts it discloses and the law, as we understand it, the plaintiff is not entitled to recover and the judge was right in so directing.

Affirmed.

Cited: Gaylord v. Berry, 169 N. C., 736; *Bank v. Brock*, 174 N. C., 548.

T. T. WHITMIRE v. J. N. HEATH, ADMINISTRATOR.

(Filed 24 May, 1911.)

1. Vendor and Vendee—Deceit—False Representations—Fraud—Evidence Sufficient.

In defense of an action upon a note given for the purchase price of a horse, the defendant alleged that at the time of the sale the plaintiff made false and fraudulent representations as to the age, qualities and condition of the horse, and introduced evidence tending to show that the horse had glanders, that it was greatly weakened by disease and became worthless, while it had been represented as sound and in good condition, excepting a very slight distemper: *Held*, that the evidence was sufficient upon the question of false warranty and deceit.

2. Same.

In an action for false warranty and deceit in the sale of a horse, it was *held*, that, in connection with other evidence tending to sustain the allegations, a letter from the vendor to the vendee, in reply to one from the latter, stating that the vendor had "a black horse seven years old, a little thin, but mending fast," which he would sell, but that he preferred the vendee to "come and look at him" before he would make a price, was relevant evidence to be considered by the jury upon the question whether there was a representation as to the age and qualities of the horse, and, if so, whether it was false and fraudulent.

WHITMIRE *v.* HEATH.

APPEAL by defendant from *Justice, J.*, at the Spring Term, 1910, of TRANSYLVANIA.

George A. Shuford for plaintiff. (305)
W. W. Zachary for defendant.

WALKER, J. This action was brought to recover the amount of certain notes given to the defendant for the price of a horse and other articles of personal property, and secured by a mortgage upon the property sold. The defendant, in his answer, alleged that the plaintiff, at the time he sold the horse to him, had made false, fraudulent and deceitful representations as to his age and qualities, stating that the horse was seven years old, when he was much older, and that he was sound and in good condition, except that he had distemper, but was better, though he still had a little of it. There was evidence for the defendant that the horse had a bad case of glanders, his nose sloughed, lumps appeared on him, and at times the odor emitted from his body and nose was very offensive. He was also lame and was gradually weakened by his disease, so that he became worthless. Without entering more into particulars, we may safely say that there was sufficient evidence to show the falsity of the warranty and the deceit, provided the plaintiff made the alleged representations, and the case turns upon the sufficiency of the evidence to establish this fact. The defendant introduced the written "recommendation" of the horse by the plaintiff, which was given to A. N. Heath, dated 26 May, 1910, at the time of the sale, and which reads as follows:

I have owned the horse six months. He has been at home during that time about four weeks. He has had the distemper during that time, and appears to have it a little yet. As to his eyes, they are good, so far as I know. His working qualities are good, and if wind-broken he has never shown it in the least; and if affected with any internal disease I do not know it. I bought the horse from Hawe Galloway, and he recommended him to be sound, except the distemper.

T. W. WHITMIRE.

Witness: D. L. English.

Defendant then introduced a postal card, mailed to A. N. Heath by the plaintiff, of which the following is a copy:

BREVARD, 25 MAY, 1905. (306)

DEAR SIR: Your card received. Will say in reply that I have a black horse 7 years old, a little thin, but mending fast. I would sell, but you will have to come and look at him before I would make a price.

T. W. WHITMIRE.

The court, upon objection by the plaintiff, excluded the card, and defendant excepted. The original defendant, A. N. Heath, having died, the present defendant, J. N. Heath, his father and administrator, was made a defendant. The execution of the notes being admitted, the court held that the defense had not been made out by the evidence, and gave judgment for the plaintiff. Defendant appealed.

The defendant proposed to prove by a witness what A. N. Heath had testified at a former trial of the case, which was excluded by the court, and exception again taken. It did not appear what he expected to prove by this witness was said by A. N. Heath—that is, the nature or substance of the evidence—so that the court could see that it was relevant to the case, and for this reason the ruling was proper. A court can never pass intelligently upon evidence unless it knows what the evidence is, in order that its bearing upon the issue may be determined. The defendant should have stated what he intended to prove was said by A. N. Heath, otherwise the evidence should be excluded, not because it is incompetent, but because it cannot be seen to be competent. The court must judge of its materiality—not the witness. This is the settled rule, and is also the "rule of reason." *Overman v. Coble,* 35 N. C., 1; *S. v. Pierce,* 91 N. C., 606. Besides, a witness can not testify to what another witness, the deceased, said at a former trial, unless he can state the substance of all his testimony. *Buie v. Carver,* 73 N. C., 264; *Paine v. Roberts,* 82 N. C., 451.

But we think the court erred in holding that there was no evidence of the representation. There was also error in excluding the postal, and we must consider the case as if it were a part of the evidence. It is perfectly manifest that what the plaintiff intended, by the written "recommendation" and the postal, the defendant should believe, was

(307) that the horse was in good condition, excepting a slight attack of distemper, and in the postal he stated that he was seven years old (which was untrue), and "a little thin, but mending fast," implying that otherwise he was sound. If these statements were knowingly false and misled the defendant, to his prejudice, they were such fraudulent representations as constituted actionable deceit. The three constituent elements of a deceit by false representation are: 1. The representation must be false. 2. The party making it must know that it is false, commonly called the *scienter.* 3. It must have misled the other party and induced him to contract upon the faith of the representation as true. *Lunn v. Shermer,* 93 N. C., 164; *Ferebee v. Gordon,* 35 N. C., 350; *Ashe v. Gray,* 88 N. C., 190 (*S. c.,* on rehearing, 90 N. C., 137); *Black v. Black,* 110 N. C., 398; *Unitype Co. v. Ashcraft, ante,* 63. There was evidence of a false and fraudulent representation. The jury might well have inferred from all the facts and circumstances that the

plaintiff made a representation as to the age and qualities of the horse which he knew to be false and which was calculated to mislead and did actually deceive A. N. Heath, the purchaser. We do not mean to say that the evidence is conclusive or even strong against the plaintiff, but merely that there is some evidence. The jury must pass upon its weight. They may find that the plaintiff did not know the condition of the horse, but acted honestly throughout the transaction and without any intent to deceive, or that he did not make any false representation.

New trial.

Cited: Robertson v. Halton, 156 N. C., 221; *Hodges v. Smith,* 158 N. C., 263; *Fields v. Brown,* 160 N. C., 299; *In re Smith,* 163 N. C., 466; *S. v. Smith,* 164 N. C., 479; *Steeley v. Lumber Co.,* 165 N. C., 30; *Oltman v. Williams,* 167 N. C., 314; *Lumber Co. v. Lumber Co.,* 169 N. C., 96.

THE BROWN CARRIAGE COMPANY v. W. C. DOWD ET AL.

(Filed 24 May, 1911.)

1. Deeds and Conveyances—Registration—Common Law—Sister States—Statutes—Presumptions—Proof.

At common law, registration of a conditional sale or a sale on commission was unnecessary, and while registration is required for certain purposes under our statute of a conditional sale, it does not apply when the *situs* of the contract is in another State, and if there is no evidence that the law of that State requires registering, the contract is valid without it, for the common law is presumed to prevail there unless the contrary is shown, and our courts will not take judicial notice of a statute of a sister State.

2. Same—Bankruptcy—Trustee—Title.

When the *situs* of a conditional sale is in another State and there is no proof of the common law as recognized there, or of a statute requiring registration of such a contract of sale, the presumption is that registration is not necessary to the validity thereof.

3. Vendor and Vendee—Conditional Sales—Bankruptcy—Notes—Endorsers and Sureties—Proof of Claim—Dividends—Presumptions.

Sureties and endorsers on notes given by a debtor for the purchase price of goods, the title to which has been retained by the creditor as further security, are discharged from liability when the creditor proves his debt as an unsecured claim against the principal debtor, who has become insolvent and a bankrupt and receives a dividend from the bankrupt court upon his claim, after permitting the trustee to take the goods for the benefit of the general creditors, as in such a case he is regarded as having intentionally abandoned the property to the trustee in bankruptcy and as ratifying his acts.

4. Same—Discharge of Sureties, Etc.

When a creditor holds a note with collateral for his debt, and also with accommodation endorsers or sureties thereon, he discharges the endorsers or sureties either in full or *pro tanto*, as the case may be, by voluntarily and irrevocably parting with the collaterals.

5. Notes—Endorsers and Sureties—Subrogation—Collaterals Released by Creditor—Discharge.

An endorser paying a note is entitled in equity to an assignment of the collaterals held by the creditor, to secure the same; and if the creditor has voluntarily rendered himself unable to assign the collaterals, or has caused them to become unavailing to the endorser, the latter is discharged, *pro tanto*, and if only a part of them has been thus lost to the endorser he is discharged.

6. Same—Conditional Sales—Interpretation—Accommodation Paper—Renewals.

The plaintiff, under a contract made in another State, shipped to its agent in Alabama a lot of vehicles, and received notes therefor from the agent, under a stipulation in the contract that they should be considered as accommodation paper only, and that the title should not pass to the agent by reason thereof, nor should the notes change the fiduciary relation created by the contract, and that the vehicles, until sold by the agent, should remain the property of the plaintiff, with full control thereof, and the proceeds of any sale to the amount of the invoice price should be paid to the plaintiff. Renewals of the notes were provided for by the contract, and while as to the originals and all renewals except the last, it was clearly and expressly stated that they were given only for the accommodation of the payee, there was some doubt from the language used as to whether the last renewals were, as they were "to be paid at maturity without reference to the amount of work still on hand unsold" at that time: *Held* (by a making of the Court), that the renewal notes under the terms of the contract retained the character of the originals as accommodation paper, it being incumbent upon plaintiff, by whom the contract was written, to have expressed itself without ambiguity with reference thereto, and the language being construed most strongly against him: *Held, further*, by the Court, whether the notes were accommodation paper or not, the plaintiff released the defendants as endorsers on the notes by proving them in the bankruptcy proceedings against the maker thereof, and voluntarily relinquishing the vehicles to the trustee in bankruptcy for the benefit of all the creditors, and by receiving a dividend on its claim filed in the proceedings from the general assets without asserting any right to or lien upon the property formerly held by its agent.

7. Notes—Endorsers and Sureties—Collaterals Relinquished—New Promise—Discharge of Endorser's Liability.

Endorsers or sureties on a note for which the payee holds other security do not lose their right of subrogation to the security thus held, by having promised, even for a consideration, but before the notes were executed, to pay them at maturity, and a voluntary relinquishment of the security by the creditor, such acts of his as render the collateral unavailable to the endorsers, releases them, at least to the extent of their loss.

APPEAL from *E. B. Jones, J.*, at May Term, 1910, of MECK- (309)
LENBURG.

The plaintiff appointed James G. Dowd as their agent at Birmingham, Ala., for the sale of their vehicles, under a contract dated 14 January, 1907 (Exhibit A), by which it was provided that the agent should pay all freight and storage charges and taxes, insure the prop- (310) erty in the name and for the benefit of the plaintiff, and sell the vehicles, in the usual course of business, to *bona fide* customers, for cash, at not less than the consigned invoice value of the same. It further provides as follows:

"(5) Said agent shall sign and send to the Brown Carriage Company accommodation notes for the amount of each invoice as soon as it is sent to him, said notes being dated the same day as the invoice and to be payable one-third in four months, one-third in five months, one-third in six months, said notes being considered as accommodation notes only, and no title in said vehicles passes to said agent by reason of giving same, nor does the fiduciary relation established by this contract change on that account.

"(6) On the first of each month, following the date of shipment, said agent is to make a full and complete report of all sales made, at the same time remitting to the Brown Carriage Company proceeds of said sale, retaining as his commission only such amount as shall have been received in excess of the invoice value of said goods.

"(7) Ten days before the first accommodation note referred to in paragraph No. 5 comes due, should the monthly payment for goods sold not have equaled an amount sufficient to pay same, said agent is to mail a new note at four months to said Brown Carriage Company for the difference between the total of said payments and the amount of this note. The Brown Carriage Company is to return to them the accommodation note referred to. Should said monthly payments exceed the amount of the first note falling due, the note is to be returned to said agent by the Brown Carriage Company, and the amount in excess is to be credited as a part payment on the second note falling due, and other payments made from that time to be credited on this second note in the same manner as provided for with the first note. Should these payments not be sufficient to pay the second note ten days before its falling due, said agent is to send a new note at four months for the amount remaining after deducting these remittances, and the Brown Carriage Company is to return the second accommodation note, as provided for the first accommodation note. Should the amount so paid exceed the amount of the second note, the surplus is to be credited on the third note in the same manner as on the previous notes. (311) Should it not be sufficient to pay the third note, however, a new

note is to be given at four months, as provided for with the two preceding notes. When the three renewal notes given as provided for above fall due, they are to be renewed in like manner, the renewal notes falling due twelve months from the time of shipment. These notes are to be paid at maturity, without reference to the amount of work still on hand unsold at that time.

"(8) Said agent shall make a report of goods on hand at any time the Brown Carriage Company shall request same, giving stock number and catalogue number of the vehicles. The attorney or agent of the Brown Carriage Company shall have access to the premises wherein said goods are kept, for the purpose of ascertaining their condition or whatever information they may desire with respect thereto; also the privilege of examining books and records pertaining to the sale of said vehicles.

"(9) If at any time, through the carelessness or neglect of said agent, any of the vehicles on hand be damaged or their condition be such as to impair their value, said agent agrees to pay to said Brown Carriage Company such an amount as will put the vehicles in good condition.

"(10) All the vehicles supplied to said agent by said principal, until in good faith sold by the latter as provided herein, shall remain the absolute property of said principal, who may at will require same to be delivered or reshipped to it or delivered to any agent of said company. All the proceeds of sales received by said agent accruing from sale of goods supplied hereunder shall belong to said principal, excepting only such amount as shall be in excess of invoice value of the same, which excess said agent shall accept as full recompense of his services, charges and expenses of every kind and description.

"(12) It is expressly understood and agreed by and between the parties hereto that this is a special agency contract for the sale of vehicles of the Brown Carriage Company, and that no act or omission on the part of said agent shall in anywise bind the Brown Carriage Company, no further authority being conferred upon said agent.

(312) "(13) If said agent shall fail to comply with any of the conditions of this contract, he shall upon non-compliance forfeit all commissions or remunerations due or which may become due the said agent hereunder."

The agent gave the notes described in clauses 5 and 7 of the contract, and this action was brought to recover the amount of the three renewal notes mentioned in the last part of the seventh clause. The first of these notes, dated 1 February, 1908, is for $500 and due 30 May, 1908; second, dated 25 February, 1908, for $416.36, due 1 July, 1908; third, dated 25 March, 1908, for $416.36, due 1 August, 1908; the total amount of the notes being $1,332.72. All the notes, both original and renewals, were endorsed by the defendants, W. C. Dowd and W. F. Dowd. Plain-

tiff also alleges that on 4 July, 1908, after the maturity of the note for $500 and the note for $416.36 due 1 July, 1908, the defendants, for a valuable consideration, promised to pay the same. The agent sold vehicles from time to time and accounted to the plaintiffs for the proceeds of sale. On 6 January, 1908, he was adjudicated a bankrupt, and at that time he had in his possession vehicles exceeding in value the total amount of the notes in suit. The defendants answered and averred that the notes upon which this suit was brought were accommodation notes by the terms of the contract of agency and given by James G. Dowd and endorsed by the defendants only for the accommodation and benefit of the plaintiff, who wished to use them in bank to supply a deficiency in their capital, caused by a withdrawal of the money which they had invested in the vehicles shipped to their agent at Birmingham, and therefore they were not liable thereon to the plaintiff. They further alleged that the plaintiff had surrendered the vehicles to the trustee in bankruptcy of James G. Dowd, had proved the claim against him as a general creditor without asserting any lien on or right to the vehicles, and had actually accepted a dividend from the bankrupt's general assets as an unsecured creditor, and that by this conduct the defendants as endorsers, or even as sureties, were released. The plaintiff admits that it proved its claim in bankruptcy without asserting any right to or lien upon the vehicles, which they permitted to be taken by the trustee and applied to the payment of the bankrupt's debts generally, and also that it received its dividend from the trustee, knowing that (313) he had the property, but it relied on the fact that the defendants, by promising, after the bankruptcy, to pay the notes, induced the plaintiff to desist from taking possession of the goods, and tendered an issue to that effect, which was refused. The court submitted issues to the jury, which, with the answers thereto, are as follows:

"1. Were the originals of the notes sued on executed by James G. Dowd pursuant to the terms of the contract marked Exhibit A? Answer: Yes. 2. Were the originals of the notes sued on, and all renewals thereof, executed by James G. Dowd and endorsed by the defendants for the accommodation of the plaintiff? Answer: Yes. 3. Were the defendants induced to endorse said notes by reason of the representations of the plaintiff that said notes were only to be paid from the proceeds of the sales of the vehicles shipped to said J. G. Dowd by the plaintiff under the terms of the contract marked Exhibit A? Answer: Yes. 4. What amount of the proceeds of the sale of the original shipment of vehicles by the plaintiff to James G. Dowd were paid to the plaintiff by the said James G. Dowd? Answer: $690. 5. What was the invoice price or value of the balance of said original shipment left on hand when James G. Dowd filed his petition in bankruptcy? Answer:

$950. 6. What disposition was made of the balance of said first shipment so left on hand when said petition in bankruptcy was filed? Answer: Trustee in bankruptcy. 7. What disposition was made of the other vehicles shipped to James G. Dowd by the plaintiff which were on hand when said petition in bankruptcy was filed? Answer: Trustee in bankruptcy. 8. What was the invoice value of all vehicles shipped by the plaintiff to James G. Dowd which were on hand when said James G. Dowd filed his said petition in bankruptcy? Answer: $1,700. 9. Did the plaintiff file its claim as a general creditor of James G. Dowd with the referee in bankruptcy for the alleged balance claimed to be due it by said James G. Dowd for vehicles shipped to the said James G. Dowd by the said plaintiff? Answer: Yes. Stating partially secured by endorsement of notes sued on. 10. Did the defendants, after the
(314) maturity of the notes described in the plaintiff's second cause of action, and after the said notes had been protested for nonpayment, agree to settle same? Answer: No. 11. Did the defendants waive the right to have the funds received from the goods sold by J. G. Dowd applied as payment on the notes? Answer: No."

Judgment was entered upon the verdict for the defendant, and plaintiff appealed.

Pharr & Bell for plaintiff.
Burwell & Cansler and Thaddeus A. Adams for defendant.

WALKER, J., after stating the case: The vital question in this case arises out of the somewhat vague wording of a clause of the contract between the plaintiff and James G. Dowd, who was appointed agent at Birmingham, Ala., to sell its vehicles. The material parts of the contract are generally expressed with sufficient clearness to be easily understood, but the last clause in the seventh section is given different constructions by the respective parties. The original notes and the successive renewals thereof, except the last, were undoubtedly for the accommodation of the plaintiff, and if the last renewals, being the notes sued on, are of a like character, the plaintiff is not entitled to recover, and the verdict and judgment were right. But what does the language of that one sentence mean? "These notes (the last renewals) are to be paid at maturity without reference to the amount of work still on hand unsold at that time" (that is, at their maturity, which was twelve months from the time the vehicles were shipped). The plaintiff says that this provision changed the character of the notes and they became ordinary promissory notes, endorsed by W. C. Dowd and W. F. Dowd, not for its accommodation, but for the benefit solely of their brother, James G. Dowd, and that they were due and payable at their maturity to the

plaintiff by both maker and endorsers, who were really sureties for their payment. The defendants, on the contrary, contend that, as shown by the proof, the object in giving the notes was that plaintiff might use them as a basis of credit in bank and supply the deficiency in funds for carrying on its business, which had been caused by the withdrawal of money invested in the vehicles held by their agent, James G. Dowd; that they were executed solely for the benefit of the (315) plaintiff, and not to create any liability of the defendants for their ultimate payment; and, further, if it had been intended that the defendants should, in the end, become absolutely bound for their payment, it was no advantage to them that they were originally accommodation paper. The defendants therefore insist that they continued to be accommodation notes, and that the stipulation for their payment at maturity meant a payment by the payee, who is the party legally bound to pay them, and this position is sound, provided the premise is correct that they did not cease to be accommodation notes because of that provision. "An accommodation bill or note is one to which the accommodating party has put his name, without consideration, for the purpose of accommodating some other party who is to use it, and is expected to pay it." 1 Daniel Neg. Inst., 191. They also contend that if this language is obscure, any doubt as to its meaning should be resolved in their favor, and in this connection rely on *Hill v. Mfg. Co.*, 79 Ga., 105, in which *Chief Justice Bleckley* said: "We recognize that the party who wrote the contract, made it ambiguous and executed it in that condition, must explain the ambiguity in order to obtain a construction of it in his favor. The author of the ambiguity has the burden of explaining it when he seeks to take the benefit of a construction favorable to himself, and if he does not clear up the meaning beyond doubt, the doubt must be given against him." They further contend that if not accommodation paper, and the stipulation is to be considered as having changed the character of the notes so that the defendants became liable upon them as endorsers or sureties to the plaintiff, it follows that the terms upon which James G. Dowd held the vehicles were also changed, and the shipment, instead of being a consignment as originally contemplated, was converted into a sale, not absolute, but conditional, the title to vest when the notes are paid, or that the vehicles in the possession of James G. Dowd were thereafter to be held by him as a security for the payment of the notes. If this be so, it is then argued that by relinquishing the property thus held for it as security, whether by way of conditional sale or otherwise, to the trustee in bankruptcy, to become a part of the general assets of the bankrupt and by proving its claim as unse- (316) cured and receiving a dividend from the general assets, plaintiff waived its lien upon the property and discharged the defendants, W. C.

Dowd and W. F. Dowd. It was admitted that all the notes were executed pursuant to the terms of the contract. We are inclined to the opinion, upon a view of the entire transaction, that the notes retained their original quality of accommodation paper, notwithstanding the clause of the contract which gave rise to this litigation, but we need not decide that question, as our opinion is with the defendants upon their second proposition. We may as well state now that the contract between the plaintiff and James G. Dowd was not made in this State, nor was it to be performed here, and if the stipulation in the contract, as to the payment of the last renewals at maturity, turned the consignment into a conditional sale, or impressed a lien upon the property, by way of mortgage, or otherwise, as a security for the payment of the notes, either of which it may be conceded would require for its validity probate and registration, if the contract had been subject to our registration law, the contract is nevertheless valid without registration, as there is no evidence in the record that registration of such a contract is required to be in writing and registered in order to be valid against creditors, either by the law of Ohio or Alabama. The case, therefore, is not affected by what is said in *Godwin v. Bank,* 145 N. C., 320; *Lance v. Tainter,* 137 N. C., 249. At common law, such contracts were not required to be registered, and not in this State until required by statute, and we presume that the common law exists in other jurisdictions until the contrary is shown. We do not take judicial notice of the statutes of other States, but they must be brought to our attention by proof. It was said by *Judge Pearson,* in *Hooper v. Moore,* 50 N. C., 130: "What is the law of another State or of a foreign country is as much a question of law as what is the law of our own State. There is this difference, however: the court is presumed to know judicially the public laws of our State, while in respect to private laws and the laws of other States and foreign countries this knowledge is not presumed; it follows that the existence of the latter must be alleged and proved as facts, for otherwise the (317) court can not know or take notice of them. This is familiar learning. 3 Woddeson Lec., 175." To the same effect are the following cases: *Knight v. Wall,* 19 N. C., 125; *Moore v. Gwynn,* 27 N. C., 187; *S. v. Jackson,* 13 N. C., 564; *Hilliard v. Outlaw,* 92 N. C., 266; Minor on Conflict of Laws, p. 531, where it is said that "if the foreign law in issue is the unwritten law of a State not originally subject to the common law, or, in any event, if it is a statute or written law, the presumption (as in the case of the common law) does not apply." In *Hall v. R. R.,* 146 N. C., 345, we said: "It was stated by counsel for the plaintiff that the law of Virginia was similar in its provisions to our statutes, but there is nothing in the record to show what the law of that State is. We do not take judicial notice of the statutes of another State. They

must be pleaded and proven." *Griffin v. Carter,* 40 N. C., 413; *Brown v. Pratt,* 56 N. C., 202. However, therefore, the fact may be, we must hold, in the absence of proof showing the contrary, that the new contract, if we may so call it, did not require registration, and consequently the vehicles in the hands of James G. Dowd at the time he was adjudged a bankrupt did not pass to the trustee. When the verdict upon the sixth and seventh issues is read and interpreted in the light of the evidence and the charge of the court, it means that the plaintiff intentionally abandoned the property to the trustee, and when taken in connection with the admission that it proved its claim as an unsecured creditor and received a dividend paid by him from the general assets, it further means that the plaintiff, quietly and without a protest, and certainly without any assertion of its right to the property, assented to, if it did not ratify, the act of the trustee in taking and appropriating the property for the benefit of the bankrupt's general creditors.

There is but one question remaining for our consideration, and that requires us to determine the legal effect of the conduct of the plaintiff with reference to the property upon both its and the defendant's rights. In the first place, if the provision of the contract as to the payment of the last renewals at maturity changed the relation of the defendants to the note as accommodation endorsers, did the plaintiff still retain a lien on the property for the security of the debt? It is impossible to read the contract throughout without concluding that it was the (318) clear intention of the plaintiff to retain control of the vehicles in the possession of James G. Dowd until their claim was satisfied in full. Referring to the first series of notes, the contract provided as follows: "Said notes being considered as accommodation notes only, and no title in said vehicles to pass to said agent by reason of giving same, nor does the fiduciary relation established by this contract change on that account." The stipulation as to the payment of the final renewals is in the seventh section of the contract, and it is followed by the tenth section, which positively and emphatically declares that the vehicles, *until sold by James G. Dowd,* shall remain the property of the plaintiff, with full control thereof, and the proceeds of any sale to the amount of the invoice price, shall be paid to it. If the plaintiff intended to wipe out this provision and part entirely with all its interest in the property and all control thereof, and to surrender it altogether, as a security, to James G. Dowd, when the last renewals were executed, why did it not say so in plain and unmistakable language? If the provision that the notes should be considered as accommodation paper, and the giving of them should not have the effect of passing the title of the property to their agent, extends to the renewals, and is not confined to the original notes, and a majority of the Court is disposed to think so, though we

do not decide the point, the contract would retain its legal designation and character as a simple consignment for sale, or upon a *del credere* commission, and the plaintiff must fail in this suit, or if the endorsers of the notes are to be regarded as simple guarantors of the good conduct and fidelity of plaintiff's agent, James G. Dowd, the same result would follow, unless some delinquency of the agent had been shown, *i. e.*, that he had sold vehicles and had not accounted for the proceeds. As tending to support this view of the case, it may well be suggested, as it was by the defendant's counsel, that the stipulation for the payment of the last renewals at maturity could not have been intended to change the liability of the endorsers, as it requires payment "without reference to the amount of work on hand and unsold at that time," and the parties could not have contemplated that James G. Dowd and his (319) endorsers should pay the notes in full if nearly all the property had been sold and the plaintiff had received the proceeds of the sale, and only an inconsiderable part of the property remained in the hands of the agent. But however this may be, it is evident that the plaintiff did not intend to release the property—to let it go—until the notes had been paid, even if the liability of the endorser was changed by giving the last renewals. This idea pervades the whole contract. If the endorsers had become insolvent, their nominal principal having become a bankrupt, we apprehend the plaintiff would be in court and claiming that it had never parted with its right to the property and seeking to recover it, or at least to charge it with a lien or as security for the payment of the notes, upon the ground that title to the property did not pass from it by the giving of the last renewals and not until the payment of the same. They would have been surprised by the suggestion, and justly so, that they had relinquished *all* of their rights therein, as they did not intend a sale to their agent. If this be the correct view to take of the case, we think the endorsers were discharged by the conduct of the plaintiff with regard to the property. In Brandt on Suretyship (3 Ed.), sec. 480, the doctrine is thus stated: "If the creditor has a surety for the debt, and also has a lien on property of the principal for the security of the same debt, and he relinquishes such lien, or by his act such lien is rendered unavailable for the payment of the debt, the surety is, to the extent of the value of the lien thus lost, discharged from liability. This rule does not depend upon contract between the surety and creditor, but results from equitable principles inherent in the relation of principal and surety. It is equitable that the property of the principal, pledged for the payment of the debt, should be applied to that purpose, and it is grossly inequitable that in such case the property should be diverted from that purpose, and the debt thrown upon a mere surety. Upon obtaining such a lien the creditor becomes

a trustee for all parties concerned, and is bound to apply the property to the purposes of the trust." The creditor, it is true, must have the means of satisfaction in his hands or under his control, either a lien on the property or something equivalent to it and just as effective, conferred by law or by agreement, or a right with respect to the (320) property, which the law requires him to assert and preserve or enforce for the benefit of the endorser. "The creditor must part with no security for the payment of the debt; but the security must be a mortgage, pledge or lien—some right or interest in the property which the creditor can hold in trust for the surety, and to which the surety, if he pay the debt, can be subrogated; and the right to apply or hold must exist and be absolute." Brandt, sec. 484. The endorser, when he pays the debt, is entitled to an assignment of the securities held by the creditor, and if the latter has voluntarily rendered himself unable to make it, or has caused the securities to become unavailing to the endorser, the latter is discharged, at least *pro tanto*. In this case it appears that there was enough property on hand to pay the notes. A familiar illustration is a release by a creditor of a lien acquired by the levy of an execution upon the property of the principal debtor. "If the creditor recovers a judgment against principal and surety, or against the principal alone, and execution is issued thereon and levied upon real or personal property of the principal subject thereto, and such property is, by act of the creditor, released from the levy and lost as a security, the surety is discharged to the extent that he is injured thereby." Brandt, sec. 489; *Cooper v. Wilcox,* 22 N. C., 90, in which it is said: "Between the creditor and a surety, the former is not bound to active diligence to protect the latter; but if by his act he deprives him of a security, the latter is *pro tanto* discharged; and where, upon an appeal from the County to the Superior Court, the judgment was affirmed, and execution issued against the defendant and the sureties to the appeal bond, and was levied upon property of the principal debtor sufficient to satisfy it, and the plaintiff discharged the levy, he discharges the sureties. The rights of a surety to protection are recognized in all courts, if his character as a surety can be averred; as at law, in cases between the holder and drawer of a bill, if the former release the acceptor he thereby discharges the latter." And, again: "So, in *Law v. East India Co.,* 4 Ves., 829, it was considered as incontestible that where a creditor has a fund of a principal debtor sufficient for the payment of a debt, and gives it back to the debtor, the surety can never afterwards be called upon. The creditor, by (321) virtue of the seizure in execution, or of the deposit, becomes a trustee of the security so acquired, or of the fund for the benefit of all concerned, and is responsible to any party injured by unfaithfulness in

execution of that trust. For it is a rule that if he be not only creditor, but trustee, *then* even his neglect, if it occasion the loss of that to the benefit of which the surety is entitled will *pro tanto* discharge the surety. *Capel v. Butler,* 2 Sim. & Stew., 457 (1 Cond. Eng. Chan., 543)." The principle is clearly defined by *Chief Justice Brickett* in *Knighton v. Curry,* 62 Ala., 404: "The principle upon which the whole doctrine of subrogation, not only as it is applied for the protection of sureties, but as it is applied to compel him who is primarily liable, or the thing which may be primarily liable to bear a burthen, to continue to bear it for the relief of him, or another thing, secondarily liable, does not depend upon contract, but has its foundation in natural justice, and is said by *Chancellor Kent* to be 'recognized in every cultivated system of jurisprudence.' No doctrine can be more firmly established than that a surety who has paid the debt of the principal is entitled to stand in the place of the creditor, as to all securities for the debt, held or acquired by the creditor, and to have the same benefit from them as the creditor might have had, if the surety had not paid, and the creditor had resorted to them. 1 Story's Eq., sec. 499, *et seq.*; 1 Lead. Eq. Cases (4 Ed.), 136; 2 *ibid.,* 277; Brandt on Suretyship, secs. 260-282. As a necessary consequence of this right of the surety, it is well settled on authority, that if the creditor, without the consent of the surety, parts with or renders unavailable any security of fund, which he has the right to apply in satisfaction of the debt, the surety is exonerated to the extent of the value of such securities. The reason is, that such securities or fund are impressed with a trust for the payment of the debt, and the creditor is bound to apply them, or hold them as a trustee, ready to be applied for the benefit of the surety. *Cheeseborough v. Millard,* 1 Johns. ch. 409; *Hayes v. Ward,* 4 Johns. ch. 123; Brandt on Suretyship, secs. 370-372. The principle is sometimes expressed in another form: 'That when a creditor has the means of satis-
(322) faction in his own hands, and chooses not to retain it, but suffers it to pass into the hands of the principal, the surety to that extent will be discharged.'" *Cullom v. Emmanuel,* 1 Ala., 29. It would be useless to multiply authorities to support so familiar a doctrine.

The plaintiff contends, though, that it was lulled into security and induced to part with the property by a promise of the endorsers to pay the notes and the court refused an issue intended to present this phase of the matter. We do not see how a promise to pay the notes could impair the right of the endorsers to have the property preserved and applied to their exoneration. If they had actually assumed their principal's obligation or paid the notes, the right of subrogation would arise at once, and it would be, if anything, more the duty of the

creditor to protect them when it is known that they must suffer, or when they have actually been subjected to loss. It can make no difference what kind of endorsers the Dowds were, or whether they were guarantors or sureties for in either of those relations to the notes, they were entitled to the protection of the creditor, and plaintiff should not have slept upon their rights, nor should it have relaxed its energies in their behalf, simply because they promised to pay the debt. As we have said, its obligation to them was increased thereby, for they were in greater jeopardy of loss, and the plaintiff's solicitude for their protection should have been correspondingly increased and quickened. At any rate, plaintiff failed in its duty, and it would be most inequitable for the consequent loss to fall upon the endorsers. This contract was not intended as a sale, either in its inception or development, but as something far different. The plaintiff surely did not propose to let go the property before it had actually received, not merely notes or a promise to pay, but all of its money. This is apparent, if we give its words, for the contract was prepared by plaintiff, their natural meaning, but settling all doubts against it and fairly and reasonably construing it as a harmonious whole, so as to effectuate the real intention and to do justice and right, and square our decision with the principles of equity, we can not but conclude that the defendants have been released, as endorsers or promisors, by the fault of the plaintiff.

We have not considered the correspondence between the parties, (323) which was introduced to show that defendants were actually regarded as accommodation endorsers, though we think the court erred in admitting secondary evidence as to the contents of the lost letter, the proof as to search and loss not being sufficient to dispense with the primary proof—the letter itself. But this is not material, in the view we have taken of the case, as we think the rights of the parties can be sufficiently determined by the contract itself and the undisputed facts, without the aid of extraneous proof.

Perhaps we should further inquire whether the relinquishment of the property to the trustee is such a dealing with the security by the plaintiff as to discharge the endorsers of the notes, but this would seem to be too plain to need any demonstration. The very question was presented in *Fleming v. Odum,* 59 Ga., 362, and the creditor held to have forfeited his right of recourse to the surety for payment. The Court said: "In respect to this property so levied on, the assignee stood in the shoes of the defendant, and the sheriff had no more right to deliver up the property to the assignee than he would have had to deliver it to the defendant himself; therefore *Lumsden v. Leonard* controls this case. Indeed, this case is stronger for the surety than that. In that case the defendant still had the property, and another levy might have been

made, and the only hurt the surety sustained was the danger that defendant, his principal, might have run it off. This risk was increased, because the creditor, through the sheriff, had in hand enough to pay the debt from the principal's property, and let it go; but in this case much more has the surety been hurt; for the property has gone to another—the assignee has it, and probably has disposed of it to pay other debts—at least it has not been heard of since. This creditor has not pursued it, either against the sheriff or the assignee, or claimed the proceeds in the bankrupt court. It is gone—a dead loss to this judgment—and the surety is hurt to the extent of its value, and that is enough to pay the whole judgment. So that the result is that the surety's property is levied on to pay a judgment which the creditor had enough of the principal's property to pay, but, by his fault and the sheriff's—one or both—let it unlawfully get away from under (324) the levy. We think it clear that the surety is discharged." It is not suggested and can not successfully be contended, that, if the property was held on consignment at the time of the bankruptcy, it passed to the trustee.

We have reached our conclusion in this matter with less hesitation, because we believe it accords, not only with well settled rules of law, but with the very justice of the case. Had the plaintiff intended to change the character of the notes and convert what was a consignment into an absolute sale, and not a conditional one, nor into a lien or security, it should have expressed that intention clearly and not left it to uncertain, if not unwarranted, inference. If the plaintiff expects the courts to enforce this kind of contract according to its present contention, it should use language which more plainly carries that idea with it, or, at least, should free it of its present ambiguity; otherwise it can not complain if it is construed favorably to endorsers. Our rendering of its provisions makes it consistent, while that of the plaintiff, we think, produces discord and repugnancy and frustrates its leading purpose. We would not be understood as even intimating that the plaintiff inserted the disputed clause in the contract for a double purpose, and so that, in certain eventualities, it might claim either way that might subserve its interests, though such a suggestion is made in this case and was made in *Bank v. Scott,* 123 N. C., 539, cited by the defendant's counsel, in regard to a contract somewhat similar. It is not necessary that we should search for a bad motive, when the rights of the parties must depend upon the contract as it is written, there being no allegation of fraud. The plaintiff has merely failed to state in the written instrument what it now says was its intention, and that is all. It is not a question of motive, but of construction. We find no reversible error.

No error.

(325)

WILLIAM M. WRIGHT v. SOUTHERN RAILWAY COMPANY.

(Filed 26 May, 1911.)

1. **Pleadings—Contributory Negligence—Allegations Sufficient.**

A plea of contributory negligence, in an action alleged to have been caused to plaintiff as a result of having crossed defendant's track in a buggy at a public crossing in front of a moving train, is sufficient which alleges that the plaintiff entered upon the track of the defendant without looking and listening, and that he recklessly attempted to cross.

2. **Evidence—Legal Sufficiency—Questions for Court.**

The judge should decide, as a matter of law, whether there is any legal evidence sufficient to be submitted to the jury.

3. **Nonsuit—Contributory Negligence—Plea Available, When.**

A defendant may avail himself of the plea of contributory negligence on a motion to nonsuit upon evidence introduced by the plaintiff.

4. **Railroads—Contributory Negligence—Effect—Causal Connection.**

When one has negligently placed himself on a railroad track in danger of an approaching train, and injurious consequences result from other sources, harmless in themselves, such as driving into a post on the other side of the track, the contributory negligence of the person so acting will bar his recovery in his action for damages alleged against the railroad company.

5. **Railroads—Crossings—"Look and Listen"—Contributory Negligence—Nonsuit.**

While passing in a buggy across a railroad track closely in front of defendant's moving train, of which plaintiff did not know beforehand, the plaintiff's horse became frightened by the smoke and noise of the train, and the plaintiff whipped up his horse to get across from the danger of being run over, and ran into a post on the other side of the track, to his injury: *Held*, the failure of plaintiff to look and listen before entering upon the track, and to heed the noises of the approaching train and a warning given by his companion who jumped out of the buggy in time, was such contributory negligence as to bar his recovery of damages.

APPEAL by plaintiff from *Councill, J.*, at December Term, 1910, of BUNCOMBE.

Action to recover damages for personal injury, on the ground of negligence.

The defendant denies that it was negligent and, among other (326) things, alleges that the plaintiff's injuries were caused by his own negligence and want of due care in attempting to drive across defendant's railroad at its crossing, without looking or listening for defendant's approaching train, as it was his duty to do for his own safety. The defendant says that the plaintiff did not look or listen for

the approach of defendant's engine or train, as it was his duty, under the circumstances, to do, and that he could, had he looked and listened, have seen and heard the approach of defendant's engine in time to have placed himself out of danger; in fact, the defendant alleges that it did blow its whistle at the usual place for blowing for said crossing, about three hundred yards from said crossing, while approaching the same, and that the plaintiff, as well as other persons, heard the same, and instead of remaining in a place of safety until after defendant's engine would pass said crossing, as it was his duty to do, he carelessly, recklessly and negligently, without due care for his own safety, violently whipped his horse, driving him and the buggy drawn by said horse across defendant's railroad track in front of defendant's approaching engine to a place of safety beyond, after which he recklessly and carelessly so drove said horse that said buggy in which the plaintiff was driving, at a distance of about thirty-six feet from the defendant's said railway and crossing, struck a post, injuring said buggy and throwing the plaintiff therefrom, injuring the plaintiff thereby, without any fault or negligence on the part of the defendant or its employees who were running said engine very slowly, not exceeding twelve miles an hour, its engineer and fireman all the while fully complying with their duty by keeping a constant lookout ahead, and who did, as soon as the plaintiff approached said railroad track or crossing near enough to become dangerous, apply the emergency brake and all other appliances at hand and stopped said engine before reaching said crossing, or just as it reached the same, without striking said horse and buggy of the plaintiff or the plaintiff himself. Had the plaintiff looked or listened before attempting to drive across said crossing, as it was his duty to do, he could have seen and heard said east-bound engine in ample time to have avoided the accident, but in total disregard of his own
(327) duty, he carelessly and negligently attempted to drive his horse and buggy across defendant's railroad at said crossing, and in doing so struck his horse violently with the whip, thereby frightening him and causing him to run against the said post, injuring the plaintiff, if he was injured at all.

The plaintiff introduced a rule of the defendant which reads: "Passenger trains in the same direction must keep at least ten minutes apart; freight trains fifteen minutes apart, except when closing up at stations or at meeting or crossing points, except where block signals are used."

The following is the statement of facts and the evidence taken from the brief of the plaintiff:

The defendants admit that on the 6th day of September, 1909, the plaintiff was injured in attempting to cross its track with his buggy;

that plaintiff's horse became frightened by an approaching train and plaintiff was thrown out against a post and injured.

The plaintiff testified in his own behalf that on 6 September, 1909, he was going towards Canton, and had just passed a little branch, and a freight train hove in sight coming from Canton; that he drove on, his mare in a slow trot, kind of cantering along; he did not see anything to stop for, as the train had just passed. He thought everything was clear, and when he got to the railroad crossing Hall, the man in the buggy with him, said, "There is another train coming up there," and plaintiff said, "It is that train down there," and Hall jumped out of the buggy right at the track and said, "Whip up your mare, or you will be caught," and plaintiff turned his head and looked up the track and the train was about forty or sixty feet from him, coming backwards down the track, and he struck his mare and the smoke and steam coming out scared the mare and she threw him against the sign post and injured him. Just before coming to the crossing where he was injured he saw a freight train go beyond the crossing 150 yards and stop, and this led him to believe there was nothing else behind—he was pretty close to the railroad and did not hurry—let his mare go, did not hurry her, but just as he got to the track the man that was in the buggy with him (had not quite got to the track, maybe sixteen or seventeen feet from it) said, "I believe I hear another train." Plaintiff did not stop, and he jumped out of the buggy at the (328) railroad, and when he jumped out and said, "Whip up your mare, or you'll get caught," plaintiff turned his head and saw the train was coming two or three rail lengths from him, and whipped his mare, and just then the steam came out, causing the mare to shy to the left.

Between the little branch and the crossing is over 100 yards; it is 150 to the place; it would take two or three minutes to go from the little branch to the crossing; could walk it in two or three minutes or less time—"it was just all right now." Plaintiff could see nothing till he got on the track; when right at the railroad could not see 150 feet; could see about two or three rail lengths. No top on the buggy; it was open; no curtains. The embankment at the crossing comes right down to it. Just before getting to the railroad, that hill makes off and makes a kind of bend.

Hall testified: "We crossed the branch, and after we crossed it, there was a freight train coming down from Canton, and after coming on past us it stopped over the trestle, and we drove on to the next crossing, and there was a very high bank there that you can't see up the railroad any, and just before we got to the crossing I thought I heard a train blow, and said, 'I believe there is a train coming,' and as I said that I put my hand on the side of the buggy and jumped, and when I turned

my face his mare's foot was on the track and buggy very close, and I hollered to him to whip the mare, and he crossed the track, and I saw he was going to hit the sign-post, and I saw him hit the sign-post and make a somersault. The distance from the little branch to the railroad crossing is 148 yards. I walked it in 1¾ minutes."

Thomas Wright testified that he was within 150 or 175 yards of plaintiff when the accident occurred; that he did not hear any bell ring or whistle blow; thought he could have heard.

There was a judgment of nonsuit, from which the plaintiff appealed.

James H. Merrimon and Bourne, Parker & Morrison for plaintiff.
Moore & Rollins and W. B. Rodman for defendant.

(329) ALLEN, J., after stating the case: It is true, as contended by the learned counsel for the plaintiff, that the defendant must plead contributory negligence, and that the plea is not good when it does no more than deny the negligence of the defendant and allege that the plaintiff was injured by his own negligence. Rev., 483; *Cogdell v. R. R.*, 132 N. C., 855.

The defendant, as appears from the answer, has done more than this, and we think it is entitled to avail itself of the defense. It has alleged that the plaintiff entered upon the track of the defendant without looking and listening, and that he recklessly attempted to cross the track in front of an approaching train.

We also concur in the interesting and able discussion of the relative functions of the judge and jury, and of the importance of preventing encroachment by one on the powers of the other, but we must recognize the principle, firmly established, that the judge must decide, as matter of law, the preliminary question whether there is any legal evidence to be submitted to the jury. In the determination of this question, caution should be observed and the construction of the evidence most favorable to the plaintiff should be adopted.

Considering the evidence in this light, we must sustain the ruling of the judge, as it appears clear to us that the plaintiff was guilty of contributory negligence on his own evidence.

There was much controversy at one time as to the right of the defendant to avail itself of the plea of contributory negligence on a motion to nonsuit, but it is now the accepted doctrine with us that it can do so if it is disclosed by the evidence of the plaintiff. If the plaintiff entered on the track without looking and listening, or if he looked and listened and attempted to drive in front of the train, in either case he would be guilty of contributory negligence.

He says that when he was sixteen or seventeen feet from the track,

Hall, who was in the buggy with him, told him he heard another train, and jumped out and told him to whip up or he would be caught; that he turned and saw the train, two or three rail lengths from him, and that he whipped his mare to force her across.

It is true he was not injured on the crossing, but he would not (330) have been injured at all if he had not negligently placed himself in a position of danger.

The citation of authority is needless, as there is no controversy between the plaintiff and the defendant as to what the law is, but as to its application.

Affirmed.

Cited: Thompson v. Construction Co., 160 N. C., 392; *Horne v. R. R.,* 170 N. C., 660.

JOSEPH M. GAZZAM v. GERMAN UNION FIRE INSURANCE COMPANY.

(Filed 26 May, 1911.)

1. **Insurance, Fire—Principal and Agent—Standard Policy—Agents Within Authority—Interpretation of Statutes.**

   Our statutory standard fire insurance policy providing that "in the matter relating to insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company," does not impose on the insured the duty of showing that the agent who issued the policy had written authority to do so.

2. **Insurance, Fire—Standard Policy—Rules of Evidence—Interpretation of Statutes.**

   The fact that a standard form of fire insurance has been adopted by statute does not change the rules of evidence applicable to a waiver by the insurer of the terms thereof upon which the policy shall have its inception and become operative.

3. **Same—Doubtful Terms.**

   Whatever doubtful terms or expressions a statutory standard fire insurance policy may contain are to receive the construction favorable to the insured, this rule of interpretation not being changed by virtue of the statute.

4. **Insurance, Fire—Principal and Agent—Written Authority—Interpretation of Statutes.**

   The stipulation in a statutory standard policy that "no person shall be deemed the agent of this company unless authorized in writing" is not contractual between the company and the insured; but if otherwise, it could only relate to matters connected with the insurance after the policy has become a valid contract, and not the acts of the agent in issuing the policy.

5. Insurance, Fire—Reinsurance—Policy Contracts—Consideration.

The surrender of a fire insurance policy in one company by the insured and the relinquishment of his right to the "return premiums" furnishes a sufficient consideration to support the policy contract given by the reinsurer thereof upon these conditions; and while the reinsurer may not have received the "return premiums," it has acquired the advantage of new business by the arrangement.

6. Insurance, Fire—Principal and Agent—Premiums—Payment—Agent's Debt.

While ordinarily the insured can not pay the premiums on his fire insurance policy by satisfying a private debt due him by the agent of the company, it does not apply when the insured has paid his premiums to the agent of the insurer in good faith, and the latter has satisfied his obligation due to another therewith, within the knowledge of the insured.

7. Same—Evidence of Agency.

N. was the general agent of the insurer, and A. its local agent. The insured failed. N. attempted to make an arrangement with the defendant insurance company, through its general agents, to reinsure the risks, with assurance to the said agents that he would take care of the policies of the old company, and they gave him the policy in suit to be sent to plaintiff, which was done. The plaintiff then returned the policy he held in the old company, and released his rights to the return premiums thereon. This arrangement was carried on without the knowledge of the insured, and it is held, N. was not the agent of the insured, but was the agent of the defendant insurance company, and that the latter was liable to the plaintiff for a fire loss which was covered by the policy thus issued by it.

8. Insurance, Fire—Principal and Agent—Declarations—Evidence.

The competency of the declarations of an agent of an insurance company rests upon the same footing as the declarations of an agent of an individual, and are properly admitted when they are of matters within the scope of the agency, and concern the very business about which the declaration is made.

9. Insurance, Fire—Principal and Agent—Reinsurance—Nearness of Offices—Evidence.

The plaintiff formerly held a policy of fire insurance in a company that failed, and alleges and introduces evidence tending to show that defendant insurance company reinsured the risk, in his action for loss subsequently sustained by him, on the subject-matter of the policy: *Held*, evidence that the two insurance companies had offices near each other in the same office building is entitled to little consideration, but not error to have admitted it under the facts and circumstances of this case.

(332) APPEAL from *Councill, J.*, at December Term, 1910, of BUNCOMBE.

Action to recover $2,500 on a policy of fire insurance.

The defendant denied that it issued the policy or that it was issued by its authority. Prior to 22 November, 1908, the plaintiff held a fire insurance policy, issued by the Ohio German Fire Company, for $2,500

on the property described in the policy in controversy in this action, and on said day said company became insolvent, and a receiver was appointed to take charge of its assets and business. M. W. Nash was the general agent, and the firm of Alston, Rawls & Co., the local agent of said company.

The plaintiff contends that the firm of W. E. Fowler & Co. was the general agent of the defendant company; that after the failure of the Ohio German Company, the said Nash, as its general agent, entered into an agreement with the defendant, through Fowler & Co., by which he, said Nash, was appointed the general agent of the defendant in this State, and that it was a part of this agreement that the defendant would reinsure the outstanding risks of the Ohio German Company; that thereafter the defendant, through said Nash, issued the policy declared on.

The defendant denies that Fowler & Co. or Nash had authority to issue the policy, and contends that under the provision in the policy that "in the matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company," authority to represent the defendant can not be shown by parol, and as no written authority has been produced, that the policy is void; that the evidence of the plaintiff fails to show any consideration to sustain the policy; that evidence admitted to prove agency was incompetent, and that on the whole evidence judgment of nonsuit should have been entered.

The policy of the defendant was delivered by Nash to Alston, Rawls & Co., who sent it to the plaintiff, and he surrendered his policy in the Ohio German Company and his right to the return (333) premium thereon, the amount of which is not stated.

Nash was indebted to Alston, Rawls & Co., and it was agreed between them, without the knowledge of the plaintiff, that the return premium should be applied to this indebtedness. The following agreement was made by the parties on the trial:

"First. It is admitted by the plaintiff that the defendant, the German Union Fire Insurance Company, did not receive, or has ever received, any cash consideration, by check or otherwise, to cover the premium on the policy set out in the complaint and the subject of this action.

"Second. It is admitted that Kenilworth Inn and its contents, which is alleged to have been insured by the policy set out in the complaint and sued on in this action, was totally destroyed by fire, as alleged in the complaint, and that the value of said hotel at the time of the fire was $108,101.71, and the value of the furniture and fixtures contained in said hotel at the time of the fire was $34,346.89, as set out in the amended proof of loss, which was duly transmitted by plaintiff to the defendant."

P. R. Moale, a witness for the plaintiff, among other things, testified that he, La Barbe and Chiles, were agents of defendant for two to two and a half years, transacting the business of issuing policies; that he reported to Stokman & Co., Fowler & Co. and the defendant; that while reporting to the company, in the due course of business, he received the following letter:

(Stamped across letter-head.)

DICKSON & TWEEDDALE,
GENERAL MANAGERS.
THE GERMAN UNION FIRE INSURANCE COMPANY
OF BALTIMORE.
417 E. BALTIMORE ST.

BALTIMORE, MD., 23 January, 1909.

MESSRS. LABARBE, MOALE & CHILES,
Asheville, N. C.

DEAR SIRS: This is to advise you that William E. Fowler & Co. have resigned general agency of the German Union Fire Insurance (334) Company, effective 2 January, '09. You will, therefore, report all business written since that date to the German Union Fire Insurance Company, 417 E. Baltimore street, and remit to them for such business.

And upon all business written prior to 2 January, '09, for which you have not yet paid, you will send your checks in payment of such business to the German Union Fire Insurance Company direct.

We would thank you to acknowledge receipt of this letter.

GERMAN UNION FIRE INSURANCE CO.
R. D. Tweeddale, President.
By W. A. Shelton, Secretary.

That after receiving this letter he sent money and reported direct to the defendant; that while reporting to Fowler & Co., and in due course of business, he received by mail the following letter:

WM. E. FOWLER & COMPANY,
GENERAL AGENTS.
FIRE INSURANCE.
417 E. BALTIMORE STREET.

BALTIMORE, MD., 30 November, 1908.

DEAR SIR: This is to advise you that as we have appointed Mr. W. M. Nash, Greensboro, N. C., as general agent for North Carolina for the German Union Fire Insurance Company of Baltimore, and beginning

1 December (this month), you will report all of your business to Mr. Nash, and when paying for business written during the month of December and the months following, you will remit directly to Mr. Nash.

Upon all business written up to 1 December you will settle with W. E. Fowler & Company and take credit for all return premiums on policies canceled up to December first on your account current to W. E. Fowler & Company.

We trust that this explanation is clear to you, and hope that this arrangement meets with your approval.

We hope that in appointing Mr. Nash as general agent for this territory that we can get better results for the company, and (335) that it will be more satisfactory to the agent, especially when we consider the fact that Mr. Nash is a North Carolina man and living in the State, and that he has made a pronounced success as a general agent, and we sincerely trust, therefore, that this appointment will have your sanction and we will have your hearty coöperation in producing business for the company as heretofore; and we also hope that the very pleasant relations heretofore existing between this office and yours may be continued through the office of Mr. Nash.

If there is anything concerning this arrangement that is not entirely clear to you, we would be very glad to have you correspond with us freely. And again thanking you for your business, and hoping for a continuance of the same, we are,

Yours truly,
WM. E. FOWLER & CO.,
General Agents.

This evidence was objected to by defendant.

Witness stated on cross-examination, without objection, that he was notified in the course of business that Fowler was the general agent of defendant.

M. W. Nash, among other things, testified for the plaintiff that the office of Fowler & Co. was situate in the same building with the offices of the defendant; that he was a stockholder of the defendant company and was present at the annual meeting in January, 1909, when Tweeddale was elected president; that he had discussed the agency of Fowler & Co. with Tweeddale several times; that he said the company would cancel its contract with Fowler & Co.; that on 26 November, 1908, he went to Baltimore and saw Mr. Fowler; that Fowler appointed him general agent of the defendant for North Carolina and agreed with him to reinsure all the risks of the Ohio German Company in the defendant company; that he afterwards received a letter from Fowler & Co. confirming this, which has been lost; that blank policies were sent him

by Fowler & Co., and he issued the policy to the plaintiff and many others; that he wrote 200 or 250 policies in defendant company.

(336) The following are the issues and the answers thereto:

1. Did the defendant, German Union Fire Insurance Company, or its agent, issue to the plaintiff, Joseph M. Gazzam, the policy of insurance set out in the complaint? Answer: Yes.

2. Was there any consideration to support said policy or contract of insurance? Answer: Yes.

3. What amount, if any, is the plaintiff, Joseph M. Gazzam, entitled to recover of the defendant, German Union Fire Insurance Company, on said policy of insurance? Answer: $2,500, with interest from 25 July, 1909, until paid.

There was a judgment for the plaintiff, from which the defendant appealed.

Adams & Adams for plaintiff.
Moore & Rollins and Aycock & Winston for defendant.

ALLEN, J., after stating the case: The policy declared on is what is known as the standard policy, and contains the provision approved by the statute, that "in the matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company."

We do not think it was the purpose of the statute to say that no recovery could be had on a policy of insurance containing stipulations not provided for in the statute, or that the stipulation under consideration imposes on the insured the duty of showing that the agent who issues the policy had written authority to do so.

If such construction should be adopted, fire insurance would be a delusion and a snare. The company could insert a new provision in the policy and render it void, or it could appoint its agents by parol, and, if the standard policy was issued, the inability of the insured to produce written authority of the agent would prevent a recovery.

The standard policy has been very generally adopted, and many of its terms have been considered by the courts.

The reasons for its adoption are well stated in *Quinlan v. Ins. Co.*, 133 N. Y., 365, in which the Court says: "The act (chapter 486, Laws 1886), providing for a uniform policy known as the standard policy, and which makes its use compulsory upon insurance companies,

(337) marks a most important and useful advance in legislation relating to contracts of insurance. The practice which prevailed before this enactment, whereby each company prescribed the form of its contract, led to great diversity in the provisions and conditions of insurance

policies, and frequently to great abuse. Parties taking insurance were often misled by unusual clauses or obscure phrases concealed in a mass of verbiage, and often so printed as almost to elude discovery. Unconscionable defenses, based upon such conditions, were not infrequent, and courts seem sometimes to have been embarrassed in the attempt to reconcile the claims of justice with the law of contracts. Under the law of 1886, companies are not permitted to insert conditions in policies at their will. The policies they now issue must be uniform in their provisions, arrangement and type. Persons seeking insurance will come to understand to a greater extent than heretofore the contract into which they enter. Now, as heretofore, it is competent for the parties to a contract of insurance, by agreement in writing or by parol, to modify the contract after the policy has been issued, or to waive conditions or forfeitures. The power of agents, as expressed in the policy, may be enlarged by usage of the company, its course of business, or by its consent, express or implied. The principle that courts lean against forfeitures is unimpaired, and in weighing evidence tending to show a waiver of conditions or forfeitures the court may take into consideration the nature of the particular condition in question, whether a condition precedent to any liability, or one relating to the remedy merely, after a loss has been incurred. But where the restrictions upon an agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power; nor is there any reason why courts should refuse to enforce forfeitures plainly incurred, which have not been expressly or impliedly waived by the company."

Also, in *Armstrong v. Ins. Co.*, 95 Mich., 139: "In construing this statute we must consider the purpose which the Legislature had in view. It was not to subserve any public policy. Contracts of insurance, so far as the public are concerned, stand upon no (338) different basis than other contracts. The object was to protect policy-holders and to provide a policy fair to the insured and the insurer, and avoid litigation. It was undoubtedly well known to the Legislature that policy-holders do not usually examine and scrutinize their policies with the same care that they do other contracts which they make, involving their ordinary business transactions. The statute imposes a penalty upon an insurance company for issuing such a policy, but imposes none upon the insured. In using the word 'void,' the Legislature certainly did not contemplate that an insurance company might insert a clause not provided for in the standard policy, receive premiums year after year upon it, and when loss occurs, say to the insured, 'Your policy is void, because we inserted a clause in it contrary to the law of

Michigan.' Such a result would be a reproach upon the Legislature and the law. The law, so construed, instead of operating to protect the insured, would afford the surest means to oppress and defraud them, and thus defeat the very object the Legislature had in view."

It is also generally held that stipulations contained in the policy, upon which it shall have its inception and become operative as a contract, may be waived. The Court says, in *Wood v. Ins. Co.*, 149 N. Y., 385, that this doctrine "has long been settled." Nor has the rule that doubtful terms are to receive the construction favorable to the insured been changed. Vance on Insurance, 430, states the doctrine as follows: "While many of the unfair features of the earlier policies have been eliminated from the modern standard policy, the courts still apply to this instrument the same rule of construction as the considerations just mentioned led them to apply to the old forms. Any doubtful terms are always construed in favor of the insured. It has been contended that inasmuch as the law compels the use of the standard policy, and will not allow any variance from it, excepting in certain limited particulars, the insurer can not be regarded as selecting the terms of the contract and subjected to an unfavorable rule of construction on that account. This contention, however, has been held to be without merit, for the terms of these statutory policies were chosen with reference to the construction given by the precedent cases to similar terms (339) in other policies, and, therefore, ought to be regarded as being used in the sense of their previous construction. It is also apparent from an examination of the instruments themselves, as well as the history of their adoption, that their terms were really chosen by the underwriters with particular reference to their own interests."

Again, he says, on page 493, with reference to the clause on which the defendant relies: "It may be stated here, however, that the condition in the standard policy stipulating that 'no person shall be the agent of the insurer unless authorized in writing,' has no contractual significance whatever. It does amount to notice to the insured, and, as such, is binding on him, if true; otherwise, not."

The decisions of our Court, in so far as the questions have been considered, are in accord with these views.

In *Floars v. Ins. Co.*, 144 N. C., 235, it was held "that the enactment of a statute which establishes a standard form for a policy, the statute being only affirmative in its terms, will not invalidate an oral contract"; and in *Black v. Ins. Co.*, 148 N. C., 170, the provisions considered did not affect the validity of the contract in its inception.

If, however, it should be held that the stipulation is contractual, the language used will reasonably lead to the conclusion that it relates to matters connected with the insurance after the policy has become a valid contract.

It does not say, "in matters relating to this *policy,* no person, unless duly authorized in writing, shall be deemed the agent of this company," but does say that "in matters relating to this *insurance.*"

There is no "insurance" until a valid contract in one form or another has been entered into. We, therefore, conclude that the part of the policy quoted is not contractual, and that it does not relate to the acts of the agent in issuing the policy. Nor do we agree with the contention of the defendant that there is no consideration to support the contract.

The surrender of the policy in the Ohio German Insurance Company and the relinquishment of the right to the return premium thereon by the plaintiff furnished a consideration; and, in addi- (340) tion, while the defendant may not have received the full premium on this policy, it gained new business by its contract of reinsurance of the risks of the old company.

The defendant, while admitting the force of this view, says it has no application to the facts appearing on the record. It says that the plaintiff admits that the defendant never received any consideration for the premium; that the firm of Alston, Rawls & Co. was the agent of the plaintiff, and that the evidence of the plaintiff shows that the policy was issued by virtue of an agreement between Nash and the agent of the plaintiff that the return premium should be used to liquidate an indebtedness existing between Nash and the agent, and it relies on *Folb v. Ins. Co.,* 133 N. C., 180.

The authority is decisive of the proposition that the insured can not pay the premium on the policy by satisfying a private debt due him by the agent of the company, and might be controlling if it appeared that the firm of Alston, Rawls & Co. was the agent of the plaintiff, but this is not our interpretation of the evidence, and there is nothing in the record to show that the plaintiff knew anything of the transaction.

It is true that a witness of the plaintiff spoke of the firm as the insurance agents of the plaintiff, but when this statement is considered in connection with the other evidence it means that the firm of Alston, Rawls & Co. was a local insurance agency, with whom the plaintiff insured. It is not unusual to hear the inquiry, "Who is your insurance agent?" meaning, "With whom do you insure?"

The record discloses that Nash was the general agent of the Ohio German Insurance Company, and the firm of Alston, Rawls & Co. its local agent; that after the failure of this company Nash attempted to make a contract with the defendant, through Fowler & Co., to reinsure its risks; that Nash assured said firm he would take care of the policies of the old company, and gave him the policy in suit, to be sent to the plaintiff, which was done, and the plaintiff then returned the policy he

had held in the Ohio German Company and released his right to the return premium thereon.

(341) The exceptions to evidence and to the refusal to give the special instructions requested, and to parts of the charge, were entered principally to preserve the exception as to the competency of parol evidence to prove the authority of the agent, and this question has already been considered; but the defendant also insists that the two letters were incompetent because they were declarations of an agent, and that the evidence as to the location of the office of Fowler & Co. was immaterial and prejudicial.

The competency of the declarations of an agent of a corporation rests upon the same principle as the declarations of an agent of an individual. If they are narrative of a past occurrence, as in *Smith v. R. R.*, 68 N. C., 107, and *Rumbough v. Improvement Co.*, 112 N. C., 752, they are incompetent; but if made within the scope of the agency and while engaged in the very business about which the declaration is made, they are competent. *McComb v. R. R.*, 70 N. C., 180; *Southerland v. R. R.*, 106 N. C., 105; *Darlington v. Tel. Co.*, 127 N. C., 450.

The letters come within the last class. The evidence as to the location of the office was a slight circumstance on the question of agency, and, standing alone, would be entitled to little consideration, but we think it was not error to admit it.

There was evidence fit to be considered by the jury on the issues submitted to them, and the motion for nonsuit was properly refused. We have considered all the exceptions appearing on the record and find

No error.

Cited: Garrison v. Machine Co., 159 N. C., 290; *Styles v. Mfg. Co.*, 164 N. C., 377; *Robertson v. Lumber Co.*, 165 N. C., 6; *Morgan v. Benefit Society*, 167 N. C., 265; *Cottingham v. Ins. Co.*, 168 N. C., 265; *Lea v. Ins. Co., ibid.*, 484; *Johnson v. Ins. Co.*, 172 N. C., 146, 148; *Trust Co. v. Ins. Co.*, 173 N. C., 566.

HENRY STEWART v. CASSIE STEWART.

(Filed 26 May, 1911.)

1. **Wills—Caveat—Insufficient Mental Capacity—Evidence.**

A witness in the trial of a *caveat* to a will for alleged insufficiency of mind of the testator to have made the will, testified of his long acquaintance with the testator, and transactions had with him. His further testimony, "that he still retained his mental faculties to the last," held competent.

2. Same—Impeachment—Feeling.

In proceedings caveating the will of the testator by his son, question asked a witness "if he had not gone to the home of the testator and removed some of its contents to the house of the caveator" held competent to impeach the witness as tending to show his relations to the parties and a state of feeling between the father and son which may have influenced the former in the disposal of his property.

3. Wills—Caveat—Witness—Impeachment—Bias—Relevant Facts—Evidence.

When a will is sought to be set aside for undue influence, testimony in reply to a question as to the influence the propounder exercised over the testator, "She certainly seemed to do most of the talking, and he seemed to be under her thumb," is incompetent as an expression of a conclusion which it was the province of the jury to draw from the facts and circumstances placed in evidence.

APPEAL by plaintiff from *Ferguson, J.*, at Fall Term, 1910, of (342) MACON.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

R. D. Sisk, Robertson & Benbow, A. M. Fry and G. L. Jones for plaintiff.

A. W. Horne and J. Frank Ray for defendant.

CLARK, C. J. This is an issue of *devisavit vel non.* The caveator is the son by the first marriage. The propounder is the second wife and the chief beneficiary under the will. Dobson, a witness for the propounder, certified that he had been acquainted with the testator for twenty-five years; was at one time his neighbor for seven years; had numerous transactions with him, mostly in land deals, the last being about three months before his death; had seen him frequently; had never detected anything wrong with his mind; was acquainted with his handwriting; that his mental condition was good, so far as he knew, and "that he still retained his mental faculties to the last." The caveator excepted to the last expression, but we think it competent. *Smith v. Smith,* 117 N. C., 326.

The exceptions as to the identification of the will were properly withdrawn in this Court. As to exception 7, it was compe- (343) tent upon cross-examination to ask the witness Webb if he had not gone to the home of the testator and removed some of its contents to the home of the caveator. This was competent to impeach the witness, and tended to show his relation to the parties and a state of feeling between the father and son which might have influenced the testator in the disposal of his property.

The caveator introduced the deposition of Mrs. Durgin and the court refused to permit the following question and answer:

Q. What influence did Cassie Stewart seem to exert over Henry Stewart, Sr.? A. She certainly seemed to do most of the talking, and he seemed to be under her thumb a good deal.

The question was excluded upon the ground that it was leading. We also think that it was incompetent as the expression of a conclusion which it was the province of the jury to draw upon facts placed before them. *Smith v. Smith,* 117 N. C., 326.

The condition of the testator's mind was a matter as to which any one having opportunity for observation can testify, subject to cross-examination to test the value of the opinion expressed by the witness, *Clary v. Clary,* 24 N. C., 78, but whether there was undue influence is a question for the jury to decide from the facts and circumstances placed in evidence. *Lewis v. Mason,* 109 Mass., 169, though relied upon by appellant, sustains this view. There it was held proper to show that the person charged with the exercise of undue influence commanded the testator in an angry voice to "shut up," and that testator obeyed him. This was a fact tending to show that such person had power and inclination to exert a controlling influence over the testator, and was competent for the jury to consider. But it would not have been competent for the witness in that case, or in this, to testify that such person had a controlling influence over the testator.

The other exceptions do not require discussion. We find

No error.

Cited: Brazille v. Barytes Co., 157 N. C., 457.

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(344)

C. N. LANNING v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 26 May, 1911.)

Telegraphs—Delayed Message—Delivery in Time—Negligence—Conflicting Evidence—Instructions—Burden of Proof.

In an action for damages for mental anguish alleging negligent delay in the delivery of a telegram announcing the sudden and serious illness of plaintiff's mother, where there is conflicting evidence as to whether the defendant was negligent or the plaintiff had time after the delivery of the message to have taken a certain train and thereby have avoided the injury complained of, it is reversible error for the trial judge to refuse or omit to charge in accordance with a special instruction tendered by the defendant, that the burden was upon the plaintiff to show the alleged negligence and that it was the proximate cause of the injury.

LANNING *v.* TELEGRAPH CO.

APPEAL by defendant from *Ferguson, J.*, at October Term, 1910, of SWAIN.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

No counsel for plaintiff.
Geo. H. Fearons and A. S. Barnard for defendant.

WALKER, J. This action was brought to recover damages for mental anguish, suffered by reason of the negligent failure of the defendant to transmit and deliver to the plaintiff a telegram sent by his father, who lived near Asheville, N. C., to Bryson City, N. C., near which place the plaintiff lived. The message was delivered to the defendant for transmission on Sunday, 15 March, 1908, after office hours of defendant at Bryson City, and for that reason was not forwarded on Sunday, but the operator at Asheville, the next morning at five minutes after 8 o'clock, when his office was opened, called up the operator at Bryson City, whose office should also have been open, but failed to get any response until at 8.28 o'clock. The message was received at Bryson City at 8.30 o'clock, and prepared for delivery. It was handed to the messenger, who carried it to plaintiff's house. He was not at home, but in the field, about one-quarter of a mile away. The message was delivered to him (345) there, but not in time, as he contended, to catch the train at Governor's Island, the nearest station, and about one mile from his residence. The defendant contended that he had sufficient time, after the delivery of the message, to take the next train for Asheville at that station. The messenger went to the station and waited there ten minutes for the train, which arrived on schedule time. The message announced the sudden and serious illness of the plaintiff's mother, and plaintiff alleged that he was delayed in reaching his mother's bedside nearly a day. We need not state any more facts, as our decision turns upon the refusal of the court to instruct the jury, as requested by the defendant, that the burden was upon the plaintiff to show the alleged negligence, and that it was the proximate cause of his injury. After a careful reading of the instruction of the court, we have been unable to find any response to this prayer. The defendant was entitled to the instruction. *Hauser v. Telegraph Co.*, 150 N. C., 557; *Shepard v. Telegraph Co.*, 143 N. C., 244; *Loyd v. Loyd*, 113 N. C., 186; *Hocutt v. Telegraph Co.*, 147 N. C., 186. The refusal to give the instruction was, perhaps, inadvertent, but it nevertheless requires that a new trial be ordered. It is not necessary to consider the other exceptions.

New trial.

S. A. HERRING ET AL. v. M. A. WARWICK AND J. T. GREGORY ET AL.

(Filed 31 May, 1911.)

1. **Deeds and Conveyances—Purchaser—Title—Insufficient Acts to Divest.**

Title to lands under a registered deed given by the mortgagee in foreclosure proceedings is not divested by the mortgagor's refusing possession and grantee's thereafter surrendering the deed to the mortgagee and receiving back the purchase price he has paid, and especially so when the purchaser diligently urges his rights by appropriate proceedings for possession under his deed.

2. **Deeds and Conveyances—Title—Possession of Lands Unnecessary.**

It is not necessary that possession of lands be given to vest title to the grantee under a valid and sufficient deed.

3. **Deeds and Conveyances—Mortgages—Foreclosure—Judgment—Evidence—Unadjudicated Rights—Appeal and Error.**

Proceedings and judgment in suit to foreclose lands put in evidence in a subsequent action to declare certain rights of a purchaser at a sale thereafter arising, will not be considered on appeal of the later action to the Supreme Court when the rights of the parties, as determined in the former cause, were not considered by the court, and the judgment therein did not enter into the verdict in this case or in anywise affect it.

(346) APPEAL from *Whedbee, J.*, at August Term, 1910, of SAMPSON.

This action was brought originally to recover the possession of land, with rents and profits and damages for waste, with a prayer for the redemption of the land from a mortgage. The case was finally tried only upon the issue as to waste. On 27 December, 1894, S. A. Herring and his wife, Nellie A. Herring, executed a mortgage with power of sale upon the lands of the wife to John T. Gregory, to secure the payment of a note for $125 with interest. The debt was not paid and the mortgagee regularly sold the land under the power, and M. A. Warwick, one of the defendants, became the purchaser, paid the price, and Gregory conveyed the land to him by deed, which was duly registered. Nellie A. Herring having died, M. A. Warwick, the purchaser at the sale, brought an action against S. A. Herring, her husband and tenant by the curtesy, for the possession of the land. S. A. Herring answered the complaint in that action, and averred that Warwick had bought the land at the sale, under the power contained in the mortgage, for John T. Gregory, the mortgagee, and that by reason thereof, the relation of mortgagor and mortgagee between S. A. Herring, the defendant in that suit, and John T. Gregory still subsisted. The heirs of Mrs. Gregory were not parties to the suit. The court admitted issues to the jury which, with the answers thereto, are as follows: 1. Did the plaintiff bid off the land described in the complaint for J. T. Gregory, the mortgagee? Answer:

No. 2. Did the purchase, under which the plaintiff claims, terminate the relation of mortgagor and mortgagee subsisting between the defendant, S. A. Herring, and the mortgagee J. T. Gregory? (347) Answer: No. 3. What are the plaintiff's damages? (No answer.) The court thereupon adjudged that the land be sold by a commissioner to pay the mortgage debt, which was done, and John T. Gregory became the purchaser and the commissioner conveyed the land to him, upon payment of the purchase money, under the order of the court. He afterwards conveyed the land to M. A. Warwick, the defendant in the action. The testimony relative to the transaction between John T. Gregory, mortgagee, and M. A. Warwick, with respect to the sale under the mortgage, was that of M. A. Warwick, who testified: "I bought the land at the sale. Nobody bid but me. Auctioneer cried it off. I never agreed to buy the land for Gregory. I paid Gregory for the land and bought it for myself. When I got the deed, I came and had it recorded. I tried to dispossess Herring. After Gregory got possession under the commissioner's deed, I bought it again. I don't know how Gregory got in possession. I have been in possession for ten or twelve years. First time I took a deed from Gregory, Herring would not give up the possession, and I went to Gregory and told him I would have nothing more to do with the land until he got possession. He paid me back the purchase money; at least, he gave me his note for the amount paid by me, and when I bought the land from him the second time he gave me credit for the note. I knew the title was in Nellie Herring's name and her bodily heirs. I knew the land had come to her from her father. Nellie Herring was my aunt. She had been dead two years when I first bought the land from Gregory. I brought suit against Herring because he would not give up possession. Mr. Gregory was a witness in the suit. I testified on the trial myself. Mr. Gregory paid me back the money that I paid him for the land. He bought the land himself (under the judgment of the court). I then got a deed from him and went into possession. It was in the spring of 1899. I don't know when; I took possession some time after Herring moved." The issues submitted in this case, with the answers thereto, are as follows: 1. Is the defendant Warwick the owner of the land described in the complaint, for and during the life of S. A. Herring? Answer: Yes. 2. Are the plaintiffs, other than (348) Lonnie Herring, the owners in remainder of said lands, subject to the life estate of said S. A. Herring? Answer: Yes. 3. If so, did defendant Warwick commit waste upon said lands? Answer: Yes. 4. If so, what are plaintiffs' (other than Lonnie Herring) damages? Answer: $300. 5. What is the amount now due on original mortgage debt? Answer: $126.50, with 8 per cent interest from 15 February, 1898.

The court charged the jury as follows: "The act and conduct of the

defendant Warwick in accepting a repayment of the money paid by him to Gregory at the first sale, and the surrender of the lands conveyed to him by deed of Gregory and wife back to Gregory was, in effect, a renunciation on his part of all right to the lands; and, therefore, the deed from Gregory and wife to Warwick (the second deed) had no more effect than to convey to him, Warwick, the life estate of S. A. Herring; and if you believe the defendant Warwick's own testimony, you will answer the first issue 'Yes.'" To this instruction the defendant M. A. Warwick excepted and appealed from the judgment which was entered upon the verdict.

H. A. Grady and F. R. Cooper for plaintiffs.
Faison & Wright and J. D. Kerr for defendants.

WALKER, J., after stating the case. We think there was error in the instruction of the court. In the first place, there was no sufficient evidence for the jury that Warwick surrendered possession of the land to Gregory. On the contrary, he demanded the possession of S. A. Herring, and upon his refusal to give it up, he brought suit against him to recover it, thereby continually asserting his right to the possession acquired by his purchase from J. T. Gregory, the mortgagee, and the deed the latter made to him, which was duly and promptly registered. Even had Warwick torn up or otherwise destroyed his deed, it would not have had the legal effect of revesting the title in Gregory. In *Linker v. Long,* 64 N. C., 296, it appeared that a deed for land had been executed by W. F. Taylor to Isaac Linker 6 November, 1852, and on 11 May, 1853, it was redelivered by Linker to Taylor, with the following endorsement upon it: "I transfer the within deed to
(349) W. F. Taylor again." Taylor kept the possession of the land during his life, and his heirs retained possession to the time of bringing the suit. The lower court refused permission to read the deed in evidence. This Court held that ruling to be erroneous, and with reference thereto, said: "This ruling is based upon the deed that it had been redelivered by the bargainee to the bargainor, the legal effect of this writing on the back was to nullify the deed, and make it as if it had never been executed. By force of the deed, and the operation of the statute, 27 Hen. VIII, an estate of *freehold of inheritance* was vested in Linker on 6 November, 1852. The question is, Has that estate been divested by any conveyance, or means, known to the law. Suppose that deed, upon 11 May, 1853, had been canceled, torn up or burnt, by consent of both parties, the estate would not have been thereby revested in Taylor, for by the common law a freehold estate in land can only pass by delivery of seizin—under the Statute of Enrollments by 'deed of bar-

gain and sale indented and enrolled'—and under the act of 1715, by 'deed duly registered'; so, the freehold having passed to Linker, could only be passed from him either to a third person or to Taylor by some kind of conveyance known to the law. A will, being ambulatory, may be revoked by cancellation; a covenant or agreement, being *in fieri,* a thing to be done by cancellation or by deed of defeasance, which may be executed after the covenant. But a conveyance of a freehold estate of inheritance, being *a thing done,* can not be *undone* by cancellation, or in any other mode, and the estate can only be revested by another conveyance, unless a condition or deed of defeasance executed *at the same time* and as a part of the conveyance, be annexed to the estate, giving to it a qualification by which it may be defeated. For illustration, a mortgage is a conveyance on condition. If the money be paid at the time fixed the estate is revested in the mortgagor, but if the condition be not performed by payment at the day, the estate becomes absolute, and although the money be paid and accepted afterwards, the estate can only be revested by another conveyance." The *Chief Justice* is referring, in the last clause, to a strict foreclosure and not to the right or equity of redemption. He is illustrating the point by giving an example of a deed upon condition and applying the strict rule of the (350) common law to the relation of the parties without regard to the equitable right of the mortgagor, and the illustration is an apt one. This decision has been approved in several cases, and among others we may cite *Wharton v. Moore,* 84 N. C., 479; *Hare v. Jernigan,* 76 N. C., 471; *Browne v. Davis* (opinion by *Justice Shepard*), 109 N. C., 23; *Tunstall v. Cobb* (opinion by present *Chief Justice*), 109 N. C., 316; *Hodges v. Wilkinson,* 111 N. C., 56. The law, as declared in *Linker v. Long,* has been recognized and acted upon to the present time. If the facts, as they appeared in that case, did not have the effect of revesting the title in the grantor, who remained in the possession of the land after the endorsement was made on the deed and the latter was redelivered to him, how can it be said, as a matter of law, that the acts and conduct of Warwick divested the title which he had acquired by his purchase and the deed from the mortgagee, which was registered? J. T. Gregory paid the purchase money back to him for the reason that Herring had possession of the land and refused to surrender it. This was not an abandonment of his title or of the right he had acquired under the sale and deed. On the contrary, he almost immediately asserted his right to the possession and by suit attempted to enforce his claim as against one of the mortgagors. It was not necessary to the vesting of the title in Warwick that Gregory should have given him the possession of the land. The title vested by the deed and its registration, the latter taking the place of livery of seizin. The verdict upon the first and second issues resulted

from an erroneous instruction of the judge to the jury. The question as to the legal effect of the proceedings and judgment in the case of *Warwick v. Herring,* upon the rights of the parties to this litigation, was not considered by the court and, therefore, did not enter into the verdict or in any way affect it. We can not, therefore, consider that question. The parties have had no opportunity to be heard in regard to it, and apart from the fact that it was offered as evidence, it has played no part in the decision of the case. The defendant has had no chance to except to any ruling upon it, and it would not be right or in accordance with correct procedure, to pass upon it at this time.

(351) We will do so if it ever comes before us directly for our decision, but it is not now presented in any tangible form. It involves the application of an important principle of law and is not at all free from difficulty. The plaintiff offered in evidence the proceedings, verdict and judgment in that case, and relied upon them to show that Warwick was seized only of a life estate and was, therefore, liable to plaintiff, as reversioner for waste committed upon the premises, as it is alleged that his act produced lasting damage to the inheritance. The judgment professes to sell the entire estate in the land, and not only the life interest, or to be more accurate, its operation is not, in terms, restricted to the life estate, though there is one expression in the decree of confirmation which indicates that such may have been the intention of the court. Did it operate upon the estate in reversion, and, if so, are plaintiffs bound by it, not having been made parties to the suit? Does it bind them by reason of the fact that they introduced it and rely upon it? Are they still required, notwithstanding the judgment and independently of it, to prove that the sale of the land by Gregory, under the power contained in the mortgage from Herring to him, is not valid as to them, or, in law, does the judgment establish this fact, although they were not parties to it? These are questions, and perhaps there are others, which may attract the attention of counsel in the further progress and development of the case, and upon which they will enlighten us if the matter again comes before us. All we can now say is that the verdict, in an essential particular, was rendered under the influence solely of an erroneous instruction, and it should, therefore, be set aside.

New trial.

Cited: *S. c.,* 158 N. C., 593.

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ARTHUR FORD, ADMINISTRATOR, v. PIGEON RIVER LUMBER COMPANY.

(Filed 31 May, 1911.)

Removal of Causes—Time for Filing Pleadings—Exceptions—Waiver—Implied Consent to Jurisdiction.

The right of removal of a cause from the State to the Federal courts is waived by not excepting to an order extending the time to file pleadings, for in not excepting the defendant is deemed to have consented to the jurisdiction of the former court.

APPEAL from *Cline, J.*, at January Term, 1911, of HAYWOOD.

Petition for removal to Circuit Court of the United States from Superior Court of Haywood County, his Honor, *Judge Cline,* presiding.

From an order denying the petition defendant appealed.

S. Brown Shepherd and G. W. Ferguson for plaintiff.

Moore & Rollins for defendant.

BROWN, J. The summons was returnable to September Term, 1910, at which term an order was made in this cause as follows: "Plaintiff allowed forty days to file complaint; defendant has forty days to file answer." The defendant did not except to this order and did not move to dismiss the action for failure to file complaint, as it had a right to do.

It may be, as contended by defendant, that a petition for removal need not be presented until the complaint is filed, and the record then discloses a removable controversy as to the sum demanded, but under our decisions the defendant has waived his right to remove and submitted itself to the jurisdiction of the court by not excepting to the order we have quoted.

By failing to except to it, the defendant is taken to have consented to it. *Lewis v. Steamboat Co.,* 131 N. C., 653; *Bryson v. R. R.,* 141 N. C., 594; *Garrett v. Bear,* 144 N. C., 26.

Where an order of reference is made in a cause, and it is not excepted to and the exception noted on the record, it is taken to be a reference by consent, upon the principle that "silence speaks consent," and a jury trial is thereby waived. *Driller Co. v. Worth,* 117 N. C., 515.

Upon same principle, when the defendant takes no exception (353) to the order extending the time within which to file complaint and answer, the order is a consent order and voluntary submission by defendant to the jurisdiction of the court and a waiver of a right to remove.

Affirmed.

Cited: Oettinger v. Livestock Co., 170 N. C., 153.

J. H. AND L. J. FOREHAND v. ALEX. TAYLOR.

(Filed 31 May, 1911.)

1. **Drainage Act—Constitutional Law.**

Revisal, sec. 3995, ch. 88, subch. 2, providing a method for the assessment and apportionment of labor, etc., of those interested and receiving actual benefit from the repairing or keeping of a dam, canal or ditch, and also for payment by parties interested or benefited therein, etc., is constitutional and valid.

2. **Drainage Act—Noncompliance—Case Dismissed—Compliance—Another Act—Judgment—Estoppel.**

When damages have been sought in an action before a justice of the peace, Revisal, sec. 3995, ch. 88, relating to drainage districts, etc., and the action was dismissed because there had been no contract or agreement between the parties and the requirements of the act had not been met, the plaintiff is not thereby barred from proceeding under the act to have the damages assessed and from bringing another action therefor, as the former judgment does not bar the second one.

3. **Drainage Act—Canal—Identification—Regarded as Under the Act—Appeal and Error—Procedure.**

In this action it is not distinctly stated, as it should be, that the canal in question had been laid out under the Drainage Act, but both parties having treated it as such, and the whole proceedings being under Revisal, 3995, concerning the apportionment of repairs of that kind, the case on appeal is considered as relating to a canal of that character.

APPEAL by defendant from *Whedbee, J.*, at April Term, 1911, of WAYNE.

(354) The facts are sufficiently stated in the opinion by *Mr. Chief Justice Clark.*

Wentworth W. Peirce for plaintiffs.
John M. Robinson for defendant.

CLARK, C. J. This is an action which was begun before a justice of the peace, under Revisal, sec. 3995, which is in chapter 88, providing for the establishment of drainage districts, and in subchapter 2 thereof. Said section 3995 provides:

"*How amount of contribution for repair ascertained.* Whenever there shall be a dam, canal, or ditch, in the repairing or keeping-up of which two or more persons shall be interested and receive actual benefit therefrom, and the duties and proportion of labor which each one ought to do and perform therefor shall not be fixed by agreement, or by the mode already in this chapter provided for assessing and apportioning such

labor, any of the parties may have the same assessed and apportioned by applying to a justice of the peace, who shall give all parties at least three days' notice, and shall summon two disinterested freeholders, who, together with the justice, shall meet on the premises and assess the damages sustained by the applicant, whereupon the justice shall enter judgment in favor of the applicant for damages or for work done on such ditch or lands. The cost of this proceeding shall be in the discretion of the justice."

In the summer of 1910 the plaintiffs did certain work repairing and cleaning out a canal which runs by certain land of the defendant, who owns on one side of the canal only, and also runs through the lands of others in the vicinity. The jury finds that the defendant, together with others, was interested in repairing the canal in question, and received actual benefit therefrom. The adjoining landowners paid their proportional part for repairing and cleaning out the canal. The defendant refused to pay the amount claimed of him, upon the ground that he had not been benefited that much. Thereupon, in September, 1910, the plaintiffs warranted the defendant before a justice of the peace for the nonpayment of $82 for his share of the cost of cleaning out and repairing the canal, alleging defendant's liability, both upon contract and on a *quantum meruit*. The magistrate dismissed the (355) action, doubtless on the ground that there had been no agreement shown and that plaintiffs could not recover on *quantum meruit* because of plaintiff's failure to comply with the prerequisite required by Revisal, sec. 3995, the cost not having been assessed by a justice of the peace and two freeholders. Subsequently, in November, 1910, the plaintiffs complied with the requirements of said section 3995 by applying to a justice of the peace, who, after summoning two disinterested freeholders and the defendant being present, viewed the canal and decided that the plaintiffs were entitled to $82 for damages, which they assessed. The defendant appealed to the Superior Court. In that court the jury found that the defendant was interested in the repair of the canal and was indebted to the plaintiffs for $82 for his proportional part of the cost.

The defendant appealed to this Court and makes two assignments of error:

1. For the refusal of the court to nonsuit on the ground that Revisal, sec. 3995, is unconstitutional. He cites no authorities to support his position. The Drainage Act has been held constitutional in several cases. *Staton v. Staton,* 148 N. C., 490; *Adams v. Joyner,* 147 N. C., 77; *Norfleet v. Cromwell,* 70 N. C., 634; *Sanderlin v. Luken,* 152 N. C., 738; *White v. Lane,* 153 N. C., 14.

2. The second exception is that the plaintiff was estopped by the

judgment in the former action. But it appears from the facts stated that at the time of the former action the plaintiff had not taken the steps required by Revisal, sec. 3995, to entitle him to recover under the Drainage Act. It was only thereafter, in November, that he applied to the justice and had two disinterested freeholders appointed, who, after giving him notice, met on the premises and, with the justice, assessed the damage. When the former action before the justice was brought, the plaintiff was therefore not entitled to recover. His action was premature, and the justice properly dismissed it. There is therefore no estoppel. *Capeheart v. Tyler,* 125 N. C., 64, and cases citing the same in the Anno. Ed.

It is not distinctly stated, as it should be, that this canal had (356) been laid out and dug under the Drainage Act, but both briefs treat it as such, and the whole proceeding is taken under Revisal, sec. 3995, concerning the apportionment of repairs of a canal of that kind.

No error.

Cited: Shelton v. White, 163 N. C., 93.

ATLANTIC COAST LINE RAILROAD v. THE CITY OF GOLDSBORO.

(Filed 31 May, 1911.)

1. **Equity—Jurisdiction—Police Powers—Roads and Streets—Obstructions—Injunction.**

Courts of equity have no jurisdiction to restrain an incorporated city from the exercise of its governmental authority conferred upon it by its charter regulating the grading of its streets, and an ordinance passed by the city in the exercise of its police power is valid which provides that a railroad company traversing with its track one of its streets in the heart of the business portion, where there are cross streets, shall level the railroad roadbed with the street which had been recently lowered so as to make them conform to a general scheme of street grading.

2. **Police Powers—Cities and Towns—Roads and Streets—Railroad Obstruction—Gradings—Ordinances.**

The railroad of plaintiff traversed the defendant town on its principal business street, and owing to a general system for grading the streets the street was lowered, so that plaintiff's railroad bed stood at a higher level of six to eighteen inches, or more, to the danger of the citizens of the town in passing and repassing: *Held,* an ordinance of the town requiring the plaintiff to lower its tracks to a level with the street at the expense of the railroad company was a lawful exercise by the town of its police power. In this case this power of the city was expressly provided for in the charter of the company.

3. Police Powers—Railroads—Charters—Prescription—Public Requirements—Roads and Streets—Obstructions—Grading.

A railroad company accepts a charter from the State in contemplation of and subject to the development of the country, and with the expectation that cities and towns would require new or improved streets across rights of way acquired, and, therefore, by prior occupancy a railroad company can obtain no rights which would impede or render dangerous streets of incorporated towns to whom the power had been granted, in the exercise of their police power for the benefit of the citizens.

4. Corporation Commission—Railroads—Gradings—Roads and Streets—Cities and Towns—Police Powers—Supplementary Powers.

Revisal, sec. 1097 (10), authorizing the Corporation Commission to require railroads to raise or lower their tracks at a crossing, is supplementary to and not in derogation of the exercise by the State, or an incorporated town authorized by it, of such police powers.

5. Railroads—Rights of Way—Limitation of Actions—Police Powers—Grading—Cities and Towns.

Revisal, sec. 388, providing that a railroad company, etc., shall not be barred by the statute of limitations as to its right of way, etc., does not affect the State or a municipality in the assertion of its right to require a railroad company to change the grade of its roadbed where it is crossed by streets, so that public travel and drainage may not be impeded.

6. Cities and Towns—Roads and Streets—Railroads—Shifting Freight—Ordinance—Penalties.

Upon the question as to whether a town ordinance is valid in this case which restricted the time of "shifting" upon a railroad track situated in the business part of the town, the Court was equally divided, ALLEN, J., not sitting.

APPEAL by plaintiff from order of *W. J. Adams, J.*, vacating (357) a restraining order, heard by consent at chambers in Raleigh, 16 January, 1911. From WAYNE.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

W. C. Monroe, George B. Elliott, and George M. Rose for plaintiff.
D. C. Humphrey and Aycock & Winston for defendant.

CLARK, C. J. The A: C. L. Railroad, originally the Wilmington and Weldon Railroad Company, occupies with its track the chief street of the city of Goldsboro. Its right of way, 65 feet on each side of its roadbed, embraces the whole of what is known as East and West Center streets, which extend north and south the entire length of the city. The right of way was originally acquired about 1835, and the town has been built up on either side and became incorporated (358) in 1847. The city of Goldsboro under the authority of the

powers granted in its charter has instituted a system of grading its streets and of drainage extending through the city. In pursuance of this work the roadbed of the railroad on Center Street in some places is now 6 inches and from that to 18 inches higher than the grade of that street and of the other streets of the city which cross East and West Center streets at right angles.

The city authorities have passed an ordinance providing that "all railroad companies owning tracks on East and West Center streets, between Walnut and Vine streets in said city of Goldsboro, are hereby required to lower said tracks so as to make the same conform to the grade line of said streets and said tracks to be filled in between rails; the grade line of said street being as follows: Beginning at the present grade line corner of Walnut and East and West Center streets, to be lowered 6 inches to corner of Mulberry and East and West Center streets, 10 inches to corner of Ashe and East and West Center streets, and 18 inches to corner of Vine and East and West Center streets." Another section of the ordinance provides that failure or refusal to comply with the ordinance should be a misdemeanor and fined $50. The plaintiff attacks this ordinance as being unconstitutional and void, and seeks to enjoin all enforcement of the ordinance by a criminal proceeding.

The city has heretofore graded and paved at its own expense said East and West Center streets outside of that part of the streets occupied and used by the defendant as its roadbed. The injunction was refused and the plaintiff appealed.

The city has from time to time laid out numerous streets crossing said right of way and has worked and maintained its streets and cross streets for more than 60 years, including all of East and West Center streets outside of the actual space occupied by plaintiff's roadbed.

As a general rule, a court of equity has no jurisdiction to restrain a State from prosecuting for a violation of its statutes and ordinances.

The ordinances in question were made by the city in pursuance (359) of its governmental authority. We need not enter into the learned and elaborate discussion as to what cases, if any, present exceptions to this general rule, for we are of the opinion that the ordinance requiring the plaintiff to lower its track from 6 to 18 inches at the points where the cross streets pass over the railroad track is a legal exercise of the public authority vested in the defendant.

The plaintiff took its charter expecting that towns and cities would grow up along the line of its road, and knowing that with the development of the country new roads and, in the cities and towns, that new streets would be laid out across its right of way. And it took its charter knowing, too, that the State would have the right to lay out such roads

and new streets, and to require the railroad to make such alterations as would prevent the passage over its track by the public being impeded.

In *English v. New Haven,* 32 Conn., 241, it was held that the city had the right to require the railroad company to widen the crossing of a street over its track or to make such other changes as the public convenience and necessity might require in order that there should be no hindrance to the public in crossing the railroad track. In *R. R. v. Bristol,* 151 U. S., 556, it was held that the imposition upon a railroad company of the entire expense of a change of grade at a railroad crossing is not a violation of any constitutional right.

In *Cleveland v. Augusta,* 102 Ga., 233, 43 L. R. A., 638, the subject is fully discussed in a very able opinion which holds that a railroad corporation must make such alterations in the change of its grade as will conform to the new grading of the streets adopted by the city. In *R. R. v. Duluth,* 208 U. S., 583, it was held that "The right to exercise the police power is a continuing one, that can not be limited or contracted away by the State or its municipality, nor can it be destroyed by compromise, as it is immaterial upon what consideration the attempted contract is based. Such power when exercised in the interest of public health and safety is to be maintained unhampered by contracts and private interests; hence, an ordinance by a city compelling a railroad to repair a viaduct constructed after the opening of a road is valid, though the city for a substantial consideration had contracted to relieve the railroad company from making such (360) repairs for a term of years."

In the present case, however, there was no contract exempting the railroad from changing its grade at such crossings when required. Indeed, section 27 of plaintiff's charter, in the Laws of 1833, expressly requires the plaintiff to do what the city now requires. Said section provides: "It shall be lawful for the said railroad company in the construction of its said road to intersect or cross any public or private way established by law; and it shall be lawful for them to run their road along the route of any such road: *Provided,* whenever they intersect and cross such public or private road the president or directors shall cause the railroad to be so constructed as not to impede the passage of travelers on said public road or private way aforesaid." In *Minneapolis v. R. R.,* 98 Minn., 380, 28 L. R. A. (N. S.), 307, the Supreme Court of Minnesota held that an almost identical provision in the charter of a railroad company was as applicable to new public roads laid out across the right of way as it was to old roads over which the right of way ran, and said: "The purpose of incorporating this particular provision in the charter of the railroad company was in the interest of the public and to require the railroad company to keep in good repair

all crossings at the intersection of highways. . . . The evils intended to be guarded against are the same, and apply equally to both new and old streets. There was no reason why the Legislature should deem it prudent to provide for existing highways only, and we do no violence to the rules of statutory construction in holding that the provisions of defendant's charter were intended to include all streets and highways intersected by railroads, whether laid out before or after building of the railroad. The expression of the statute is special, perhaps; but the reason therefor is general. The expression must therefore be deemed general. A railroad company accepts and receives its franchise subject to the implied right of the State to lay out and open new streets and highways over its tracks, and must be deemed, as a matter of law, to have had in contemplation at the time its charter was granted, and is bound to assume, all burdens incident to new as well as existing crossings." The same doctrine has been held in Maine,
(361) Connecticut, Illinois, New York, Tennessee, Indiana, Texas, Mississippi, Ohio, Nebraska, New Jersey, Vermont, Wisconsin, and by the United States Supreme Court. Indeed, the above case from Minnesota was affirmed, 214 U. S., 497.

In the above-cited case of *Cleveland v. Augusta,* 102 Ga., 233, 43 L. R. A., 638, the railroad ran across the public road, which was not then a street. When the territory was taken into the city its authorities changed the road to a street and raised the grade at that point, and required the railroad to raise its grade. This the railroad refused to do unless the city would pay the expense. The Court held that the railroad company was liable for the expense of raising its roadbed to conform to the city grade, and said that it must yield to the reasonable burden imposed by the growth and development of the country or the city, and where the public welfare demands a change of grade of the highway or street, the railroad company must, at its own expense, make such alterations in the grade of its crossings as will conform to the new grade. That case is exactly in point. In the course of its opinion the Court said: "Upon streets or highways crossed by it, or subsequently laid out, the railroad company must construct proper crossings (*Lancaster v R. R.,* 29 Neb., 412; *R. R. v. Smith,* 91 Ind., 119, 13 A. & E. R. R. Cases, 608); and must alter, change, or otherwise reconstruct such crossings whenever the public welfare demands. *Eng. v. New Haven Co.,* 32 Conn., 240." The doctrine is further clearly stated thus by the Court: "When the railroad company laid its track across the highway, it did so subject to the right of the public authorities to make such alterations or changes in the highway, either by lowering or raising the grade, widening or otherwise improving the same, as the public safety and welfare might require. In doing so, the presence

of the railroad necessitates a certain character of crossings and safeguards which otherwise would not exist; and with however much plausibility it might be argued that the public authorities should be required to do just such work as they would have to do did the railroad not exist, it is certain that the railroad company should bear the burden of such work as is made necessary by reason of the peculiar and dangerous character of its operation. The principle of the common (362) law is embodied in this statute. It is the railroad which makes the construction of a railroad crossing necessary, whether the highway be laid out before or after the construction of the railroad."

In *R. R. v. Minn.*, 208 U. S., 583, it is said: "As the Supreme Court of Minnesota points out in its opinion, 98 Minn., 380, the State courts are not altogether agreed as to the right to compel railroads without compensation to construct and maintain suitable crossings at streets extended over its right of way after the construction of the railroad. The great weight of State authority is in favor of such right. See cases cited, 98 Minn., 380. There can be no question as to the attitude of this Court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one, that it can not be contracted away, and that a requirement that a corporation or an individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of obligations of contract." Here, the city in pursuance of its right, has graded the streets of the city and put in a system of drainage, both of which are impeded by the railroad maintaining its roadbed on Center Street from 6 to 18 inches above the level of the streets crossing it, its roadbed extending through the entire length of the city on this main street.

The plaintiff earnestly contends that, inasmuch as Rev., 1097 (10), authorized the Corporation Commission to require the raising or lowering by a railroad of its track or highway at any crossing and to designate who shall pay for the same, this deprives the city of Goldsboro of the right to exercise its police power in that regard. The provision just cited giving the Corporation Commission the power stated is not in derogation of that conferred in the charters of towns and cities, but is supplementary merely.

The plaintiff also contends that Rev., 388, providing that no railroad company, etc., shall be barred by the statute of limitations as to its right of way, etc., by occupation of the same by any person whatever, deprived the city of the right there claimed. This is (363) a misconception. The defendant is not contending for the ownership of the soil of East and West Center streets. It is merely asserting its right to require the railroad company to change the grade

of its roadbed where it is crossed by the other streets so that public travel and the drainage of the city may not be impeded.

A further ordinance of the city prohibits the railroad from doing any "shifting on East and West Center streets between Spruce and Ash at any other time than hours of 6:30 and 8:30 A. M. and from 4:30 to 6:30 P. M., or to allow any car to stand for a longer period than 5 minutes at any point on East and West Center streets between Spruce and Ash, under a penalty of $50 for each offense. East and West Center streets constitute the main street of the town, and that portion of it between Spruce and Ash—four blocks—is the very heart of the city. In a former action in which the plaintiff in this case was a defendant, *Dewey v. R. R.*, 142 N. C., 392, the plaintiff herein, which was the defendant in that action, alleged in its answer as follows: "The operation of the trains along said Center Street increases annually and the danger accordingly; trains are constantly passing and the crossings, notwithstanding the utmost diligence and care on the part of the railroad, are necessarily blocked. Said Center Street is the main business street in the city; it is frequently crowded with pedestrians and vehicles, and the operation of so many trains daily throughout the length of said street is fraught with danger to life and property." This statement, admission, and averment of the plaintiff herein, made under oath, is set up in answer in this case, in which an injunction is sought, and it is admitted in the reply.

We understand the ordinance, in forbidding "shifting" within the limited space of four blocks, on the main street in the center of the town, to refer to what is commonly understood by that expression, to wit, the "cutting out and putting in" cars in the making up of a train before it is dispatched on its journey. Such a regulation certainly can not be held void, and is a reasonable exercise of the police power necessary for the convenience and safety of the public at the four
(364) crossings designated. Whether such ordinance would be reasonable in smaller towns is a question not before us.

We certainly do not understand the term "shifting" to refer to the "transfer" of a train of cars already made up and to be delivered by the plaintiff company to another railroad company to be transported. The ordinance does not apply to the transfer of a car or cars from one railroad to another through the city. Whether an ordinance forbidding the transfer of the cars from one railroad to another through said street except at specified hours would be reasonable, in view of the fact that at Goldsboro such cars can be transferred by way of the physical connection of the tracks of all the railroads on the edge of town at the new union station, might admit of debate. But that question is not before us. The plaintiff railroad company has its shifting yards fur-

ther out, where its trains can be made up and where at least the chief part of the necessary shifting can be done. Certainly it is a reasonable exercise of the police power to forbid such "shifting" except at specified hours, on four blocks of the plaintiff's track, in the heart of the town.

The plaintiff's official returns show $223,000,000 of property owned by it. The defendant's counsel having adverted to the very large proportion of this property held by the plaintiff in this State, the plaintiff's counsel replied that Goldsboro had only 6,107 population, and contended that for "a little town like that to interfere with the operation of so vast an enterprise" was, to use his expression, "like the tail wagging the dog." It is such a mistaken standpoint that doubtless induced the plaintiff on this occasion, and has so often induced such corporations, to assert what they deem their rights in defiance of the evident convenience and desires of the public by means of whose patronage such corporations thrive and make their profits. It is true, the city of Goldsboro is not large. But the powers it has exercised in making these ordinances, it exercises in the name of and by the right of the sovereignty of the people of this State. From that sovereignty the plaintiff derives its rights and its very existence. It was incorporated solely for the public convenience and subject to public regulation. Its stockholders were exempted from personal liability and it was (365) granted the power of the State's right of eminent domain to procure its right of way and to exercise its vocation. The right of the plaintiff to derive a profit from its business is an incident of a private nature and subject to the right of the sovereign to regulate its operations and to "alter or repeal its charter, at will." Cons., Art. VII, sec. 1.

The requirements by the authorities of Goldsboro that the plaintiff railroad shall at its own expense ($3,400) change its grade where its road is crossed by other streets to conform to the grade adopted by the city, and its prohibition of "shifting" to make up trains on the main street of the town, within four blocks in the heart of the city, except in specified hours, are lawful exercise of the police powers conferred upon the city by the sovereign power in the State. *Cooper v. R. R.*, 140 N. C., 229; *Wilson v. R. R.*, 142 N. C., 348; *Gerringer v. R. R.*, 146 N. C., 35. The only unreasonable aspect of the controversy is that the plaintiff should have resisted such requirements instead of yielding immediate assent or indeed preventing the necessity of the passage of such ordinance, by anticipating the wishes of the public in a matter so essential to the safety, comfort, and health of the town.

Affirmed.

BROWN, J., concurring in part: The following ordinances of the city of Goldsboro are attacked by the plaintiff upon the ground that they

are an unlawful interference with the chartered property rights of the plaintiff, as well as an impediment in the discharge of its duty to the public, viz.:

SEC. 2. That the shifting limits on East and West Center streets shall be on the south from Spruce Street to the city limits, and north from Ash Street to city limits.

SEC. 3. That it shall be unlawful for any railroad or railway company to do any shifting on East and West Center streets, between Spruce and Ash streets, at any other time than from the hours of 6:30 to 8:30 A. M., and from 4:30 to 6:30 P. M. Any railroad or railway company violating this ordinance shall be subject to a fine of $50 for each offense.

SEC. 4. That it shall be unlawful for any railroad or railway
(366) company to place any car and allow said car to stand for a longer period of time than five minutes at any point on East and West Center streets, between Spruce and Ash streets. Any railroad or railway company violating this ordinance shall be subject to a fine of $50 for each offense.

SEC. 5. That all railroad and railway companies owning tracks on East and West Center streets between Walnut and Vine streets in said city of Goldsboro are hereby required to lower said tracks so as to make the same conform to the grade line of said streets, and said tracks to be filled in between the rails; the grade line of said street being as follows: Beginning at the present grade line, corner of Walnut and East and West Center streets, to be lowered 6 inches to corner of Mulberry and East and West Center streets, 10 inches to corner of Ash and East and West Center streets, and 18 inches to corner of Vine and East and West Center streets.

I concur fully in the opinion of the *Chief Justice* in so far as it refers to Ordinance No. 5, requiring the railways entering the city to lower their tracks at street crossings so as to conform to grade line of the streets.

This requirement does not interfere with the traffic of the railways or impede them in the performance of their obligations as common carriers, and evidently will add materially to the safe and convenient use of the streets. This ordinance seems to be supported by the weight of authority. But I find no authority to support the ordinance fixing shifting limits and undertaking to prohibit the use of portions of plaintiff's tracks for shifting purposes during the large part of both the day and night; and none has been cited to us.

I take it to be settled now by abundant authority that when it is shown that a municipal ordinance unlawfully interferes with the chartered rights, duties, as well as business, of a common carrier, and will

seriously obstruct the carrier in the discharge of its duties to the public, the enforcement of such ordinance will be enjoined.

In *Dobbins v. Los Angeles,* 195 U. S., 223, the Supreme Court of the United States says: "It is well settled that where property rights would be destroyed, unlawful interference by criminal proceed- (367) ings under a void law or ordinance may be reached and controlled by a decree of a court of equity." *Smith v. Ames,* 169 U. S., 466; *Prentiss v. R. R.,* 124 U. S., 228; *Waterworks v. Vicksburg,* 185 U. S., 82; *R. R. v. Bradley,* 108 Wis., 467.

In *Schlitz Brewing Co. v. Superior,* 117 Wis., 297, the Supreme Court of Wisconsin says: "This Court has recently had the general subject under discussion, and, after full consideration, has laid down the rule that equity may enjoin such prosecutions where they are resorted to or threatened as a means of preventing the enjoyment of property rights and there is not any way to adequately remedy the mischief."

The principle upon which injunctive relief may be given in cases of this character is stated by this Court in *R. R. v. Olive,* 142 N. C., 265: "Injunctive relief against interference with the use of the right of way of a railroad company is not given because of any special consideration for these corporations, but because they are public agencies chartered, organized, and given the right of eminent domain in the contemplation of law to serve the public; they are a part of the system of highways of the State." The Federal courts take the same ground, and for a similar reason. "It is settled," said the Court, in *Southern Exp. Co. v. Ensley,* 116 Fed., 756, "that a court of equity should enjoin the enforcement of a municipal ordinance, though violations of it are punished criminally, when its enforcement will effect the illegal destruction of, or a grave interference with, a corporate franchise, in the operation of which the public have an interest."

If this were not true, any municipal corporation by repeated arrests of the carrier's servants, for violation of some ordinances, might bring its trains to a standstill, paralyze its business, and seriously injure the interests of the public, who are dependent upon the carrier's service.

The defendant's counsel based the right to enact the switching ordinances upon the police power of the city, contending that it is *per se* a nuisance to conduct such operations in a public street, because dangerous to persons crossing the street and disagreeable and (368) annoying to those doing business and residing on both sides of the plaintiff's track.

In the first place, the plaintiff's track is not a public street, although there is a public street partly on the right of way on both sides of the track. The plaintiff was chartered by the General Assembly before

the defendant, and acquired its right of way and built its road some years before the defendant became a municipality.

In the second place, operating a railroad, whether in moving its trains or in switching its cars, is a lawful business; and a business properly conducted under the sanction of law can not be a nuisance *per se,* as is held by the Supreme Court in *Transfer Co. v. Chicago,* 99 U. S., 640. It is said in that case: "A Legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which, without authority, would be nuisances; but in such a case, if the statute be such as the Legislature has power to pass, the acts are lawful, and are not nuisances unless the power has been exceeded."

In *R. R. v. Armstrong,* 71 Kan., 366, the Court says that an authorized business properly conducted at an authorized place is not a nuisance, for whatever is lawful can not be wrongful. To same effect is Cooley on Torts, 67.

It was held in *Drake v. R. R.,* 7 Barb., 508, that a railroad passing through streets in New York City when the cars were drawn by steam power, into a crowded part of the city, was not *per se* a nuisance. Similar decisions are *R. R. v. Applegate,* 8 Dana, 289; *Moses v. R. R.,* 21 Ill., 516; *Murphy v. R. R.,* 21 Ill., 516.

In *Yates v. Milwaukee,* 77 U. S., 498, the Supreme Court of the United States holds that "The question of nuisance or obstruction must be determined by general and fixed laws, and it is not to be tolerated that the local municipal authorities of a city declare any particular business or structure a nuisance, in such a summary mode, and enforce its decision at its own pleasure." In that case, *Mr. Justice Miller* says:

"This would place every house, every business, and all the
(369) property of a city at the uncontrolled will of temporary local authorities."

In commenting on the powers of municipal corporations to declare what is a nuisance, Smith in his Modern Law of Municipal Corporations, vol. 2, sec. 1106, says that "the city council may not, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination."

In a note to the above is the following: "In *R. R. v. Joliet,* 79 Ill., 25, an action by the city to enjoin the railroad company from running its trains through the public streets and over certain public grounds of the city, which the city council by ordinance has declared to be a nuisance, the Supreme Court of Illinois reversed the court below, which had granted the injunction, and remanded the case with directions to dismiss the bill, declaring that they would regard the ordinance as without

effect upon the case, although the charter conferred upon the common council the power to abate and remove nuisances, and to punish the authors thereof, and to define and declare what shall be deemed nuisances, upon the authority of *Yates v. Milwaukee,* 10 Wall., 497, and *S. v. Mayor,* 29 N. J. Law, 170.

This is not only the universal doctrine in this country, but is so held in England: *R. R. v. Brand,* 4 Eng. & Ir. App., 171-196, in which case it is said that "No court can treat that as a wrong which the Legislature has authorized."

In *New Orleans v. Lenfant,* 126 La., 455, it is held that "An ordinance which absolutely prohibits the doing of things, upon property which appears to be the subject of private ownership, which are harmless in themselves, and may or may not become nuisances, according to the manner in which they are done, is unconstitutional, because it seeks unduly to regulate and trammel the use of such property; and where it imposes arbitrary and unreasonable obligations, it is illegal, for that reason." In that case the city of New Orleans by ordinance undertook to prohibit the railway company from parking its cars on its own tracks on Elysian Fields Street, and the ordinance was held (370) to be an infraction of the company's chartered rights.

This principle is clearly recognized and enforced by this Court in *Thomason v. R. R.,* 142 N. C., 318, wherein it is held: "When a railroad company acquires a right of way, in the absence of any restrictions either in the charter or the grant, if one was made, it becomes invested with the power to use it, not only to the extent necessary to meet the present needs, but such further demands as may arise from the increase of its business and the proper discharge of its duty to the public.

A railroad company may, if necessary to meet the demands of its enlarged growth, cover its right of way with tracks and, in the absence of negligence, operate trains upon them without incurring, in that respect, additional liability either to the owner of the land condemned or others.

In *Taylor v. R. R.,* 145 N. C., 400, it is held that the lawful operation of a railway on its own right of way and premises can not be an actionable nuisance, the Court saying that "the several acts charged against the defendant are well within its chartered powers, provided they are performed with reasonable care."

In *Morgan v. R. R.,* 98 N. C., 247, this Court recognized the right of a railroad company to move its engines and cars at will, when necessary, on its tracks along the streets of an incorporated town, *Mr. Justice Merrimon* saying: "The defendant certainly had the right on its roadway to move its locomotive with or without cars attached to it, in the orderly course of such work, to and fro in making up its trains, detach-

ing cars from one already formed and shifting them from one train or place to another."

There is nothing in the *R. R. v. Baptist Church* case, 108 U. S., 317, which contravenes this principle, as is pointed out in *Taylor v. R. R., supra,* and in *R. R. v. Armstrong,* 71 Kan., 366. The railroad company had built a roundhouse and shops for storing, cleaning and repairing its engines, up against a church, and the Supreme Court sustained a recovery upon the ground that the right given by Congress
(371) to enter the city of Washington did not authorize it to purchase a lot and build roundhouses and shops at any place it should select, the Court saying: "As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol."

In commenting upon that case the Supreme Court of Kansas says: "The plaintiff was permitted to recover, but it was because the company had no authority to build its engine-house at the place where it did." *R. R. v. Armstrong, supra.*

In our case the plaintiff has the right to use its tracks, granted by the Legislature in 1845, for all purposes incident to its business as a common carrier. The movement of detached cars and shifting engines is as necessary to enable the plaintiff to discharge its public duties as is the running of its freight and passenger trains.

The plaintiff's freight depot is at the southern end of Goldsboro, and those of two other railroad companies are at the north end, and the tracks over which shifting is prohibited for twenty hours out of twenty-four connects the respective freight stations.

There must be a frequent shifting and transfer of cars from one carrier to the other, absolutely essential in the transportation of freight. To restrict the use of this track to four hours per day and to undertake to fix shifting limits is practical confiscation of plaintiff's chartered rights.

It is suggested that the railways can run their shifting engines and cars around the city of Goldsboro on a track constructed in recent years. This track runs through a passenger station and is used for the passage of the numerous trains of the three railways that enter Goldsboro.

It may be impracticable and dangerous to have such track used hourly by switching engines. That is a matter that must of necessity be left to the officials of the railways when they are acting within the powers conferred by the General Assembly. They are the persons to whom the law must look for the proper conduct of the business of the company and upon whom rests the burden of responsibility.
(372) Whatever power the Legislature may have in the premises, it has not, in my opinion, conferred it upon the defendant; and therefore those ordinances are void.

In this age common carriers are held to the strictest rules and regulations, especially in the movement of freight. Heavy penalties are denounced against them for unreasonable delay. If the railroad companies are to be hampered and restricted in the legitimate exercise of their chartered rights by all sorts of regulations enacted by the municipalities through which their roads are laid, it will be impossible for them to discharge the public functions for the performance of which they were chartered.

MR. JUSTICE WALKER concurs in this opinion. MR. JUSTICE ALLEN did not sit.

Cited: Herndon v. R. R., 161 N. C., 659; *S. v. R. R.,* 164 N. C., 424; *R. R. v. Morehead City,* 167 N. C., 120; *Nelson v. R. R., ibid.,* 190; *Tate v. R. R.,* 168 N. C., 525, 528; *McMillan v. R. R.,* 172 N. C., 858.

Affirmed: On writ of error, *R. R. v. Goldsboro,* 232 U. S., 548.

W. L. HENRY ET AL. v. W. L. HILLIARD ET AL.

(Filed 31 May, 1911.)

1. Deeds and Conveyances—Lands—Parol Contract of Sale—Statute of Frauds—Pleadings.

A vendee, under a parol contract in regard to land, after the payment of the purchase price, can compel the execution of the deed to him, when the statute of frauds is not pleaded, the contract is not denied, and there is no objection to the evidence in his suit for its execution.

2. Same—Consideration—Services of Surveyor.

It appeared upon supporting evidence in the report of a referee appointed by the court, that an executor in the valid exercise of a power contained in the will of deceased respecting his lands, had employed a surveyor for the lands under a parol agreement that he should have certain designated lots thereof for the services thus to be rendered, and that the services so agreed upon were actually rendered by the surveyor. The statute of frauds was neither relied on nor pleaded by any of the parties, nor was any objection taken to the evidence tending to establish the parol sale of the lands: *Held,* the surveyor was entitled to have a deed made to the lands under his parol agreement with the administrator, since deceased, and a decree made appointing a commissioner to execute the deed.

APPEAL from *Cline, J.,* at January Term, 1911, of HAYWOOD. (373) Action instituted a number of years ago by certain of the

heirs of James R. Love, deceased, against W. L. Hilliard, the then sole surviving executor of the last will and testament of said Love, by which will certain lands of the said Love, of which the land in question is a part, were devised to his executors to be sold and the proceeds divided among his heirs at law.

Some time after the institution of the action, Hilliard died, whereupon all the heirs at law of the said Love were made parties, and R. D. Gilmer was appointed by the court trustee, with all the power and authority of an executor under the will.

During his executorship, W. L. Hilliard employed the appellant, W. W. Stringfield, as a surveyor, for the purpose of locating and surveying the lands belonging to the estate, and agreed with the said Stringfield that he, the said Hilliard, would sell and convey to him the two tracts of land, mentioned in the petition of Stringfield, at the price of $11.25 per acre, the purchase price to be paid by Stringfield by services as surveyor.

The land referred to in this agreement was immediately surveyed and Stringfield entered into possession and has been in possession thereof for twenty years.

After the death of Hilliard, Gilmer, trustee, recognized the claim of Stringfield, and continued to employ him as surveyor.

At Fall Term, 1907, of HAYWOOD, Mrs. M. E. Hilliard, one of the heirs at law of James R. Love, deceased, moved in the cause to require R. D. Gilmer, trustee, to account; and at the same time appellant, W. W. Stringfield, filed his petition, set out in the record, alleging his contract with Hilliard for the land in question, and that the purchase money had been paid in full, and praying that the court direct the trustee to execute to him a deed for the land.

To this petition no answer was filed by any of the parties, and the whole matter, including the Stringfield claim, was referred by consent.

It was admitted that the said Hilliard had authority to make said contract with said Stringfield, and that the whole of the purchase
(374) price for the land had been paid. The original and supplemental report of the referee and the exceptions thereto are as follows:

"The report of the undersigned referee would respectfully show that pursuant to the order of reference made at the Fall Term, 1907, of this court, a copy of which is hereto attached, I designated 23 May, 1908, at 1 o'clock P. M., as the time when the hearing the matters referred to me would begin at the courthouse at Waynesville, N. C., and gave notice by mail to the parties as I was advised and as shown by the first page of the evidence.

"The various hearings were had and the adjournments taken as therein noted.

CLAIM OF W. W. STRINGFIELD.

"The referee finds as facts:

"1. That W. W. Stringfield began to act as agent for Dr. Hilliard, former trustee, in 1893 or 1894, and continued after the appointment of R. D. Gilmer as trustee in 1891. That he also acted as surveyor whenever needed and performed various services in and about the Love lands in both of said capacities.

"2. That during the lifetime of W. L. Hilliard, former trustee, the said Stringfield made a verbal contract for the purchase of the two lots of land known as exceptions Nos. 70 and 71, in the deed from R. D. Gilmer, trustee, to S. A. Jones, of the boundaries therein given, and that the contract of purchase was never reduced to writing.

"That the heirs at law and the trustee have recognized the said Stringfield's claim to the said parcels of land, and that he has been in possession of the same for at least twenty years, and that the same were excepted from the deed to S. A. Jones by reason of and because of the said Stringfield's claim thereto.

"That on 26 August, 1908, counsel for Mrs. M. E. Hilliard sent to the referee a paper-writing, which is marked Exhibit No. 203, in which it was stated as follows: 'Mrs. Hilliard will not oppose a report to the effect that Stringfield is the owner of the land excepted in the Jones deed as sold to Stringfield; rather, she will consent to such a decree.' And on the same day, R. G. A. Love and Maggie L. (375) Marshall, by her attorney in fact, handed to the referee a paper-writing in the following words and figures:

"'We hereby give our consent for Maj. W. W. Stringfield to be allowed his amount in full as filed with you, and find as a fact W. W. Stringfield is entitled to the deed for 70 and 71 exceptions in the deed from R. D. Gilmer, trustee, to S. A. Jones for lands in Jackson County.'

"This is also marked Exhibit No. 203.

"And I concluded as a matter of law that W. W. Stringfield is not entitled to a deed for the exceptions 70 and 71 in the Jones deed, the contract of purchase thereof not having been in writing, and the former trustee with whom said contract is claimed to have been made being dead; but in good conscience and equity, the said Stringfield is entitled to a judgment for $1,150.93, to be paid out of the funds now on hand.

"Your referee herewith sends all the evidence taken by and before him and the papers filed with him, and respectfully reports to the court that his actual expenses have been paid, except the sum of $7 for the past two trips he made to Waynesville, and that $100 has been paid to him as a part of his allowance." Signed in triplicate. Filed 4 October, 1910.

SUPPLEMENTAL REPORT.

"The referee desires to submit the following supplemental report, as to the claim of W. W. Stringfield, to that heretofore filed by him in the case, deeming it advisable to do so, because additional facts may be necessary, and that in his conclusions of law that he finds an error has been made, as follows:

"Add to findings of facts No. 2 the words, 'and fully paid for the same at the dates shown in Exhibit No. 2, in the amounts herein given.'

"I desire to strike out the conclusions of law submitted and substitute in lieu thereof the following:

"I conclude as a matter of law that said W. W. Stringfield is not entitled to a deed for the exceptions 70 and 71, the contract of purchase therefor not being in writing, and the former trustee, with whom said contract is alleged to have been made, being dead; but that in
(376) good conscience and equity he must be paid the sums shown to have been paid by him for said exceptions, with interest from the date on which they were paid; unless by agreement the heirs convey said exceptions to him.

"That said W. W. Stringfield is entitled to a judgment for $1,150.93, balance of account.

"This 4 October, 1910."

Filed 4 October, 1910.

EXCEPTIONS OF W. W. STRINGFIELD TO THE REPORT AND THE SUPPLEMENTAL REPORT OF REFEREE.

That whereas the said referee found as a fact that there was a verbal contract made between W. L. Hilliard, one of the executors and trustees of the said Love estate, who had power to make said contract with W. W. Stringfield, whereby W. L. Hilliard, former trustee, sold to said W. W. Stringfield the said lands known as exceptions Nos. 70 and 71 in the deed from R. D. Gilmer, trustee, to S. A. Jones; and whereas the said referee found as a fact that the said land was fully paid for by the said W. W. Stringfield, who has been in possession for more than 20 years; and whereas the said referee in his said reports found as a fact that the heirs at law and those who are interested therein recognize the right and claim of the said Stringfield to have a deed to said land, and filed no plea of objection to his said claim and petition for title deed to said land in the hearing of this cause or at any other time; all which facts the said petitioner, W. W. Stringfield, admits to be true.

That the said referee in his said reports erred in his conclusions of law upon the above found facts whereby he concluded as a matter of law that the said Stringfield was not entitled to a deed for said land

because it was a verbal contract made with W. L. Hilliard, former trustee, who is dead. The said referee should have found as a conclusion of law that the said W. W. Stringfield was entitled to a deed to the said exceptions Nos. 70 and 71 in the deed from R. D. Gilmer, trustee, to said S. A. Jones.

Wherefore, the said W. W. Stringfield prays the court to (377) correct and modify said report and to issue a decree appointing a commissioner to execute a deed to the said Stringfield for the said land.

W. J. HANNAH,
Attorney for said W. W. Stringfield.

A judgment was rendered overruling the exceptions to the report, and holding that the said Stringfield was not entitled to a conveyance of the land, but that he could recover the purchase money paid by him, from which judgment this appeal is taken.

No pleading was filed relying on the statute of frauds, or denying the contract, and no objection to evidence was entered except by Mrs. Hilliard, and this has been withdrawn.

W. T. Crawford for plaintiff.
Adams & Adams for defendant.

ALLEN, J., after stating the case: A single question is presented by this appeal, and that is, Can the vendee, under a parol contract in regard to land, after payment of the purchase price, compel the execution of a deed to him, when the statute of frauds is not pleaded, the contract is not denied, and there is no objection to the evidence? The authorities seem to be uniform that the vendee is entitled to a conveyance under such circumstances.

In 20 Cyc., 312, note 4, the decisions of the highest courts of sixteen States are cited in support of the text, that, "If he (the vendor) admits the making of the contract, and fails to claim the benefit of the statute, or to demur, he will be taken to have waived it."

Browne on Stat. Frauds, sec. 135, says: "As the statute of frauds affects only the remedy upon the contract, giving the party sought to be charged upon it a defense to an action for that purpose, if the requirements of the statute be not fulfilled, it is obvious that he may waive such protection, or rather, that, except as he undertakes to avail himself of such protection, the contract is perfectly good against him."

Also, Story Eq. Pl., sec. 763: "It seems now understood that (378) this plea extends to the discovery of the parol agreement, as well as to the performance of it; although it has been said that the defendant is compellable by answer, or by plea, to admit or to deny the parol agreement, stated in the bill. But this seems utterly nugatory, for it is

now well settled that if the defendant should, by his answer, admit the parol agreement, and should insist upon the benefit of the statute, he will be fully entitled to it, notwithstanding such admission. But if he admits the parol agreement, without insisting on the statute, the court will decree a specific performance, upon the ground that the defendant has thereby renounced the benefit of the statute."

The decisions of this Court announce the same doctrine.

In *Loughran v. Giles,* 110 N. C., 426, the Court says: "The statute of frauds (said *Justice Ruffin* in *McRacken v. McRacken,* 88 N. C., 276) was intended to 'close the door upon temptations to commit perjury and the assertion of feigned titles to property.' The evil intended to be guarded against in the enactment of the statute was the attempt to enforce pretended verbal agreements by resorting to perjury, and though it became necessary in attaining this end to put it in the power of a party to avoid, at his election, his own verbal promise to convey land, the statute was not construed as a declaration that all such contracts not in writing and signed by the party to be charged were to be treated, *ipso facto,* as null and void. *Wilkie v. Womble,* 90 N. C., 254; *Green v. R. R.,* 77 N. C., 95; *Davis v. Inscoe,* 84 N. C., 396.

" 'A verbal contract for the sale of land, tenements, or hereditaments, or any interest in or concerning them (said the Court in *Thigpen v. Staton,* 104 N. C., 40), is good between the parties to it, and will be enforced if they agree upon its terms, and *the party to be charged does not plead the statute.*' "

Syme v. Smith, 92 N. C., 338; *Thigpen v. Staton,* 104 N. C., 40, and *Hall v. Lewis,* 118 N. C., 510, are to the same effect. The rule does not, however, apply except when there is no denial of the contract, and the statute is not pleaded.

(379) The party to be charged may simply deny the contract alleged, or deny it and set up a different contract, and avail himself of the statute, without pleading it, by objecting to the evidence; or he may admit the contract and plead the statute; and in either case the contract can not be enforced. *Browning v. Berry,* 107 N. C., 235; *Jordan v. Furnace Co.,* 126 N. C., 147; *Winders v. Hill,* 144 N. C., 617.

We are of the opinion there was error in the ruling of the court on the record, as it is presented to us, and that the appellant is entitled to a conveyance as prayed.

Reversed.

Cited: Herndon v. R. R., 161 N. C., 654.

BOARD OF TRUSTEES OF YOUNGSVILLE TOWNSHIP v. WEBB.

(Filed 31 May, 1911.)

1. Counties and Towns—Governmental Agencies—Legislative Control—Constitutional Law.

Counties and townships are as a rule simply agencies of the State constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of ordinary governmental functions they are subject to almost unlimited legislative control, except when restricted by constitutional provision.

2. Same—Public Quasi Corporations.

Under our Constitution, the Legislature is given power to create special public *quasi* corporations for governmental purposes in certain designated portions of the State's territory subject to like control, and in the exercise of such power county and township lines may be disregarded.

3. Same—Road Districts.

Under this power the Legislature may create special road districts and confer upon the trustees or authorities thereof the regulation, management and ordinary control of the public roads in such district, and may further create in a given district a special road commission and authorize the commissioners to levy a tax for the purpose of maintaining and extending the roads of the district.

4. Same—Taxation—Vote of the People.

The construction and maintenance of public roads is a governmental purpose, and the cost thereof is a necessary expense which may be paid for by current taxation or issuing bonds, having regard, always, to the requirements, limitations and purpose of the legislation under which these local authorities are acting, and, unless the statute so requires, no election by the people is necessary.

5. Same.

When the Legislature has created a municipal corporation to be known as the board of trustees of a certain township, and has given them as such the entire management and control of the public roads of the township, and has conferred upon them power to issue and sell bonds, without requiring their issuance to be submitted to a vote of the people therein, and apply the proceeds to the purpose designated, such bonds so issued are valid.

APPEAL from *Webb, J.*, at May Term, 1911, of BUNCOMBE. (380)

Controversy, submitted without action, under section 803, Revisal, and heard before *Webb, J.*, in May, 1911, when and where it was properly made to appear that, on the ___ day of March, 1911, the defendants contracted with the plaintiff for the purchase of $10,000 of Youngsville Township road bonds, to be issued under the authority of an act of the General Assembly of 1911, entitled "An act to provide good roads

in Youngsville Township, Franklin County," which said act was read three several times, and the yeas and nays on the second and third readings duly entered on the journals of each House of the General Assembly, and was ratified on 24 January, 1911; said bonds were to be dated 1 April, 1911, to mature 1 April, 1941, and were to bear 6 per cent interest, payable semiannually; and for them the defendant agreed to pay par and accrued interest; but this agreement of purchase was made subject to the legality of the issue. The proceeds from the sale of the bonds were to be used solely for the construction and maintenance of public roads in said Youngsville Township. The plaintiff board of road trustees offered to deliver said bonds issued in accordance with the terms of the contract of sale and of the act authorizing same, (381) and in prospect of such sale have incurred debts and entered into obligations for the working of the roads of said township; but the defendants now decline and refuse to accept said bonds and to pay for same, on the ground that they are invalid and not a legal liability of said Youngsville Township, for that the question of their issue was not submitted to and ratified by a vote of a majority of the qualified voters in the township. Omitting the parts of the said act, "To provide good roads in Youngsville Township," giving the detailed instructions for the working of the roads, the sections of said acts material to this controversy are as follows: "Whereas, under the provisions of chapter 234, Public Laws of 1909, an election was duly held and carried in Youngsville Township, Franklin County, on 11 May, 1910, for building good roads, and the levy of a tax of 30 cents on the $100 worth of property and of 90 cents on the poll in said township; and whereas, at a mass-meeting of the citizens of said township, held prior to said election, the provisions of this bill were discussed and unanimously indorsed:

The General Assembly of North Carolina do enact:

SECTION 1. That R. C. Underwood, C. C. Winston, J. F. Mitchell, L. C. Mitchiner, G. C. Paterson, J. C. Winston, C. W. Roberts, D. W. Spivey, and C. A. Garner are hereby appointed a board of trustees for the public roads of Youngsville Township in Franklin County. The first three shall hold the said position of trustees for six years, the next three for four years, and the last three for two years. At the expiration of the terms of any, their successors shall be elected for six years by the County Board of Commissioners of Franklin County.

SEC. 2. That the said board of trustees and their successors shall be and are hereby constituted a body corporate by the name and style of 'The Board of Road Trustees of Youngsville Township,' and by that name may sue and be sued, make contracts . . . and exercise such

other rights and privileges as are incident to other municipal corporations.

SEC. 3. That it shall be the duty of said board of trustees to take the control and management of the roads of said Youngsville Township, and said trustees are hereby vested with all the rights and powers for such control and management as are now vested in and exercised by the Board of County Commissioners of Franklin County (382) and the Road Supervisors of Youngsville Township.

SEC. 9. That the said board of trustees shall be and are hereby authorized and empowered to issue bonds of said Youngsville Township, to be styled 'Youngsville Township Road Bonds,' to an amount not to exceed $25,000, of such denominations and of such proportions as said board may deem advisable, bearing interest from the date of issue thereof at a rate not exceeding 6 per cent per annum with interest coupons attached, payable annually or semiannually as may be deemed best, . . . and the principal thereof payable or redeemable at such time or times, not exceeding forty years from date thereof; and the said bonds may be issued at such time or times and in such amount or amounts as may be deemed best to meet the expenditures provided for in this act. The liability for the payment of such bonds shall be attached to and imposed upon the political division of Franklin County known as Youngsville Township as constituted at the time of the ratification of this act.

SEC. 10. That for the purpose of providing for the payment of said bonds and the interest thereon and for the construction, improvement, and maintenance of the roads of said township, the Board of County Commissioners shall annually and at the time of levying the county taxes levy and lay a special tax on all persons and property subject to taxation within the limits of said Youngsville Township of not less than 15 cents and not more than 30 cents on the $100 assessed valuation of property and not less than 45 cents and not more than 90 cents on each taxable poll.

SEC. 11. That all funds derived from the sale of any bonds shall be used for the purpose of constructing and improving the public roads in said township, the purchase of such material, machinery, and implements and the employment of such officers and labor as may be found necessary in the carrying out of this work.

SEC. 16. That this act shall be in force from and after its ratification."

The plaintiff contends that, under the act of the Legislature, (383) Youngsville Township is a municipal corporation; that maintaining the public roads is one of the necessary expenses of such corpora-

tion, and that no vote is necessary for the validity of the bonds issued for that purpose, and asks for judgment against the defendants.

The defendants contend that a vote for such an issue by a majority of the qualified voters was necessary, and ask to go without day.

Upon these facts the court entered judgment as follows:

This cause coming on to be heard upon the statement of facts agreed upon, and the court having considered the matter after hearing arguments on both sides, the court is of opinion that the bonds referred to in said statement of facts are invalid, for the reason that said bonds were not authorized by a majority of the qualified voters of said township at an election called and held for the purpose of obtaining their consent thereto. It is therefore considered, ordered, and adjudged that said bonds are invalid and void, and that the plaintiff have and recover nothing of the defendant, and that they pay the costs of this action.

JAS. L. WEBB,
Judge Superior Court.

From said judgment plaintiff excepted and appealed.

Bickett & White for plaintiff.
No counsel contra.

HOKE, J. The provisions of our Constitution applicable to the question presented and authoritative decisions construing statutes of similar import are against the ruling of the lower court by which these bonds were declared invalid. Thus in *Jones v. Commissioners of Madison County,* 137 N. C., 579-596, speaking to the action of counties in matters governmental and the power of the Legislature over them in this respect, the Court said: "In the exercise of ordinary governmental functions they are simply agencies of the State constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of such functions they are subject to
(384) almost unlimited legislative control except when restricted by constitutional provisions."

Citing *Hamilton v. Miguels,* 7 Ohio St., 109; 1 Dillon on Mun. Cor., sec. 23; 1 Smith Municipal Corporations, sec. 10; *People v. Flagg,* 46 N. Y., 401; *Galveston v. Pomanski,* 62 Texas, 118; *Phil. v. Fox,* 64 Pa., 160; *Locomotive Co. v. Emigrant Co.,* 164 U. S., 559-596, and authorities from our own Court: *Tate v. Commissioners,* 122 N. C., 812; *White v. Commissioners,* 90 N. C., 437; *Mills v. Williams,* 33 N. C., 558, and many others could be cited, notably with us *McCormac v. Commissioners,* 90 N. C., 441. On this subject in *Mills v. Williams* it was held: "The Legislature has the constitutional power to repeal an act establishing a county. It has the same power to consolidate, as to

divide, counties, the exercise of the power in both cases being upon considerations of public expediency. The purpose of making all corporations is the public good. The only substantial difference between corporations is that in some cases they are erected by the *mere will* of the Legislature, there being *no other party interested or concerned,* and these are subject at all times to be modified, changed or annulled." And in *Locomotive Works v. Emigrant Co., supra,* the position is referred to in this way: "The county of Calhoun is a mere political subdivision of the State, created for the State's convenience to aid in carrying out within a limited territory the policy of the State. Its local government contains no will contrary to the will of the State, and it is subject to the paramount authority of the State as well in respect to its acts as of its property and revenue held for public purposes. The State made it and could, in its discretion, unmake it and administer such property and revenue through other instrumentalities." In *McCormac's case, supra, Merrimon, J.,* for the Court said: "That it is within the power and is the province of the Legislature to subdivide the territory of the State and invest the inhabitants of such subdivisions with the corporate functions, more or less extensive and varied in their character, for the purpose of government, is too well settled to admit of any serious question. Indeed, it seems to be a fundamental feature of our system of free government that such power is inherent in the legislative branch of the Government, limited and regulated, as it may be, only (385) by the organic law. The Constitution of the State was formed in view of this and like fundamental principles. They permeate its provisions, and all statutory enactments should be interpreted in the light of them, when they apply. It is in the exercise of such power that the Legislature alone can create, directly or indirectly, counties, townships, school districts, road districts and like subdivisions, and invest them, and agencies in them, with powers, corporate or otherwise in their nature, to effectuate the purposes of the Government, whether these be local or general, or both. Such organizations are intended to be instrumentalities and agencies employed to aid in the administration of the Government, and are always under the control of the power that created them, unless the same shall be restricted by some constitutional limitation." The same principle has been applied and upheld with us in reference to townships. *Jones v. Commissioners of Stokes,* 143 N. C., 59; *Jones v. Commissioners of Person,* 107 N. C., 248; *Brown v. Commissioners of Hertford,* 100 N. C., 92. In *Jones v. Commissioners of Stokes, supra,* the present Chief Justice, speaking to the subject, said: "The defendant suggests, however, that it infringes upon the provisions of the Constitution establishing counties and requiring them to be maintained in their integrity. But we do not find any such provisions. The

Constitution recognizes the existence of counties, townships, cities and towns as government agencies (*White v. Commissioners,* 90 N. C., 437), but they are all legislative creations and subject to be changed (*Dare v. Currituck,* 95 N. C., 189; *Harriss v. Wright,* 121 N. C., 178), abolished (*Mills v. Williams,* 33 N. C., 558), or divided (*McCormac v. Commissioners,* 90 N. C., 441) at the will of the General Assembly."

Again, in *Smith v. School Trustees,* 141 N. C., 143, the Legislature incorporated a school district, confined territorially to portions of two existent townships, authorized the trustees of the district to issue bonds, levy and collect taxes, etc., and the Court after full and careful
(386) consideration held that this power of the Legislature over counties, townships, etc., when acting as governmental agencies, was not confined to the ordinary political subdivisions of the State, but that it authorized and extended to creating special public *quasi* corporations for governmental purposes in designated portions of the State's territory, and that in the exercise of such power, county and township lines could both be disregarded if such action was, in the judgment and expressed declaration of the Legislature, best promotive of the public welfare. And within the proper exercise of this power were included levee, school, drainage, road and highway and other special taxing districts. Citing among other authorities, A. & E. Enc., of Law, p. 906, as follows:

"Districts for schools, highways, levee, irrigation, drainage and other similar purposes may be and often are invested by the State with a corporate character and may be endowed with the taxing power. These are *quasi* corporations, mere subdivisions of the State for political purposes." Desty on Taxation, 226, has the following: "As distinct from its power of local assessment, the Legislature may create special taxing districts which may include all or mere subdivisions of the State or parts of subdivisions. It is not essential that such districts shall correspond with the territorial limits of such subdivisions. So it may create levee, school, swamp land, road highway and other taxing districts"—an extension of the principle affirmed and applied to school districts in *McCormac's case, supra;* and to drainage districts, *Sanderlin v. Luken,* 152 N. C., 738; and to highways in townships, *Highway Commissioners v. Webb,* 152 N. C., 710. In *Smith v. School Trustees, supra,* it was held, also, that when these special districts were incorporated for governmental purposes, they came within the limitations and restrictions as to the methods, purposes, and powers of taxation contained in Article VII, secs. 7, 9, 13. Section 7 being the prohibition against "contracting debts, loaning credits, or levying taxes except for necessary expenses, unless by a vote of the majority of the qualified voters therein." Section 9 requiring that all taxation shall be uniform and *ad*
(387) *valorem.* Section 13 prohibiting the payments of debts contracted

in support of the Confederate Government. And with the exception of these sections above noted, there was not only no further restraint on the power of the Legislature contained in the Constitution, but under section 14 of the same article express provision was made for its fullest exercise. And speaking further to the question, the Court said: "The language of section 14 is very broad in its scope and terms, and the Supreme Court in construing the section has decided that it is not necessary to effect changes in municipal government that an act for the purpose should be general in its operation or that it should, in terms, abrogate one article and substitute another in its stead; but that an act of the General Assembly making such change, and local in its operations, must be given effect under this amendment, if otherwise valid. After declaring this as a principle of construction, the Court, in *Harriss v. Wright,* 121 N. C., 179, further holds as follows: "In 1875 a constitutional convention amended Article VII in these words: 'The General Assembly shall have the full power by statute to modify, change, or abrogate any and all the provisions of this article and substitute others in their place, except sections 7, 9, 13.' Thus was placed at the will and discretion of the Assembly the political branch of the State Government, the election of court officers, the duty of county commissioners, the division of counties into districts, the corporate power of districts and townships, the election of township officers, the assessment of taxable property, the drawing of money from the county or township treasury, the entry of officers on duty, the appointment of justices of the peace, and all charters, ordinances and provisions relating to municipal corporations. Our Constitution, therefore, so far from restricting the power of the General Assembly on the matter now before us, has conferred upon that body full and ample power to establish any form of municipal government which the public interests and special needs of a given community may require." And it is no objection to this legislation that the issuing of the bonds, and the control and ordering of the road work are given to the local authorities, while the county commissioners are directed to levy and collect the taxes. This is the plan contained in our general statute in reference to school districts—adopted, (388) no doubt, for convenience and to avoid possible friction between different sets of officers and unnecessary harassment of the citizens in the collection of taxes. As declared, however, in *Perry v. School Commissioners,* 148 N. C., 526: "Whether the collection of this tax was done by specified local agencies or by the general authorities of the county, this was only an immaterial matter, a question of method simply, which was not of the substance and should in no way affect the result."

The power of the Legislature, then, over these local agencies, when acting in matters governmental, being ample, certainly when given

territorial placing and whether designated as counties, townships, or as special districts, it is well established with us that the construction and maintenance of public roads is a governmental purpose, and the cost thereof is a necessary expense to be paid for by current taxation or by issuing bonds, having regard always to the requirements and limitations of the legislation under which these local authorities are acting, and for such purpose, and unless the statute so requires, no election by the people is necessary. Within the range of governmental action there could not be a more beneficent purpose or a more compelling need, and numerous and repeated decisions of our Court are in furtherance of the enlightened policy of which this statute is an expression. *Highway Commissioners v. Webb,* 152 N. C., 710; *Ellison v. Williamston,* 152 N. C., 147; *Jones v. New Bern,* 152 N. C., 64; *Hendersonville v. Jordan,* 150 N. C., 35; *Commissioners v. McDonald,* 148 N. C., 129; *Crocker v. Moore,* 140 N. C., 429; *Herring v. Dixon,* 122 N. C., 420; *Tate v. Commissioners,* 122 N. C., 812.

Speaking to this subject in his learned and able argument counsel for the plaintiff well said: "Today, when the industrial activities of men have multiplied, when specialization is the order of the hour, and every man is to some extent dependent upon the products and the purse of his fellowman, when the social instinct has become a habit and demands a larger field than the neighborhood, the need for roads has become a necessity both to the commercial and social life of our people. (389) Without them the State can not maintain effective order nor administer adequate justice. In equal measure, they are dependent upon the power of the State. They can not be constructed without the right of eminent domain, nor maintained save by a community of interests made stable by legislative enactment."

The statute in question expressly creates the municipal corporation to be known as the Board of Trustees of Youngsville Township; gives them as such the entire management and control of the *public* roads of the township; confers upon them the power to issue and sell the bonds and apply the proceeds to the purpose designated. On authority, therefore, we are of opinion that the bonds are valid and that no good reason is shown why performance of the contract of sale should not be enforced.

For the reasons stated, the judgment of the lower court must be Reversed.

Cited: Ellis v. Trustees, 156 N. C., 12; *Comrs. v. Bank,* 157 N. C., 193; *Comrs. v. Comrs., ibid.,* 517; *Bunch v. Comrs.,* 159 N. C., 336; *Pritchard v. Comrs., ibid.,* 637; *S. c.,* 160 N. C., 478; *In re Drainage District,* 162 N. C., 128; *Comrs. v. Comrs.,* 165 N. C., 635; *Drainage Comrs. v. Farm Asso., ibid.,* 700; *Hargrave v. Comrs.,* 168 N. C., 627.

LONNIE SMITH AND WIFE, NANCY J. SMITH, v. ELLINGTON-GUY LUMBER COMPANY.

(Filed 31 May, 1911.)

1. **Wills—Construction—Intent—Repugnancy.**

In construing a will, the intent of the testator must govern as ascertained from the consideration of the whole instrument in the light of surrounding circumstances, and each and every part should be given effect if it can be done by fair and reasonable intendment before one clause may be construed as repugnant to or irreconcilable with another.

2. **Wills—Estates—Uncertain Event—Fee Simple—Defeasance—"Heirs"—Purchasers.**

An estate devised to certain named children of the testator, with a provision that "if any of my children" mentioned "should die without leaving lawful issue of his or her body surviving, or to be born within the period of gestation," then his or her part "shall descend to and upon the survivors . . . or upon the lawful heirs who may be surviving any of my said children": *Held,* (1) the vesting of the interests under the terms of the will is determined by the death of the children named, and not by that of the devisor, each of these children taking an estate in fee simple, defeasible as to each on their "dying without leaving lawful issue of his or her body surviving," in the sense of children, grandchildren, etc.; (2) the "lawful heirs" of the children named take as purchasers, the word "heirs" as thus used not meaning general heirs.

3. **Same—Partition—Judgment.**

Devisees of lands under a will by which they take a fee simple estate defeasible upon the happening of an uncertain event can not by a judgment in partition proceedings obtain a fee simple title, or pass a greater or different interest than they acquired by the devise. *Gillam v. Edmonson,* 154 N. C., 127, cited and distinguished.

APPEAL from *Peebles, J.,* at May Term, 1911, of DUPLIN. (390)

Case agreed. On the hearing it was properly made to appear that plaintiffs had contracted in writing to sell defendant an interest in a certain tract of land in said county, stipulating that a good title should be made and having tendered a deed for the property, in correct form. Defendant resisted payment, claiming that the title offered was defective.

On the question of title it appeared that Bryant Smith, now deceased, was the owner of this land and other lands and had in the third item of his will devised his real estate, including this tract, to six of his children, to wit, Penelope, Lemuel, Hepsey, Nancy (the plaintiff), Celia, and Bryant, the devise containing and affected by a limitation expressed as follows: "And it is further my will and desire that if any of my said children mentioned in this item of my said will should die

without leaving lawful issue of his or her body surviving, or to be born within the period of gestation after his death, then it is my will and desire that the part therein given and devised to said child shall descend to and upon the survivors of my said children mentioned in this item of this my will, or upon the lawful heirs who may be surviving any of my said children mentioned in this item." By a subsequent clause of this will, another child, Sapronia, having married contrary to her
(391) father's wishes, was given $1 as her full share of the estate.

After the death of Bryant Smith, the six children mentioned in item three of the will instituted proceedings and partition of the land was duly made between these devisees, that portion of the land the subject of this contract being duly assigned to *feme* plaintiff. The case further states that one child had been born to plaintiff which lived a short time and is now dead. Upon these facts, the court, being of the opinion that plaintiffs could convey a good title, entered judgment enforcing the contract, and defendant excepted and appealed.

H. D. Williams for plaintiff.
G. V. Cowper for defendant.

HOKE, J. Under several recent decisions of the Court, the children, under the third item of this will, took an estate in fee simple, defeasible as to each on an uncertain event—in this case, "a dying without leaving lawful issue of his or her body surviving or to be born within the period of gestation after death." *Perret v. Byrd,* 152 N. C., 220; *Dawson v. Ennett,* 151 N. C., 543; *Harrell v. Hagan,* 147 N. C., 111; *Sessoms v. Sessoms,* 144 N. C., 121; *Whitfield v. Garris,* 134 N. C., 24; *Smith v. Brisson,* 90 N. C., 284. And we have held, also, in these and other cases, that when a devise is limited over on a contingency of this kind, unless a contrary intent clearly appears in the will, the event by which each interest is to be determined must be referred, not to the death of the devisor, but to that of the several holders respectively. Speaking to this question in *Harrell v. Hagan, supra,* the Court said: "Under several of the more recent decisions of the Court, the event by which the interest of each is to be determined must be referred, not to the death of the devisor, but to that of the several takers of the estate in remainder, respectively, without leaving a lawful heir. *Kornegay v. Morris,* 122 N. C., 199; *Williams v. Lewis,* 100 N. C., 142; *Buchanan v. Buchanan,* 99 N. C., 308. And by reason of the terms in which the contingency is expressed, 'That if each or all of the girls die without leaving a lawful heir, then the land,' etc., and other indications which could be referred to,
(392) the estate does not become absolute in the other daughters on the death of one of them without leaving such heir, but the determinable quality of each interest continues to affect such interest until the

event occurs by which it is to be determined or the estate becomes absolute. *Galloway v. Carter,* 100 N. C., 112; *Hilliard v. Kearney,* 45 N. C., 221."

Construing this will in reference to these authorities and bearing in mind the well-recognized positions that as to wills the intent of the testator as ascertained from the consideration of the whole will in the light of the surrounding circumstances must govern (*Holt v. Holt,* 114 N. C., 241); and that as to both wills and deeds the intent as embodied in the entire instrument must prevail, and each and every part must be given effect if it can be done by fair and reasonable intendment before one clause may be construed as repugnant to or irreconcilable with another (*Davis v. Frazier,* 150 N. C., 447), we are of opinion that the will conveys to the children mentioned in the third item an estate in fee, defeasible on dying without leaving lawful issue of his or her body surviving, and in that event as to either, and when it occurs, the interest passes to the surviving children or to the "lawful heirs who may be surviving any of my children"; and that by these words the testator did not intend heirs in the ordinary or general meaning of the term, but surviving issue and in the sense of children and grandchildren, etc., of the devisees named, and that in case this interest should arise to them, they would take and hold as purchasers directly from the devisor.

To hold as plaintiffs contend, that the words "lawful heirs who may be surviving any of my children" were intended to and did include the heirs general of the devisees named or issue in the sense of "heirs of the body," which last under our statute are established as equivalent to heirs general, would be to declare such devisees the absolute owners, and in direct contravention of the words just used by the testator and by which their interest and ownership was made contingent on either dying "without issue of the body living at the time of his or her death," and would also frustrate the purpose expressed in the item just succeeding, by which the daughter Sapronia was disinherited, for she would come within the description and definition of "lawful heirs who (393) may be surviving any of my children," as contended for by plaintiff. There are numerous decisions, here and elsewhere, by which the words "heir or heirs or issue" in wills are construed to mean children and grandchildren when such construction would effectuate the manifest purpose of the testator. *Smith v. Proctor,* 139 N. C., 314; *Sain v. Baker,* 128 N. C., 256; *Patrick v. Morehead,* 85 N. C., 62; *Campbell v. Cronly,* 150 N. C., 458. In his last case on matter relevant to the present inquiry, it was held: "An estate to one, with a declaration of the use to grantor's wife and two named children, in fee, and to the survivors of them, the conveyance further providing that if the said daughters 'shall die leaving issue, then to the use of such surviving issue, who shall

take the same *per stirpes,* and not *per capita,'* does not vest the fee in the daughters upon the death of the wife; the grantor's intent appearing, both from the usual and legal significance of the language employed, to create in the daughters a determinable fee, and, upon the death of either, the use would shift and vest in the 'surviving issue.' An estate in trust to the use of grantor's two daughters, providing in the deed that if said daughters 'shall die leaving living issue, then to the use of such surviving issue, who shall take the same *per stirpes,* and not *per capita,'* creates a succession of survivorships in the living children and grandchildren of the daughter, who may take as purchasers upon the happening of the event, and the daughters named can not convey to a purchaser a good and indefeasible title." And the decision is an apt authority on the interpretation placed on the present devise.

Having held the estate in the devises to be a fee simple, defeasible on certain contingencies, by which the interest of one or more of them might pass to the children or grandchildren of the others as purchasers, it follows that the judgment in the partition proceedings, to which the original devisees were all parties, does not operate to perfect this title. True, we have held in *Carter v. White,* 134 N. C., 466, that "a judgment in a partition proceeding determining the respective interests of the parties thereto is binding on said parties as against an after-
(394) acquired title." But this position obtains only as between the parties and their privies in estate, and does not prevail as against third persons. *Gillam v. Edmonson,* 154 N. C., 127. Suppose this present *feme* plaintiff should die without issue living at her death, under the terms of the will her estate would pass to her surviving sisters and her brothers mentioned in the third item of the will. Suppose, further, that one of her surviving sisters should then die, leaving sons and daughters, these last would take and hold, not under their mother, who was a party to the proceedings, but as purchasers under the will of their grandfather. They would claim not under the partition proceedings, but above it, and so would not be bound by it.

For the reason stated, we are of opinion that the plaintiffs are not now in a position to offer the defendant company a good title to the property, and that the decree enforcing performance of the contract must be

Reversed.

Cited: Vinson v. Wise, 159 N. C., 655; *Faison v. Moore,* 160 N. C., 149; *Jones v. Whichard,* 163 N. C., 245; *Rees v. Williams,* 164 N. C., 132; *S. c.,* 165 N. C., 208; *Burden v. Lipsitz,* 166 N. C., 525; *Hobgood v. Hobgood,* 169 N. C., 489; *O'Neal v. Borders,* 170 N. C., 484; *Springs v. Hopkins,* 171 N. C., 491; *Bizzell v. Bldg. Asso.,* 172 N. C., 160; *Albright v. Albright, ibid.,* 353; *Bowden v. Lynch,* 173 N. C., 206.

STACEY CHEESE COMPANY v. R. E. PIPKIN

(Filed 31 May, 1911.)

1. Justice's Court—Appeal—Superior Court—Derivative Jurisdiction.

The Superior Court has no jurisdiction on appeal from a justice's court of an action erroneously brought in the latter court, and of which the justice's court had no jurisdiction, the jurisdiction of the Superior Court in such case being derivative only.

2. Contract—Counterclaim—Scope.

The statutory counterclaim allowed to a defendant is very broad in its scope and not confined to that of a technical "set-off" or recoupment; and a party being sued for the purchase price of goods may set up a counterclaim for damages from a breach of warranty of the same creditor of other goods he had sold him.

3. Justice's Court—Contract—Jurisdiction—Counterclaim—Pleadings—Satisfaction.

When an action, brought upon contract, before a justice of the peace is to recover an amount within the jurisdiction of that court, the defendant may plead in bar a counterclaim exceeding two hundred dollars, and upon judgment being rendered against him for the amount claimed and establishing his counterclaim for the greater sum, he is entitled to go without day, and to recover costs.

4. Same—Counterclaim—Recovery for Excess.

A defendant pleading and establishing his counterclaim, exceeding the sum of two hundred dollars, in an action for damages upon contract properly brought in the court of a justice of the peace, is not entitled to a judgment for the excess of his counterclaim over the demand upon him, also established by the action.

APPEAL from *O. H. Allen, J.*, at January Term, 1910, of (395) WAYNE. Heard on appeal from a justice's court. The action was instituted by plaintiff to recover $199 due by contract. Defendant denied the indebtedness and set up a counterclaim for breach of contract of warranty on other sales of cheese. On the hearing before the justice there was judgment in defendant's favor for an excess of $38.36. Plaintiff having appealed, on trial in Superior Court four issues were submitted, as follows:

First. In what amount, if any, is the defendant indebted to the plaintiff?

Second. In what amount, if any, is the plaintiff Stacey Cheese Company indebted to the defendant?

Third. What amount, if any, is the plaintiff entitled to recover?

Fourth. What amount, if any, is the defendant entitled to recover?

And it was agreed by parties that the court should answer the third and fourth issues according to the findings of the jury in the first and second. The jury rendered verdict as to defendant's indebtedness to plaintiff. Answer first issue, $199, and the second issue as to plaintiff's indebtedness to defendant, $210.

On the verdict defendant moved for judgment that plaintiff take nothing by his suit and defendant recover his costs. The court being of the opinion that as the counterclaim of defendant was in excess of the justice's jurisdiction, and that defendant had at no time (396) remitted the excess or offered to do so until after verdict, the court in accordance with the agreement answered the third issue $199 and the fourth issue nothing, and entered judgment in favor of plaintiff for said amount of $199 and costs, and dismissed defendant's counterclaim for lack of jurisdiction, etc.

Defendant excepted and appealed, assigning for error that the court refused to sign the judgment as tendered by him; second, to the judgment as entered.

W. T. Dickinson for plaintiff.
Aycock & Winston and W. T. Dortch for defendant.

HOKE, J., after stating the case: There is apparent conflict of authority with us on the question presented, and at least two or more decisions of this Court would seem to be in direct support of his Honor's ruling. *Raisin v. Thomas,* 88 N. C., 148; *Meneeley v. Craven,* 86 N. C., 364. The cause having originated in the court of a justice of the peace, questions of jurisdiction must be considered and determined in reference to that fact, and numerous and repeated cases with us are to the effect "That the jurisdiction of the Superior Court on appeals from a justice of the peace is entirely derivative, and if the justice had no jurisdiction, in an action as it was before him, the Superior Court can derive none by amendment." *Ijames v. McClamrock,* 92 N. C., 362. A principle fully approved by the present *Chief Justice,* delivering the opinion of the Court in *Robeson v. Hodges,* 105 N. C., 49, and reaffirmed and applied in *Wilson v. Insurance Co., ante,* 173. Considering the present case in that aspect, however, we are of opinion that it is a fair and correct deduction from the better considered decisions of our Court, is in accord with reason and the enlightened policy and expressed purpose of our present Code that, whenever one is sued in a court of justice of the peace and has a valid counterclaim against plaintiff's demand, though the same may be in excess of the justice's jurisdiction, it may be pleaded, and, if established to an amount equal to or greater

than plaintiff's claim, it may avail to defeat the action. On a counterclaim resting in contract no recovery for an excess can be had in favor of the defendant except on demands for $200 or less, or (397) unless the excess over $200 has been remitted in the justice's court and in apt time (*Ijames v. McClamrock, supra*); but whether set up strictly as a counterclaim or not, where it exists and has been pleaded and established, it should avail as a defense and defeat recovery by plaintiff, where the amount is sufficient for the purpose. This position is not in violation of our Constitution, limiting the jurisdiction of justices of the peace in actions *ex contractu* to cases involving $200 or less. Though a larger counterclaim may be presented, the question determined is limited to $200 or less, to wit, the amount required to defeat the plaintiff's claim, and is no more forbidden by the Constitution than in cases where the excess of a larger counterclaim is remitted to $200, or an equitable defense has been entertained in bar of plaintiff's demand. Under our former system and in actions at law this principle of balancing one claim against another was much more restricted than at present, and was included in the general term, set-off, confined usually to actions of debts or *indebitatus assumpsit* for a moneyed demand and of a liquidated nature. It was so held with us in *Lindsey v. King,* 23 N. C., 401; but under the present system, by which actions at law and suits in equity are instituted and determined in one and the same court and, as far as permissible, in one and the same action, the doctrine has been included and very much extended under the general term, counterclaim. In *Smith v. French,* 141 N. C., 6, the Court said: "Our statute on counterclaim is very broad in its scope and terms, is designed to enable parties litigant to settle well-nigh any and every phase of a given controversy in one and the same action, and should be liberally construed by the court in furtherance of this most desirable and beneficial purpose"; and after quoting our statutory provisions on the subject, said further: "Subject to the limitations expressed in this statute, a counterclaim includes well-nigh every kind of cross-demand existing in favor of defendant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief (398) which a separate action at law, or a bill in chancery, or a cross-bill would have secured to him on the same state of facts." Several of the earlier New York decisions showed a disposition to establish some of the common-law retrictions on the relief available under their statutory counterclaim and confine this user of one claim against another to the old technical doctrine of set-off; and Green, on Code Pleading, comments on the doctrine of these cases as follows: "Now, if the term

'counterclaim' includes set-off and recoupment—and, in fact, nearly all counterclaims are either set-offs or recoupments—how is it, and why is it, that a set-off may be interposed as a defense, and that a counterclaim can not? Or why should the same state of facts be a good defense when called a set-off, and liable to demurrer when called a counterclaim? There seems to be literally no sense at all in the distinction here made between a counterclaim and a set-off; and such hair-splitting is even worse than that under the old system in regard to the distinctions between the actions of trespass and case." And further the author says: "Indeed, it makes no difference what name a party may give to his pleading under the Code system, if the facts constitute a good cause of action or ground of defense."

In the line of these comments and in direct support of the disposition we make of the present appeal are the well-considered decisions in our own Court of *Hurst v. Everett,* 91 N. C., 399, and *McClenahan v. Cotton,* 83 N. C., 333. In *Hurst v. Everett* plaintiff sued before a justice of the peace in five separate actions on five separate promissory notes, aggregating $800. These actions were consolidated in the Superior Court; but this in no way affects the bearing of the decision on the point presented. Defendant claimed damages for breach of warranty in failing to supply goods of the quality contracted for, to the amount of $400. The sale and warranty attached to one entire transaction, to wit, a single sale. It was objected that as this was for breach of warranty in an indivisible transaction, the claim was not available as a set-off to plaintiff's actions in the court of a justice of the (399) peace. The lower court sustained plaintiff's objection, and on appeal this Court, in reversing the judgment, after referring to the effect of our statute extending the doctrine of set-off to all matters embraced within our statutory counterclaim, said further on the question chiefly involved: "This view of the case, founded upon the statutes, the authorities, and the 'reason of the thing,' leads us to the conclusion that when the defendants were sued, no matter whether for goods sold and delivered or upon one of the notes given in payment therefor, they had the right to recoup the damages they had sustained to the amount of the sum claimed in the plaintiff's complaint, and so on in each action, *'toties quoties,'* until the amount of their damages should be exhausted. And this defense, having attached to the action while in the justice's court, followed the case on appeal; and when the several actions were consolidated in the Superior Court the defendants had the right to recoup the whole amount of such damages as they might be able to prove they had sustained from the plaintiff's recovery. In *McClenahan v. Cotton,* the court spoke of the rights available to a defendant under a counterclaim as follows: "The question now arises,

How may a party use and rely on his cross-demand? The answer is, He may plead it or not, at his will; but if he elect to plead it, he may do so, and then, if it be equal to or greater than the opposing demand, he may plead it in bar, as formerly, or plead it as a defense, so called, under The Code, the plea of defense having the operation merely to defeat the action, and not to admit of any judgment for an excess; or he may, if he will, instead of pleading it as a bar merely, set up his demand under the name and with the proper prayer of a counterclaim as introduced by The Code, and then the defendant will have judgment for the excess." This construction is within the words of the Code and is just in itself, for no reason can be given why A, having a debt of $200 against B, who has a debt of $1,000 against him, should have judgment for his debt without the right in B to defeat the action by a plea of his larger debt as a set-off in bar. Such a distinction between set-off set up as a bar and as a technical counterclaim is laid down as proper to be taken, by an intelligent writer (Bliss on Code Pleading, sec. 368), and is recognized and admitted under the Code in (400) New York. Tillinghast & Sherman Prac., 158; *Burnall v. DeGroot,* 5 Duer, 379; *Prentiss v. Graves,* 33 Barb., 621. "In our opinion, therefore, the judgment, if not otherwise liable to objection, was properly pleadable as a defense, formerly a plea in bar, without any *remittitur* whatever, and there was no error in the ruling on this point except in requiring the excess above plaintiff's demand to be remitted, which was an error against the defendant, of which the plaintiff can not complain." And in that case the decision of the Court expressly holds: "A defendant, sued on contract in a justice's court, may plead as *a defense* an independent cross-demand arising *ex contractu,* the principle of which is beyond the jurisdiction of a justice of the peace." The same principle is applied in many well-considered decisions of this Court, holding that an equitable defense may be interposed to defeat a recovery in a justice's court though affirmative equitable relief in such court is not allowed, as in *Garrett v. Love,* 89 N. C., 205; *Lutz v. Thompson,* 87 N. C., 334.

In all the cases examined, except the two heretofore mentioned which seem to uphold a contrary view, as in *Electric Co. v. Williams,* 123 N. C., 51; *Derr v. Stubbs,* 83 N. C., 539, etc., the claimant continued to insist on his right to recover on his counterclaim an amount in excess of the justice's jurisdiction, and such claim was very properly denied. Even the two cases referred to, that is, *Raisin v. Thomas, supra,* and *Meneeley v. Craven, supra,* perhaps permit of that interpretation; but to the extent that these cases hold that a valid demand by way of counterclaim can not be had as a *defense* to an action in justice's court because the entire amount of same is in excess of such jurisdiction, we are of

opinion that these cases are not well decided. In the cases themselves and in others which refer to them, with apparent approval, the decisions seem to lay much stress upon the form of the statement, that it was set forth as a counterclaim; but substantial rights should not to that extent be made a matter of form. In numerous and repeated decisions of this Court we have held that neither a particular form of statement
(401) nor a special prayer for relief should be allowed as determinative or controlling, but that rights are declared and justice administered on the facts which are alleged and properly established. *Peanut Co. v. R. R., ante,* 148; *Williams v. R. R.,* 144 N. C., 498-505; *Vorhees v. Porter,* 134 N. C., 591; *Bowers v. R. R.,* 107 N. C., 721.

Defendant having pleaded and the verdict having established a counterclaim in his favor of $210, and plaintiff's claim being for a lesser sum, said defendant is entitled to have judgment entered that he go without day and recover costs. *Unitype Co. v. Ashcraft, ante,* 63. He is not entitled to a judgment for the excess, for that would be to uphold the justice's jurisdiction in excess of the constitutional provision, but, to the amount required to defeat plaintiff's demand, to wit, $199, such court has jurisdiction and may award relief by rendering judgment that defendant go without day. For the reasons stated, we are of opinion that the judgment of the Superior Court must be

Reversed.

CLARK, C. J., concurs that *Raisin v. Thomas,* 88 N. C., and *Meneeley v. Craven,* 86 N. C., should be overruled, but finds no authority in the Constitution for the doctrine of "derivative jurisdiction." It has been created solely by judicial construction. The jurisdiction of the Superior Court is fixed by the Constitution and contains no limitation because the case may have been previously tried in another court. When the case gets into the Superior Court, its jurisdiction is general and unlimited, and it can make no difference whether the case was brought into the Superior Court by summons or by appeal. In either event, the case is in that court, which has full jurisdiction to give an adequate remedy. I am, therefore, of an opinion that judgment should be rendered against the plaintiff and in favor of the defendant for the excess of the counterclaim pleaded and proven over and above the amount of the claim proven to be due the plaintiff by the defendant.

If on appeal from the justice of the peace to the Superior Court the inquiry were confined to the question whether error had been
(402) committed in the court below, there would be a logical basis for the doctrine of "derivative jurisdiction." But on such appeal the trial is *de novo* and it is proceeded with precisely as if it had been begun in the Superior Court, without any consideration as to whether the action of the justice was erroneous or not. There is therefore no

reason to restrict the remedy to the limits of the jurisdiction of the justice of the peace. The case is tried exactly like any other in the Superior Court, and the remedy should not be restricted to that which might have been granted by a justice of the peace.

Cited: Reid v. King, 158 N. C., 89; *Ludwick v. Penny, ibid.,* 112; *Mfg. Co. v. Mfg. Co.,* 161 N. C., 435; *McIver v. R. R.,* 163 N. C., 547; *Yellowday v. Perkinson,* 167 N. C., 147; *McLaurin v. McIntyre, ibid.,* 353, 356; *R. R. v. Dill,* 171 N. C., 177.

S. L. CABE, ADMINISTRATOR OF W. H. SIGMON, v. SOUTHERN RAILWAY COMPANY AND LON ROBERTS.

(Filed 31 May, 1911.)

1. Railroads—Negligence—Injury to Fallen Brakeman—Imputed Knowledge to Engineer—Evidence—Nonsuit.

Plaintiff's intestate, a brakeman on defendant's freight train, while going across the top of three coal cars loaded with wood, a part of the train, for the purpose of putting on the brakes, as the train was being pushed backward onto a siding, fell between the two cars nearest the engine, one of his feet catching in the rubber hose of the air brake: *Held,* a motion to nonsuit was properly allowed upon evidence tending solely to show that the train was slowly moving about at the rate of three or four miles an hour—as a man would walk; that the train stopped, as designed, in the space of a thought, or a moment or so after the brakeman fell, or after he hallooed, which was immediately thereafter; that the engineer could not have seen the intestate's peril from the engine cab; that the train could not have been stopped sooner; that neither the engineer nor a lookout at the further end of the train could have rendered timely assistance, and that the engineer did not hear him cry out.

2. Power of Court—Nonsuit.

When there is not more than a scintilla of evidence in support of plaintiff's contention, it is proper for the trial court to nonsuit him thereon.

3. Railroads—Negligence—Injury to Fallen Brakeman—Imputed Knowledge to Engineer—"Lookout"—Evidence—Nonsuit.

To recover damages for the alleged wrongful killing of plaintiff's intestate, a brakeman on defendant's freight train, occasioned by his falling between two cars from the top, where he was engaged in putting on brakes, as three coal cars loaded with wood were being backed upon a siding, and nearly stopped at the intended place, it was necessary in this case for plaintiff to establish actionable negligence by showing: (1) the engineer either saw or had actual knowledge of intestate's peril, (2) or that he should have discovered it in the performance of his legal duty,

and that he could have stopped the train in time to have avoided the injury: *Held*, there was no evidence upon these points sufficient to go to the jury, and that a motion to nonsuit was properly allowed.

4. Same.

While backing cars from a freight train onto a siding the engineer is required to look ahead in the direction in which he is moving, and though fixed with knowledge of what thus he should have discovered, he is not required, as a matter of law, to see one who has fallen between two cars onto the track and is endeavoring to work his way out along the sills from danger threatened by the slowly revolving wheels near their stopping place, about a car length from him; and no actionable negligence can be imputed to the engineer, or to his company, if, under such circumstances, an injury is inflicted, unless he has seen the danger and could have averted it by the exercise of reasonable care.

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

(403) APPEAL from *Councill, J.*, at October Term, 1910, of BUNCOMBE.

Action for the alleged negligent killing of one W. H. Sigmon. At the conclusion of the evidence a motion to nonsuit was allowed, and plaintiff appealed.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Brown.*

Craig, Martin & Thomason for plaintiff.
Moore & Rollins and W. B. Rodman for defendants.

(404) BROWN, J. The plaintiff brings this action against the defendant Lon Roberts to recover damages for the death of his intestate, W. H. Sigmon, attributing his death to the negligent conduct of Roberts, an engineer of defendant railway company's freight train.

Sigmon was a brakeman on the train, and on 6 May, 1908, was killed by falling between two cars. The facts are that the engineer was backing his train of three cars from the main track onto a siding at Balsam, the engine and tender pushing the cars. The three cars were coal cars loaded with wood. As the train was partly on main track and turning onto the siding, Sigmon undertook to step from the second car to the one next to the tender, and fell between them. As he fell one foot was caught in the air-hose coupler between the two cars and Sigmon was thrown on his stomach across the rail. He grasped the ends of the cross-ties with his hands and endeavored to move his body along so as to keep out of the way of the wheel, but one wheel caught his leg and severed it, from which he died.

It is admitted that if Roberts was guilty of such negligence as caused Sigmon's death the railway company is liable along with Roberts for the resultant damage.

The learned judge of the court below ruled that there was not sufficient evidence that Sigmon's death was occasioned by Robert's negligence to require the matter to be submitted to the jury, and in that we agree with him.

We infer from the eloquent remarks of the learned counsel for plaintiff in defense of the right of trial by jury, that he feels that his client was deprived of a fundamental right by the action of the judge.

The record shows that the jury were duly impaneled and heard the case. At its conclusion his Honor ruled that the plaintiff had failed to make out a case by proof, as he was required to do. If his Honor was correct, then there was nothing for the jury to try.

Speaking for the Court, in *S. v. Walker,* 149 N. C., 530, *Mr. Justice Hoke* well says: "The controlling principle on a question of this character is very well stated by *Merrimon, J.,* in *S. v. White,* 89 N. C., 464-465, as follows: 'It is well-settled law that the court (405) must decide what is evidence and whether there is any evidence to be submitted to the jury pertinent to an issue submitted to them. It is as well settled that if there is evidence to be submitted, the jury must decide its weight and effect. This, however, does not imply that the court must submit a scintilla—very slight evidence—on the contrary, it must be such as, in the judgment of the court, would reasonably warrant the jury finding a verdict upon the issue submitted, affirmatively or negatively accordingly as they might view it in one light or another and give it more or less weight, or none at all.' "

This is a settled rule of law which obtains in all courts where the practice and principles of the common law obtains, and is quoted and affirmed by *Mr. Justice Allen* in *S. v. Hawkins, post,* 466. This practice is conducive to the dispatch of business and the orderly determination of litigated rights, and has been crystallized into a statute, Revisal, sec. 539, which bears the name of an eminent lawyer of this State.

There are four grounds of negligence set out in the complaint, but plaintiff rests his case upon one only, viz., that the defendant Roberts failed to stop his train, when he knew or should have known of Sigmon's imminent danger, and that he could have stopped in time to have saved his life.

It was stated upon the argument that there was a man stationed on the end of the train to keep a lookout as the train was being backed, but it was admitted that he could have rendered no assistance and could not possibly have prevented the injury.

As to whether the engineer under such conditions must also look out of his cab window when he is backing his train, or can well do so and manage his train, it is unnecessary to determine. This engineer admits

he was looking out of the cab window and towards the end of the train and in the direction in which his train was moving.

The learned counsel for plaintiff admits with characteristic candor and humanity that if the defendant Roberts had seen the pre-
(406) dicament of Sigmon he would have done all in his power to avert the catastrophe. But it is contended that by the exercise of due diligence the said defendant could have seen him, and that if he had seen him he could have stopped the train in time to have saved life.

All the evidence shows that when Sigmon fell Roberts could not have possibly seen the fall. He was in his cab and the tender and a car loaded high with wood was between him and Sigmon.

When Sigmon fell one foot was hung in the air-hose coupler and his stomach was on the rail and his head and hands about at end of cross-ties. He grasped the ends of the ties with his hands and endeavored by moving his body to keep the car wheel from catching him. He commenced to halloo as soon as he fell, and according to the witnesses it was about two seconds from the time he fell and commenced to halloo before one wheel ran over him and the train stopped before next wheel reached him.

The plaintiff Cabe was examined as a witness in respect to the letters of administration, but he was not present on the occasion and knew none of the circumstances.

Plaintiff introduced three witnesses who were present and saw the occurrence. Witness Bryson states that he saw Sigmon twisting the brakes when train was backing on side-track; "heard him commence hollering, and the train was then slowing up, stopping." "Train did not run over 10 feet after I heard Sigmon holler."

On cross-examination Bryson stated that he did not really know how far train moved after Sigmon commenced to halloo, but repeats his statement that train was then slowing up and very shortly stopped.

The witness was asked these questions:

Q. The train at the time of the accident was backing in on the side-track at Balsam? A. Yes.

Q. And was preparing to stop at that time? A. Yes.

Q. I will ask you if it was not only two or three seconds after the hollering until the train stopped? A. I don't know.

Q. Wasn't it an instant? A. It was all done in a short time.
(407) Q. Almost a thought or an instant? A. Yes, something like that.

C. H. Perry saw Sigmon fall. On direct examination he states that after Sigmon fell the "train went a little piece; could not say exactly how far." Being pressed to estimate the distance, witness said "probably a car length." Upon cross-examination the witness materially qualified

his estimate of the distance the train moved after Sigmon fell, as following shows:

Counsel: Q. There was a car between where Sigmon stood and the engine, loaded with wood? A. Yes.

Q. At that time you say you saw him fall down on the track, did he say anything at first or did it knock the breath out of him? A. He hollered pretty soon after he fell.

Q. Did he holler the same instant he fell or a second or two afterwards? A. Yes, a second or two afterwards, about the same time.

Q. I ask you if about the time he hollered twice, if the train did not stop—wasn't it all over in a second or two? A. It was not but a short time until the train stopped.

Q. It was only a thought or a second or two? A. Yes, he hollered a few times before the train stopped.

Q. Would you swear positively that the train moved over 8 or 10 feet or 15 feet, at the outside? A. No, sir; I did not measure it.

Mrs. C. H. Perry saw Sigmon just as he fell. His foot caught in something between cars. He fell between cars and had his hands hold of ends of cross-ties.

The following excerpt from the evidence gives Mrs. Perry's estimate of the distance train moved after Sigmon fell:

Q. How far do you think the car ran while he was trying to keep out from under the wheels? A. Not very far.

Q. What is your best judgment, a car length?

Q. You give us your best judgment?

The Court: Q. Can you give any idea about the length from any object? A. It was only a few feet between the wheels.

Mr. Craig: Q. What was he doing when the wheel caught him? (408) A. He was trying to get out from under.

Q. Did he seem to be hanging to anything? A. He was just lying there trying to get out. I don't know whether he was hanging to anything or not.

Q. What was he doing; was he moving along? A. He had his hands outside ahold of the ends of cross-ties.

Q. How far did the train run after he fell before the train ran over him? A. Just a few feet; it just pushed him along a few feet and caught him.

Q. How far? A. About as far as from here to the end of the table. (Court: Witness indicating about 4 or 5 feet.)

Upon cross-examination Mrs. Perry testifies as follows:

Q. I ask you if he did not look like he was stepping from one car to the other and either slipped or fell between them? A. Yes, that was the way it looked to me.

Q. How far were the closest wheels to him when he fell on the track; was it over 2 or 3 feet? A. No, sir; I think not.

Q. And you said that when he was standing he was in the middle of the car? A. Yes.

Q. And when he fell he fell on the track? A. Yes.

Q. And the car ran immediately on his body as the train moved on? A. Yes, it was just a second or two.

Q. And it pushed his body along, before he fell, not exceeding 10 or 15 feet? A. Yes.

Q. Don't you know it was not over 8 feet? A. I don't know.

Q. You know it was done in a short distance? A. Yes.

Q. I ask you if his falling and his hollering and the stopping of the train was not all in a few seconds? A. Yes.

Q. Almost in a thought, wasn't it? A. Yes.

This is all the evidence introduced by the plaintiff of those who witnessed the occurrence.

The plaintiff's case is not aided by anything cropping out in the evidence introduced by the defendant, as an examination of the evidence plainly discloses.

J. R. Warren, witness for defendant, saw Sigmon as he fell; was 10 feet from him; he fell on his stomach across rail; his hands (409) caught hold ends of cross-ties; sliding along in front of wheels; one foot hung in air hose.

Q. Which rail did he fall across? A. The left-hand rail going west.

Q. That is the south rail? A. Yes.

Q. When he fell in that position, what did you hear and what did you see and what was done? A. He hollered once or twice; he did not have time to holler much; it was done in a very short time.

Q. It was all done in how long? A. In one or two seconds.

Q. One or two seconds from the time he fell until the train stopped? A. Yes.

Q. How far did the train move, how many feet, before it stopped? A. It could not have moved but a short distance.

Q. Can you give an idea of how many feet or yards, how many feet? A. I never measured it.

Q. Give us your best impression. A. It was something between 6 or 10 feet, I guess that train moved.

Q. That the train moved? A. Yes, before the train stopped.

Q. Was there a car between Sigmon at the time he fell, and the engineer? A. Yes, one car.

Q. What was that car loaded with? A. Wood.

Q. How many seconds was it from the time he fell until the train stopped? A. About two seconds.

Q. How fast was that train going? A. Three or four miles an hour; just was barely moving; it was stopping when he fell.

This witness further testifies that when Sigmon fell across the rail his head was about even with the end of the cross-ties.

D. C. Ensley saw Sigmon fall and gives substantially same account as other witnesses. He helped to pull Sigmon out after train stopped, and was asked this question:

Q. Did you make any measurements of how far it was from where he fell to where you pulled him out? A. No, sir; only we saw the print where it looked like he had been in the cinders. It was about four cross-ties.

Q. How far would that be? A. Something like 2 feet from the center to center.

Q. And you say there were four? A. Yes, we counted four.

Q. From where he fell to where you pulled him out? A. Yes. (410)

F. L. Potts saw the occurrence, and stated:

Q. I wish you would state to his Honor and the jury just what you saw in regard to this matter. A. I heard him holler and I ran out a few steps and looked; I was facing the railroad and could have seen him if I had looked. And the train was just barely stopping when I saw him flounce on his stomach and his heels came over and I started towards him.

Q. From the time you heard him holler until the train stopped, how far did the train run? A. Not over 6 feet.

Q. How many times did you hear him holler? A. Three times—I am not certain.

Q. From the time he first hollered until the time the train stopped, how much time elapsed? A. Not over two or three seconds.

The defendant Roberts testifies that he was backing from main track to switch from 4 to 6 miles an hour; that he could not see Sigmon from the engine, as there was a curve from the side-track and he could not see Sigmon for that; that he was looking back from cab window in direction in which he was going; that he did not know Sigmon had fallen until train stopped; that he examined the distance and it was 6 feet from where Sigmon fell to where train stopped; that he could not have stopped his train of three loaded cars under 8 or 10 feet.

Before the plaintiff can recover or "go to the jury" in this case he must offer evidence of sufficient probative force to justify the establishment of these propositions:

1. That Roberts saw or had actual knowledge of Sigmon's peril.

As this is not contended by counsel, it may be dismissed without discussion.

2. That although Roberts had no actual knowledge of Sigmon's peril,

it was his legal duty to have discovered it, and hence the law fixes him with such knowledge.

3. That after Sigmon fell between the wheels of the cars Roberts could have stopped the train in time to avoid the injury.

Upon the second proposition we have been cited to no authority,
(411) and have been able to find none, which fastens upon an engineer the duty to watch his brakemen as they move over the train in discharge of their duties, or to discover immediately that one has fallen between the cars.

It is manifestly impossible and inconsistent with the management of an engine. Neither have we any authority for the contention that it is an engineer's duty, while moving his train backward, to look under it or along the cross-ties and in the vicinity of the rails for persons who may have fallen between the cars.

The engineer is not required to anticipate such accidents, and unless he actually discovers them neither reason, authority, nor ordinary justice requires that he be held culpable if he fails to see them.

In looking back from his cab window at the end of his train in the direction in which it is going, the engineer may well fail to see a person struggling under the wheels of the cars, for he is not required to look there, or anticipate such accidents as befell Sigmon.

And as said by this Court, "Where the law does not impose the duty of watchfulness it follows that the failure to watch is not an omission of duty intervening between the negligence of plaintiff in exposing himself and the accident, unless he actually be seen in time to avert it." *Pickett v. R. R.*, 117 N. C., 636.

In this case there was no legal duty on the part of the engineer Roberts to watch under the cars, the place where Sigmon fell, and therefore the failure to discover him cannot be imputed to his negligence.

When moving his train forward it is the engineer's duty to keep a vigilant lookout in front of him along the tracks. For that reason he is chargeable with knowledge, not only of what he actually sees on the track, but of what by reasonable diligence he might have discovered. This is the principle settled by *Bullock v. R. R.*, 105 N. C., 180; *Deans v. R. R.*, 107 N. C., 686; *Pickett v. R. R., supra,* and many other cases.

But when a train is backing, the engineer from his cab can not see the track ahead of his cars. Therefore the company must place a
(412) watchman on the end of the last car so he can watch the track and guard against injuring persons in front of him. When the engineer is backing and looking in the direction in which he is moving, his vision is of course directed at the end of his train. He is looking from an elevated position far above the track rails. His purpose in looking is to note signals and as far as possible guard against any ob-

struction ahead of his train, and not what may be under its wheels or the end of the cross-ties.

The duties of an engineer are many and weighty and he is held to a degree of vigilance and responsibility that is placed upon no other servant of the public. But if, in addition, he is to be charged with knowledge of everything that happens on his train and under it, he would require the hundred eyes of the fabled Argus. But if perchance Roberts had been looking from his cab directly at the place where Sigmon fell, there is no reasonable proof that he could have seen him. The train was being switched from the main track to a siding at time Sigmon fell, and this formed a curve, throwing the car further out of the line of vision. All the evidence shows that Sigmon's head and hands were at the end of the cross-ties and that the cars themselves extend 14 inches beyond the rail. The plaintiff's witnesses who were on the ground heard Sigmon halloo, but did not see him until they looked for him. Roberts testifies that not only did he not see or hear Sigmon, but that he could not then have seen him from his position in the cab window.

Edge v. R. R., 153 N. C., 212, is no authority for the positions advanced by the plaintiff. In that case the train was at a standstill in the switching yards. A messenger of the company approached it with the evident purpose of going between the cars. The plaintiff testifies that "he (the engineer) was looking straight at me." When plaintiff was between cars the engineerfi who should have known of his perilous position, started his train and injured plaintiff.

The court thought the evidence of negligence sufficiently strong to be submitted to the jury. The great difference between that case and this is too obvious to justify discussion.

As to the third proposition, it is not contended that Roberts (413) could have seen Sigmon as he fell between the cars, and if he had afterwards actually discovered him struggling on the rail and between the wheels, the plaintiff's evidence falls short of showing that Roberts could have stopped his train in time to have avoided the injury.

Plaintiff's witnesses all say the train was slowing up when Sigmon fell; that it did not move over 8 or 10 feet after that. One witness said about a car length, but afterwards materially qualified that statement, as the evidence we have quoted will show. Upon cross-examination all plaintiff's witnesses say it was "only a thought," "two or three seconds," from time Sigmon commenced to "holler" until train stopped, and that he commenced to "holler" as soon as he fell.

All the evidence shows that this train could not have been stopped, at the rate of speed it was moving, under 8 or 10 feet.

We understood it to be contended on the argument that Roberts, the engineer, testified that he could have stopped his train in 10 or 12 inches.

This is erroneous. He stated he could stop *one car* in 10 or 12 inches, provided the slack was all out. There is some 2 feet slack between the cars, and as the train was backing the "slack was all in."

This train consisted of three heavy coal cars loaded with wood, and the engineer stated repeatedly it could not have been stopped under 8 or 10 feet.

We have reviewed this case at some length because of its importance, and are unable to find any sufficient evidence to warrant the contention that the defendant Roberts was responsible for the injury Sigmon received or that it can be fairly attributed to Roberts' negligence.

From the evidence it appears to us to have been an accident pure and simple, and, however lamentable, no omission of duty by the defendant Roberts was the proximate cause of it.

The judgment is

Affirmed.

HOKE, J., concurring: I concur in the result. All of the testimony tends to show that the deceased fell beneath the train from a (414) position where his fall could not possibly have been noted by the engineer, and that he was run over in about two or three seconds from the time that he fell. All of the witnesses except one testified that the distance the train moved was from 6 to 10 feet, and that he was standing some distance off, and that the train moved about a car length, and the witness afterwards qualified this testimony by saying that he could not positively say that the train moved over 10 or 15 feet. All of the testimony tends to show further that the tender and a car loaded with wood were between the engineer and the intestate at the time he fell; that the deceased only gave a cry or two, and that if any part of his person was exposed to view at all it was only his hands about the end of the cross-ties and close to the ground, affording slight if any opportunity to either see or hear him, under any circumstances. I assume that the duty was on the engineer, in so far as consistent with proper attention to his engine, to keep an outlook over his train in the direction in which it was moving and to be properly regardful of the safety of employees upon it; but on the facts of this case, considering the point from which the deceased fell, that it could not have been observed by the engineer, the shortness of the time—not more than two seconds—the necessary attention of the engineer to the proper operation of his engine and the noise attendant upon its movement, I am of opinion that this was an excusable accident, and there is no testimony, within the definition of legal evidence, that there was a breach of duty on the part of the engineer or that an actionable wrong has been committed by the defendants.

ALLEN, J., dissenting: I do not concur in the views expressed by the Court, but the opinion has been filed so late in the term that I can not do more than suggest my reasons for dissenting.

The opinion of the Court is based on two propositions:

1. That it was not the duty of the engineer to keep a lookout in the direction the train was backing, except for the purpose of seeing if there was any obstruction on the track in front of the rear of the train, and consequently the defendants owed no duty to the plaintiff's intestate, a brakeman, who was between the first and second cars.

2. That if such a duty should be imposed there is no evidence (415) that, by the exercise of ordinary care, the dangerous position of the intestate could have been discovered and his death averted. If either position can be sustained, the judgment of nonsuit should be affirmed.

It is noticeable that in the first part of the opinion it is stated that it is not necessary to decide the first proposition, but after a review of a part of the evidence, it was thought best to do so.

1. The authorities agree that it is the duty of an engineer while running his train, to keep a lookout, and that he and the company he represents are chargeable with what he sees and with all that can be discovered by the exercise of ordinary care. By the term "keeping a lookout," I understand looking in front when the train is moving forward, and to the rear when it is moving backward.

If there is any difference in the degree of care to be observed in the performance of this duty, dependent on the movement of the train, I would say that greater care should be required when moving backward, as the operation is more dangerous. I do not think that the purpose of requiring the engineer to look to the rear when it is backing is to enable him to see obstructions in front of the train, as stated in the opinion of the Court, but that it is that he may overlook the train and note the signals of the trainmen; and to do this he must observe their positions.

In this case, the train consisted of an engine, tender, and three cars, and it was backing into a siding for the purpose of leaving the cars.

J. R. Warren, a witness for the defendant, explains this:

Q. State to his Honor and the jury exactly how it occurred and all about it? A. The train comes there; it has a mountain to come up, and they were to put those cars on the side-track, and Mr. Sigmon was riding the car when he passed the switch, and he put on the first brake on the rear car and he jumped off by the side of me, and he jumped up between the cars and got out of my sight then, and they went down about 30 or 40 feet, and I saw him down under the car, and he rolled out in front of the wheels.

The plaintiff's intestate was setting the brakes in order that the (416)

cars might remain on the siding and in the position desired. Suppose the brakes had not held, was it not the duty of the brakeman to notify the engineer, and, if so, his duty to see?

I do not wish to see a harsh or unreasonable rule imposed on engineers, who are usually prudent, intelligent, and brave; but the position of the brakeman is a very dangerous one, and he should not be left without protection.

If this is a correct view of the relation of the parties, it was the duty of the engineer to look towards the rear of the train, that he might note its condition and might receive signals, and if he failed to look, or if he looked and failed to see what could have been seen by the exercise of ordinary care, he was negligent.

(1.) Did he look? I don't know, and it is not for me to say. My duty is at an end when I consider the question whether there was any evidence that he did not look. The engineer testified that he was looking west towards the rear of the train.

C. H. Perry, a witness for the plaintiff, described the fall of the deceased, his crying out, etc., and was then asked the following questions:

Q. Which way was the engineer looking when this was going on; what was standing on the other side of this train? A. There was a train pulling out just as they headed in there; pulling out towards Asheville—a freight train.

Q. What was Mr. Roberts looking at? A. He had his face turned towards the east, towards Asheville, when I noticed him.

Q. Away from this train? A. Yes.

Q. And Mr. Sigmon was which way from him? A. He was west.

It is true, he stated on cross-examination that he was not looking at the engineer the instant the deceased fell, but this witness was not a partisan of the plaintiff. It is in evidence that the defendant furnished him a pass to attend the trial, and that he notified witnesses for the defendant to attend.

Again, Mrs. C. H. Perry says:

(417) Q. Do you know which way the engineer was looking when he fell? A. He was looking east before the accident, but I don't know which way he was looking when he was under the car.

It seems to me this is some evidence that the engineer was not keeping a lookout.

(2) But suppose he looked, did he fail to observe what a man exercising ordinary care would have discovered? There was one car and a tender between the deceased and the engineer, a distance of perhaps 60 feet. The deceased began crying out about the time he fell, and this continued until the train stopped.

C. H. Perry says:

Q. At that time you say you saw him fall down on the track, did he say anything at first, or did it knock the breath out of him? A. He hollered pretty soon after he fell.

Q. Did he holler the same instant he fell, or a second or two afterwards? A. Yes, a second or two afterwards—about the same time.

Q. I ask you if it was not a second or two after he fell that he hollered, and if his hollering and the stopping of the train was not almost at the same time? A. No, sir; the train did not stop when he fell.

Q. I mean did not the train stop almost as he hollered? A. As I recollect, the train stopped while he was hollering.

This witness was 65 or 70 yards from the train.

Q. How far were you away? A. About 65 or 70 yards.

Mrs. C. H. Perry testifies that she heard the crying out, and she was asked: "How far away were you? About 65 yards. Did you hear him holler? Yes."

F. L. Potts, a witness for defendant, said he was 60 yards from the railroad, and heard him.

Dock Bryson said he was 125 feet from the railroad, and heard him.

If two witnesses, who were 65 yards, and another 125 feet distant, heard him, is it unreasonable to say that there is evidence that the engineer, who was within 60 feet, could have heard if he had exercised ordinary care? Next, was there evidence that he could (418) have seen the dangerous position of the deceased?

The deceased fell between the first and second car. One of his feet became entangled at the coupling, and he fell across the rail, out between the cars. He was a grown man, and the wheels ran across his thigh. This admits of the argument that from the thigh to the head was beyond the rail, approximately 3 feet.

Mrs. C. H. Perry says:

Q. What was he doing; was he moving along? A. He had his hands outside ahold of the ends of the cross-ties.

J. R. Warren says:

Q. What position was he in when he fell between the cars? A. He fell right down on his stomach, and his hands were catching onto the ends of the cross-ties as he was sliding down in front of the wheels.

Q. Where were his feet? A. One was down next to the ties, and one was hanging somewhere, and he told me it was hung on the air hose, that his foot was hung on the air hose.

Q. What is the air hose? A. It is to connect the air between the cars; it is the rubber hose.

Q. When he fell, did he fall right across the track? A. Yes, his head was out about even with the end of the ties, about 2 feet, I guess, that is, to the end of the ties.

A. L. Roberts, the engineer, testifies:

Q. How far do those cars project over the rail? A. I don't know; something like 12 or 14 inches.

Q. So if a man's body projected out 2 feet over the rail there would not be anything in the world to prevent you from seeing him? A. It don't look like that would be.

S. L. Cabe testifies that he had worked on the railroad seven or eight years, and was acquainted with the situation at Balsam, and was asked the following questions:

Q. I wish you would state to his Honor and the jury how much of a curve there is there on this side-track? A. The main line comes up straight until you get there to the switch.

(419) The Court: That switch was where they were putting the cars in? A. Yes, and then the main line curves south around this way.

The Court: Q. That is coming towards Asheville? A. Yes, and when the engine went up in here (indicating with motion), you could see down in there plain enough on this curve, and when you get down to the switch there is a curve there, that is, the switch curves off from the main line like any other switch.

By Counsel: Q. How much does the switch curve? A. Very little.

Q. State whether or not, at any point along there, he could have seen a man 2 feet over the track at the rear end of the car next to the engine? A. He could have seen him at any point. And the track comes on the south, on the engineer's side, and he could have seen better from his cab than he could from the side-track.

I submit that a fair consideration of this evidence leads to the conclusion that, if true, the engineer could have seen and heard.

(3) If so, the remaining inquiry is: Could he have seen and heard in time to stop the train and avoid killing the deceased, or, rather, is there evidence of this fact? This involves an investigation of the evidence as to the distance the train moved after the deceased fell, the speed of the train, and the distance within which it could be stopped.

(a) How far did the train move after the deceased fell?

C. H. Perry testified:

Q. After he fell, how far did your train go? A. It seemed to me that it went but a little piece; could not say exactly how far.

Q. Give your best judgment as to how far it went? A. It went, it seemed to me, probably a car length.

Q. That is your best judgment of it? A. Yes, at the time.

Q. When he fell, what did you see him doing on the track? A. It looked like he was just scrambling along. I don't know whether his feet were fastened or whether he was just trying to keep out of the front of the car.

Q. And it looked like he was trying to keep out of the way of (420) the wheels? A. Yes.

Q. Well, just state how he was? A. The best I could see, it just looked like he was trying to keep out of the way of the wheel.

Q. How far did the car go under those circumstances—you say it went a car length? A. I could not say; it might have been more than that.

Q. That is your judgment, that it went about a car length while he was in that situation? A. Yes, something like that.

It is conceded that a car length is about 30 feet.

(b) What was the speed of the train? Dock Bryson and C. H. Perry say it was going about "as fast as a man could walk"; J. R. Warren, "3 or 4 miles an hour"; D. C. Ensley, "3 miles an hour."

A. L. Roberts says when he started in the siding he was running from "4 to 6 miles an hour," and he was then asked:

Q. You mean to tell the jury that when you started to back in there it was going 4 to 6 miles an hour? A. Yes; but when he fell off it might not have been going 2 miles an hour.

(c) Within what distance could the train have been stopped? S. L. Cabe testified: "Within 4 feet."

A. L. Roberts testified on cross-examination:

Q. You say if the train had been going from 4 to 6 miles an hour, you could have stopped in 8 or 10 feet, so that you could stop the train going at 2 miles an hour in what distance? A. In the slack of the car.

Q. How much slack is there in a car? A. There was 2 feet slack in the cars that were coupled together.

Q. How much slack was there in this car? A. Six or 8, maybe 10 inches.

Q. And you could stop that one car in 6 inches? A. In 10 or 12 inches.

Q. And the others might have rolled on a little further? A. (No answer.) And on redirect examination:

Q. You say you could stop a train going 2 miles an hour in 10 inches; do you mean with or without slack? A. Without the slack of the cars. With the slack of the cars it would have taken longer.

Q. If that train was going back in there at 2 miles an hour (421) with the slack in, in how far could you stop it? A. In about 8 feet.

There is therefore evidence that the train ran 30 feet after the deceased fell; that he fell within 60 feet of the engine and in the direction the engineer was required to look; that he began crying out as he fell; that he was heard 65 yards distant; that his head was 2 feet beyond the rail and he was grabbing at the end of the cross-ties; that the car

between him and the engine projected over the rail 14 inches; that the train was running at from 2 to 4 miles an hour, and therefore making little noise; that the train could have been stopped in 4 feet at least, and one witness, who was not present but was familiar with the location and trains, swore the engineer could have seen the deceased.

If the car ran 30 feet and he had seen or heard the deceased as he fell, and had stopped his car in 28 feet, when, according to the evidence, it could have been stopped in 4, a life would have been saved.

I agree with the principle laid down by the Court, that it is the duty of the Superior Court judge to decide whether there is evidence, and of this Court upon appeal to review this decision; but we cannot go further.

We cannot weigh the evidence and pass on its sufficiency, and if we do undertake to do so, we usurp the powers of the jury. The duty imposed is well stated by *Justice Hoke* in *Fitzgerald v. R. R.*, 141 N. C., 534. He says: "It is very generally held that direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances, and it is well established that if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. Thus, in Shearman and Redfield on Negligence, sec. 58, it is said: 'The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is entitled to recover unless the defendant produces evidence to rebut the presumption. It has (422) sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's default; but this is going too far. If the facts proved render it probable that the defendant violated its duty, it is for the jury to decide whether it did so or not. To hold otherwise would be to deny the value of circumstantial evidence.' "

I was interested in the eloquent plea of counsel for the plaintiff in behalf of trial by jury, in the course of which he said it was reported that King Alfred, in the olden days, had caused forty-four of the judges to be executed because of their denial of this right to the subject. I would suggest to him that the incident is violative of the principle he advocates, as there is no suggestion that the king gave the judges a trial by jury.

I repeat that I do not know how the fact is, nor I do know what I would do as a juror, but in my opinion there is evidence fit to be submitted to a jury.

CLARK, C. J., concurring in the dissenting opinion of *Allen, J.*: When the train was moving rear-foremost into the siding, that is, backing

into it, it was the duty of the engineer to look out of the cab window in the direction in which the train was moving. If he did not do so, and thereby failed to hear the outcries or see the struggles of the deceased brakeman in trying to save himself, it was clearly negligence. The engineer was in charge of the train, and it was his duty to keep supervision over it. It is true that the engineer testifies, in his own behalf, that he did keep a lookout by leaning out of the window and looking in the direction in which the train was moving. But he may have been mistaken as to this. The nonsuit takes for granted that his statement was true; but if the statement had been submitted to the jury there was evidence from which they might have found the contrary. The fact that people standing some distance off heard the agonized scream of the victim, while the engineer, little more than a car length away, says that he did not, would indicate that he was not leaning out the cab window. Besides, how far the head and hands of a man in the position of the deceased should have been seen by one leaning out of the cab window, which would put the engineer considerably beyond the (423) edge of the ties, was a matter for the jury. These and other potent circumstances mentioned in the able dissenting opinion of *Mr. Justice Allen,* which need not be repeated here, would seem to make it clear that this case should have been submitted to the jury.

The old landmark was, that if there is "any evidence beyond a *scintilla*" a party was entitled to have the case submitted to a jury, as guaranteed by the Constitution. The departure was made in *Wittkowsky v. Wasson,* 71 N. C., 451, in which *Judge Bynum* filed his admirable dissenting opinion which is a classic. From that day to this, the power of the judges to take cases from the jury has been steadily extended, till now it can almost be said that trial judges are tempted to think it is not incumbent upon them to give the plaintiff, especially in negligence cases, the right to a trial by jury unless the judge is of an opinion that the evidence will "reasonably" justify a verdict for the plaintiff. That is, the judge puts himself in the place of the jury. The distinguished counsel of the plaintiff in this case recalled to our attention that Alfred the Great is said by some writers to have hung forty-four judges for denying this right to trial by jury. The incident is doubtless mythical, for trial by jury was not known till many centuries later, if we take the best authorities. But if the tendency to cut short trials by depriving parties of the right to have controversies settled by jury is not very much restricted it will inevitably result in legislation that will deprive judges of that power, and probably go much further than it should. We have instances before us of such results.

At common law, the judges were not forbidden to express an opinion upon the facts. In fact, this right was very useful in practice as an aid

to the jury, and the judges still possess such power in the Federal courts and in many of our sister States as well as in England. But by reason of some excuse, as it was thought, in this State the judges were absolutely deprived of that power by the Act of 1796, now Rev., 535, with the result that the slightest expression of an opinion on the facts, by a judge in the course of a trial, however impartial or helpful it might be
(424) to the jury, is now ground for a new trial. Again, it was the right of the judges to prescribe the number and length of the speeches of counsel, as it still is in the Federal courts and in most of the State courts and in England. But by reason of what was thought to be an abuse of this power by the judges it was absolutely taken away by statute, with a great increase of the length of trials and expense to the public. Rev., 216, has somewhat restored the former power of the judges in this respect, but not to the full extent.

By reason of the holding of this Court in *Owens v. R. R.*, 88 N. C., 502, that the burden was upon the plaintiff to negative contributory negligence (*Ruffin, J.*, dissenting), the General Assembly promptly passed the Act of 1887, now Rev., 483, which requires that the defense of contributory negligence "shall be set up in the answer and proved on the trial." In *Neal v. R. R.*, 126 N. C., 634, this Court by a bare majority decided that the judge could hold as a matter of law, upon the demurrer to the evidence of the plaintiff, that contributory negligence was proven. Without repeating what was said in the dissenting opinions in that and subsequent cases, it is sufficient to say that the doctrine of *Neal v. R. R.* has been extended until in the opinion of many good lawyers the beneficial intent of the Legislature in enacting Rev., 483, has been largely denied to the plaintiff in many cases.

The extent to which the courts are assuming, on motions for nonsuit, to judge of the "sufficiency of the evidence," and, as to the defense of contributory negligence, the tendency to hold as a matter of law that the plaintiff is guilty of contributory negligence, notwithstanding the statute put that burden upon the defendant and clearly meant that whether it was "proven" or not was a fact to be determined by the jury, are to be deplored.

Without questioning in the slightest degree the right of the majority of the Court to express their own views, I deem it my duty, as well as my right, to dissent earnestly against this claim of power on the part of the Court. Men conscious of their own rectitude are especially prone to believe their own judgment correct, and judges are no exception.

But under our Constitution parties to litigation have a right to
(425) have jurors and not judges pass upon the evidence, however slight, when beyond a mere scintilla. They can challenge jurors who are to pass upon the facts, but can not except to a judge who feels

competent to pass upon the facts in holding that the evidence is not sufficient to justify a verdict for the plaintiff.

In the late decision of the United States Supreme Court in the *Standard Oil case* that Court assumed to write into an act of Congress the word "reasonable," as *Mr. Justice Harlan* so clearly pointed out in his dissenting opinion. The majority of that Court were doubtless sincere, but they attributed to their own intelligence, powers which under the Constitution were vested in Congress. They doubtless believed that the Court had "the last say." But the Constitution, from which they derive their powers, Art. III, sec. 2, clause 2, gives that Court jurisdiction, "with such exceptions, and under such regulations, as the Congress shall make." The courts have not even the "last say" in respect to the Executive, for when *Chief Justice Marshall* rendered a decision which the President deemed unsound he declined to obey it, and the decision has never been executed to this day.

Not concurring in the views of the majority of the Court, it is not improper to call attention to some of the instances in which, in this State, the Legislature has dissented from this tendency in the courts to substitute their own judgment as to the extent of their powers by terming it a matter of law. In some instances the Legislature has probably gone too far in the opposite direction, as was perhaps a natural consequence.

S. B. LEE AND R. L. GODWIN, TRUSTEE, v. THE SHAWNEE FIRE INSURANCE COMPANY.

(Filed 19 April, 1911.)

Godwin & Townsend, E. F. Young and J. C. Clifford for plaintiff.
Aycock & Winston and Tillett & Guthrie for defendant.

PER CURIAM. Under the decision in *Lee v. Insurance Co.*, 154 (426) N. C., 446, the judgment appealed from in the above-entitled case is

Modified and affirmed, with costs against appellant.

S. B. LEE AND R. L. GODWIN, TRUSTEE, v. NEW HAMPSHIRE FIRE INSURANCE COMPANY ET AL.

(Filed 19 April, 1911.)

Godwin & Townsend, E. F. Young and J. C. Clifford for plaintiff.
Aycock & Winston and Tillett & Guthrie for defendant.

PER CURIAM. Under the decision in *Lee v. Insurance Co.*, 154 N. C., 446, the judgment appealed from in the above-entitled case is
Modified and affirmed, with costs against the appellant.

See *Joyner v. Insurance Co., ante,* 256.

STATE v. EUGENE WEBB.

(Filed 19 April, 1911.)

1. **Trial, "Speedy"—Constitutional Law.**

The right of a person formally accused of a crime to a "speedy and impartial" trial has been guaranteed to Englishmen since Magna Charta, and is embodied in the Sixth Amendment to the Federal Constitution; and a like provision is substantially made in our own and other State constitutions.

2. **Same—Legislative Definition.**

The word "speedy," as used in these instruments and as relevant to this question, is a word of indeterminate meaning, permitting, to some extent, legislative definition.

3. **Same—Treason or Felony—Right of Accused—Interpretation of Statutes.**

Section 3155 of Revisal, providing in substance that one formally accused and committed for treason or felony shall, on demand properly made, be indicted and tried on or before the second term of court ensuing the commitment, or be discharged from imprisonment, is peremptory in its requirements; and where one so committed has formally complied with the provisions of the statute, it is the duty of the court to discharge the prisoner.

4. **Appeal and Error—Trial, "Speedy"—Habeas Corpus—Procedure.**

Habeas corpus will not lie to review the lower court in refusing to discharge a prisoner from custody under Revisal, sec. 3155, upon the alleged error that a "speedy" trial under the conditions therein named was not given him.

5. **Appeal and Error—Trial, "Speedy"—Appellate Powers—Constitutional Law.**

Article IV, sec. 8, of our State Constitution, providing that "the Supreme Court shall have jurisdiction to hear, upon appeal, any decision

of the court below, upon any matter of law or legal inference," is only designed and intended to confer general appellate power on the court to be exercised under recognized and established forms and writs, or according to methods provided by the Legislature.

6. Appeal and Error—Criminal Prosecution—Final Judgment.

No statutory appeal in ordinary form lies in a criminal prosecution except from a final judgment of conviction or on plea of guilty duly entered.

7. Appeal and Error—Writ of Error—Statutory Appeal.

With us, the statutory appeal takes the place of the old writ of error, which only issued in review of final judgments.

8. Appeal and Error—Trial, "Speedy"—Certiorari—Procedure.

A *certiorari* is the proper procedure to review the order of the lower court in refusing to discharge a prisoner from custody under the provisions of Revisal, sec. 3155.

9. Appeal and Error—Trial, "Speedy"—Final Judgment—Procedure.

The defendant was committed by a justice of the peace for a felony, and on the last day of the next subsequent term of the court the action was continued on motion of the State for the absence of a material witness from sickness, whereupon the defendant, having given notice in open court, appeared and demanded that a bill of indictment be found at the next subsequent term, and that he be tried then, and that if an indictment were not then found he would pray for his discharge, which was done accordingly and the case further continued to the next term, owing to the continued sickness of the witness: *Held*, there being no final judgment, an appeal would not lie from the refusal of the motion by the lower court.

APPEAL from *Daniels, J.*, at January Term, 1911, of DURHAM. (428)

Assault with intent, etc., heard on motion to discharge defendant from imprisonment. The statute upon which the motion was chiefly predicated, Revisal 1905, sec. 3155, is in terms as follows: "When any person who has been committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer in open court to be brought to his trial, shall not be indicted some time in the next term of the Superior or criminal court ensuing such commitment, the judge of the court, upon notice in open court on the last day of the term, shall set at liberty such prisoner upon bail, unless it appear upon oath that the witnesses for the State could not be produced at the same term; and if such prisoner, upon his prayer as aforesaid, shall not be indicted and tried at the second term of the court, he shall be discharged from his imprisonment." On the hearing it was made to appear: "That the defendant was committed to jail of Durham County by a justice of the peace on 24 September, 1910; that on the last day of said December term of this court, which was 10 December, 1910, the

above-entitled action was continued on motion of the State on account of the absence of Mrs. Ella Newton, who at that time was pregnant and was about to be confined, and unable to attend court, which appeared from the certificate of a reputable physician, and because she was the only witness as to the facts of the assault. The defendant, on the last day of said term, having given notice in open court, appeared and demanded that a bill of indictment be found and the defendant tried at the next succeeding term, which is the present term, which began on 9 January, 1911; that if a bill of indictment was not found he would pray for his discharge at the said term. That at the second term, the defendant, in accordance with the said notice, moved the discharge of the defendant, no true bill having been found. The solicitor for the (429) State moved for a continuance on the ground that Mrs. Ella Newton has been confined and unable to leave her home and attend court. She was confined on the 13th day of December, as shown from the evidence herewith sent of her husband J. W. Newton. The court finding as a fact that she was confined on 13 December, 1910, and that she is not sufficiently recovered to be able to attend court at this term and to leave her home," the court entered judgment denying the motion, and defendant excepted and appealed.

Attorney-General T. W. Bickett and G. L. Jones, Assistant Attorney-General, for the State.

Manning & Everett for defendant.

HOKE, J. The right of a person formally accused of crime to a speedy and impartial trial has been a right guaranteed to Englishmen since Magna Carta and to all peoples basing their system of jurisprudence on the principles of common law. The Charter of Henry III., proclaimed in further assurance of the former and to make it in some respects more specific on this especial subject, concludes as follows: "We will sell to no man; we will not deny or defer to any man either justice or right." Creasy on the English Constitution, 134, 135, and note. The principle is embodied in the Sixth Amendment to the Federal Constitution and in some form is contained in this and most of our State constitutions; all of them, so far as examined. The term "speedy," being a word of indeterminate meaning and permitting, therefore, to some extent, of legislative definition (*Ferrall v. Ferrall,* 153 N. C., 174); the Legislatures of this and several other States have enacted statutes on the subject the same or similar to that presented here, and while the question has not been before our Court, the construction which has generally obtained in other jurisdictions is to the effect that the law is peremptory in its requirements, and where a prisoner has brought his case within its pro-

visions he is entitled to his discharge. *People v. Morena,* 85 Cal.; *S. v. Kuhn,* 154 Indiana, 450, etc. The construction further being that in statutes expressed as this one is, the effect is to require simply that the prisoner be discharged from custody, and not that he go quit of further prosecution. 12 Cyc., 500, note 16, citing *S. v. Garth-* (430) *waite,* 23 N. J. L., 143, and other cases in support of the statement.

While the ruling of the court below, on authority, would seem to be erroneous, the appeal of the defendant must be dismissed because, in this State, no appeal in ordinary form lies in a criminal prosecution except from a judgment on conviction or on plea of guilt duly entered. Revisal 1905, secs. 3274, 3275. It would lead to interminable delay and render the enforcement of the criminal law well-nigh impossible if an appeal were allowed from every interlocutory order made by a judge or court in the course of a criminal prosecution, or from any order except one in its nature final. Accordingly, it has been uniformly held with us, as stated, that an ordinary statutory appeal will not be entertained except from a judgment on conviction or some judgment in its nature final. *S. v. Lyon,* 93 N. C., 575; *S. v. Hinson,* 82 N. C., 540; *S. v. Jefferson,* 66 N. C., 309; *S. v. Bailey,* 65 N. C., 426; *William Biggs, ex parte,* 64 N. C., 202. In some of these decisions, as in *S. v. Jefferson, supra,* the very question presented was the right of a prisoner to be discharged from custody, and *Pearson, Chief Justice,* delivering the opinion dismissing the appeal, quoted with approval from *Bailey's case* as follows: "An appeal can not be taken on the State docket to this Court from any interlocutory judgment or order," and then said: "It follows that the appeal in this case was improvidently allowed, and must be dismissed." It is only to a very limited extent that such an appeal is allowed in civil cases, and these in cases restricted and very clearly defined. The case of *Ledford v. Emerson,* 143 N. C., 535, to which we were referred in the argument, was on the civil docket, and the order there was in its nature final. Nor would a *habeas corpus* in the present instance afford an efficient remedy. That writ, as noted in the recent case of *In re Holley,* 154 N. C., 163, is not used in this State as a writ by which errors may be reviewed. The very question presented, in the court below, was on the right of a prisoner to his discharge from custody, and one judge of equal or concurrent jurisdiction would have no power to review the decision of another. The case, then, is clearly one to be re- (431) viewed under the provisions contained in Article IV, sec. 8, of the Constitution, conferring on this Court the power "to issue any remedial writs necessary to give it general supervision and control over the proceedings of the inferior courts." The entire section being as follows: "The Supreme Court shall have jurisdiction to review, upon appeal, any

decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said Court over 'issues of fact' and 'questions of fact' shall be the same exercised by it before the adoption of the Constitution of 1868, and the Court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts."

It is suggested and urged that an appeal lies under and by virtue of the first clause of this section, "The Supreme Court shall have jurisdiction to hear, upon appeal, any decision of the court below, upon any matter of law or legal inference," etc.; but the clause in question is only designed and intended to confer general appellate power on the Court, to be exercised under recognized and established forms and writs, or according to methods provided by the Legislature. The statutory appeal, with us, takes the place of the old writ of error, which only issued in review of final judgments (Clark Criminal Procedure, p. 500; *Rush v. Steamboat Co.,* 68 N. C., 72); and there being no provision made by statute for cases like the present, under *Holley's case, supra,* and other cases mentioned, and many more could be cited, it is established that the proper writ to review the order of his Honor is the writ of *certiorari,* the same to be applied for in accordance with law and the course and practice of the court. The statute in question here was enacted in 1868, at a time when very few of our counties had court oftener than twice a year, and it is a suggestion worthy of consideration whether, under the changed conditions which now prevail, some safeguarded modifications of this legislation may not be desirable. For the reason stated,

Appeal dismissed.

Cited: S. v. Dunn, 159 N. C., 472; *S. v. Andrews,* 166 N. C., 353; *S. v. Foard,* 168 N. C., 166; *S. v. R. R.,* 169 N. C., 306; *S. v. Burnett,* 173 N. C., 751.

(432)

STATE v. CHARLIE HOUSTON.

(Filed 3 May, 1911.)

1. Appeal and Error—Objections and Exceptions—Insufficient Evidence—Procedure.

An exception that the evidence is not sufficient to be submitted to the jury is waived if not taken before verdict.

2. Same—Jurisdiction—Insufficient Allegations.

No exception can be taken in the Supreme Court which was not assigned in the lower court with opportunity given the judge to rule upon it, except

(1) want of jurisdiction of the lower court or (2) the insufficiency of the complaint or indictment as the statement of a cause of action.

3. **Appeal and Error—Evidence—Demurrer—Consent of Attorney-General—Procedure.**

When it seems to the Attorney-General that justice requires it, the Supreme Court may permit a demurrer to the evidence to be made there, though it should have been done in apt time in the Superior Court, but such practice is not commended or encouraged.

4. **Felony—Manslaughter—Evidence Sufficient—Questions for Jury.**

Evidence is sufficient for conviction of manslaughter which tends to show that the defendants were at a fish-fry, and a fuss arose because a brother of deceased had stepped on the toes of one of the prisoners, for which he apologized, and acting at a suggestion that he again apologize, and while approaching for the purpose, one of the defendants suddenly drew a pistol and fired, and was joined in the firing by the other defendants, and "in less than two seconds" they fired twelve or fifteen shots, immediately after which the deceased fell.

5. **Felonies—Manslaughter—Instruction—Defense Not Taken—Proper Conviction—Harmless Error.**

A charge of the law upon the principles of self-defense, when there was no evidence thereof, and such was not relied upon, is harmless error of which the defendant, convicted of manslaughter under the evidence, can not complain.

6. **Courts—Jury's Convenience—Deliberations.**

A recommendation by the judge to the jury that, the latter "doubtless being weary, they go to their hotel and rest for the balance of the night so that they might deliberate upon their verdict in the morning, when they were fresh," etc., is no just ground for exception.

7. **Instructions—In Part—Construed as a Whole—Harmless Error.**

Upon a trial for manslaughter the judge charged the jury that in passing upon the question whether the defendant maliciously slew deceased with a pistol, they "will consider all the evidence relied on by the State bearing upon the language, acts and conduct of the deceased . . . on the night of the homicide, and leading up to the same": *Held*, if erroneous, it should be construed with other portions of the charge, and, in this case, when so construed, it was in effect an instruction to the jury that they should consider all the evidence in the case in arriving at their verdict, and therefore it was correct.

APPEAL by defendants from *Long, J.*, at December Term, 1910, (433) of MECKLENBURG.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Attorney-General T. W. Bickett and George L. Jones, Assistant Attorney-General, for the State.

Stewart & McRae and F. M. Redd for defendants.

CLARK, C. J. The defendants Houston, Byers, and Boyd were convicted of manslaughter. In this Court they entered a demurrer to the evidence. It is settled by uniform decisions than an exception that the evidence is not sufficient to be submitted to the jury is waived if not taken before verdict. *S. v. Hart,* 116 N. C., 976; *S. v. Kiger,* 115 N. C., 746; *S. v. Varner, ibid.,* 744; *S. v. Brady,* 104 N. C., 737; *S. v. Harris,* 120 N. C., 577, and cases there cited; *S. v. Wilson,* 121 N. C., 650; *S. v. Huggins,* 126 N. C., 1055; *S. v. Williams,* 129 N. C., 582, and numerous cases cited in Clark's Code (3 Ed.), p. 773. The reason is that the object of the law is to try cases on their merits, and if there is reasonable ground for such motion it should be made before the case is submitted to the jury, in order that the court, if it sees fit, may in its discretion permit the opposite party to introduce further testimony.

Still less can any exception be taken in this Court which was not assigned in the lower court with opportunity to the judge to rule upon it, save only (1) want of jurisdiction in the court that tried the case; (2) that the complaint, or indictment, does not state a cause of action.

McKinnon v. Morrison, 104 N. C., 354; *Taylor v. Plummer,* 105 (434) N. C., 56; *S. v. Craige,* 89 N. C., 475; *S. v. Hardee,* 83 N. C., 619, and numerous other cases cited in Clark's Code (3 Ed.), p. 777.

However, it has been held that if in this Court the Attorney-General thinks that the interests of justice require that the demurrer be entered we will permit it (*S. v. Wilcox,* 118 N. C., 1131), as we would doubtless do in a civil case if the opposite party should waive the objection. But certainly such practice is not to be commended or encouraged. If there is not sufficient evidence to go to the jury, or other ground of exception, the point should be called to the attention of the judge on the trial below and in apt time, that he may have opportunity to correct the error, if any.

Taking the exception as duly entered, it cannot be sustained. There was evidence that the deceased was killed at a fish-fry, that there was drinking and gambling going on and a big crowd present, that a fuss arose because the brother of deceased had stepped on the toes of the prisoner Houston. He apologized to Houston, but was told by his brother to apologize again, and upon approaching Houston, apparently for that purpose, the latter suddenly drew his pistol and fired. The witness added that, "In less than two seconds the other prisoners, Boyd and Byers, joined in. There were twelve or fifteen shots in less than two seconds. Immediately after firing ceased the deceased fell. After the firing the prisoners scattered. All the prisoners had pistols." Another witness testified: "The pistols fired like cane-brake set afire." There was a good deal of other evidence, and there was some conflict in the evi-

dence. But the testimony that Houston fired and that the other two prisoners "joined in," and that "there were fifteen to twenty shots fired," of itself is sufficient to show that there was evidence proper to go to the jury.

There were seventeen exceptions taken on the trial and also assigned as errors on appeal, but in the brief of the prisoners there are only four set out, to wit, exceptions 1, 2, 11, and 17. "Exceptions in the record not set out in appellant's brief will be taken as abandoned by him." Rule 34 of this Court, 140 N. C., 666.

The first and second exceptions are that the judge charged the (435) jury as to the principles of law applicable to self-defense. The prisoners contend that this was prejudicial, because they did not rely upon self-defense, but upon the ground that they did not participate in the killing. We do not see upon the face of the evidence that any prejudice could have accrued to the prisoners from such charge. If there was no evidence of self-defense the prisoners simply received the benefit of an instruction to which they were not entitled.

Exception 11 is that the court charged the jury: "It is not at all likely that you can decide the case satisfactorily at this hour of the night. I am weary and I know you are also. The court therefore recommends that you go to your hotel and rest for the balance of the night. In the morning we can get breakfast at 7; you can in the morning, when fresh, deliberate on your verdict, before or after breakfast as you choose. Some men can think better on an empty stomach. But you can do as you choose about that; and if you prefer to deliberate tonight, you can do so. The court will not return tonight. It will adjourn until 9 A. M. tomorrow."

The remarks of the judge are almost identical with those of the judge in *S. v. Davis,* 134 N. C., 633, in which the Court said: "The recommendation of the court to the jury, doubtless given at a late hour and after a long, fatiguing session, not to consider the case till next morning, is without merit. It is not shown that it prejudiced the prisoner in any way, nor can we see that it was likely to do so."

The 17th, and last, exception in the prisoner's brief is that the court instructed the jury: "In passing upon the question whether Houston slew deceased with a pistol, and whether he did so maliciously, the jury will consider all the evidence relied upon by the State bearing upon the language, acts, and conduct of the deceased and his brother, and the language, acts, and conduct of Houston on the night of the homicide and leading up to the same." But this instruction, if any fault could be found with it taken alone, must be construed together with the following language immediately following it in the same paragraph, which told the jury to also consider "the evidence tending to show the nature of

(436) the altercation, if any, in the yard and the evidence tending to show the circumstances of the use of the pistol by Houston, if he did use it; also all the evidence relied on by Houston and his codefendants, tending to show that he did not engage in the affray, did not shoot the deceased, and did not in any wise aid and abet any one else in doing so." The court was simply telling the jury that they should consider all the evidence in the case, both that on the part of the State and that on the part of the defendants, in arriving at their verdict as to whether or not the defendants were guilty.

No error.

Cited: Riley v. Stone, 169 N. C., 423; *S. v. Randall,* 170 N. C., 762; *Stallings v. Hurdle,* 171 N. C., 6.

STATE v. CHARLES ROWE.

(Filed 17 May, 1911.)

1. Appeal and Error—Courts—Improper Remarks—Prejudice Not Shown.

A remark by the trial judge to the sheriff in the presence of the jury upon a trial for homicide, after four counsel had addressed them, the last being one of the defendant's, "You can give the jury water. And, gentlemen of the jury, if you wish to retire to your room you can do so for a few minutes. We have no band to play between the speeches," makes it incumbent upon the complaining party to show that it was prejudicial, and, nothing else appearing, it does not constitute reversible error.

2. Homicide—Provocation—Words Spoken—Conditions—Questions for Jury.

Upon a trial for a homicide, when unfriendly relations have been shown to have previously existed between the prisoner and deceased, and each had been told by the other never to speak to him again, the disagreement having arisen from the deceased's driving over the clover patch of the prisoner along the side of a road, where the deceased had been forbidden by the prisoner to drive, it is for the jury to say, under the plea of self-defense, and under all the facts and circumstances, whether the prisoner's words first spoken to deceased, "You are not doing what you promised to do, keeping off the clover," were sufficient to provoke an assault made by the deceased upon him, resulting in a fight causing the death of the former.

3. Instructions—Prayers—Substance Given—Appeal and Error.

When the trial judge instructs the jury substantially as requested in special instructions, it is sufficient.

4. Homicide—Self-defense—"Sudden"—Words and Phrases—Harmless Error.

A charge by the trial judge to the jury following in other respects the principles of law applicable to self-defense, upon a trial for a homicide, is

not erroneous because of an instruction that if the assault on the prisoner was "sudden, serious, and continuous," he had the right to kill in defense of his person, the instruction being favorable to the prisoner.

5. Same—Elements of Self-defense.

An instruction that the prisoner upon trial for homicide under the plea of self-defense had a right to stand his ground and resist the attack upon him, even to the slaying of his adversary, provided the assault was "sudden, serious, and continuous," is erroneous, for it leaves out of consideration the question as to how serious the assault was, and as to whether the deceased intended to kill or to inflict great bodily harm, or whether at the time the assault was made it was calculated to excite in the prisoner's mind a reasonable apprehension of death or great bodily harm; but the error being in favor of the prisoner, he has no right to complain on appeal.

6. Homicide—Deadly Weapon—Presumptions—Burden of Proof.

The killing with a deadly weapon raises at least the presumption of murder in the second degree, placing the burden upon the prisoner to satisfy the jury that such facts and circumstances of mitigation or justification existed as will excuse the homicide or reduce its grade to manslaughter.

7. Same—Manslaughter—Harmless Error.

When the jury upon a trial for homicide with the plea of self-defense interposed, have, upon sufficient evidence, accepted the theory of the State, that the prisoner did not kill in self-defense, and it appears that he used a deadly weapon, and slew the deceased with it, a verdict for manslaughter was not improper.

8. Same—Evidence.

In this case there was evidence that the prisoner pursued and killed the deceased by firing a shotgun at him without any real or apparent necessity for the act as a measure of self-defense, that being the only plea interposed; that he twice snapped the gun at the 16-year-old son of deceased; that neither the deceased nor his son was armed; that the prisoner and his brother, who was with him, then ran away, giving as the reason for their sudden flight, which the jury rejected, that they were afraid that the boy would shoot them with a pistol; they said he had one, which he did not have: *Held*, a conviction for manslaughter would not be disturbed on appeal, the trial in other respects being free from error.

APPEAL from *Pell, J.*, at November Term, 1911, of MITCHELL. (438)

The defendants, Charles Rowe and Wesley Rowe, were indicted for the murder of Filmore Rose. Wesley Rowe was acquitted and Charles Rowe was convicted of manslaughter. The killing was admitted by the defendant Charles Rowe, his plea being self-defense. The evidence is voluminous, but for the purpose of considering the exceptions the following statement of facts and a portion of the evidence will suffice:

The deceased, whose wife was a first cousin of the prisoner, had in cultivation a field about a mile from his home, and in order to reach the field it was necessary for him to go over an old road, which was used by the public at will, across the property of the defendant. At one place the road was rough and difficult to pass. The deceased, on one or two occasions drove a little out of the usual bed of the road, allowing his wagon to run over the land and clover of the defendants. On the morning of the homicide the two defendants left home early, about 7 o'clock, one with an axe and the other with a gun, to place some poles along the road to prevent trespassing, as they alleged. From this point, the evidence of the State and the defendant conflicts.

The State's witness, Avery Rose, the 16-year-old son of the deceased, and the only one present at the homicide, except deceased and two defendants, testified: "Thursday morning father and I started to the field; got outside of Charlie Rowe's field and quite a distance from us we saw Charlie Rowe and Wesley Rowe standing on a high knoll, about 125 yards away."

Q. Were they on or near this road you were traveling? A. Yes, sir; up on a knoll, looking down the road towards us. We went on and met them; as soon as we got in sight they came towards us.

Q. What did they have in their hands? A. Wesley had a gun and Charlie Rowe had an axe.

(439) Q. What kind of gun was it? A. A double-barrel shotgun. Charlie had the axe. My father went up and said, "Good morning" to them, and they didn't speak to him. Charlie said: "Now, look here, Filmore, you have run over my clover and grass. If you don't drive down there in the road I am going to put the law to you." Father said: "Charlie, clean out those stumps over there and fix the road so I can drive it, and I will do so." Father went on up the road, Charlie following father; Wesley following Charlie. I was behind my father. Father went on up the road. Charlie turned around to Wesley, handed Wesley the axe; Wesley handed him the gun. I then turned and saw there was trouble. I made for the gun and Charlie knocked me down with the gun and run on around and shot my father. He struck me above the right ear—side of the head. After he shot my father, he turned and snapped twice at me as I went to my father.

Q. Then what happened? A. They ran; went back down the road.

The witness further testified that neither he nor his father had a pistol or other weapon of any kind, and there was no evidence that one was found on the body. The wife of the deceased testified that deceased had not had a pistol for over twenty years.

The appellant testified in his own behalf, and after telling about going to the place of the homicide, on the morning when they met, and doing

a little work on the road, continued as follows: "I was just on the bank of the road, just in the edge of the clover."

Q. Did any one speak? A. I was throwing the stones out and making a racket just as they got up there and didn't hear any one speak.

Q. What was the first word spoken there that you heard? A. Just at that time they were up to us and were just passing us, and I spoke and said: "Filmore, you are not doing what you promised you would do, keeping off the clover." Just at that time, he spoke and cursed me (using offensive and insulting language).

Q. How far away from you was he when he said that? A. Two (440) or three steps away.

Q. What happened when he used the language you have mentioned? A. Just when he used the language I have mentioned, I had seen his hand in his pocket all the time, from the time he came up, and just at that time he stooped and picked up a stone with his left hand, his right hand being in his right pocket, and Avery stooped and picked up two, a stone in each hand. Just at that time Avery rushed at me, wildly, furiously, with the stones. As he rushed at me he saw the axe and he dropped the stones and grabbed the axe.

Q. Then what did he do? A. Just as he grabbed the axe he was getting very close to me and made a blow at me with the axe, and I dodged him, the handle striking me on the left shoulder, jerking the axe out of his hand. I gave back three or four steps from him and by then I had gotten to where my brother had stopped and was standing with the gun on his shoulder; that was my brother Wesley. As the blow came and I dodged it, I was right at my brother and I reached and took the gun off his shoulder and smashed him around the side of the neck or head; it staggered him considerably; he didn't fall.

(Here witness indicates position of parties).

Q. When you struck him with the gun, what did you say, if anything? A. Filmore made about one step towards me with his right hand in his pocket, and as it came above his pocket, with the stone in his left hand, the right hand with the revolver in it, I fired.

Q. How was he holding the pistol when you fired? (Witness indicates.)

Q. Where was it when you fired? A. The butt was just above the pocket.

Q. Did you see the pistol? A. Yes, sir. From the time he came up, I saw his hand was on his pocket, and I could see the bulk; it looked like the muzzle of the pistol. (Witness indicates to the jury how the pistol was held.) I could see the butt above the edge of the pocket.

Q. When you saw the pistol in that position, what did you do? A. I shot.

(441) Q. Did you move from the point where you were standing when you struck Avery with the gun, as you have described? A. After I got hold of the gun and smashed him, I didn't move; stood right where I was; it was all in a minute.

Q. Why did you shoot? A. Our life is dear to us, and I saw that, if I didn't shoot, I would be killed.

Q. When you shot, what did Filmore Rose do? A. Just as I threw the gun up he scringed a little; he was square facing me, and when I threw the gun up, he scringed around to the right, turning his left shoulder a little towards me. The instant I fired he began to sink down. He sank down and at that moment I spoke to my brother and said, "Let's go."

Q. How did you go? A. Back towards home.

Q. Did you run or walk? A. We trotted; didn't run fast; went faster than a walk. Of course, when I fired the gun I thought Avery would go to his father, and I expected when Avery got to his father, he would grab the pistol; that was why we hurried away.

The witness further testified that when he reached his home, he changed his clothing and reloaded the gun and went with it to Spruce Pine and surrendered himself to an officer. He took the gun with him because he thought he would be assaulted. There was evidence tending to show that the prisoner and the deceased were very unfriendly at the time of the homicide, and had been for some time before. He had spoken before to the deceased about driving on his land, and the deceased became angry and quarreled with him, though he did not quarrel himself, but spoke mildly to him. The defendant, in this connection, testified: "I had been cursed by him and told him to never speak to me any more, and he had given me orders never to speak to him any more."

Q. What made him mad with you (that morning)? A. My speaking to him, I suppose.

Q. Didn't you know by your experience before that time that if you spoke to him it would make him mad? A. He seemed to be very passionate.

Q. Did he get mad when you would tell him to keep off the road and clover? A. Yes, he got mad before.

(442) Q. You expected him to get mad that morning? A. I did not know whether he would get mad. I don't know what you are going to do. I spoke as kind to him as I am talking to you. I knew he had gotten mad at other times.

He further stated that he bore no malice towards the deceased at the time of the shooting; that he had learned not to entertain malice; that the clover and grass were not worth much—not over ten cents; that deceased weighed about 140 pounds and the boy, Avery Rose, about 125

pounds, and that he and his brother, Wesley, each weighed about 165 pounds. There was evidence that the prisoner and his brother, Wesley, did not start from home together. They met at the river, a half mile from the place of the homicide, prisoner with the axe and Wesley with the gun, which he carried for his brother to shoot squirrels with, as he did not hunt.

During the trial, after four of the counsel had closed their addresses to the jury, and just after one of the defendant's counsel had spoken, the judge said to the sheriff: "You can give the jury water, and, gentlemen of the jury, if you wish to retire to your room (the jury-room being a private room at the right of the jury box), you can do so for a few minutes. We have no band to play between the speeches." Defendant excepted.

The defendant requested the court to charge the jury that the language used by him, when talking to the deceased about keeping off the clover, was not calculated to provoke a difficulty or bring on a fight, if the words were spoken in a pleasant way and in a mild tone of voice. This the court refused to do, and defendant excepted. The defendant requested the court to give several instructions to the jury, and among others the following, which is typical of all of them, and presents the question of self-defense to the jury as fully as any of them: "The court charges you that from all the evidence, both for the State and the defendant, the defendants were in their field where they had a right to be, and being in a place where they had a right to be, if they were without fault in bringing on the difficulty and the deceased advanced upon them or either of them with a rock or pistol, with intent to slay the prisoners or either of them, then the defendants were not required to retreat or fly, but might stand their ground and repel the assault, (443) even to the extent of taking the life of the deceased; and if they did this, your verdict should be 'not guilty.' You are to be the judges of the reasonableness of the apprehension of the prisoners, or either of them, at the time they were assaulted, if you shall find from the evidence that they were assaulted; and to do this, you are to place yourselves in the position and circumstances that the prisoners were placed in at the time, and say whether or not their apprehension was reasonable." The record states that this instruction was given substantially. At all events, the court charged the jury as follows:

"1. But when a person is without fault, and in a place where he has a right to be, and a sudden, fierce, and continuous assault is made upon him with a deadly weapon, he may stand his ground and slay his adversary, if necessary, to protect himself from death or great bodily harm. And the accused, under such circumstances, is not required to wait until the opportunity for successful defense is passed, but has the

right to act in time to prevent death or great bodily harm, and act on the facts and circumstances as they appear to the prisoner, which facts and circumstances are considered by the jury as sufficient to put in fear of death or great bodily harm a person of reasonable firmness and self-possession; and if under such circumstances the prisoner, Charlie Rowe, shot the deceased, it would be excusable homicide.

"2. If you should find from the evidence that Charlie Rowe was in a place where he had a right to be—and I charge you that he was in a place where he had a right to be, being on his own land—and you should find that he was reasonably without fault in bringing on the difficulty, and that Filmore Rose made a sudden, serious, and continuous assault upon them, then Charlie Rowe would be allowed to stand his ground and shoot the deceased to save his own life or himself from serious bodily harm.

"3. Whether a person who is assaulted by another will be justified in using such violence in resistance as will produce death, must depend upon the nature of the assault and the circumstances under which (444) it was committed. It may be of such a character that the party assaulted may reasonably apprehend death or great bodily harm to his person, and in order to protect himself from such an assault he may kill his adversary. The law of self-defense is founded on necessity, and in order to justify or excuse the taking of human life upon this ground, it must appear, first, that the slayer had reason to believe that he was in danger of losing his life or of receiving great bodily harm; secondly, it must also appear to the jury that he believed as a reasonably firm man, that in order to avoid such danger it was necessary for him to take the life of the deceased. The danger of losing life or receiving great bodily harm must be real, or honestly believed to be so, at the time, and on reasonable ground, and the jury is the judge of such reasonableness of his fears. Though it may afterwards be ascertained that there was no actual danger, yet the slayer has a right to kill in self-defense if the danger is reasonably apparent. It should appear that the circumstances in which the slayer was placed were such as would have produced the fear of death or great bodily harm in the mind of a man of reasonable prudence, courage, and self-possession."

The court was also requested to charge the jury that there was no evidence of manslaughter. This was refused, and defendant excepted. Judgment was entered upon the verdict, and defendant appealed.

Attorney-General Bickett, G. L. Jones, J. W. Pless, and John C. McBee for the State.

Hudgins & Watson, W. L. Lambert, C. E. Greene, M. L. Wilson, and Black & Ragland for defendant.

WALKER, J., after stating the case: The remark of the judge to the jury is severely criticised by counsel as an intimation by him that the case was being argued by defendant's counsel at too great length; but we cannot draw the inference from it. Counsel for the State might just as well complain that it was directed against them. It seems to have been made indifferently. We are not informed by the record what elicited the remark, and we are unable to see that it was prejudicial to the defendant. It may have been so, but it is incumbent upon him (445) to show it. We will not presume error. *S. v. Tyson,* 133 N. C., 692; *S. v. Davis,* 134 N. C., 633; *S. v. Lance,* 149 N. C., 551; *S. v. Plyler,* 153 N. C., 630.

But it was strenuously contended and argued before us with much force and plausibility, that the words of the defendant, addressed to the deceased, were not calculated, nor could they have been intended, to provoke a difficulty, and, therefore, if the jury accepted the defendant's version of the facts, he was without fault, while the deceased made a sudden and deadly assault upon him, thus making complete the right of self-defense. Whether language is provocative or not, cannot always be determined by a mere consideration of the words by themselves. It is sometimes necessary, in order to ascertain the meaning or intention of the speaker, or the probable effect of what is said upon the person to whom he has spoken, that we should view them in their proper setting—the circumstances and surroundings of the parties, their previous relations to each other, and the state of their feelings. What is said by a friend may pass unnoticed, while if the same words are uttered by an enemy, they are like a spark, though small it be, falling into powder, and the explosion quickly follows. In such a case, a single word, though apparently innocent and harmless, will arouse the human passions of anger and resentment. An illustration may be found in *McGrew v. State,* 49 S. W. Rep., 226, in which it appeared that defendant and deceased being unfriendly, had met casually in a saloon. Defendant ordered a glass of Dutch beer, whereupon deceased said: "I will take a glass of American beer," and a fight ensued. It was contended that the words of the deceased were not calculated to provoke a difficulty, but the court ruled otherwise, and said: "While the act of provocation must be confined to the time when the homicide was committed, yet we do not understand by this that we cannot look back to facts transpiring before this, the course of conduct of the parties, and their former conversations, in order to shed light upon and render significant some act or declaration done at the time of the homicide." The evidence in the case shows that the deceased had previously quarreled with the defendant about this same matter, and each had ordered the other (446) not to speak to him. They were enemies, and the defendant should

have known and did know of this state of feeling, at the time he spoke to the deceased about driving over his "clover patch." According to his own testimony, he accused the deceased of bad faith, in that he had deliberately broken his promise not to injure his grass and clover, and he should have known, if he did not know, that such language was calculated to provoke a difficulty, as deceased had quarreled with him before under like circumstances, and they would have fought then if the defendant, as he says, had not exercised great self-control. The court properly instructed the jury to consider the evidence and decide whether or not the words were calculated and intended to bring on a fight, and the exception to this part of the charge must be overruled.

The defendant was entitled to the instruction requested by him and which we have set out in the statement of the case, if he was entitled to any which he asked to be given; but while the judge did not use the language of the prayer, as he was not required to do so, we think the substance of the instruction was given in the general charge to the jury, and that was a sufficient response to the prayer. It may well be said that the charge of the court was favorable to the defendant, as much so as he had any right to expect, for the jury were told that the deceased was where he had a right to be, and that if a "sudden, fierce, and continuous assault was made upon him with a deadly weapon," the law permitted him "to stand his ground" and slay his adversary, and he was not required to wait until the opportunity for successful defense had passed, but might act at once upon the facts as they appeared to him, and if the jury found, when the evidence is thus considered, that is, by putting themselves in his place, that the circumstances were such as to put a man of ordinary firmness in fear of death or great bodily harm, the killing of the deceased was excusable, and they should acquit the defendant.

The following instruction was still more favorable: "If you find from the evidence that the defendant was in a place he had a right to be—and

(447) I charge you he was in a place where he had a right to be, being on his own land—and you further find that he was reasonably without fault in provoking the difficulty, and that Filmore Rose made a sudden, serious, and continuous assault upon him, then the defendant had the right to stand his ground and shoot the deceased to save his own life or himself from serious bodily harm." It will be observed that, in the last instruction, the court did not describe the kind of assault which would justify the taking of human life, with great particularity. He did not tell the jury that it must have been committed with intent to kill or even to inflict great bodily harm, but that if it was "sudden, serious, and continuous," and without regard to its effect upon the defendant's mind or whether calculated to excite a

reasonable apprehension of death or grievous bodily injury, it would be sufficient to justify him in "standing his ground" and killing his adversary. The word "serious" has no fixed or technical meaning in the law, but is rather general and indeterminate in its signification. It may, when applied to an assault, include one made with the intent to kill or to inflict great bodily harm, or it may not, and the jury should have been instructed more definitely upon the character of assault that will justify a killing in self-defense; but this omission was clearly in favor of the defendant, and he has no just cause of complaint. The defendant certainly has no ground upon which to base an exception that the case has not been tried in accordance with the law as declared in former decisions of this Court. *S. v. Dixon,* 75 N. C., 275; *S. v. Blevins,* 138 N. C., 668; *S. v. Hough, ibid.,* 663.

The killing with a deadly weapon having been admitted, the defendant was guilty, at least, of murder in the second degree, nothing else appearing; and the burden accordingly rested upon him to *satisfy* the jury that such facts and circumstances of mitigation or justification existed as would excuse the homicide or reduce its grade to manslaughter. *S. v. Brittain,* 89 N. C., 481; *S. v. Barrett,* 132 N. C., 1005; *S. v. Capps,* 134 N. C., 622; *S. v. Fowler,* 151 N. C., 731. There was some evidence to show that the defendant slew Filmore Rose in self-defense, and it was fairly submitted to the jury, under instructions which were at least free from any error unfavorable to the defendant. The jury decided the fact against him and accepted the theory of the State and the (448) evidence in support of it, that there was no felonious assault upon the defendant prior to the homicide. This being so, he was guilty either of murder in the first or, at least, in the second degree, or of manslaughter. There was ample evidence upon which a conviction of either of the degrees of murder would have been warranted, but the jury, with merciful regard for the weakness and frailty of human nature, convicted of the inferior felony.

What was said in *S. v. Fowler,* 151 N. C., 731 (by *Justice Brown*), is peculiarly applicable to this case: "When, as in this case, the plea is self-defense, and the killing with a deadly weapon is established or admitted, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice. An unlawful killing is manslaughter, and when there is the added element of malice, it is murder in the second degree. When the defendant takes up the laboring oar he must rebut both presumptions—the presumption that the killing was unlawful and the presumption that it was done with malice. If he stops when he has rebutted the presumption of malice, the presumption that the killing was unlawful still stands, and, unless rebutted, the defendant is guilty of manslaughter. This is a fair deduction from the cases in this State.

S. v. Hagan, 131 N. C., 802; *S. v. Brittain,* 89 N. C., 501, 502. At the request of defendant, the judge charged the jury very explicitly that if they should find from the evidence offered by the defendant that the killing occurred under circumstances claimed by him and testified to by his witnesses, they should return a verdict of not guilty. The jury discarded defendant's plea, and if, as now argued by him, there was nothing in the evidence to warrant a verdict of manslaughter, it was the duty of the jury to convict of murder in the second degree. It necessarily follows that, under such circumstances, the defendant can not complain of a verdict for manslaughter, a lesser degree of homicide. An error on the side of mercy is not reversible." But, as also said in *S. v. Fowler,* we think there is, in this case, evidence upon which a verdict of manslaughter may well be supported, and it is not
(449) necessary to apply the rule as broadly stated in *S. v. Quick,* 150 N. C., 820. The jury evidently concluded that the defendant had entered into the fight willingly, if not with malice or with deliberation and premeditation. There was evidence on the part of the State that the defendant pursued Filmore Rose and shot him, when there was no real or apparent necessity for doing so in order to defend his own person, and that after killing him he turned and snapped his gun twice at his son, a boy 16 years old. There was further evidence that Filmore Rose was not armed and that defendant must have known it, as the jury rejected his statement of the facts. He and his brother ran immediately after this tragedy, he says in fear of this boy, whom he thought would take the pistol from his father's pocket, when the jury find that there was none, and shoot him. There was evidence of other facts and circumstances strongly tending to show, not only the defendant's willingness, but his eagerness for the fray. His misfortune is that the jury did not credit his story, but repudiated it and the whole of it. He was fortunate, though, in the fact that the jury, having disbelieved him, did not convict him of murder.

We have not set out the charge of the court in its entirety. If we had done so, it would appear, more clearly than it does in the few passages taken therefrom, that the jury were clearly and fully instructed as to the law and its application to the facts and that the defendant was treated with perfect fairness and impartiality. We need not consider the other numerous exceptions, as they cannot be sustained in view of what we have already said, and we find no reversible error in the ruling to which they were taken.

No error.

Cited: S. v. Vann, 162 N. C., 542; *S. v. Blackwell, ibid.,* 684; *S. v. Lane,* 166 N. C., 339; *S. v. Robertson, ibid.,* 365; *S. v. Cameron, ibid.,* 384; *S. v. Heavener,* 168 N. C., 164; *S. v. Hand,* 170 N. C., 706; *S. v. Crisp, ibid.,* 791; *S. v. Foster,* 172 N. C., 964.

(450)

STATE v. DANIEL YATES.

(Filed 17 May, 1911.)

1. **Homicide—Manslaughter—Evidence Sufficient.**

Evidence that deceased and prisoner got into a heated dispute over a boundary to their lands, both being armed and cursing each other, when the prisoner said to deceased that he would shoot him, upon which deceased turned and the prisoner fired in his face, causing death: *Held*, sufficient for judgment of manslaughter, upon the theory that both fought willingly, under the facts and circumstances of this case.

2. **Homicide—Self-defense—Burden of Proof.**

The burden is on defendant to show self-defense upon trial for a homicide, when there is sufficient evidence to show an unlawful killing of another.

3. **Instructions—"Contentions"—Misstatement by Judge—Appeal and Error.**

If the statement of the contentions by the judge is not as full as desired, it is appellant's duty to ask for specific instructions, and if the judge inadvertently states a contention incorrectly, it should be called to his attention.

4. **Instructions—Homicide—Verdict—Harmless Error.**

An exception to an instruction relating to murder in the second degree becomes immaterial when the prisoner has been found guilty of manslaughter by the jury.

5. **Homicide—Manslaughter—Self-defense—Evidence—Requisites.**

It is the duty of one who is assaulted to abandon the difficulty and avoid the necessity of killing, if he can do so with reasonable safety; and one who enters into a fight willingly and does not abandon it, but prefers to stand his ground and continue in the fight, is guilty of manslaughter at least, if he kills.

APPEAL from *Pell, J.*, at Fall Term, 1910, of WATAUGA.

Indictment for murder. The jury returned a verdict of "guilty of manslaughter," and from the judgment of imprisonment for seven years in the State's Prison pronounced thereon the defendant appealed.

There was evidence upon the part of the State tending to show that on the morning of 16 November, 1909, the defendant, his wife, Bettie Yates, and her two daughters, met with Mrs. Liddy McGuire, wife of the deceased, Jack McGuire, and Mrs. Nancy Ward, her daughter, in a galax patch in the woods near a disputed line of their (451) respective lands. After a conversation between the defendant and Mrs. Liddy McGuire, in regard to the manner of settlement of the disputed line, the defendant and his wife, Bettie Yates, passed on up the hill in the direction of the defendant's home, and also in the direction of Sam Hicks', where the defendant claims that he had started to have

a tooth extracted. After traveling a distance of from 100 to 150 yards, they passed within a few steps of the deceased, who was coming down the ridge with a rifle-gun on his shoulder, while the defendant was armed with a 16-gauge shotgun, and immediately after meeting, the trouble commenced.

Mrs. Liddy McGuire, witness for the State, testified, in part, as follows: That she, her two daughters, the defendant, his wife and her two daughters, were in the woods the morning of the difficulty; that she and the defendant had a conversation about the land in dispute; that after defendant and his wife had passed on, she heard a dispute between the defendant and the deceased, some distance away in the woods; that they were disputing about the line; that she heard curse words pass; that witness asked her husband if that was he talking, and he said, "Yes." Yates said, "Yes, and by G——, I am up here, too." They kept adding words back and forth. "I cannot recollect how they were spoken. Dan started off like he was going home and my husband started down like he was going home, and Dan said, 'G—— d—— you, I will shoot you.' He was talking loud; he had walked between 15 and 20 steps from where I was—from McGuire—after they spoke and had this talk together. When he said that, my husband turned and the gun fired in his face. At the time my husband was shot he had his gun on his shoulder, and when he was shot it fell breech foremost in front of him."

Mrs. Nancy Ward, daughter of deceased, corroborated the statement made by Mrs. Liddy McGuire in most essential parts.

Dr. H. B. Perry, witness for the State, said, on cross-examination, that the range of the shot in the head and face indicated that the deceased and defendant were standing face to face when the gun was fired; that there were 37 shots from the middle of the neck to just above the forehead.

(452) The defendant, Daniel Yates, testified in his own behalf, in part: That on the day of the difficulty he started to Sam Hicks' to have a tooth extracted; that he took his wife along to show her where the line in dispute was; that in going around the line they met Liddy McGuire, wife of deceased; that after talking to Mrs. McGuire for some time as to the location of the line in dispute, he proposed to leave the matter to disinterested parties, to which proposition she seemed to assent; that after talking over the matter he and his wife started up the ridge, and after going from 100 to 150 yards they passed the deceased coming and within eight or ten steps of him; that he spoke to deceased and deceased muttered something which defendant did not understand; that deceased appeared to be mad. After passing deceased, the deceased called to defendant, and said, "Dan Yates, I want you to get out of here; get out of these woods, and take your G—— d—— set with you." Defendant

told him he had a right there and he was not going. "He said, 'Yes, G—— d—— you, you will leave.' I said, 'I am not going.' He said, 'Yes, you are; I will make you.' I said to him, 'D—— you, show me your authority.' And he said, 'G—— d—— you, I can shoot you and drag you out,' and he cocked his gun and started to shoot me. The first thought that entered my mind was to ask him not to shoot. I said, 'Jack, don't draw that gun.' The next thought that run through my mind was to shoot, and I shot. He cocked his gun first and had it up. I had my gun on my shoulder when we first met, and he did, too. (Here witness indicated position in which the guns were held by the parties.) After he cocked his gun and had it up, then I raised mine as quick as I could and shot."

"I shot McGuire because I thought he was going to shoot me. I thought to save myself, I would shoot. In the beginning I was walking away from him. I saw he was very mad, and when I passed, I turned facing him for fear he would shoot me, and I thought if I should face him we would have a few words and he would go off and there would be nothing of it. Before I would have shot him I would have turned, but I was afraid he would shoot me if I turned my back. I wasn't thinking about any trouble. I knew it was his mail day. I just saw him a day or two before that and he was perfectly friendly; he pro- (453) posed to sell me some hay and I said I guess I would buy it."

Witness said he had known deceased nearly all his life; knew the general character of the deceased as being a dangerous, violent, fighting man; a bad man, overbearing man, wanted everything his own way. That his wife, Bettie Yates, had told him the evening before that he aimed to kill him, and said, "By G——, he had enough money to burn him up." That his wife told defendant deceased made that threat in the galax patch.

There was evidence in corroboration of the evidence of the defendant.

Attorney-General Bickett and Assistant Attorney-General G. L. Jones for the State.

T. A. Love and L. D. Love for defendant.

ALLEN, J. The evidence offered on the part of the State tended to show that the defendant was guilty of murder in the second degree, at least, while the evidence of the defendant and of the witnesses introduced to corroborate him, if believed by the jury, would have justified a verdict of not guilty.

It is evident that the jury did not accept, in its entirety, the evidence of the State or of the defendant, and that the verdict, guilty of manslaughter, was rendered upon the theory that the defendant and the deceased fought willingly, of which there was ample evidence.

The only exceptions appearing in the record are to parts of the charge of the judge presiding, as follows:

"Now, gentlemen, did he do it in self-defense? The burden is upon him to satisfy you of the facts and circumstances constituting self-defense. Now, the defendant contends that he had great fear of his life when he shot the deceased; that he did not intend to shoot him, nor did he willingly shoot him, but that it was only through dire necessity—that is, only through the fear that he would lose his own life or have serious bodily harm inflicted upon him if he did not shoot. The defendant contends that he said to the deceased man: 'If you draw that gun on me, I will shoot you'; and the defendant contends further (454) that he calculated that when he did tell him, 'Not to point your gun at me; I will shoot you,' that by that expression the deceased man should have understood that if he did not point his gun at him he would not shoot; the defendant contends that on that occasion he was not at fault; that there was no reasonably safe way for him to escape; that he was afraid if he turned his back and went towards his home he would be shot in the back; that he was afraid of his life, and that it was through dire necessity that he shot him." Defendant excepts.

"Now, gentlemen, if you should find from the evidence that McGuire and Yates each held malice towards the other, and they each armed themselves with a gun for the purpose of fighting it out when they met, and they met accidentally and a quarrel ensued in which both engaged, and Yates killed McGuire, it was at least murder in the second degree, and it makes no difference whether Yates was on his own land or not, it appearing in this case that the land upon which the difficulty took place was in dispute." Defendant excepts.

"If you shall find from the evidence that McGuire sent word to Yates or told Mrs. Yates, who communicated it to her husband, that he was going to kill Yates, and Yates for the purpose of defending himself and not for the purpose of venting his malice and satisfying his revenge upon McGuire, armed himself with a gun and met McGuire accidentally, and engaged in a dispute with McGuire, but not with unfriendliness upon his part, and McGuire attempted to shoot Yates, or acted in such manner with his gun as to cause Yates to have reasonably grounded fear that unless he shot McGuire, McGuire would shoot him, and, acting under this apparent necessity, Yates shot McGuire, Yates would not be guilty, unless at some time before the fatal moment and after Yates had seen the danger of continuing the dispute with McGuire, and had observed McGuire's evil disposition to engage in a gun fight, Yates could have, with reasonable safety, abandoned the difficulty and avoided the necessity of shooting McGuire. For if, after the two entered into the dispute, both having deadly weapons in their hands, Yates perceived

that McGuire was going to shoot if he did not desist from the dispute, and Yates did not desist, but preferred to continue the (455) dispute, and kept his gun in a position on equal terms with McGuire in order to get the drop on him when the dispute had gotten to such fever heat that McGuire would attempt to shoot him, then the defendant Yates would be guilty, at least, of manslaughter, he not being allowed, under the law in such case, to plead self-defense." Defendant excepts.

"If you shall find from the evidence that, when on meeting up with McGuire, the defendant Yates willingly entered into a dispute with McGuire; and if you shall further find that the defendant Yates willingly stood his ground and engaged in the quarrel with McGuire, both having deadly weapons in their hands; and if you shall further find that Yates, willing to stand his ground and willing to engage in the fight, raised his weapon every time McGuire raised his, in order that he might not let McGuire get the drop on him, and that in such fight the defendant killed McGuire, Yates would not be allowed to interpose the plea of self-defense, but would be guilty of manslaughter." Defendant excepts.

"If you shall find from the evidence that the defendant Yates met up with McGuire by accident, and shall find also that he did not have his deadly weapon with him for an unlawful purpose, and also find that said Yates endeavored to make peace with McGuire, but should further find that during the conversation defendant Yates got mad with McGuire, and in the heat of an ungovernable temper decided he would shoot it out with McGuire, and did shoot and kill McGuire in this heat of passion, the defendant Yates would be guilty of manslaughter, and you should so find, and would be so even though McGuire was in the act of drawing his own weapon upon him." Defendant excepts.

None of these exceptions can be sustained.

His Honor properly instructed the jury that the burden of proof was on the defendant to satisfy them of the facts and circumstances constituting self-defense, and the remaining part of the charge covered by the first exception consists of a statement of the contention of the defendant.

If not as full as the defendant desired, it was his duty to ask for specific instructions, and if the judge inadvertently stated a (456) contention incorrectly, it ought to have been called to his attention. *Simmons v. Davenport,* 140 N. C., 411; *Davis v. Keen,* 142 N. C., 502.

It is not necessary to consider the second exception, as the charge excepted to relates to murder in the second degree, and the defendant was convicted of manslaughter.

The third and fourth exceptions are to parts of the charge which embody well-settled principles.

It is the duty of one who is assaulted to abandon the difficulty and to avoid the necessity of killing, if he can do so with reasonable safety; and one who enters into a fight willingly and does not abandon it, but prefers to stand his ground and continue in the fight, is guilty of manslaughter, at least, if he kills.

The charge is set out in full in the record, and it shows that all phases of the evidence favorable to the defendant were presented to the jury.

No error.

Cited: S. v. Blackwell, 162 N. C., 684; *S. v. Lane,* 166 N. C., 339; *S. v. Robertson, ibid.,* 365; *S. v. Cameron, ibid.,* 384; *S. v. Heavener,* 168 N. C., 164; *S. v. Hand,* 170 N. C., 706; *S. v. Crisp, ibid.,* 792; *S. v. Foster,* 172 N. C., 964.

STATE v. J. K. BOYNTON.

(Filed 24 May, 1911.)

1. **Intoxicating Liquors—License—Specific Places of Sale—Evidence, Prima Facie—Corroborative.**

Our statute, Revisal, sec. 2060, relating to the sale of intoxicating liquors in prohibition territory makes the issuance to or possession of a United States revenue license by one charged with the offense *prima facie* evidence of his guilt; and under an indictment charging the unlawful sale at a certain numbered place in a city, a license to the accused to sell at another number therein may be considered in evidence as a relevant circumstance with other evidence tending to establish a sale elsewhere in the city, that the defendant had the intoxicating liquors on hand and was in a condition to violate the law.

2. **Same—Liquors on Hand.**

Upon trial on indictment for the sale of intoxicating liquors at a certain city number, testimony that the accused had and kept liquors on hand in other portions of the city is a relevant circumstance tending to show that he had it on hand and was prepared and equipped to make the illegal sale charged in the bill of indictment, and to be considered by the jury with other evidence tending to show that he had sold such liquor at the place charged in the indictment.

3. **Same—Other Sales.**

The rule of evidence that one illegal sale of intoxicating liquors should not be received as any evidence that another such sale had been made, applies where the sales are entirely separate and distinct transactions, the one having no fair or reasonable tendency to establish the other, but inapplicable when it tends to show that the defendant, accused of violat-

ing the prohibition law at a certain city number, with evidence tending to show such violation there, kept the spirituous liquor elsewhere in the city, or under his control, for the purpose of making illegal sales.

4. Same.

Upon indictment for violating the prohibition law, the possession of liquors by the accused, at the time of the offense charged, is always a circumstance admissible against him, and in general the circumstances under which liquors are kept, and even that they are kept at other places or in other rooms, may be shown.

5. Same—Instructions—"Place" of Offense Charged.

There being direct evidence that the prisoner, indicted for a violation of our prohibition law in a city, sold intoxicating liquors at the time and place therein charged in the indictment, and a United States revenue license being introduced by the State, which, upon its face, permitted him to sell at a different place in the same city, a charge by the court that the revenue license was *prima facie* evidence that the accused was "retailing and selling spirituous liquor under the provisions of that license, at the place specified and mentioned in the indictment," is correct, when it clearly appears from the other relevant portions of the charge that the "place" referred to was the city and not the particular location therein.

6. Same.

The accused being tried for the unlawful sale of intoxicating liquor to a certain person, and at a certain time and place specified in the indictment, and there being evidence that he had sold to others at the same place, and that this was his place of business, where such intoxicants were kept under his control, a charge of the court which confines the evidence of the sale to the others, and to the liquor being kept in his place of business, etc., to corroboration of the evidence of the specific offense, is proper.

7. Intoxicating Liquors—Witness—Paid Detective—Interest in Result—Evidence Scrutinized.

For conviction upon the evidence of a paid detective of violating the prohibition law, the jury should be instructed to make proper allowance for the bias likely to exist in one having such an interest in the outcome of the prosecution, and with reference to any other relevant facts calculated to influence the testimony of the witness, leaving very largely to the discretion of the trial judge the exact terms for the expression of the rule.

8. Same—Charge as a Whole—Construction.

When the accused is being tried for an unlawful sale of intoxicating liquor, and conviction is sought upon the testimony of a paid detective employed for such purposes, an instruction which correctly states the weight with which such testimony should be received is not erroneous because of an expression that it is commendable for a detective or sheriff, etc., to use all reasonable and proper means in the apprehension of those who are violating the law, and when they do so in that spirit it will enable the law to place its hands upon its offenders and violators.

9. Instructions—Charge as a Whole—Interpretation.

A part of the instructions to the jury excepted to is not reversible error when the charge as a whole is correct.

10. Intoxicating Liquors—Instructions—Part Error—Correct as a Whole—Jury—Fairness of Consideration.

Upon trial under an indictment for violating the prohibition law, the judge charged the jury that if any of the jurors were prohibitionists they should try the case as if they were anti-prohibitionists, and *vice versa: Held*, while this of itself might have been misleading, it was not reversible error when in the other pertinent parts of the charge it appeared that he directed the jury, in apt and forceful language, to divest themselves of all prejudice and give the defendant a fair and impartial trial under the law, and on the testimony alone, it being evident that the jury must have understood the charge correctly.

(458) APPEAL from *Councill, J.*, at November Term, 1910, of BUNCOMBE.

Action, charging illicit sale of whiskey in the city of Asheville to one C. M. Laughter, tried on appeal from the police justice, before *Councill, J.*, and a jury, at November Term, 1910, of BUNCOMBE.

On the part of the State, C. M. Laughter, the alleged purchaser (459) of the whiskey, testified as follows: "That on 6 October, 1910, he bought a pint of rye liquor from the defendant, at No. 33 South Main Street, and paid him 75 cents therefor, giving in detail the circumstances under which he purchased. On cross-examination he said that he was a carpenter and had given up this business, accepted employment to work up liquor cases as a detective for the city of Asheville; that he got a salary which was paid him by the city of $70 a month, as a special policeman for such purpose and was furnished with money from time to time to purchase the whiskey, which money he never accounted for and was not required to account for; that this money was furnished him by Colonel Lusk, and witness used it as he was told to do." The State, over defendant's objection, then offered in evidence a list of names from the Collector of Internal Revenue office, certified as being a list of those to whom Government license had been sold to retail spirituous liquors in Asheville, N. C., the certificate as directly relevant to defendant's case being in terms as follows:

"Record of special taxpayers in Buncombe County, Fifth District of North Carolina. Name: Boynton, J. K. R. F. D. Asheville, Blomberg Building, Passenger Station. July, 1910. Amount of taxes, $25. Issued June 30, 1910. Serial Number, 145784. Transferred, 20 August, 1910, to 28 W. College Street, Asheville. (Signed) Geo. H. Brown, Collector of Internal Revenue, Fifth District of North Carolina.

"Certified Form, 7541, issued 19 September, 1910, in lieu of stamp which was lost."

Defendant, specifying his objection, as follows:

a. Because defendant was not charged with being a liquor dealer.

b. That the place mentioned in said list is not the place where the prosecuting witness testified that he had purchased whiskey from the defendant.

c. That the paper introduced shows the defendant was not authorized to sell, under said license, at any place other than No. 28 College Street, Asheville, N. C.

The State, over defendant's objection, was allowed to show by Watt Britt, J. B. Bryson, and others, that at some time prior to (460) this alleged sale and within twelve months, defendant had whiskey in his possession in different quarters and in places in Asheville, N. C., and that at the business places under control and management of defendant, to wit, at the American Saloon on College Street and at Lexington Avenue and at 28 College Street, whiskey was being sold and drunk, and the record further shows, "That the State was permitted to introduce many other witnesses to show that they knew the defendant; that they had been in his place of business and had seen whiskey and beer in his places often." There was verdict of guilty, and from judgment on the verdict the defendant appealed, and assigned for error the rulings of the court on questions of evidence and to the charge of the court as indicated by various exceptions, properly noted.

Attorney-General T. W. Bickett and Assistant Attorney-General G. L. Jones for the State.

G. S. Reynolds and J. G. Merrimon for defendant.

HOKE, J., after stating the case: Our statute, section 2060, Revisal, provides in effect, "That the possession of or issuance to any person of a license to manufacture, sell, or rectify whiskey by the United States Government, in any county, city, or town where such manufacture, sale, etc., are prohibited by law, shall be *prima facie* evidence that the person having such license or to whom the same was issued is guilty of doing the act permitted by such license in violation of the laws of the State," etc. The occasion for the enactment of such a law and its application to a state of facts not dissimilar to those presented here were considered and passed upon in *S. v. Dowdy,* 145 N. C., 432, and it was there held that the United States license was properly admitted in evidence. True, the questions chiefly discussed and dealt with in *Dowdy's case* were, (1) as to whether the certificate there presented came within the term license, used in the statute; (2) whether the act was in excess of the power vested in the Legislature to confer artificial weight on a given kind of proof, and (3) whether it was in violation of the right of the accused to be confronted with the witnesses against him. An exami-

(461) nation of the facts, however, will disclose that while the license specified a particular place, to wit, 104 Queen Street, it was admitted as evidence and given its proper weight as a relevant circumstance, tending to establish an illegal sale in the city of New Bern. The case, therefore, is a direct authority in support of his Honor's ruling, and on further reflection we are satisfied that on this point also *Dowdy's case* was well decided. By the terms of the statute the license is evidence that the holder is doing the act that it permits, selling whiskey by retail, in the county of Buncombe and city of Asheville, 28 College Street, and this is a relevant circumstance, tending to establish a sale elsewhere in Asheville, as it shows or tends to show that the defendant had the whiskey on hand and was in a condition to violate the law by making the sale as charged, the sale to C. M. Laughter. It is testimony in support of direct evidence of such sale, just as much so as if he had shown to have a barrel of whiskey at 28 College Street and was unlawfully engaged in selling it. And for the same reason the ruling must be upheld by which the oral evidence was admitted. It tended to show that defendant had and kept whiskey on hand, in prohibited territory, and was prepared and equipped to make the illegal sale charged in the bill of indictment. There are, as defendant contends, many decisions of the court to the effect that one illegal sale should not be received as evidence that another such sale had been made, but this rule exists where they are entirely separate, distinct transactions, the one having no fair or reasonable tendency to establish the other, and should not obtain where the testimony, as it does in this case, tends to show that defendant habitually kept whiskey on hand or under his control for the purpose of making illegal sales. The position is in accord with right reason and is well supported by authority. In 7 Encyclopedia of Evidence, 760, the author says: "Of course, the possession of liquors by the defendant, at the time of the offense charged, is always a circumstance admissible against him, and in general the circumstances under which liquors are kept, and even that they are kept at other places or in other rooms, may be shown." And there are numerous decisions in support of this statement. *S. v. Illsley,* 81 Iowa, 49;
(462) *S. v. Welch,* 64 N. H., 525; *S. v. Pfefferlee,* 36 Kansas, 90.

Counsel for defendant, in his earnest and able argument before us, insisted that reversible error was committed, to his client's prejudice, when his Honor, among other things, charged the jury, in reference to the effect of the United States revenue license, as follows: "The possession or issuance to any person of a license to manufacture, rectify, or sell spirituous liquors under section 2060 of the Code of North Carolina, laws of this State, makes the possession of such license *prima facie* evidence that the person having it, or to whom the same was issued, guilty

of doing an act permitted by such license, forbidden by the laws of this State. In other words, the introduction of this paper, stating that he had a license issued to him for the purpose of selling whiskey, makes it *prima facie* evidence that he is retailing and selling spirituous liquor under the provisions of that license, at the place specified and mentioned in the indictment." The objection being that as the license authorizes a sale of whiskey at 28 College Street, it should only be given the statutory effect as evidence at that place, and that the portion of the charge in question erroneously allows this same probative effect at the place of the alleged illegal sale, to wit, No. 33 South Main Street; but we do not think the position correctly interprets his Honor's charge. In telling the jury that the statute made the United States license *prima facie* evidence that the defendant was a retail liquor dealer at the "place specified and mentioned in the bill of indictment," the court was not referring to 33 South Main Street, the place of the alleged illegal sale, nor was he ignoring the place specified in the license. "The place specified and mentioned in the bill of indictment" referred to the city of Asheville, and, so taken and understood, the charge is correct. The fact that he held a United States license to retail liquor at 28 College Street, Asheville, N. C., was made by the statute *prima facie* evidence that he was there engaged in that business, and this was only recognized and allowed as a circumstance tending to support the direct evidence of the alleged illegal sale. To show that this was all the effect given the statutory presumption, the charge of the court immediately proceeds: "That, however, is not sufficient to make him guilty of the (463) charge of selling liquor, as charged in the bill of indictment, to the State's witness, C. M. Laughter; and while you can consider this license as evidence tending to show that the defendant is exercising the privilege of selling liquor in Asheville, as specified, yet, before the State can convict him, it must go further and satisfy you from the evidence, beyond a reasonable doubt, that he sold Laughter liquor, and you may consider the license, as before stated, as being evidence tending to show that he is a liquor dealer. The law makes it *prima facie* evidence that he is, in law, a dealer in spirituous liquor, under the provisions of the license referred to. But the State must go a step further and satisfy you from the evidence beyond a reasonable doubt that he sold to Laughter, before you can convict him of selling liquor under this indictment." And like effect was given the oral evidence objected to. Speaking to this testimony, the court in part said: "The State further contends that other evidence has been introduced that defendant sold spirituous liquor to others than Laughter, and the court has held it to be competent as a corroborating circumstance, or circumstances, tending to show that he is engaged in handling spirituous liquors, and the evidence

which has been introduced tending to show that he was at the places of business, claimed to be the defendant's places of business, and that liquor was seen there under his control and in his possession, if there was such evidence, was for the purpose of corroborating the contention of the State that he is a liquor dealer and had liquor under his control and possession, and you can consider it for that purpose only, but not for the purpose of proving that he sold to Laughter." As heretofore stated, the court permitted the license and the oral evidence to be regarded as circumstances tending to support the direct evidence of the alleged illegal sale, and, for the reasons given as to the admission of the evidence, the effect allowed it in the charge must be upheld.

Defendant further contended that the court did not properly caution the jury in reference to the testimony of the principal witness for the prosecution, and especially in the failure to give certain prayers
(464) for instructions, as follows: "In weighing the testimony of the witness Laughter greater care should be exercised in relation to the testimony of a detective employed in hunting up evidence, who is interested in or employed to find evidence against the accused, than in other cases, because of the natural and unavoidable tendency and bias of the mind of such person against the person whom the witness has been employed as a detective, and his evidence should be weighed with greater care than that given by a disinterested witness." And, second, the testimony of a detective must be scrutinized with unusual caution. These prayers have been upheld and almost in this exact language by courts of approved authority, but usually there were facts *ultra* tending to impeach the testimony of the witness, and in one of them, certainly, the detective was shown to have a pecuniary interest in the result of the verdict; and it was no doubt in reference to these facts that the prayer was approved, and not with a view of establishing any hard and fast formula as to the evidence of detectives. The general rule is that the jury should be directed to scrutinize the evidence of a paid detective and make proper allowances for the bias likely to exist in one having such an interest in the outcome of the prosecution and in reference to any other relevant facts calculated to influence the testimony of the witness; but where this is done, the exact terms in which the rule may be expressed are left, by our decisions, very largely in the discretion of the trial judge. In the present case, while his Honor told the jury that it "was commendable on the part of a detective or sheriff or other officer of the law to use all reasonable and proper means in the apprehension of those who are violating the law of the land, and when they do so in that spirit that will enable the law to place its hands upon offenders and violators, it is to the credit rather than the discredit of the person so acting." He said, further, and in this immediate connection: "But when one acts

in the capacity of a private detective or public officer, it becomes the duty of the jury to scrutinize the testimony of such person, and to say whether or not the testimony of that person so acting is biased, whether the interest he serves has influenced him to an extent that would reflect upon or affect his testimony." and we are of opinion that (465) this was all the caution that the facts of the present case required. *S. v. Black,* 121 N. C., 578; *S. v. Barber,* 113 N. C., 711.

Defendant excepted, further, that the court told the jury, "If you are a prohibitionist, you must try this man as you would try an antiprohibitionist, and if you are an antiprohibitionist you must try him under the law and the evidence as if you were a prohibitionist." While this statement, taken by itself, might be to some extent misleading, the excerpt does not give a correct impression of his Honor's charge nor of this particular portion of it. In connection with this matter, the entire charge of the court was as follows: "In passing upon the guilt or the innocence of the defendant, it is not a question of privilege with the jury as to what they will do, but it is a matter of duty and obligation which rests upon them to try the defendant under the evidence, and convict or acquit him, as you shall find. Juries sitting in the trial of a case of this kind, involving an investigation into the illicit sale of spirituous liquor, are not privileged to try the case upon any individual ideas which they may have, as bearing upon the question of the sale of spirituous liquor. In other words, the ideas of any individual juror, as to whether the law is wise or unwise, are not to be considered. If you are a prohibitionist, you must try the man as you would try him if you were an antiprohibitionist; if you are an antiprohibitionist, you must try him under the law and evidence as if you were a prohibitionist. In other words, you can not ingraft upon your verdict any personal or individual views you may entertain upon the liquor law, but you must try him, defendant, as you would any other person for the violation of any statute law which we find upon the books of our State, divesting yourself of any prejudice and take the evidence as it comes from the witnesses and the law as it is given to you by the court, and determine the guilt or the innocence of the defendant. Now, in that spirit you go about this investigation, and return a verdict, as you are in duty bound to do, of guilty or not guilty, as you shall find." Considering the statement as a whole, and it is right so to consider (466) it (*S. v. Exum,* 138 N. C., 599; Thompson on Trials, sec. 2407), it directs the jury, in apt and forceful language, to divest themselves of all prejudice and give the defendant a fair and impartial trial under the law and on the testimony, and on that alone, and the jury must have so understood it. After giving the case most careful consideration, we find no reversible error, and the judgment against the defendant is affirmed.

No error.

STATE v. BOB HAWKINS.

(Filed 24 May, 1911.)

1. **Indictment—Clerical Omissions—Corrections—Offense Sufficiently Charged.**

An indictment charging that the prisoner "unlawfully, willfully and feloniously break and enter" a certain house at night for the purpose of stealing, is not rendered invalid because the word "did" (unlawfully, etc., enter) was omitted, as it appears that the omission was a clerical error and the offense was sufficiently charged.

2. **Larceny—Evidence Circumstantial—Conflicting Evidence—Questions for Jury.**

Upon a trial under an indictment for entering a certain house at night for the purpose of larceny, there was evidence introduced by the State that the prisoner had been forbidden to be present at a town hall where the ladies were giving an entertainment for the benefit of a charity; that a policeman, who slept in the building, late that night heard a noise as if some one were breaking the lock to the door of the hall, placed there for the purpose of locking up certain articles of value which the ladies had used; that the policeman went at once to the hall and found the door open, the lock gone, which he has not found since; that defendant was within the hall, and sat down by a heating stove as he (the policeman) reached the door: *Held*, evidence sufficient for conviction, it being for the jury to determine whether the prisoner's evidence in explanation should be accepted as true.

3. **Larceny—Intent—Evidence, Circumstantial.**

Upon evidence tending to show that the prisoner broke into a hall in the night, where he had no right to be, where things of value had been locked up and left, there is sufficient evidence of criminal intent to commit larceny to sustain a verdict of guilty.

4. **Larceny—Breaking—Ownership of Building—Motion in Arrest—Instructions—Procedure.**

The objection that the evidence is not sufficient to show ownership of a building which the defendant is charged with breaking into with intent to commit larceny may not be taken advantage of by motion in arrest of judgment, the procedure being by a prayer for instruction.

(467) APPEAL from *Lane, J.*, at March Term, 1911, of BURKE.

The defendant was convicted at March Term, 1911, of BURKE, under section 3333, Revisal, upon the following indictment:

"The jurors for the State, upon their oaths, do present that Bob Hawkins, late of the county of Burke, on 31 October, 1910, with force and arms, at and in the county aforesaid, unlawfully, willfully, and feloniously break and enter the town hall in the town of Morganton, the property of said town of Morganton, then and there situate, in the nighttime, in which said town hall there was at the time goods, chattels, dishes,

and other merchandise and things of value, with intent unlawfully, willfully, and feloniously commit the crime of larceny, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

Upon the call of the case for trial, and before the jury was impaneled, the defendant moved the court to quash the bill of indictment on the ground that there was no allegation in said bill that defendant did commit any crime, in that the word "did" nowhere appeared in said bill. Motion denied, and defendant excepted.

The State introduces the following evidence:

C. R. Gilbert testified as follows: "I am night policeman in the town of Morganton. On the night of 31 October, 1910, the ladies of the town had a Halloween party in the town hall for the benefit of Grace Hospital. They left the hall some time between 10 and 11 o'clock that night, and left some dishes, cups, pots, pans, etc., in there. (468) Some time that night, while the party was going on, the defendant Bob Hawkins came up there, and they told him to get out, and he went down the stairway and went away. When they all left the hall door was locked with a padlock, with hasp and staple. That night, some time between 1 and 2 o'clock, I heard a noise like some one working at the lock at the door of the hall. I was in my room just across the aisle in the building. I heard something like a lock break. I got up and went to the door and looked in, and the defendant sat down by the side of the stove. I pulled the door shut, went back to my room, put on my clothes, and went in and arrested defendant and took him to the calaboose and locked him up. The lock was gone, and we haven't found it yet. He said that if I would turn him loose he would go home; that a wagon was coming for him in a few minutes. I heard the noise at the lock, I suppose about five minutes. It was continuous. I heard something like some one walking down the stairway just about the time the lock was broken, and while I heard the noise at the door like some one working with the lock. I sleep in the building across the hall. The building belongs to the town of Morganton."

Cross-examination: "This was some time between 1 and 2 o'clock in the night. It was dark. The lights had gone out. I searched the defendant. He had nothing on his person. I will not swear Bob Hawkins broke the door open or that he broke the lock to the door. I did not see any one break the door open. All that I know is that I heard a noise like some one working at the door and heard something like a lock break and found Hawkins in the hall. He told me he was hunting for a place to sleep. I told him I would give him a place to sleep, and took him to the calaboose."

Here the State rested.

The defendant introduced the following testimony:

Bob Hawkins, defendant, testified as follows: "I am defendant. Live some six or eight miles from Morganton. Was in town the night the ladies had a Halloween party for the benefit of Grace Hospital. I was employed by Timothy Smith to take some vegetables and other
(469) things to the hall for Mrs. Walton. I was there most of the time while the party was going on. They gave me supper and I stayed there until they all left. I went down street and met up with some of my friends and took a drink or two of liquor. I got cold and went back up there to get warm before starting home. Some of my friends had a wagon and they were coming by the town hall to get me. I went up to the door, and it was standing partially open, so that I could see the glimmer of the light from the stove in the dark room. I walked in and sat down by the stove and directly the policeman came in and arrested me and took me down to the calaboose and locked me up. I did not break anything, neither did I attempt to take anything—only wanted to warm before starting for home."

Four witnesses testified to the good character of the defendant.

The defendant requested that the following instructions be given to the jury:

1. The court charges you that upon all the testimony in this case, the jury should return a verdict of not guilty.

Refused, and defendant excepted.

2. The court charges you that the fact that the prisoner was found in the building, as alleged, is not evidence that he entered it with the intent to commit any particular crime.

Refused, and defendant excepted.

After the verdict the defendant moved in arrest of judgment upon the same grounds urged in support of his motion to quash, and upon the additional ground that there was no evidence that the hall was the property of the town of Morganton. Judgment was pronounced on the verdict, and the defendant appealed.

Attorney-General Bickett and Assistant Attorney-General George L. Jones for the State.

R. C. Huffman for defendant.

ALLEN, J., after stating the case: It is apparent that the failure to use the word "did" in the indictment is a clerical or grammatical error, which is cured by our statute (Revisal, 3254). The meaning of
(470) the bill is clear and the defendant could not have been misled, nor could he have failed to understand the exact nature of the offense charged.

In Joyce on Indictments, sec. 201, it is said: "Though an indictment

may be couched in ungrammatical language, this will not, of itself, render the indictment insufficient, provided the intention and meaning of the pleader is clearly apparent." And in section 202: "It is the general rule than an indictment is not vitiated by mistakes which are merely clerical, where they do not destroy the sense of the indictment, and the meaning is apparent."

A case in point is *Bond v. State,* 55 Ala., which holds an indictment sufficient which charged that "the defendant broke into and entered a storehouse of R. D., with the intent to steal, in which there was at the time of such breaking and entering goods, merchandise, or other valuable things kept for use."

In *Com. v. Call,* 21 Pick. (Mass.), 515, *Justice Morton* says: "The grammatical and critical objection, however ingenious and acute it may be, cannot prevail. The age is gone by when bad Latin or even bad English, so it be sufficiently intelligible, can avail against the indictment, declaration, or plea."

The evidence for the State, when considered in connection with that of the defendant, and the evidence of his good character, would have fully justified a verdict of acquittal; but we can not say there was no evidence fit to be submitted to the jury, and it was for them to determine its force and conclusiveness.

The controlling principle in determining whether there is evidence which the jury ought to consider is well stated in *S. v. White,* 89 N. C., 464, and approved in *S. v. Walker,* 149 N. C., 530, as follows: "It is well-settled law that the court must decide what is evidence, and whether there is any evidence to be submitted to the jury, pertinent to an issue submitted to them. It is as well settled that if there is evidence to be submitted, the jury must determine its weight and effect. This, however, does not imply that the court must submit a scintilla—very slight evidence; on the contrary, it must be such as, in the judgment of the court, would reasonably warrant the jury in finding a verdict upon the issue submitted, affirmatively or negatively, according as they might view it in one light or another, and give it more or less weight, or (471) none at all. In a case like the present one, the evidence ought to be such as, if the whole were taken together and substantially as true, the jury might reasonably find the defendant guilty. A single isolated fact or circumstance might be no evidence, not even a scintilla; two, three, or more, taken together, might not make evidence in the eye of the law; but a multitude of slight facts and circumstances, taken together as true, might become (make) evidence that would warrant a jury in finding a verdict of guilty in cases of the most serious moment. The court must be the judge as to when such a combination of facts and circumstances reveal the dignity of evidence, and it must judge of the

pertinency and relevancy of the facts and circumstances going to make up such evidence. The court can not, however, decide that they are true or false; this is for the jury; but it must decide that, all together, they make *some evidence* to be submitted to the jury; and they must be such, in a case like the present, as would, if the jury believe the same, reasonably warrant them in finding a verdict of guilty."

The evidence of the State tended to prove that on the night the crime is alleged to have been committed there was a crowd in the hall until between 10 and 11 o'clock; that while the crowd was there the defendant went to the hall and was told to leave, which he did; that after the crowd left, the door was locked, a padlock, hasp and staple being used; that property of some value was left in the hall; that between 1 and 2 o'clock in the night a policeman, who slept in the building, heard a noise like some one working at the lock of the door; that he heard something break and he thought it was the lock; that he went immediately to the hall and found the door open and the lock gone; that the defendant was on the inside, and when the policeman reached the door, he sat down by the stove.

If so, the jury could find from the evidence that the defendant broke the lock to the door and entered the hall, in which there was property, with the criminal intent alleged in the indictment.

(472) "The intent may, and generally must, be proven by circumstantial evidence, for as a rule it is not susceptible of direct proof. It may be inferred from the time and manner at and in which the entry was made, or the conduct of the accused after the entry, or both." Cyc., vol. 6, p. 244.

In *S. v. McBryde,* 97 N. C., 393, the defendant was charged with breaking into a dwelling with intent to commit larceny, and in discussing the evidence of intent, the Court says: "The intelligent mind will take cognizance of the fact that people do not usually enter the dwellings of others in the night-time, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The intent is not the object of sense; it can not be seen or felt, and if felonious, is not usually announced; so where no felony is committed, it would be difficult to prove a crime consisting of the intent alone, unless the jury be allowed to infer the intent from circumstances."

This is the law as announced in many decisions of this and other courts, but in its application juries should be guided by the humane rule delivered by *Judge Ruffin* in *S. v. Massey,* 86 N. C., 660: "When an act of a person may reasonably be attributed to two or more motives, the one criminal and the other not, the humanity of our law will ascribe it to that which is not criminal. 'It is neither charity nor common sense

nor law to infer the worst intent which the facts will admit of. The reverse is the rule of justice and law. If the facts will reasonably admit the inference of an intent, which though immoral is not criminal, we are bound to infer that intent.' "

The evidence of criminal intent is, we think, stronger than in *S. v. McBryde, supra,* and in *S. v. Christmas,* 101 N. C., 754, in which judgments upon convictions were affirmed.

The motion in arrest of judgment upon the ground that the State failed to prove that the hall was the property of the town of Morganton, was properly overruled.

If there had been a failure of proof, the defendant should have taken advantage of it by a prayer for instruction, and not by motion in arrest of judgment. *S. v. Baxter,* 82 N. C., 606; *S. v. Harris,* (473) 120 N. C., 578; *S. v. Huggins,* 126 N. C., 1056.

It seems, however, there was evidence of the fact. A witness testified without objection: "The building belongs to the town of Morganton," and there was no evidence to the contrary. The fact that the defendant was in the house was a circumstance to be considered by the jury upon the question of criminal intent. We find

No error.

Cited: Cabe v. R. R., ante, 405; *S. v. Wellman,* 166 N. C., 355; *S. v. Rogers, ibid.,* 390; *S. v. Allison,* 169 N. C., 375.

STATE v. ELZIE SMITH AND BERT LILES.

(Filed 26 May, 1911.)

1. Slander—"Innocent Woman"—Essential Facts.

Upon a trial for the slander of an innocent woman under Revisal, sec. 3640, the innocence and virtue of the woman are essential elements of the crime.

2. Same—Burden of Proof.

The burden is upon the State to show that an innocent and virtuous woman has been slandered in order to convict under the provisions of Revisal, sec. 3640.

3. Slander—"Innocent Woman"—Good Character—Instructions—Burden of Proof—Conflicting Charge—Appeal and Error.

Upon a charge of slander of an innocent woman under Revisal, sec. 3640, the court instructed the jury that the burden was upon the State to show by the preponderance of the evidence that the woman was vir-

tuous or innocent, but further charged, with reference to this matter, that "the law presumes all witnesses are of good character, and it likewise presumes that a woman is of good character until the contrary appears." In analyzing the charge in this case, and giving it a fair and reasonable construction as a whole: *Held*, reversible error, as it in effect put the burden on defendant to show that the prosecutrix was not innocent or virtuous, or at least left the jury in doubt where this burden rested.

APPEAL from *Webb, J.*, at Fall Term, 1910, of POLK.

Indictment for the slander of an innocent woman under Revisal, sec. 3640. The exceptions are to the charge of the judge. He (474) correctly defined the term "innocent woman" as used in the statute, and then charged upon the burden of proof as follows:

1. The burden of proving the charge is upon the State, and it must satisfy you beyond a reasonable doubt, and if it fails to offer evidence which will establish the uttering of the slanderous words beyond a reasonable doubt, the offense is not made out; but the defendants having admitted uttering the slanderous words, proof of that fact is dispensed with, and you will find that they were uttered.

2. The law presumes that all witnesses are of good character till same is impeached, and it likewise presumes that a woman is of good character for virtue till the contrary appears; but evidence having been offered in impeachment of the character of the woman, May Liles, the court charges you that the burden is cast upon the State to prove that she is a woman innocent within the purview of the statute, and if you find that she is not an innocent and virtuous woman as explained to you above, then you will not convict, but will return a verdict of "Not guilty" as to both the defendants.

3. The court further charges you that the defendants do not have to satisfy you beyond a reasonable doubt as to the truth of the slanderous language used, but only have to offer such evidence as will cause you to entertain a reasonable doubt as to their truth, because if you have a reasonable doubt as to the virtue of the prosecuting witness you cannot convict, and the court so charges you.

4. The only question for you to determine in this case is whether the statement of the defendants, that they both had had criminal intercourse with the prosecuting witness, May Liles, is true; and if you have a reasonable doubt of this testimony, then you will not convict. The defendants testify that they have had intercourse with May Liles, and she denies it and offers evidence of her good character. All this you will consider, but, as stated above, the only question in the case is whether these statements of the defendants are true, and your verdict will turn upon your findings in this particular.

5. The statute was passed to protect and preserve the character of

innocent women, as already explained to you, and before you can (475) convict it must appear that the woman is innocent and virtuous. The court has told you where the burden of proof rests, and calls the matter again to your attention to impress is upon your minds.

6. You will consider the evidence offered by the State as to the character of the prosecuting witness, May Liles, and if you find upon the evidence and from the presumptions as explained to you, beyond a reasonable doubt, that said prosecuting witness, May Liles, is an innocent and virtuous woman, then you will return a verdict of "Guilty."

The jury returned a verdict of guilty. The defendants, after moving unsuccessfully for a new trial, appealed from the judgment rendered upon the verdict.

Attorney-General Bickett and Assistant Attorney-General George L. Jones for the State.

Defendants not represented in this Court.

WALKER, J. When the charge of the court is analyzed and its several parts compared and after giving it a fair and reasonable construction as a whole, which we are required to do in all cases, we are driven to the conclusion that the judge virtually told the jury that the burden was on the defendants to disprove the innocence of the prosecutrix. It may well be inferred from one or two sentences of the charge that his Honor thought the burden as to this ingredient of the offense was upon the State, and this was the correct view; but when he said that there was a presumption of law in favor of the innocency and virtue of the prosecutrix, *until the contrary appears,* he might as well have gone further and instructed the jury, in so many words, that, unless the defendants had satisfied them she was not an innocent woman, the presumption should prevail and they would find the fact accordingly. A similar charge was condemned by this Court in *S. v. McDaniel,* 84 N. C., 803. We reproduce the syllabus of the case: "On trial of an indictment for slander under chapter 156, Laws 1879, the admission of the defendant that he spoke the words charged does not shift the burden of proof upon him to show he had not slandered an innocent woman. Her inno- (476) cence is a question for the jury upon the evidence, and no presumption of her innocence should be allowed to weigh against the defendant." It will be seen at once that it decides the very point presented in this case. Instead of placing the burden by explicit words, upon the State, where it belonged, the court used language which was certainly calculated, whether intended or not, to impress the contrary view upon the jury. It could make no difference what the judge intended to charge; we must deal with the charge as it is; for the jury can not see or understand his unexpressed intention, but only what he said. This

error was not cured by anything said afterwards, or by any previous utterance of the judge. On the contrary, it was, if possible, emphasized in one or two instances. What could the jury have understood the learned judge to have meant when he told them that the law presumes a woman is innocent and virtuous until the contrary appears? It could not be expected that the State would make it appear otherwise than that she was innocent, or, in other words, to defend the prisoners. Well, then, who must make this appear? Why, of course, the defendant. The court further charged that the case turned upon the truth of the charge made by defendants, leaving out of consideration the question of the woman's innocence. And again the court charged: "But evidence having been offered in impeachment of the character of the woman, May Liles, the burden is then cast upon the State to prove her to be an innocent woman." What does this mean? That the defendant must first attack the prosecutrix by evidence showing her lascivious nature and guilt of actual sexual intercourse, before the burden of proof shifts to the State. This is not the law, as we understand it to be. The burden is upon the State to show every fact essential to the commission of the crime, and we can not doubt that the innocence of the woman is one of those facts. Without it, to show that her virtue and chastity have been impeached by a charge of sexual intercourse is not sufficient. It tends to prove no criminal offense, and is proving, we may say, but one-half of the offense, when the State is required to prove the whole of it.

In *S. v. McDaniel, supra, Justice Ruffin* thus clearly explains (477) the law as to the burden of proof in prosecutions of this kind:

"As we construe it, the offense defined consists, not in the slander of a woman by falsely charging her with incontinency, but in the attempt to destroy the reputation of an innocent woman by such means. . . . The innocency, then, of the woman who is the subject of the attempt lies at the very foundation of the offense, and constitutes its most essential element, its very *sine qua non,* and must of necessity be distinctly averred in the indictment. If necessary to be averred, then, under the principle declared in the cases of *S. v. Woodly,* 47 N. C., 276, and *S. v. Evans,* 50 N. C., 250, the burden of proof devolved upon the State, even though it involved the necessity of its proving a negative." The decision in that case was approved in *S. v. Mitchell,* 132 N. C., 1033, and the general rule is fully and ably discussed by *Justice Hoke* in *S. v. Connor,* 142 N. C., 700, where it is held that the burden of showing the innocence of the woman is upon the State. In the most favorable view we can take of the charge for the State upon this appeal, the jury were at least left in doubt and uncertainty as to the burden of proof, whether it rested upon the State or the defendants. The Attorney-General admits in his brief that in this respect the charge was erroneous.

New trial.

STATE v. GEORGE MAYHEW ET AL.

(Filed 31 May, 1911.)

Solicitor's Fees—Homicide—Insolvent Defendant—Capital Felony—Interpretation of Statutes.

A trial upon an indictment charging murder in the first degree, with conviction in the second degree, the solicitor having announced on the trial that he would only ask for conviction in the second degree or manslaughter, does not entitle the solicitor to his full fees when the party convicted is insolvent, the exception to the statute where full fees are allowed in such instances being "capital felonies," etc., and murder in the second degree is not a "capital felony." Revisal, sec. 2768.

CLARK, C. J., dissenting; WALKER, J., concurring in the dissenting opinion.

APPEAL from *O. H. Allen, J.*, at April Term, 1910, of WAYNE. (478)

Appeal by the Commissioners of Union County from an order of his Honor retaxing the costs or fees due the solicitor in above case.

The following are the findings and judgment:

1. That at January Criminal Term of Union County the solicitor sent a bill of indictment before the grand jury, charging George Mayhew and two others with murder in the first degree, and that said indictment was returned into open court on Monday, 28 January, indorsed "A true bill."

2. That on 31 January at said term the solicitor announced that he would not ask for murder in the first degree, but for murder in the second degree or for manslaughter, as the jury might find the facts to be.

3. That said defendants were put on trial and convicted of murder in the second degree at said term, and were sentenced to terms of years in the penitentiary.

4. That said defendants are insolvent and are unable to pay the costs in the case.

5. That in making out the bill of costs in the case to be presented to the county commissioners the clerk taxed a fee of $10 for each defendant, and the bill was ordered paid by the Commissioners of Union County.

6. That upon due notice to the Commissioners of Union County the solicitor moved to retax the bill of costs, claiming that he was entitled to a fee of $20 for each defendant; and, by consent, the motion was heard before the court at the February term of the Superior Court.

Upon the foregoing facts the court is of the opinion that the solicitor is entitled to a fee of $20 for each defendant convicted upon said indictment, and the clerk is hereby directed to retax the bill of costs in accordance with this order.

J. J. Parker for Solicitor.

Adams, Armfield & Adams for Commissioners of Union, defendants.

(479) BROWN, J. The fees of the solicitor in this case are fixed by the following paragraphs, Revisal, sec. 2768; "The solicitors shall, in addition to the general compensation allowed them by the State, receive the following fees, and no other, namely:

"For every conviction upon an indictment which they may prosecute for a capital crime, $20.

"The fees in all the above cases are to be taxed in the costs against the party convicted; but where the party convicted is insolvent, the solicitor's fees shall be one-half, to be paid by the county in which the indictment was found, except that for convictions in capital felonies, forgery, perjury, and conspiracy, when they shall receive full fees."

The record in this case raises only one point, viz.: Is the solicitor entitled to full fee of $20 for each defendant or to only $10, half fees?

It is admitted by the counsel for the appellants, the commissioners, that the solicitor is entitled to $10, half fees, for each defendant convicted in this case.

The prosecution, as commenced by bill of indictment, was undoubtedly for a capital crime, but the conviction was for murder in the second degree, which is not a capital crime. It would therefore seem plain that under the express language of the act, the defendants being insolvent and the county taxed with the costs, the solicitor is entitled to only half fees, admitted by appellants to be $10 in each case.

There was no conviction for a capital felony, and therefore the case is not brought within the exception contained in the statute.

Since the division of the crime of murder into two degrees, the solicitor's fees have remained unchanged. It requires about as much labor to convict of murder in second degree as of the capital crime, and a conviction for the former should be put on the same basis as forgery, perjury, and conspiracy; but that can be done only by the Legislature.

It is suggested that the solicitor never prosecuted an indictment for a capital crime, and that he is entitled to only $4. We are of opinion that he commenced a prosecution upon an indictment for a capital (480) crime, and that had he convicted the defendants of the capital felony he would have been entitled to $20 for each defendant; but as he did not so convict, he is entitled to only half that sum. The prosecution commenced when the solicitor drew the indictment for murder, a capital felony, and sent it to the grand jury. The prosecution for a capital felony continued when the bill was returned a true bill and the solicitor caused the prisoners to be arraigned, as the record shows, for a capital felony. "Prosecution is the whole or any part of the procedure which the law provides for bringing offenders to justice." 6 Words & Phrases, 5737, citing *Ex parte Fagg,* 38 Tex. Cr. App., 573, 40 L. R. A., 212.

No degrees of murder were recognized in this State prior to 1893, and all murder was punishable with death. The act of 1893 created no new crime. It merely classified the different kinds of murder, leaving it to the petit jury to say of what degree of murder the accused is guilty. Laws 1893, ch. 85; *S. v. Ewing,* 127 N. C., 555; *S. v. Banks,* 143 N. C., 656. As pointed out above, this Court has held that the solicitor must send a bill charging murder in the first degree, and the grand jury must so find it, before the solicitor can prosecute the accused for murder in the second degree. *S. v. Ewing, supra.* Therefore when the solicitor after arraignment decided to ask for a verdict of murder in the second degree only upon the evidence, so far as his fees are concerned he occupied the same position as if he had asked for a conviction for the capital felony and secured one for the second degree only. We can not suppose for a moment that when the Legislature divided the crime of murder into two degrees it intended as a consequence to reduce the solicitor's fees to $4 in case of a conviction for murder in second degree. This would reduce the fee in such cases to a much smaller figure than is allowed in perjury, forgery, counterfeiting, and seven other offenses of much less gravity than homicide, where the fee is fixed at $10. Revisal, 2768.

We think our opinion that the indictment and arraignment constituted a prosecution for a capital felony, although there was a conviction for murder in second degree, is strongly supported by the (481) opinion in *Coward v. Commissioners,* 137 N. C., 300, 49 S. E., 207, where *Clark, C. J.,* says: "The question presented is the liability of the county of Jackson for costs of State's witnesses in *S. v. Long,* who was indicted in that county for murder, but whose cause was removed to the Superior Court of Macon. After the removal to the latter a *nolle prosequi* was entered as to murder in the first degree, and the witnesses were subpœnaed to the next term, at which the prisoner was tried for murder in the second degree and convicted of manslaughter. The witnesses for the State were entitled to their mileage and fees in full so long as attending court as witnesses upon the capital charge, including the terms at which the *nol. pros.* was entered." In that case there was a trial for murder in the second degree only, and yet the witnesses were allowed full fees so long as attending court upon the capital charge.

We take the true intent and meaning of the law is that the solicitor shall receive $20 for a conviction in a capital felony, and where he indicts and arraigns the prisoner for the capital felony, and the jury returns a verdict of murder in second degree or manslaughter, the solicitor is entitled to $10 only.

Error.

CLARK, C. J., dissenting: Rev., 2768, provides that the solicitors shall "receive the following fees and no other." In the list is the following: "For every conviction upon an indictment which they may *prosecute for a capital crime,* $20."

Revisal, 3245, provides the form of indictment for murder and Revisal, 3271, provides that the same form shall be used, whether it is murder in the first degree or murder in the second degree. In *S. v. Ewing,* 127 N. C., 555, it was held that the grand jury could not make the distinction by indorsement upon the bill, and in *S. v. Hunt,* 128 N. C., 589, it was said that when the case is reached for trial the solicitor determined that the trial or prosecution was for murder in the second degree by then so stating. The Court held that "such action was equivalent to a (482) *nol. pros.* as to murder in the first degree," and that consequently the prisoner was not entitled to a special venire or twenty-three challenges. This has been approved in *S. v. Caldwell,* 129 N. C., 683; *Coward v. Commissioners,* 137 N. C., 300.

In *Coward v. Commissioners,* 137 N. C., 300, the Court held, approving the above cases, that when a *nol. pros.* is entered as to murder in the first degree the State's witnesses subsequently attending are entitled to only half fees. The solicitor having entered a *nol. pros.,* the prisoner, it was held, was not *prosecuted* for murder in the first degree and was deprived of all his challenges but four, and of the right to a special venire. After such *nol. pros.* the witnesses also were not entitled to be considered witnesses in a capital felony, and were deprived of the pay which they would have otherwise received as such.

How, then, can it happen that the solicitor, notwithstanding the *nol. pros.* entered by him, shall be entitled to pay for *prosecuting* a capital felony? As to the prisoner, it is held that he was not prosecuted for a capital felony. As to the witnesses, it is held that they are not attending a prosecution for a capital felony. How, then, could the solicitor be prosecuting for a capital felony so as to earn an allowance which is given for the extra labor involved in prosecuting an offense in which a special venire is ordered, and twenty-three challenges are allowed, and with the responsibilities incident to a trial in which a verdict is sought for a capital offense?

The grand jury certainly could not prosecute. The bill is a very simple one of a few lines, and is simply a bill for "murder." It is not a bill specifying either degree of murder, and whether it is to be "prosecuted for a capital felony" or not can not be determined till the prosecution or trial begins, at which time the solicitor in this case stated that the trial or prosecution would be for "murder in the second degree," which is not a "prosecution for a capital felony." The solicitor prosecuted for murder in the second degree and entered of record that he

would not prosecute, *i. e.,* would not try the prisoner, for the capital felony. He can not be entitled to an allowance for "prosecuting for a capital felony" when he has done nothing of the kind.

The "prosecution" by the solicitor means "the trial," and (483) begins only when the trial begins. This is plainly stated by *Chief Justice Marshall* in *Cohen v. Va.,* 19 U. S., 264, who said: "To prosecute a suit is, according to the common acceptation of language, to continue a demand which has been made by the institution of process in a court of justice."

It may be that the Legislature has not been as liberal to the solicitors in this respect as they ought to be, and that there ought to be a larger allowance than $4 for prosecuting for murder in the second degree, which is the actual service that the solicitor in this case rendered. But it is for the Legislature to fix the fees of the solicitor, and if they are too low, it is for that body, and not for the courts, to amend the allowances.

WALKER, J., concurring in opinion of the *Chief Justice:* I agree that there is error in the judgment, but not for the reason stated by the majority.

The definition in the opinion of the Court of the word "prosecution," as being the whole or any part of the procedure which the law provides for bringing offenders to justice, is statutory and was taken from a Texas enactment. It does not conform to the accepted definition of the word, but was evidently intended, for some reason, to modify it. The courts have generally adopted *Chief Justice Marshall's* definition, as given in the opinion of the *Chief Justice.* The Court, in *Buecker v. Carr,* 60 N. J. Eq., 300, says there is a clear distinction between the prosecution of a proceeding or suit and the bringing or initiation of it. The same Court held in *S. v. McDonald,* 2 N. J. Law, 355-360, that "a prosecution is not an action, it is not a suit, for none of our books confound it with those two words. It is the following up or carrying on of an action or suit already commenced, until the remedy be attained." In *Schulte v. Keokuk,* 74 Iowa, 292, a case involving the amount of fee due a solicitor, the Court adopted the definitions of the word given by Bouvier and Burrill, substantially the same, as follows: "A prosecution is the means adopted to bring a supposed offender to justice and punishment by due course of law" Bouvier's Law Dict.; or "the institution and continuance of a criminal suit; the process of exhibit- (484) ing formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the State or Government, as by indictment or information." Burrill's Law Dict. "To prosecute an action or suit is to follow up or to carry on such action or suit." *Knowlton Township v. Read,* 6 Halst., 321. "The requirement

to 'prosecute' means that the suit or proceeding shall be followed up to the conclusion, and is not complied with by a return of the suit to the court, for that is but one of the series of acts which go to make up the prosecution of the suit." *Marryott v. Young,* 4 Vroom, 337; 6 Words & Phrases, 5734. Having regard to its Latin derivation, the word means not to go backward or abandon, but to pursue or to go forward. It clearly involves the idea of continuance, and not suspension. Blackstone and Webster agree that "to prosecute" means "to institute and carry on a legal proceeding." All this is according to the high authority of *Chief Justice Marshall.* But our statute plainly contemplates that the indictment shall first be returned by the grand jury and then prosecuted. It so says: "For any conviction upon an indictment which they may prosecute for a capital crime, $20." As you can not carry on what is not commenced, the indictment may, in that sense, be a part of the criminal prosecution, but not by any means all of it, and the prosecution intended by the statute is that which follows the finding of the bill. We do not even require the aid of a definition to guide us in ascertaining the meaning of this provision. It sufficiently explains itself.

My strong inclination would be to decide in favor of the full allowance of $20, believing, as I do, that it would be but inadequate compensation for the services rendered in such cases; but the language of the statute is clear and the meaning too plain even for construction. The defendant must be prosecuted for the capital felony to entitle the solicitor to the fee of $20. It seems to me that the expression used, "for conviction in capital felonies," when providing for half fees, and the other,

"for conviction upon an indictment which they may prosecute for
(485) a capital crime," should have the same meaning, and if the construction of the majority is correct, namely, that the prosecution intended by the statute is the commencement of the proceeding by the finding of the bill, the solicitor should have the full fee of $20, and the judgment should, therefore, be affirmed; but for the reasons above stated, my opinion is that the solicitor is not entitled to even the half of the fee of $20, as he did not prosecute for the capital crime.

Coward v. Commissioners, 137 N. C., 300, sustains our view. As long as there was a prosecution for the capital crime, the fees were allowed to the witnesses, as claimed by them, but not so after the solicitor had abandoned the prosecution for the capital felony and had agreed to prosecute only for murder in the second degree. This shows clearly that there must be a continuance of the prosecution for the capital felony in order to entitle the solicitor to the fee of $20.

STATE v. J. G. HOLLY.

(Filed 31 May, 1911.)

1. **Homicide—Poisoning—Evidence, Expert—Hypothetical Questions—Scope—Analysis for Poison—Prejudicial Error.**

Upon a trial for a homicide alleged to have been brought about by means of strychnine, the evidence disclosed that this poison may be in the stomach and death ensue from other causes, and that the quantity contained in the stomach, unassimilated, does not contribute to death; that an analysis had been made of the stomach of the deceased, and an insufficient quantity of strychnine was found to produce death, and that no analysis had been made of the liver or lungs. There was evidence that the deceased may have met his death from other causes; and *held*, reversible error in the trial judge to ask an expert witness a hypothetical question and admitting in evidence an affirmative answer, based upon strychnine having been found in the liver and lungs.

2. **Homicide—Poison—Evidence—Character Witnesses—Cross-examination—Collateral Matters.**

Upon a trial for a homicide, when the prisoner does not take the stand as a witness, and the indictment has charged him with the killing of the deceased by means of poison, it was competent for the prisoner to introduce witnesses as to his good character, but reversible error to permit a question as to the witness having heard that the prisoner had been accused of killing his wife, with the reply, "Not till after the present charge was brought."

3. **Same.**

It is competent upon cross-examination of the prisoner's witness to ask questions tending to impeach his general character; but a question permitted to be asked as to a particular matter, as to his previously having been accused of killing his wife, would tend to involve numerous collateral issues to the prejudice of the prisoner, and hence constituted reversible error.

4. **Witnesses—General Character—Impeaching Questions—Confined as to Time.**

When the prisoner accused of a crime is being tried therefor, and he has not become a witness in his own defense, evidence tending to impeach his general character should be confined to the time preceding the crime charged.

5. **Witnesses—General Character—Impeachment—Collateral Matters—Evidence Confined—Instructions.**

It is permissible to test the character of a witness by inquiring as to the sources of his information; and he may be asked if there was not a general reputation, prior to the controversy, as to particular matters, tending to his discredit; but such evidence should be restricted by the judge in his charge to the jury to the credibility of the witness who testifies as to character.

(486) APPEAL from *Peebles, J.*, at January Term, 1911, of NEW HANOVER.

The defendant was convicted of murder in the first degree at the February Term, 1911, of New Hanover Superior Court. He was sentenced to be electrocuted, and appeals to this Court. The defendant offered no evidence. That introduced on the part of the State tends to show:

That the defendant, J. C. Holly, was the proprietor of a hotel in the city of Wilmington, known as the Rock Spring Hotel. That the
(487) deceased, Edward Cromwell, was a boy about 18 years of age who lived with the defendant, and the defendant spoke of adopting him. It does not appear what relation, if any, the deceased bore to the defendant. That about 27 March, 1910, the Life Insurance Company of Virginia received an application for a $1,000 policy on the life of Edward Cromwell, but declined to issue same for lack of information as to the parentage of the young man. The agent of the Virginia Company told Holly and Cromwell that they might get a policy with the Greensboro Life, and also told the agent of the Greensboro Life that he might get an application from these people. That about 20 June, 1910, application was made to the Greensboro Life Insurance Company for a $5,000 policy on the life of Edward Cromwell. The company issued a $2,500 policy, the beneficiary named being the estate of Edward Cromwell, and the policy was delivered to Holly and Cromwell jointly, Holly paying the premium. That about a week after the policy was delivered Holly and Cromwell requested the agent of the Greensboro Life to make out the papers for the transfer of the policy to Holly, and the transfer was duly made, and probated on the evening of 8 August. That Holly said he intended to adopt the young man and educate him and will him all his property, and that he expected the boy to take care of him in his old age. That the agent said to Holly that the transfer would have to be sent to the home office and be approved before the assignment would be valid, and that Holly, so far as the agent of the Greensboro Life knew, had never been notified that the policy had been transferred to him by the home office. That Holly had insured his furniture for $1,250, stating to the insurance agent at the time the policy was issued that the furniture was worth $1,700. That the agent of the company made an examination after the fire, and valued the furniture at $450. That something was said to Holly about there not being much furniture in the house, and Hally said he had shipped a part of it away. That in June, 1910, the defendant Holly bought one dram of strychnine from a drug store in Wilmington, saying that he wanted it for the purpose of killing rats, and on 3 August, 1910, he bought another dram for the same alleged purpose. That on the night of 9 August, 1910, the boy

Cromwell came into the hotel about 10 o'clock eating an ice- (488) cream cone. That some time after 10 o'clock, one Matthews, the occupant of room No. 8 in the hotel, heard some one who seemed to be in great agony. Room No. 4, where deceased was found, was about 6 feet from room No. 8, occupied by Mr. Matthews. That Matthews heard a low voice like some one crying to another, and then heard a little whiffling sound which he recognized as a peculiar noise made by Holly with his nose. That after the fire witness asked Holly what all the trouble meant in the house that night, and Holly said he was having one of his spells and his boy was fanning him. That on the same night, that is, about 2:30 a. m., on the morning of 10 August, an alarm of fire was turned in, and Holly's hotel was found to be on fire.

W. P. Monroe, assistant chief of the fire department, testifies as follows: "I am assistant chief of the fire department of the city of Wilmington. On the morning of 10 August, 1910, we had an alarm of fire from box 25, and upon responding to the alarm we found the fire in the old Rock Spring Hotel, occupied by the prisoner, at No. 8 Chestnut Street. I heard people hollering and ordered the men to rescue the people from the windows, which they did. I went in the building from the front, and when I came out the prisoner asked me if I had seen his boy, the one that worked in the kitchen; and I asked him where he was, and he said he usually occupied room No. 4, on the right side of the passage. I went back in the building and found the boy lying in the room No. 4, dead. His head was to the south, his feet to the north, and he was lying on an old comfort, which was burned up, except the part which was underneath him. I went back to the street and told Holly that the man was dead in No. 4, and that if he had told me in time, I could have gotten him out. When I told him the boy was dead, he cried. I examined the room and found that there was a bed, bedstead, mattress, and a grip in the room. The head of the bed was towards the north and the body was lying between the bed and the door, with his feet towards the north. The body was near the foot of the bed. There was nothing on the bed except the sheet and pillow, and the bed did not look like it had been occupied. Mr. Farrow, Mr. Frost, and myself (489) took the body out. It was then stiff and cold. I discovered the body somewhere between thirty and forty minutes after I got to the fire. The fire was then out. The body was stiff, with hands drawn upon the breast clinched. He had the thumb placed between the two fingers (turned under the forefinger). He appeared to be about 18 years old, and would weigh about 110 pounds, and was about 4 feet and 6 inches tall. The main fire was in the adjoining room, and the partition between this room and room No. 4, where the boy was, had burned out. The mattress which I found in this room was saturated with kerosene

on it, and it had burned up to where the boy's body was on it. I detected odors something like kerosene. The fire was burning very badly in the adjoining room. It seemed to have originated there. After I took the body out, I placed it in the front room until the coroner was notified. I did not see the coroner. The body was taken to King's undertaking shop. I asked the prisoner about his furniture, and he said he had shipped some that belonged to Mr. Flowers in Pikeville. Didn't say when he shipped it. There didn't seem to be very much furniture in the house. When I opened room No. 4 it was full of smoke and steam. Chief Schnibben was there at that time. The windows were shut down, and we broke the glass out. The body was dressed in socks and underwear. I saw two kerosene oil cans in the room where the fire originated, and an empty vinegar barrel."

An autopsy was held and a part of the liver, a part of the lungs, and the stomach were sent to W. A. Withers, professor of chemistry in the College of A. and M. Arts, who analyzed parts of the stomach and found two-fifths of a grain of strychnine in the stomach.

Five tests were made, and all of these disclosed the presence of strychnine in the stomach. Professor Withers and the doctors testified that one-half of a grain of strychnine is the minimum dose that will produce death, but that the strychnine which kills is the portion assimilated and distributed through the blood, and not the portion that remains in the stomach, and that he made no test of the liver and lungs.

(490) The court put the following hypothetical question to Dr. Russell Bellamy:

Dr. Russell Bellamy, a witness for the State, testified as follows:

"I am a physician. (Witness is admitted by the defendant to be an expert.) I have heard the evidence in this case and am acquainted with the effect of poison on the human system."

Q. By the Court: If the jury should find that the deceased was a young man about 18 years old, weight from 110 to 140 pounds, was found dead between 2 and 3 o'clock in the morning, stiff and rigid, with his hands clenched and his thumbs between his forefingers, and upon chemical examination of the contents of his stomach and a part of his liver and a part of his lungs, the jury should find that such chemical examination showed that those parts had about two-fifths of a grain of strychnine in them; what, in your opinion, would be the cause of the death of the deceased? A. Strychnine or the salt of strychnine.

Dr. Bell, a witness for the State, testified upon cross-examination that the general character of the defendant was good. Upon the redirect examination the witness was asked by the State if he had not heard that the prisoner had been accused of killing his wife. The witness answered:

"Not until after the present charge was brought." To this question and answer the defendant objected and excepted.

Two expert witnesses on the part of the State expressed the opinion that the cause of the death of the deceased was suffocation by smoke.

The evidence was entirely circumstantial.

Attorney-General Bickett and Assistant Attorney-General G. L. Jones for the State.

C. D. Weeks and William J. Bellamy for defendant.

ALLEN, J., after stating the case: We have examined the record with the care the importance of the case demands, and conclude that there is error which entitles the prisoner to a new trial.

The hypothetical question propounded by the court to the medi- (491) cal expert, Dr. Russell Bellamy, included an important circumstance, as to which there was no evidence, to wit, that there had been a chemical examination of a part of the liver and a part of the lungs of the deceased, and that strychnine was found in each. Professor Withers, who made the chemical examination, stated expressly that he made no test of the liver and lungs, and that his test was confined to the stomach. The clear inference from the evidence is that, but for the incorporation of this circumstance into the question, the answer of the expert would have been different, and the prisoner would have had the benefit of an opinion favorable to him, instead of the disadvantage of one that was injurious.

The evidence indicates that strychnine may be in the stomach and death ensue from other causes, and that the quantity found in the stomach does not contribute to death, as it has not been assimilated. It is the strychnine taken up by the system which is dangerous, and this is traced in the liver, lungs and other organs. The materiality of the answer to the question and its effect on the jury is apparent when it is remembered that the cause of the death of the deceased was in dispute, the State contending it was caused by strychnine administered by the prisoner, and the prisoner contending it was from suffocation by smoke, and that two expert witnesses for the State testified the latter was the cause of death.

The injurious effect of this evidence is intensified by the fact that the question was propounded by the court and not by counsel. It not only elicited an opinion upon facts not in evidence, but the jury might well infer that the court thought there was evidence that strychnine had been found in the liver and lungs.

It is not necessary in the statement of a hypothetical question that all the facts should be stated. Opinions may be asked for upon different

combinations of facts on the examination in chief and on the cross-examination, but "to allow on the direct examination, an hypothetical question to be put, which assumes a state of facts not warranted by the testimony, is error, and counsel will never be permitted, on the direct examination, to embrace in an hypothetical question anything
(492) which the testimony does not either prove or tend to prove." Rogers Ex. Ev., sec. 27; *People v. Hall,* 48 Mich., 489; *Reber v. Herring,* 115 Pa. St., 609.

We also think there was error in allowing the State to ask Dr. Bell, who testified to the good character of the prisoner, if he had not heard that the prisoner had been accused of killing his wife, and his reply, "Not until after the present charge was brought."

The defendant did not testify in his own behalf, but he was entitled to introduce evidence of his good character, as a circumstance tending to show the improbability of his having committed the crime alleged against him. *S. v. Laxton,* 76 N. C., 216; *S. v. Hice,* 117 N. C., 783. When he avails himself of this right, the State can introduce evidence of bad character, but can not, by cross-examination or otherwise, offer evidence as to particular acts of misconduct.

The rule is just, and based upon sound reason.

A party charged with crime may be prepared to defend an attack upon his general character, which is a single fact, but he could not have at the trial witnesses to explain the conduct of a lifetime.

Again questions of this character, if permitted, would tend to multiply issues, would needlessly prolong trials, and would be calculated to distract the minds of jurors from the real issue.

If a witness may state that he has heard that the defendant had been charged with killing his wife, the defendant ought to be allowed, in reply, to show that the charge is false, and to do so might involve the examination of many witnesses.

If one collateral question of this character can be raised and tried, the same rule would permit a hundred others.

The authorities in this State are numerous and uniform that it is error to allow such questions on the cross-examination of a witness as to character.

In *Barton v. Morphes,* 13 N. C., 520, it was held inadmissible to ask "if he had not heard Morton accused of stealing a penknife"; in *Luther v. Skeen,* 53 N. C., 357, that "there was a current report in the
(493) neighborhood that plaintiff had sworn to lies while living in Randolph"; in *S. v. Bullard,* 100 N. C., 487, "Do you not know that it was extensively talked about and said that the defendant practiced a fraud upon the firm of Worth & Worth?"; in *Marcom v. Adams,* 122 N. C., 222, "Have you not heard that defendant had committed

forgery?", "Do you not know the defendant had been indicted for forgery?"; and in *Coxe v. Singleton,* 139 N. C., 362, "Have you not heard that the defendant committed rape on a negro girl?", "Have you not heard he padded his pay-roll at the mill?"

The first of these cases, *Barton v. Morphes, supra,* which has been frequently approved, is of special importance, in that *Chief Justice Henderson* considers the ground frequently urged as a reason for admitting questions like the one under consideration, as a means of testing the character witness. He says: "The ground on which the counsel for the defendant placed the question can not render the evidence admissible, namely, that although not evidence in chief, it is admissible to impeach the character of the supporting witness; that witness having given the first a good character, when he knew such reports had been circulated, this would be doing that indirectly which the law forbids to be done directly, viz., impeaching the character of the witness in chief by specific charges; and that, too, not by common reputation, but by a mere report, which is very different. For the law supposes the latter to be true, and therefore admits it as evidence. But it makes no such supposition in favor of a mere report, which we know to be most commonly false. Reports may ripen into common reputation and common belief. When they arrive at that stage, it is supposed that they are true. They have been the best test of their truth, *common opinion* and *belief,* and cease to be mere reports."

There is another objection to the answer of the witness, as applied to the facts of this case, and that is that the evidence related to a fact affecting the character of the defendant subsequent to the time of the commission of the offense alleged against him.

When the defendant is not a witness, evidence of his general character should be confined to the time preceding the crime charged. *S. v. Johnson,* 60 N. C., 151. The rule is otherwise if he testifies in (494) his own behalf, as his credibility is then involved. *S. v. Spurling,* 118 N. C., 1250.

That the evidence was prejudicial can not be doubted. The prisoner was charged with murdering, by poison, a member of his household, and the evidence was circumstantial. It was calculated to excite feeling against him in the minds of the most intelligent and upright jurors to know that he had been charged with killing his wife.

It is permissible to test the character witness by inquiring as to his sources of information (*S. v. Perkins,* 66 N. C., 126), and he may be asked if there was not a general reputation, prior to the controversy, as to particular matters, tending to discredit; but when this is done the jury should be instructed that such evidence can only be considered as bearing on the evidence of the witness who testifies as to character. The

evidence was withdrawn from the jury, and the error in admitting it was not cured in the charge.

The competency of the record of the druggist, as the evidence is now presented, is doubtful, but it is not necessary to pass upon it, as the State can produce the witness who made the entries at the next trial. There must be a

New trial.

Cited: S. v. Stewart, 156 N. C., 640; *S. v. Dove, ibid.,* 658, 659; *Woodie v. Wilkesboro,* 159 N. C., 355; *Edwards v. Price,* 162 N. C., 245; *S. v. Robertson,* 166 N. C., 361; *S. v. Cathey,* 170 N. C., 796; *S. v. Killian,* 173 N. C., 796.

STATE v. WILLIAM BALDWIN.

(Filed 11 May, 1911.)

1. **Evidence—Dying Declaration—Expectation of Death.**

For dying declarations to be admitted as evidence it is essential that they must have been made in expectancy and contemplation of impending death.

2. **Homicide—Uncommunicated Threats—Evidence.**

Exclusion of certain uncommunicated threats of the deceased uttered shortly before the homicide and tending to show animosity towards the prisoner and a purpose to do him bodily harm, *held,* error when there is evidence on the part of the prisoner tending to show that the killing was in his self-defense and the proposed evidence would throw light upon the occurrence.

3. **Homicide—Instructions—Willingness—Rightfulness.**

A charge upon a trial for a homicide wherein there is evidence of self-defense is erroneous which instructs the jury that if the deceased and prisoner fought willingly at any time up to the fatal moment, it would be their duty to convict of manslaughter, as this would inculpate the prisoner if he had fought willingly but rightfully in his necessary self-defense.

4. **Homicide—Insufficient Modifications.**

In this action of homicide, there being evidence of self-defense, it appears that the judge in the concluding sentence of his charge upon the law of self-defense modified an error theretofore committed, but held insufficient as a correction.

(495) APPEAL from *Pell, J.,* at Fall Term, 1910, of WATAUGA.

Murder. The jury returned a verdict of guilty of manslaughter, and from judgment pronounced the prisoner appealed.

STATE *v.* BALDWIN.

Attorney-General Bickett and Assistant Attorney-General George L. Jones for the State.

L. D. Lowe and T. A. Love for defendant.

PER CURIAM. On a former appeal in this case, the prisoner having been convicted of murder in the first degree, it was held that the testimony as it then appeared of record did not justify such a verdict, and a new trial was awarded, with the direction that if the evidence was the same the prisoner should be tried on the question of his guilt or innocence of the crime of manslaughter. *S. v. Baldwin,* 152 N. C., 822, where the facts are very fully reported. This opinion having been certified down and the evidence relevant to the inquiry being substantially the same as that received on the former trial, the case was submitted on the issue as indicated, and defendant, having been convicted of manslaughter, again appeals, assigning errors committed on the second trial. It was urged that the court improperly excluded relevant statements of the deceased tending to support the plea and claim of self-defense on the part of the prisoner, the same having been offered as dying declarations, but it is essential to the admissibility of such statements (496) that they be made in the expectancy and contemplation of impending death, and we concur with his Honor in the view that the facts as they now appear of record do not establish the conditions required.

It was insisted further that his Honor made an erroneous ruling in excluding evidence of certain uncommunicated threats of the deceased uttered shortly before the homicide, tending to show animosity towards the prisoner and a purpose to do him serious bodily harm. It is now generally recognized that in trials for homicide uncommunicated threats are admissible (1) where they tend to corroborate threats which have been communicated to the prisoner; (2) where they tend to throw light on the occurrence and aid the jury to a correct interpretation of the same, and there is testimony *ultra* sufficient to carry the case to the jury tending to show that the killing may have been done from a principle of self-preservation, or the evidence is wholly circumstantial and the character of the transaction is in doubt. *Turpin's case,* 77 N. C., 473; *S. v. McIver,* 125 N. C., 645; Hornigan & Thompson Self-defense, 927; *Stokes' case,* 53 N. Y.; *Holler v. State,* Ind., 57; *Cornelius v. Commonwealth,* 54 Ky., 539. In the present case, while there was evidence on the part of the State tending to show that the prisoner fought wrongfully and killed without necessity, there is testimony on his part tending to show a homicide in his necessary self-defense, and the proposed evidence, tending as it did to throw light upon the occurrence, should have been received.

The prisoner excepts further that his Honor charged the jury in part as follows: "Now, gentlemen of the jury, I repeat, if you should find that he fought willingly at any time up to the fatal moment, it would be your duty to convict the defendant of manslaughter, there being no evidence that he retreated or otherwise showed that he abandoned the fight; but if you should find that he entered into the compact unwillingly, then you should proceed to consider his plea of self-defense." In *S. v. Garland,* 138 N. C., 675-678, the Court said: "It is the law of this State that where a man provokes a fight by unlawfully assaulting (497) 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." Citing Foster's Criminal Law, 276. But authority does not justify the position as contained in the excerpt from his Honor's charge, "That if he fought willingly at any time up to the fatal moment, it would be your duty to convict of manslaughter." This would be to inculpate a man who fought willingly but rightfully, and in his necessary self-defense. True, the concluding portion of the statement would seem to qualify the position to some extent, but not sufficiently so as to correct it, and in a case of this importance, and as the matter goes back for another hearing, we have considered it best to advert to the error.

For the reasons stated, we think the prisoner is entitled to have this cause tried before another jury.

Venire de novo.

Cited: S. v. Price, 158 N. C., 647; *S. v. Blackwell,* 162 N. C., 682, 685; *S. v. Pollard,* 168 N. C., 119; *S. v. Crisp,* 170 N. C., 793.

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AMENDMENT TO RULES

ADOPTED 30 MAY, 1911

Rule 29 shall be amended so as to read as follows:

29. How Printed.

The transcript of an appeal shall be printed under the direction of the clerk of this Court, and in the same type and style, and pages of same size, as the reports of this Court, unless the transcript is printed or is being printed when the appeal is docketed. If the transcript of an appeal is not printed or is not being printed when the appeal is docketed, and the transcript is required by this rule to be printed under the direction of the clerk of this Court, the appellant shall deposit with the clerk of this Court an amount sufficient to cover the estimated cost of printing the transcript, and said estimate shall be made by the clerk of this Court at the rate of 60 cents per printed page (which includes 10 cents per page to the clerk). When it appears that the clerk has waived the requirement of a cash deposit by appellant to cover estimated cost of printing, and the cost of printing has not been paid when the case is called for argument, the Court will, in its discretion, on motion of counsel for appellee or a statement by the clerk, dismiss the appeal.

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"ALL ABOARD." See Negligence.

APPEAL AND ERROR. See Evidence.

1. *Appeal and Error—Verdict Set Aside in Part—Legal Rights—Procedure.*—When upon appeal it appears that the trial judge has erroneously set aside issues as to the negligence and liability of one defendant and rendered judgment against the other, it is not an invasion of the discretion of the judge below for the Supreme Court to order a new trial upon all the issues, and it will be so ordered. *Gregg v. Wilmington*, 18.

2. *Appeal and Error—Arbitration and Award—Partiality—Allegation—Too Late on Appeal.*—An award will not be set aside on appeal for partiality claimed on the part of an arbitrator when it is not pleaded or assailed in the trial court upon that ground. *Robertson v. Marshall*, 167.

3. *Appeal and Error—Supreme Court—Retention of Cause—Superior Court—Final Judgment—Procedure.*—The Supreme Court having held on a former appeal in this case that an investment or reinvestment of certain funds ordered by the Superior Court was void and not within the meaning of Revisal, sec. 1590, and that a hotel in the erection of which the funds had been invested be sold and the heirs to whom the funds belonged be reimbursed, preserving the legal rights of claimants or creditors therein until the sale and final hearing, upon the reports of commissioners appointed by the court below, an application by a former commissioner to have the Supreme Court consider and pass upon certain exceptions noted by him in the progress of the case in the court below as to the superiority of payment of his commissions will be refused, as the cause is in the court below and will not be considered here except on appeal from final judgment. *Smith v. Miller*, 242.

4. *Certiorari—Error of Counsel—Appeal and Error—Final Judgment—Former Record.*—A *certiorari*, except possibly under very exceptional circumstances, will not issue to bring up an appeal from the lower court on account of error of counsel. In this case it appearing that no final judgment has been entered, the petitioner may preserve his exceptions for review in the Supreme Court upon final judgment, and on this appeal the record in a former appeal may be again used. *Ibid.*

5. *Appeal and Error—Execution, Stay of.*—The motion for *certiorari* being refused in this case, should petitioner appeal from final judgment of the court below, as pointed out, a stay of execution can be obtained under Revisal, 598. *Ibid.*

6. *Appeal and Error—Certiorari—Laches of Counsel.*—A *certiorari* will not be granted to bring up an appeal to the Supreme Court from final judgment in the lower court on the ground of *laches* of counsel, except possibly in an exceptional case. *Smith v. Miller*, 247.

7. *Appeal and Error — Certiorari — Substitute — Interlocutory Order — Former Record—Subsequent Appeal.*—A *certiorari* will not be granted as a substitute for an appeal from an interlocutory judgment. In

APPEAL AND ERROR—*Continued.*

this case so much of the former record on appeal as is relevant may be used should the applicant for the *certiorari* appeal from a final judgment. *Ibid.*

8. *Deeds and Conveyances — Registration — Defective Probate — Wife's Separate Examination—Findings—Evidence—Appeal and Error.*— Findings of fact by the clerk and adopted by the judge upon a petition to correct an alleged defective probate of a deed, in that it did not show the privy examination of the wife of the grantor, etc., under allegation that the original correctly showing the probate had been lost, will control on appeal when there is evidence to sustain such findings; and when they are adverse to the claim of the petitioner, he is bound by them. *Mills v. McDaniel*, 249.

9. *Appeal and Error—Former Appeal—Adjudication—Finality.*—When a case is sent back to the Superior Court for a new trial for errors committed, matters therein decided on the former appeal to the Supreme Court will not be considered on a subsequent appeal of the same cause of action. *Roberts v. Baldwin*, 276.

10. *Objections and Exceptions—"Charge as a Whole"—Appeal and Error.*— A broadside exception to a charge as a whole is untenable on appeal. *Ibid.*

11. *Deeds and Conveyances — Mortgages — Foreclosure — Judgment—Evidence—Unadjudicated Rights—Appeal and Error.*—Proceedings and judgment in suit to foreclose lands put in evidence in a subsequent action to declare certain rights of a purchaser at a sale thereafter arising, will not be considered on appeal of the later action to the Supreme Court when the rights of the parties, as determined in the former cause, were not considered by the court, and the judgment therein did not enter into the verdict in this case or in anywise affect it. *Herring v. Warwick*, 345.

12. *Appeal and Error—Trial, "Speedy"—Appellate Powers—Constitutional Law.*—Article IV, sec. 8, of our State Constitution, providing that "the Supreme Court shall have jurisdiction to hear, upon appeal, any decision of the court below, upon any matter of law or legal inference," is only designed and intended to confer general appellate power on the court to be exercised under recognized and established forms and writs, or according to methods provided by the Legislature. *S. v. Webb*, 426.

13. *Appeal and Error—Criminal Prosecution—Final Judgment.*—No statutory appeal in ordinary form lies in a criminal prosecution except from a final judgment of conviction or on plea of guilty duly entered. *Ibid.*

14. *Appeal and Error—Writ of Error—Statutory Appeal.*—With us, the statutory appeal takes the place of the old writ of error, which only issued in review of final judgments. *Ibid.*

15. *Appeal and Error—Trial, "Speedy"—Certiorari—Procedure.*—A *certiorari* is the proper procedure to review the order of the lower court in refusing to discharge a prisoner from custody under the provisions of Revisal, sec. 3155. *Ibid.*

16. *Appeal and Error—Trial, "Speedy"—Final Judgment—Procedure.*— The defendant was committed by a justice of the peace for a felony, and on the last day of the next subsequent term of the court the

APPEAL AND ERROR—*Continued.*

action was continued on motion of the State for the absence of a material witness from sickness, whereupon the defendant, having given notice in open court, appeared and demanded that a bill of indictment be found at the next subsequent term, and that he be tried then, and that if an indictment were not then found he would pray for his discharge, which was done accordingly and the case further continued to the next term, owing to the continued sickness of the witness: *Held*, there being no final judgment, an appeal would not lie from the refusal of the motion by the lower court. *Ibid.*

17. *Appeal and Error—Objections and Exceptions—Insufficient Evidence—Procedure.*—An exception that the evidence is not sufficient to be submitted to the jury is waived if not taken before verdict. *S. v. Houston*, 432.

18. *Same—Jurisdiction—Insufficient Allegations.*—No exception can be taken in the Supreme Court which was not assigned in the lower court with opportunity given the judge to rule upon it, except (1) want of jurisdiction of the lower court or (2) the insufficiency of the complaint or indictment as the statement of a cause of action. *Ibid.*

19. *Instructions—"Contentions"—Misstatement by Judge—Appeal and Error.*—If the statement of the contentions by the judge is not as full as desired, it is appellant's duty to ask for specific instructions, and if the judge inadvertently states a contention incorrectly, it should be called to his attention. *S. v. Yates*, 450.

ARBITRATION AND AWARD.

1. *Arbitration and Award—Scope of Submission—Void Arbitration.*—An award may not extend beyond the meaning and scope of the submission unless waived by the voluntary introduction of testimony or some other recognized method of enlarging the inquiry, and when thus extended is void as to the excess. *Robertson v. Marshall*, 167.

2. *Excess—Dependent Conditions.*—If the matters awarded in excess of the meaning and scope of the inquiry submitted are on matters not independent and severable, the effect may be to render the entire award invalid. *Ibid.*

3. *Arbitration and Award—Scope—Evidence.*—The plaintiff having purchased from the defendant two sawmills, referred to respectively as the big and the little mill, had several disagreements respecting the terms of purchase, it having been agreed, among other things, that payments were to be made in sawing defendant's lumber. The plaintiff contended that the defendant failed in its agreement to supply the lumber to be sawed, etc. Under agreement between the parties, the defendant took back and credited the plaintiff with the little mill, and proceeded under the original agreement as thus changed, but upon another disagreement submitted the matter to arbitration under a writing stating all matters of difference and disagreement growing out of the contractual and trade relations and dealings, and all matters incident thereto should be passed upon by the arbitrators and the award should be final and binding. Accordingly, an award was rendered, canceling the plaintiff's note given for the balance of the purchase price and giving damages in a certain sum: *Held*,

ARBITRATION AND AWARD—*Continued.*

(1) the award was within the scope of the terms of the arbitration, and binding upon the parties; (2) it was also within the scope of the arbitration, under defendant's own evidence, that all matters relating to the business dealings were to be considered, including those relating to the big as well as to the little mill. *Ibid.*

4. *Arbitration and Award—Possible Conditions—Hypothecated Note.*—An award directing the cancellation of certain notes which the payee, a party thereto, had hypothecated with a bank for security for borrowed money is not void as impossible of performance, the repossession of the notes being possible by the payment of the note for which the security was pledged. *Ibid.*

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ASSESSMENT. See Taxation.

ASSUMPTION OF RISK. See Master and Servant; Pleadings.

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BANKRUPTCY.

1. *Trusts and Trustees — Wrongful Loan — Subrogation — Bankruptcy — Rights of Creditors.*—The *cestuis que trustent* have their remedy against their trustee who has wrongfully loaned the trust funds, but neither they nor the trustee can recoup themselves for any loss at the expense of the other creditors of the borrower who has become insolvent and is in bankruptcy. *Costner v. Cotton Mills*, 128.

2. *Vendor and Vendee—Conditional Sales—Bankruptcy—Notes—Endorsers and Sureties—Proof of Claim—Dividends—Presumptions.*—Sureties and endorsers on notes given by a debtor for the purchase price of goods, the title to which has been retained by the creditor as further security, are discharged from liability when the creditor proves his debt as an unsecured claim against the principal debtor, who has become insolvent and a bankrupt and receives a dividend from the bankrupt court upon his claim, after permitting the trustee to take the goods for the benefit of the general creditors, as in such a case he is regarded as having intentionally abandoned the property to the trustee in bankruptcy and as ratifying his acts. *Carriage Co. v. Dowd*, 307.

BANKS.

1. *Banks—Shareholders—Individual Liability—Interpretation of Statutes —Contracts.*—The provision of chapter 298, Public Laws 1897, that stockholders in a bank "shall be held individually responsible . . . for all contracts, debts and agreements" thereof "to the extent of the amounts of the stock therein at the par value thereof, in addition to the amount vested in such share," creates an additional liability upon the stockholders as a matter of statute, and not by contract. *Smathers v. Bank*, 283.

2. *Same—Married Women.*—Revisal, sec. 2094, restricting the executory contractual rights of married women, does not relieve her property from the liability imposed by the Public Laws 1897, ch. 298, upon

BANKS—*Continued.*

the stockholders of the bank, when she owns such stock in her own name and right, the liability under the Laws of 1897 being statutory and for the benefit of the bank's creditors and not arising by contract. *Ibid.*

BOND FOR TITLE. See Deeds and Conveyances.

BOND ISSUES. See Taxation.

BURDEN OF PROOF.

1. *Carriers of Passengers—Baggage—Liability as Carriers—As Warehousemen—Legal Excuse—Burden of Proof.*—When a railroad company accepts a trunk of its passenger for transportation, on failure to deliver it it is held responsible as a common carrier or warehouseman, with the burden on the carrier, in an action for damages, to render legal excuse for the failure. *Williams v. R. R.*, 260.
2. *Homicide—Deadly Weapon—Presumptions—Burden of Proof.*—The killing with a deadly weapon raises at least the presumption of murder in the second degree, placing the burden upon the prisoner to satisfy the jury that such facts and circumstances of mitigation or justification existed as will excuse the homicide or reduce its grade to manslaughter. *S. v. Rowe*, 436.
3. *Homicide—Self-defense—Burden of Proof.*—The burden is on defendant to show self-defense upon trial for a homicide, when there is sufficient evidence to show an unlawful killing of another. *S. v. Yates*, 450.
4. *Slander—"Innocent Woman"—Burden of Proof.*—The burden is upon the State to show that an innocent and virtuous woman has been slandered in order to convict under the provisions of Revisal, sec. 3640. *S. v. Smith*, 473.

CANCELLATION. See Equity; Insurance.

CARRIERS OF GOODS.

1. *Carriers of Goods—Delay in Shipment—Damages—Contract—Tort—"Party Aggrieved."*—On negligent delay in the shipment of goods, with common carrier acting under a *quasi*-public franchise, the person injured may sue in contract or tort; and in case of tort, the damages may be awarded under facts and conditions existing and relevant at the time the same is committed. *Peanut Co. v. R. R.*, 148.
2. *Same—Notice After Shipment—Reasonable Opportunity to Deliver.*—In such action, evidence tending to fix the carrier with notice or knowledge of special circumstances affecting the question of damages, and under conditions affording fair and reasonable opportunity to avoid further delay, is competent and relevant; and the rejection of such evidence by the trial court constitutes reversible error. *Ibid.*
3. *Same—Principal and Agent—Undisclosed Principal.*—In such case an undisclosed principal holding the business rights and interests under the contract of shipment may sustain the action, subject to the limitations and restrictions ordinarily prevailing in such relationship. *Ibid.*

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers, Duty of—Negligence—Stations—Obstructions—Safety.*—Railroad companies in the performance of their duty as

CARRIERS OF PASSENGERS—*Continued.*

common carriers are held to a high degree of care in providing at their regular stations, places and conditions by which passengers may board and alight from their trains in safety and in keeping such places free from unnecessary obstructions which threaten them harm. *Roberts v. R. R.*, 79.

2. *Same—Negligence—Proximate Cause.*—It is the duty of a railroad company to exercise reasonable care for the safety of passengers attempting to board its trains at one of its stations, and if there is a failure of such duty on the part of the railroad company, and as the proximate cause thereof a person is injured, it would constitute actionable negligence. *Ibid.*

3. *Carriers of Passengers—"Passenger" Defined.*—One who has purchased a ticket at a railroad depot for a certain train and who is standing at the station in full view of the conductor and train crew, near to where the train had stopped, in such manner as to indicate his intention, is regarded as a passenger on that train and is entitled to the consideration due a passenger. *Ibid.*

4. *Same—"All Aboard"—Duty of Carrier.*—One who has purchased a ticket as a passenger for a certain train and indicates by his location at the depot and manner that he is a passenger, has ordinarily the right to assume that it is safe for him to get on the train when the conductor calls "All aboard." *Ibid.*

5. *Carriers of Passengers—Moving Trains—Negligence—Presumptions—Exceptions.*—While the general rule is that a passenger or outsider who is injured in the voluntary effort to board a moving train is guilty of contributory negligence, there are exceptions to the rule; and this is especially true when the act is induced by the direction or advice of the employees of the company, and when the movement of the train does not make it obviously dangerous, giving due and proper regard to the surrounding conditions. *Ibid.*

6. *Carriers of Passengers—Acceptance of Baggage—Notice.*—To fix the responsibility for lost baggage upon a railroad company, either as a common carrier or warehouseman, a delivery, actual or constructive, including an acceptance by the company, is necessary; and in order to a valid delivery the general rule is that when baggage is taken by others to the station, and to places where baggage is usually received, some kind of notice must be given to the agent authorized to receive it. *Williams v. R. R.*, 260.

7. *Same—Custom—Modification of Rule.*—The requisites of the general rule to affect delivery of baggage of a passenger to a railroad company in order to hold the company liable may become modified by a custom of the latter to consider and treat baggage as received when left at a given place, without further notice. *Ibid.*

8. *Same—Apparent Agency.*—To establish liability by a railroad company for the loss of a passenger's trunk, there was evidence on plaintiff's part tending to show that she had sent her trunk to defendant's depot by a drayman who, in the absence of the regular baggage man, placed it under the direction of one who apparently had charge at the time, where trunks were usually accepted; that the one giving directions for placing the trunk had on regular citizen's clothes, with

CARRIERS OF PASSENGERS—*Continued.*

the exception that the vest had brass buttons on it like those of defendant's conductors or employees, and that he went where the baggage men usually went, and appeared to be acting as a baggage agent for defendant; that plaintiff did not find her trunk, and after some conversation with defendant's acknowledged baggage agent the latter agreed to send her trunk on a following train and gave her a check for it: *Held*, (1) Error of the trial court to refuse plaintiff's prayer for special instruction, that if the trunk was left by the dray-man at the time and place where baggage was received, in charge of the baggage man, or in *care* of *any one* whom *defendant* held out to the public to be in charge of the baggage room, such would be sufficient delivery; and further, *held*, error (2) a modification of the special instruction that in order to make a valid delivery the trunk should have been left at the time and place with the knowledge and consent of defendant's baggage man or other *authorized agent* of the defendant company. *Ibid.*

9. *Same—"Agency by Estoppel."*—When a railroad company by its acts has left a person in its baggage room apparently in charge of the baggage, notice given to him of the delivery of a trunk of a passenger is notice and may amount to an acceptance by the company, under the principle of "agency by estoppel," and render the company liable in damages for the loss of the trunk. *Ibid.*

10. *Issues—Carriers of Passengers—Immediate Transportation—Definition—Surrounding Circumstances—"Reasonable Time."*—The plaintiff, on Sunday afternoon, having purchased a ticket over defendant's railroad, sent her trunk to the depot to be received and transported by it as baggage, intending to take her train to destination on Monday morning following. There was evidence tending to show the acceptance of the trunk as baggage on Sunday afternoon, and of the custom of the railroad company to receive baggage to be transported in accordance with plaintiff's intent. In an action for damages for the loss of the trunk, *held*, it was proper to submit the issue, "Was said trunk received by defendant for immediate transportation?" but thereon the jury should be instructed that the meaning of the word "immediate" in this connection was "reasonable time," having due regard to the nature and circumstances of the case. *Ibid.*

11. *Carriers of Passengers—Baggage—Liability as Common Carrier—Acceptance—Reasonable Time.*—In order to fix a railroad company responsible for baggage as a common carrier, the same must be delivered by the passenger and accepted for transportation within a reasonable time before he takes his intended train. *Ibid.*

12. *Same—"Custom"—Warehouseman—Questions for Jury.*—When, in accordance with a custom of the carrier, it accepts baggage one afternoon for a train leaving the following morning, which the passenger intended to and did take to her destination, in the absence of some reasonable regulations restrictive of the company's duty, the company would be liable, in case of loss of the baggage, as a common carrier, and held as an insurer. In the absence of such custom, the liability of the company would only be for ordinary care as a bailee for hire; and on conflicting evidence as to the custom, the question would be for the jury to determine under proper instructions. *Ibid.*

CARRIERS OF PASSENGERS—*Continued.*

13. *Railroads — Pleadings — Cause of Action—Passengers—Assault—Ejection from Train.*—A complaint sufficiently alleges a cause of action against a railroad company which sets forth that the plaintiff was a passenger on defendant's train, and while riding as a passenger defendant's agents willfully, maliciously and in utter disregard of his rights assaulted him and wrongfully ejected him from the car and caused him to be arrested upon a criminal charge, for which he had been acquitted before the commencement of his civil action. *Berry v. R. R.*, 287.

14. *Railroads — Passengers—Assault—Ejection—False Arrest—Continuous Tort.*—Allegation of the complaint that the defendant railroad company, through its agent, assaulted the plaintiff without provocation, wrongfully and maliciously ejected him, while rightfully a passenger, from its train, caused his arrest and trial for a crime of which he has since been acquitted before the bringing of the present suit, avers a series of acts constituting one continuous tort, for which the defendant is liable. *Ibid.*

15. *Railroads — Passengers — Ejecting from Train — Anticipated Consequences.*—A conductor on a passenger train is not obliged to wait until a passenger thereon has committed an act of violence before ejecting him from the train, for he may anticipate violent and offensive conduct when the condition of the passenger is such as to indicate that he will become offensive to other passengers. *Ibid.*

16. *Railroads—Principal and Agent—Passengers—Torts—Wrongfully Ejecting—Evidence of Agency—Conductors.*—Defendant railroad's traveling passenger agent was on an excursion train assisting the conductor in his duties of collecting fares, etc., and by his bearing and other circumstances evincing his authority over the conductor: *Held*, sufficient evidence to go to the jury of the scope of his agency to bind his principal, the railroad company, by his acts in wrongfully and maliciously causing a passenger to be assaulted and ejected from the train, and the passenger's immediate arrest and trial for a criminal offense. *Ibid.*

CAUSAL CONNECTION. See Evidence.

CAVEAT. See Wills.

CERTIORARI. See Procedure; Appeal and Error.

CITIES AND TOWNS. See Master and Servant; Railroads.

1. *Cities and Towns—Licensee—Negligence—"Pari Delicto."*—When a city has permitted its codefendant in the action to pile upon a sidewalk bricks taken from a building which was being torn down for the purpose of erecting a new one on the same site, and the codefendant negligently piles the brick in such manner as to cause the injury resulting in the death of plaintiff's intestate, the city and its codefendant are not *in pari delicto*, so as to deprive the city of the right to indemnity against the delinquent codefendant, as the permission to pile the brick implied that the piling should be carefully done. *Gregg v. Wilmington*, 18.

2. *Same—Notice—City's Liability.*—The negligence complained of in an action against a city and one who, under contract with the city, is

CITIES AND TOWNS—*Continued.*

alleged to have negligently piled brick upon a sidewalk in such a manner as to cause the alleged injury, does not render the city responsible in damages, unless it appears that the city permitted the continuance of the negligent act after it was fixed with actual or constructive notice thereof. *Ibid.*

3. *Same—Dependent Liability.*—When, in an action against a city and one whom it had permitted to pile bricks on its sidewalk, the negligence consisted in carelessly piling the bricks on the sidewalk so as to injure and cause the death of plaintiff's intestate, the negligence of the city is directly and necessarily dependent upon the negligence of the licensee, and can not exist without it. *Ibid.*

4. *Cities and Towns—Licensee—Secondary Liability—Indemnity.*—In an action against a city and its licensee for injury caused by the negligent act of the latter, of which the city had notice, their liability as between them and the plaintiff would be joint and several, but the city would be entitled to judgment against the licensee to indemnify it from loss in the event of recovery, being only secondarily liable. The doctrine of contribution has no application. *Ibid.*

5. *Cities and Towns—Contracts—Public Works—Indemnity—Scope.*—An indemnity company entered into an agreement with a city to save it harmless from any negligence of a contractor in the performance of certain work upon the city's street and from damages recovered in all suits against it for any injuries sustained by any person by or from any cause under its control while in the construction of the streets, or by reason of any negligence in guarding the same, etc.: *Held*, the contract, by its very terms, embraced an injury caused to a pedestrian upon one of the city's sidewalks at night by reason of his falling into an unguarded trench, left by the contractor without a light or other signal of warning. *Comrs. v. Indemnity Co.*, 219.

6. *Equity—Jurisdiction—Police Powers—Roads and Streets—Obstructions —Injunction.*—Courts of equity have no jurisdiction to restrain an incorporated city from the exercise of its governmental authority conferred upon it by its charter regulating the grading of its streets, and an ordinance passed by the city in the exercise of its police power is valid which provides that a railroad company traversing with its track one of its streets in the heart of the business portion, where there are cross streets, shall level the railroad roadbed with the street which had been recently lowered so as to make them conform to a general scheme of street grading. *R. R. v. Goldsboro*, 356.

7. *Corporation Commission—Railroads—Gradings—Roads and Streets— Cities and Towns—Police Powers—Supplementary Powers.*—Revisal, sec. 1097 (10), authorizing the Corporation Commission to require railroads to raise or lower their tracks at a crossing, is supplementary to and not in derogation of the exercise by the State, or an incorporated town authorized by it, of such police powers. *Ibid.*

8. *Railroads—Rights of Way—Limitation of Actions—Police Powers— Grading—Cities and Towns.*—Revisal, sec. 388, providing that a railroad company, etc., shall not be barred by the statute of limitations as to its right of way, etc., does not affect the State or a municipality in the assertion of its right to require a railroad company to change the grade of its roadbed where it is crossed by streets, so that public travel and drainage may not be impeded. *Ibid.*

CITIES AND TOWNS—*Continued.*

9. *Cities and Towns—Roads and Streets—Railroads—Shifting Freight—Ordinance—Penalties.*—Upon the question as to whether a town ordinance is valid in this case, which restricted the time of "shifting" upon a railroad track situated in the business part of the town, the Court was equally divided, ALLEN, J., not sitting. *Ibid.*

10. *Counties and Towns—Governmental Agencies—Legislative Control—Constitutional Law.*—Counties and townships are as a rule simply agencies of the State constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of ordinary governmental functions they are subject to almost unlimited legislative control, except when restricted by constitutional provision. *Trustees v. Webb*, 379.

11. *Same—Public Quasi Corporations.*—Under our Constitution, the Legislature is given power to create special public *quasi* corporations for governmental purposes in certain designated portions of the State's territory subject to like control, and in the exercise of such power county and township lines may be disregarded. *Ibid.*

12. *Same—Road Districts.*—Under this power the Legislature may create special road districts and confer upon the trustees or authorities thereof the regulation, management and ordinary control of the public roads in such district, and may further create in a given district a special road commission and authorize the commissioners to levy a tax for the purpose of maintaining and extending the roads of the district. *Ibid.*

COLLATERAL ATTACK. See Executors and Administrators.

COLLISION. See Negligence.

"COLOR." See Evidence.

CONDITIONAL SALES. See Principal and Surety.

CONFIDENTIAL RELATIONS. See Fraud.

CONSIDERATION. See Fraud; Insurance; Deeds and Conveyances.

CONSIGNOR AND CONSIGNEE. See Penalty Statutes.

CONSTITUTION.

Article IV, sec. 8. Relating to general appellate power of the Supreme Court. *S. v. Webb*, 426.

Article VII, sec. 14. Legislative power to create and authorize road districts to issue bonds, etc. *Trustees v. Webb*, 379.

CONSTITUTIONAL LAW. See Watercourses; Drainage; Taxation.

1. *Water and Watercourses—Sewers—Pollution—Statutory Regulation—Constitutional Law.*—Revisal, sec. 3051, regulating sewers discharging into "any drain, creek, or river from which a public drinking-water supply is taken," etc., is within the police power of the Legislature, enacted for the public health, and is constitutional and valid. *Shelby v. Power Co.*, 196.

CONSTITUTIONAL LAW—*Continued.*

2. *Police Powers—Legislative Powers—Subsequent Legislation.*—No Legislature can bind a subsequent one in its exercise of the powers conferred in regard to the pollution of streams from which the public drinking supply is taken. Revisal, sec. 3051. *Ibid.*

3. *Water and Watercourses—Sewers—Pollution—Statutory Regulations—Lawful Taking of Property.*—As no prescriptive right can be acquired by one in emptying sewers into streams from which a public drinking-water supply is obtained, there can be no taking of property for public use under the inhibition of Revisal, 3051, and nothing to compensate for it, the State only prescribing the conditions under which the stream may be used for sewer purposes. *Ibid.*

4. *Counties and Towns—Governmental Agencies—Legislative Control—Constitutional Law.*—Counties and townships are as a rule simply agencies of the State constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of ordinary governmental functions they are subject to almost unlimited legislative control, except when restricted by constitutional provision. *Trustees v. Webb*, 379.

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7. *Trial, "Speedy"—Constitutional Law.*—The right of a person formally accused of a crime to a "speedy and impartial" trial has been guaranteed to Englishmen since Magna Charta, and is embodied in the Sixth Amendment to the Federal Constitution; and a like provision is substantially made in our own and other State constitutions. *S. v. Webb*, 426.

8. *Same—Legislative Definition.*—The word "speedy," as used in these instruments and as relevant to this question, is a word of indeterminate meaning, permitting, to some extent, legislative definition. *Ibid.*

9. *Appeal and Error—Trial, "Speedy"—Appellate Powers—Constitutional Law.*—Article IV, sec. 8, of our State Constitution, providing that "the Supreme Court shall have jurisdiction to hear, upon appeal, any decision of the court below, upon any matter of law or legal inference," is only designed and intended to confer general appellate power on the Court, to be exercised under recognized and established forms and writs, or according to methods provided by the Legislature. *Ibid.*

CONTINUOUS TRESPASS. See Limitation of Actions.

CONTRACTS. See Insurance; Deeds and Conveyances; Negligence; Cities and Towns.

1. *Written Contracts—Parol Evidence—Fraud.*—One who can read and write and has been afforded opportunity to do so, and to inform himself, will not ordinarily be relieved of liability under a written contract he has thus signed, upon the ground that he did not understand its purport or that it was an improvident one. *Leonard v. Power Co.*, 10.

2. *Same—Exceptions—Misrepresentation—Inducements—Confidential Relations—False Security.*—The ordinary rule that one will not be relieved from liability under his written contract which he could have read and informed himself of before signing can not be invoked in behalf of one who lulls the other party to security, for the law does not require men to deal with each other upon the presumption that they are rascals. *Ibid.*

3. *Same—"Caveat Emptor"—Equal Knowledge.*—Where the falsity of misrepresentation relied on to avoid liability under a contract is patent and the party seeking to avoid it accepts and acts upon it with his eyes open, he has no right to complain, for if the parties have equal information, the rule of *caveat emptor* applies unless the complaining party has fraudulently been prevented by some artifice or contrivance of the other party from making proper inquiry. *Ibid.*

4. *Deeds and Conveyances—Contracts—Inadequate Consideration—Fraud—Evidence.*—When the inadequacy of the consideration for a contract or conveyance is so gross as to shock the conscience, it is in itself sufficient evidence of fraud to submit the case to the jury; but mere inadequacy thereof, while it may not alone justify setting aside a contract or other paper-writing, may be considered by the jury with other evidence on the question of fraud. *Ibid.*

5. *Master and Servant—Contracts—Independent Contractor.*—When one contracts with another that the latter shall do a certain work in accordance with plans and specifications furnished him, the work not being intrinsically dangerous, and there being no suggestion that the contractor was incompetent to do it, and the contractee retains or assumes no control of the methods by which it is to be done or of the workmen employed to do it, and the contractor has the sole right to employ and discharge the workmen in pursuance of doing or completing the work contracted for, the relation of independent contractor is established, and the contractee is not responsible in damages for an injury to one of the workmen alleged to have arisen from a tort committed by the contractor. *Denny v. Burlington*, 33.

6. *Same—Torts—Independent Control—Inspection—Suggestion of Supervisor—Liability.*—When the relation of independent contractor has been established and the work is to be done according to plans and specifications furnished, the mere fact that a supervisor of the contractee is present for the purpose of seeing that the work is being done according to the contract, at the time the tort complained of is committed, does not render the contractee liable therefor; nor is the contractee liable for mere suggestions made by his supervisor without authority and with relation to the work or workmen over whom he has no control, and in the performance of which work the contractee is interested only to the extent that it shall be done in accordance with his contract. *Ibid.*

CONTRACTS—*Continued.*

7. *Vendor and Vendee—Contracts—Fraud—Declarations—Inducements—False Representations.*—While expressions of opinion by a seller, amounting to nothing more than mere commendation of his goods, such as extravagant statements as to value, etc., are not, as a rule, to be regarded as fraudulent in law, yet when assurances of value are seriously made and are intended and accepted and reasonably relied upon as statements of fact, including a contract, they may be considered in determining whether there has been fraud perpetrated. *Unitype Co. v. Ashcraft,* 63.

8. *Same—Questions for Jury.*—Where there are declarations of value of goods made by the seller, though made in the form of opinions, and there is doubt as to whether they were intended and received as mere expressions of opinion or as statements of facts to be regarded as material, the question must be submitted to the jury. *Ibid.*

9. *Same—Knowledge Implied.*—To create a right of action for deceit in a sale, there must be a statement made by the seller or by one for whom the defendant is answerable, which is untrue in fact, and is known by the person making it to be untrue, or he is culpably ignorant—*i. e.,* does not know whether it is true or false, and made with the intent that the plaintiff shall act upon it or in a way reasonably calculated to mislead him, and he does act in reliance upon the statement and in the manner contemplated or reasonably probable, and damage to the plaintiff must result therefrom. *Ibid.*

10. *Same—Unequal Opportunity.*—A false representation of the value of goods made by the seller is actionable which materially affects the transaction, when the facts are peculiarly within the knowledge of the seller, and in respect to them the other party, in the exercise of the proper care, had not a fair opportunity of ascertaining the truth. *Ibid.*

11. *Inventor.*—When the inventor of a typesetting machine, who is the agent of the manufacturers to sell the same, makes false representation as to its mechanical construction and its quality or value, they are presumed to have been knowingly made, and being well calculated to deceive, the vendor will be bound by them if the seller is induced thereby to act to his prejudice. *Ibid.*

12 *Contracts—False Representations—Fraud—Parol Evidence.*—Pertinent evidence tending to show fraudulent representations sufficient to invalidate a contract of sale can not be objectionable on the ground that the contract can not be contradicted or varied by parol, as in law it does not have that effect. The contract is canceled and not varied. *Ibid.*

13. *Written Contracts—Deeds and Conveyances—Bonds for Title—Misrepresentations of Improvements—Parol Evidence.*—Parol evidence that a development company induced the sale of lots platted on its land to purchasers under contract to convey, by guaranteeing certain improvements to be made within a year which would materially affect the desirability of the lots, is consistent with the written contract which specifies the terms of payment and the restrictions and stipulations under which they may acquire the deed. *Anderson v. Corporation,* 131.

CONTRACTS—*Continued.*

14. *Partnership—Contracts—Counterclaim—Breach of Covenant—Credit on Note.*—Defendant partnership, consisting of man and wife, were sued on a note given for the purchase of a livery business, the subject of the partnership. The husband claimed damages for breach of warranty in the purchase of a surrey plaintiff subsequently sold him for the partnership, as a counterclaim: *Held*, the note being joint and several, the damages allowed on the breach of warranty to the husband in the judgment was a proper credit on the note. *Shell v. Aiken*, 212.

15. *Damages—Contract—Breach of Warranty—Tort—Waiver.*—A counterclaim for damages for a breach of warranty arises out of contract and can properly be set up in an action thereon, and the defendant may waive the tort and sue in contract. *Ibid.*

16. *Contract—Counterclaim—Scope.*—The statutory counterclaim allowed to a defendant is very broad in its scope and not confined to that of a technical "set-off" or recoupment; and a party being sued for the purchase price of goods may set up a counterclaim for damages from a breach of warranty of the same creditor of other goods he had sold him. *Cheese Co. v. Pipkin*, 394.

CONTRACTS TO CONVEY. See Deeds and Conveyances.

CONTRIBUTORY NEGLIGENCE. See Railroads; Evidence.

CORPORATION COMMISSION. See Taxation.

CORPORATIONS. See Banks.

1. *Surplus—Stock in Other Corporations.*—By the language of chapter 440, section 34, Laws of 1909, only the value of the real and personal property locally assessed is to be deducted by the Corporation Commission from the total value of the shares of the capital stock to be ascertained in the manner therein prescribed; and no further deduction may be allowed for investments by a corporation in stock in other corporations, chapter 438, section 4, Laws of 1909, having no application, when it appears that the complainant had no surplus. *Pullen v. Corporation Commission*, 152 N. C., 548, cited and distinguished. *S. v. Morrison*, 53.

2. *Corporations—Subscriptions to Stock—Conditions—Collateral Agreement.*—Collateral agreement to a subscription of stock in the formation of a corporation which renders the subscription void unless the company has a paid-in capital in a certain sum is valid and binding. *Alexander v. Savings Bank*, 124.

3. *Same—Waiver.*—A waiver must be made with knowledge of the conditions under which it is sought to be established, so that the intention to waive a right may in some way appear, and when there is contradictory evidence as to such conditions and intention the question is a proper one for the jury. *Ibid.*

4. *Same—Proxy.*—A subscriber to shares of stock in a corporation being organized upon agreement that his subscription will not be binding upon him if the capital be less than a certain amount, is not held to have waived his rights by subsequently being represented by proxy at a stockholders' meeting after the capitalization had been fixed in

CORPORATIONS—*Continued.*

a less amount, when he was reasonably unaware of that fact and had been misled by the acts of the corporation. *Ibid.*

5. *Trusts and Trustees—Wrongful Loans—Priorities—Borrower—Receivership—Rights of Creditors.*—A trustee who has loaned his trust funds to a manufacturing corporation, the funds being used by the latter to purchase raw material and in the payment of labor, can acquire no superiority of lien upon the assets of the corporation after insolvency or receivership. *Costner v. Cotton Mills,* 128.

6. *Trusts and Trustees—Trust Funds—Wrongful Loan—Subrogation.*—The right of subrogation does not exist in behalf of a trust fund which has been wrongfully loaned by a trustee to a corporation afterwards becoming insolvent. *Ibid.*

7. *Corporations — Officers — Declarations — Hearsay Evidence.*—Declarations of officers of a corporation are competent as evidence against the corporation only when made in the line of their official duty and while discharging it in reference to a transaction for the company complained of; declarations otherwise made are hearsay and objectionable as evidence against the principal. *Younce v. Lumber Co.,* 239.

8. *Principal and Agent—Corporations—Respondeat Superior.*—Corporations are liable for the acts of their agents while engaged in the business of their principals in the same manner and to the same extent that individuals are liable under like circumstances. *Berry v. R. R.,* 287.

CORPORATIONS, PUBLIC QUASI. See Cities and Towns.

CORRECTION. See Equity; Deeds and Conveyances.

COUNTERCLAIM. See Contracts; Jurisdiction.

COUNTIES. See Cities and Towns.

COURTS. See Jurisdiction; Decisions; Appeal and Error.

1. *Arbitration and Award—Courts—Favorable Consideration—Intent.*—Courts favor arbitrations, and will always put as liberal and comprehensive a construction upon agreements to submit as the apparent intention of the parties will allow. *Robertson v. Marshall,* 168.

2. *Appeal and Error—Courts—Improper Remarks—Prejudice Not Shown.* A remark by the trial judge to the sheriff in the presence of the jury upon a trial for homicide, after four counsel had addressed them, the last being one of the defendant's, "You can give the jury water. And, gentlemen of the jury, if you wish to retire to your room you can do so for a few minutes. We have no band to play between the speeches," makes it incumbent upon the complaining party to show that it was prejudicial, and, nothing else appearing, it does not constitute reversible error. *S. v. Rowe,* 436.

COVENANT, BREACH OF. See Contracts.

CROSSINGS. See Railroads; Negligence; Contributory Negligence.

DAMAGES. See Injunction.

1. *Notice After Shipment—Reasonable Opportunity to Deliver.*—In such action, evidence tending to fix the carrier with notice or knowledge of special circumstances affecting the question of damages, and under conditions affording fair and reasonable opportunity to avoid further delay, is competent and relevant; and the rejection of such evidence by the trial court constitutes reversible error. *Peanut Co. v. R. R.*, 148.

2. *Same—Principal and Agent—Undisclosed Principal.*—In such case an undisclosed principal holding the business rights and interests under the contract of shipment may sustain the action, subject to the limitations and restrictions ordinarily prevailing in such relationship. *Ibid.*

3. *Damages—Contract—Breach of Warranty—Tort—Waiver.*—A counterclaim for damages for a breach of warranty arises out of contract and can properly be set up in an action thereon, and the defendant may waive the tort and sue in contract. *Shell v. Aiken*, 212.

4. *Surface Water—Damages—Duty of Lower Proprietor.*—A lower proprietor is not required to avoid the damages to his land by digging ditches to carry off surface water wrongfully diverted from its natural flow by the upper proprietor to the injury of the former. *Roberts v. Baldwin*, 276.

5. *Damages—Release—Meritorious Defense.*—A valid release given to one of two joint tort feasors by the plaintiff in an action for damages is a good and meritorious defense for the other. *Sircey v. Rees*, 296.

6. *Damages—Personal Injuries—Joint Tort Feasors—Release—Evidence—Nonsuit.*—There can be but one satisfaction recovered for injury arising from a joint tort; and when it appears that the plaintiff in his action for damages for a personal injury has released from liability one tort feasor, the release operates as a discharge of the other, and a motion for nonsuit should be allowed. *Ibid.*

7. *Same—Master and Servant—Third Persons—Joint Participants.*—A switchman of a railroad company was struck by a pile of tan bark near the track while employed on a train which was being backed for the purpose of leaving a car on defendant's private siding, for the latter's accommodation, and brought his action for damages alleging that the defendant was negligent in placing the tan bark so near the track as to cause injury to those on passing cars: *Held*, the railroad and the defendant were joint participants in the wrong as alleged, and being joint tort feasors, a release from liability for damages given by the plaintiff to the railroad operated to release the defendant. *Ibid.*

DANGEROUS INSTRUMENTALITIES. See Electricity.

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Decisions—Rights Acquired—Reversal.—Titles or vested interests acquired upon the faith of decisions of this Court will not generally be disturbed or the parties prejudiced by a subsequent reversal thereof. *Jones v. Williams*, 179.

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DEEDS AND CONVEYANCES. See Contracts; Vendor and Vendee; Easements.

1. *Deeds and Conveyances—Fraud—Misrepresentation—Acreage—Description—Imputed Knowledge.*—The mere fact that a grantee in a deed to a tract of land, said to contain 108 acres, had previously been shown the tract and its corners, without other knowledge or information of its acreage, does not necessarily conclude him in his action for damages upon ascertaining that the deed he accepted conveyed only 88 acres, the deed reciting the corners he had been shown, and apparently conveying 113 acres, and it further appearing that the grantor had had the tract surveyed in the absence of the grantee and had failed in his agreement to notify the grantee of the time of the survey. *Shell v. Roseman*, 91.

2. *Deeds and Conveyances—Fraud—Misrepresentations—Evidence—Questions for Jury.*—When there is evidence tending to show that a grantor of a tract of land induced the grantee to purchase at a certain price by falsely and knowingly representing that it contained 108 acres, and that the grantee, without knowledge of the acreage and relying upon the misrepresentations, accepted a deed to the tract purporting to convey 113 while in fact it conveyed only 88 acres, it is sufficient to go to the jury in the grantee's action to recover damages for false and fraudulent representations in the sale of the land. *Ibid.*

3. *Same—Deeds and Conveyances—Principal and Agent—Respondeat Superior.*—In this case advertisements of a city development company were put in evidence that certain improvements were to be made materially affecting the value of the lots offered for sale, and of instructions given to agents to that effect, which called upon would-be purchasers to get information from its agents, who would see them upon request and exhibit the property: *Held*, sufficient evidence of the agent's authority to bind the company by representations accordingly made. *Anderson v. Corporation*, 131.

4. *Deeds and Conveyances—Bond for Title—Assignment to Agent—Principal's Misrepresentation—Rights of Agent—Subrogation.*—When an agent of a land development company has honestly made representations as an inducement for the sale of its lots under a contract to convey, and his principal fails to perform its promise, he may have the purchaser assign the contract to him, upon a sufficient consideration, and maintain his action thereon against his principal. *Ibid.*

5. *Deeds and Conveyances—Delivery—Title—Registration—Limitation of Actions.*—The delivery of a deed to land passes title to be perfected as to subsequent purchasers and creditors by registration, as to which there is no limitation of time. Revisal, 980. *Brown v. Hutchinson*, 206.

6. *Deeds and Conveyances—Unregistered Deeds—Title—Evidence.*—An issue of title being raised in proceedings for processioning, and the cause properly transferred to the term of the Superior Court for trial, it is not necessary that a party claiming title under a deed should have had his deed recorded before the commencement of the action if he had theretofore acquired it, and it becomes evidence if recorded before or at the trial. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

7. *Deeds and Conveyances—Registration Relates Back.*—Registration of a deed relates back to the date of its execution as between the original parties. *Ibid.*

8. *Deeds and Conveyances—Prior Deeds—"Color"—Registration—Title—Evidence.*—The trial judge having excluded prior deeds in plaintiff's chain of title, sufficient to show "color," and the one directly to him, the latter for want of registration prior to the commencement of the action involving title, evidence of possession was not necessary to his taking a nonsuit and appeal. *Ibid.*

9. *Deeds and Conveyances—Probate Sufficient—Certificates—Signature of Officials.*—It is not necessary to the validity of the probate of a deed that the signature of the name of the justice before whom it was acknowledged should be recorded at the end, when it appears from the certificate as recorded and from the clerk's adjudication thereon that his name appeared in the first line, and that in fact he properly took the acknowledgment. *Ibid.*

10. *Deeds and Conveyances—Registration—Order Continuous—Corrections.* The order of registration by the clerk is a continuous one, with which the register may subsequently comply upon inadvertently having omitted to copy the words it contained upon his book. *Ibid.*

11. *Deeds and Conveyances—Probate—Registration Erroneous—Original Deed—Evidence.*—The original deed may be shown in evidence to correct an omission by the register of deeds of the signature of the justice of the peace before whom the deed was acknowledged. *Ibid.*

12. *Deeds and Conveyances—Registration—Common Law—Sister States—Statutes—Presumptions—Proof.*—At common law, registration of a conditional sale or a sale on commission was unnecessary, and while registration is required for certain purposes under our statute of a conditional sale, it does not apply when the *situs* of the contract is in another State, and if there is no evidence that the law of that State requires registering, the contract is valid without it, for the common law is presumed to prevail there unless the contrary is shown, and our courts will not take judicial notice of a statute of a sister State. *Carriage Co. v. Dowd*, 307.

13. *Same—Bankruptcy—Trustee—Title.*—When the *situs* of a conditional sale is in another State and there is no proof of the common law as recognized there, or of a statute requiring registration of such a contract of sale, the presumption is that registration is not necessary to the validity thereof. *Ibid.*

14. *Deeds and Conveyances—Purchaser—Title—Insufficient Acts to Divest.* Title to lands under a registered deed given by the mortgagee in foreclosure proceedings is not divested by the mortgagor's refusing possession and grantee's thereafter surrendering the deed to the mortgagee and receiving back the purchase price he has paid, and especially so when the purchaser diligently urges his rights by appropriate proceedings for possession under his deed. *Herring v. Warwick*, 345.

15. *Deeds and Conveyances—Title—Possession of Lands Unnecessary.*—It is not necessary that possession of lands be given to vest title to the grantee under a valid and sufficient deed. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

16. *Deeds and Conveyances—Lands—Parol Contract of Sale—Statute of Frauds—Pleadings.*—A vendee, under a parol contract in regard to land, after the payment of the purchase price, can compel the execution of the deed to him, when the statute of frauds is not pleaded, the contract is not denied, and there is no objection to the evidence in his suit for its execution. *Henry v. Hilliard*, 372.

DEFEASANCE. See Estates.

DEFENSE.

Damages—Release—Meritorious Defense.—A valid release given to one of two joint tort feasors by the plaintiff in an action for damages is a good and meritorious defense for the other. *Sircey v. Rees*, 296.

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DELIVERY. See Carriers of Goods; Insurance; Telegraphs.

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Appeal and Error—Evidence—Demurrer—Consent of Attorney-General—Procedure.—When it seems to the Attorney-General that justice requires it, the Supreme Court may permit a demurrer to the evidence to be made there, though it should have been done in apt time in the Superior Court, but such practice is not commended or encouraged. *S. v. Houston*, 432.

DEPOSITIONS. See Evidence.

DIVIDENDS. See Bankruptcy; Principal and Surety.

DOMICILE. See Executors and Administrators.

DRAINAGE ACT.

1. *Drainage Act—Constitutional Law.*—Revisal, sec. 3995, ch. 88, subch. 2, providing a method for the assessment and apportionment of labor, etc., of those interested and receiving actual benefit from the repairing or keeping of a dam, canal or ditch, and also for payment by parties interested or benefited therein, etc., is constitutional and valid. *Forehand v. Taylor*, 353.

2. *Drainage Act—Noncompliance—Case Dismissed—Compliance—Another Act—Judgment—Estoppel.*—When damages have been sought in an action before a justice of the peace, Revisal, sec. 3995, ch. 88, relating to drainage districts, etc., and the action was dismissed because there had been no contract or agreement between the parties and the requirements of the act had not been met, the plaintiff is not thereby barred from proceeding under the act to have the damages assessed and from bringing another action therefor, as the former judgment does not bar the second one. *Ibid.*

3. *Drainage Act—Canal—Identification—Regarded as Under the Act—Appeal and Error—Procedure.*—In this action it is not distinctly stated, as it should be, that the canal in question had been laid out under the Drainage Act, but both parties having treated it as such,

DRAINAGE ACT—*Continued.*

and the whole proceedings being under Revisal, 3995, concerning the apportionment of repairs of that kind, the case on appeal is considered as relating to a canal of that character. *Ibid.*

EASEMENTS.

1. *Deeds and Conveyances—Right of Way—Electricity—Fraud—Parol Evidence—Confidential Relations—Misrepresentations.*—The owner of lands will not be held upon his written contract granting an easement to a power company to erect steel towers upon his land, when it is shown that the agent of the company was well known to him, and he relied upon the assurances of the agent that only a line of one or two poles and wires was included in the conveyances; that the agent of the company read the writing without mentioning the towers which were expressly specified therein, and that at the time actual work had been commenced to the knowledge of the agent and without that of the grantor upon a location of a line of towers and wires that would embrace a greater acreage than verbally represented, though the grantor could have read the grant and have informed himself of its contents at the time of signing it. *Leonard v. Power Co.*, 10.
2. *Railroads—Rights of Way—Limitation of Actions—Police Powers—Grading—Cities and Towns.*—Revisal, sec. 388, providing that a railroad company, etc., shall not be barred by the statute of limitations as to its right of way, etc., does not affect the State or a municipality in the assertion of its right to require a railroad company to change the grade of its roadbed where it is crossed by streets, so that public travel and drainage may not be impeded. *R. R. v. Goldsboro*, 356.

EJECTMENT OF PASSENGER. See Carriers of Passengers.

ELECTRICITY. See Easements.

Electricity—Negligence—Evidence—Questions for Jury.—Evidence of the death of plaintiff's intestate by the negligence of the defendant in permitting an excessive voltage of electricity upon the wires where the intestate was employed to work by contractors repairing the building, and a defect in the mechanism of an electric socket for a lamp, *held*, sufficient, in connection with other circumstantial evidence, to take the case to the jury. *Houston v. Traction Co.*, 4.

ENDORSEMENTS. See Negotiable Instruments.

EQUITY. See Fraud; Mortgage; Insurance.

1. *Insurance—Policy—Written Contract—Presumption—Equity—Fraud—Evidence—Proof.*—There is a presumption that a written contract of insurance expresses the intention of the parties, and a party who alleges mistake and seeks to reform the contract must overcome it and show mistake by clear, strong and convincing proof. *Clements v. Insurance Co.*, 57.
2. *Equity—Relief—Diligence—Rule of Prudent Man.*—Equity will not afford relief to one who sleeps upon his rights, or whose condition is traceable only to that want of diligence which may fairly be expected from a reasonable and prudent man; and it requires of one asserting an equity, who was watchful and discovered the wrong, that he be prompt in asserting his right. *Ibid.*

EQUITY—*Continued.*

3. *Mortgages—Power of Sale—Equitable Procedure.*—The equitable power of a court to foreclose a mortgage is not derived from the power of sale contained therein; and when the mortgagee applies to the court to foreclose, the court pursues its own course of practice without restraint, so as to administer the rights of the parties according to law and its own procedure. *Jones v. Williams*, 179.

4. *Foreclosure Sales—Equity—Bidder—"Proposer"—Confirmation—Party—Decree.*—One who bids in property at a sale under a decree of foreclosure is a mere proposer until his bid is legally accepted and confirmed, and when made a party after his bid and before confirmation, to a prior suit for foreclosure of which he had constructive notice, he is subject to and bound by the final decree in that suit. *Ibid.*

5. *Mortgages—Foreclosure—Third Parties—Equity—Interested Persons—Hearings.*—Where there is the foreclosure of a mortgage under a power of sale therein contained, third parties must be vigilant to protect their interests, as it is not a judicial proceeding, but simply a method adopted by the parties to enforce the lien. *Ibid.*

6. *Note—Transfer Before Maturity—Innocent Purchaser—Guardian and Ward.*—When sureties on a guardian's bond have become such upon agreement with the guardian that the securities taken for investments should remain in their hands for their protection, and it is shown by affidavits that the guardian had sold the lands of the ward and received a note for the deferred payments secured by a lien on the land, which the defendant took from the guardian, and that it had not yet reached maturity, a remedy by injunction in favor of the guardian and sureties is proper to restrain the negotiation of the note by defendant until the hearing, so that it may not get into the hands of an innocent purchaser for value. *Yount v. Setzer*, 213.

ESTATES. See Wills.

ESTOPPEL. See Principal and Agent; Drainage.

EVIDENCE. See Nonsuit; Questions for Jury; Appeal and Error; Injunction; Instructions; Intoxicating Liquors; Deeds.

1. *Electricity—Negligence—Evidence—Questions for Jury.*—Evidence of the death of plaintiff's intestate by the negligence of the defendant in permitting an excessive voltage of electricity upon the wires where the intestate was employed to work by contractors repairing the building, and a defect in the mechanism of an electric socket for a lamp, *held*, sufficient, in connection with other circumstantial evidence, to take the case to the jury. *Houston v. Traction Co.*, 4.

2. *Insurance—Policy—Written Contract—Presumption—Equity—Fraud—Evidence—Proof.*—There is a presumption that a written contract of insurance expresses the intention of the parties, and a party who alleges mistake and seeks to reform the contract must overcome it and show mistake by clear, strong and convincing proof. *Clements v. Insurance Co.*, 57.

3. *Instructions—Fraud—Verdict—Appeal and Error—Evidence—Nonsuit—Practice.*—When, under erroneous instructions of the trial judge upon an issue of fraud raised in an action to set aside a policy of life insurance, the jury has found the issue against the defendant,

EVIDENCE—*Continued.*

and there is no evidence of any fraud, viewing the case in its most favorable light to the plaintiff, the error complained of vitiates the entire verdict, and it will be set aside on appeal with directions to dismiss the action upon defendant's motion to nonsuit made in apt time in the trial court. *Ibid.*

4. *Vendor and Vendee—False Representations—Principal and Agent—Evidence—Declaration of Agent—Proof Aliunde.*—False representations made by an agent sent to negotiate a sale and made as an inducement thereto are binding upon the principal, and an objection that the agency was not shown *aliunde* the acts and declarations of the agent is not tenable when it appears that the agent was acting for the principal, who recognized his authority and claims the benefit of the transaction, after acknowledging his acts and declarations. *Unitype Co. v. Ashcraft*, 63.

5. *Carriers of Passengers—Obstructions—Trunks—Evidence.*—Unloading a trunk from a passenger train and leaving it so near thereto that a passenger was injured thereby while endeavoring to get on the train as it was slowly leaving the station is a relevant fact to be considered with other facts and circumstances in this case, tending to show that negligence on the part of defendant's employees on the train proximately caused the injury complained of. *Roberts v. R. R.*, 79.

6. *Witnesses—Expert—Qualification.*—For expert evidence to be competent there must be a finding by the lower court, or an admission, that the witness was an expert. *Boney v. R. R.*, 95.

7. *Same — Negligence — Opinion Evidence.* — A locomotive engineer, not qualified as an expert upon the trial, who was not present at the time the injury causing the death of plaintiff's intestate occurred, the intestate being an engineer on a passenger train and killed while running his train thirty-five miles an hour where the defendant's rules required a speed not exceeding six miles, is not competent to give testimony as to whether the injury would have been caused had the intestate complied with the rules of the company. *Ibid.*

8. *Railroads—Warnings—Switches—Lights—Evidence.*—When, in an action against a railroad for damages for the wrongful death of its engineer caused by a collision of the train he was running at night into a station with another train negligently permitted to be on the main line, and the question is material as to whether there was a white light showing at the time, evidence of defendant's negligence is sufficient to be submitted to the jury which tends to show that the "white glass" was turned to the main line at 8 o'clock that night, and that the injury was inflicted at 2 o'clock the following morning, the yard, lights, etc., being under the supervision and control of the defendant during that time. *Ibid.*

9. *Written Contracts — Parol Evidence — Consistency—Interpretation.*—When the written and contemporaneous parol parts of a contract are consistent, and the law does not require the latter to be in writing, both will be considered in ascertaining what the entire agreement between the parties was. *Anderson v. Corporation*, 131.

10. *Written Contracts—Deeds and Conveyances—Bonds for Title—Misrepresentations of Improvements—Parol Evidence.*—Parol evidence that

EVIDENCE—*Continued.*

a development company induced the sale of lots platted on its land to purchasers under contract to convey, by guaranteeing certain improvements to be made within a year which would materially affect the desirability of the lots, is consistent with the written contract which specifies the terms of payment and the restrictions and stipulations under which they may acquire the deed. *Ibid.*

11. *Wife's Money—Purchaser—Title to Husband—Resulting Trusts—Proof Required.*—When a resulting trust for the wife is sought to be established upon the allegation that the husband purchased land with her money and took a deed to himself which is absolute in form and conveys the legal and equitable title to him, it is necessary that the trust be established by clear, strong and convincing proof. *McWhirter v. McWhirter*, 145.

12. *Contracts—Fraud and Deceit—Evidence.*—Evidence considered and held insufficient to establish actionable fraud or deceit. *Wilson v. Insurance Co.*, 173.

13. *Evidence—Deposition—Presumptions—Regularity—Commissioner's Relationship.*—The presumption is that a deposition has been properly taken when it appears thereon that it was taken by one named in the commission on the day and at the designated place; and a motion to quash the deposition will be denied when the motion is put upon the ground that the certificate of the commissioner was irregular in failing to state that he was of kin to neither party, the burden being upon the movant to show that he was. *Younce v. Lumber Co.*, 239.

14. *Corporations—Officers—Declarations—Hearsay Evidence.*—Declarations of officers of a corporation are competent as evidence against the corporation only when made in the line of their official duty and while discharging it in reference to a transaction for the company complained of; declarations otherwise made are hearsay and objectionable as evidence against the principal. *Ibid.*

15. *Evidence—Expert Witness—Sawing Lumber—Cost.*—In an action to recover damages for cutting lumber for defendant in a certain county, laid as the difference between the contract price therefor and the cost of cutting, evidence as to the cost of cutting by a witness who has had experience in cutting lumber in that county under conditions like those existing at the location in question is competent, though the witness has had no experience in such work at the exact place. *Ibid.*

16. *Deeds and Conveyances — Registration — Defective Probate. — Wife's Separate Examination—Findings—Evidence—Appeal and Error.*—Findings of fact by the clerk and adopted by the judge upon a petition to correct an alleged defective probate of a deed, in that it did not show the privy examination of the wife of the grantor, etc., under allegation that the original correctly showing the probate had been lost, will control on appeal when there is evidence to sustain such findings; and when they are adverse to the claim of the petitioner he is bound by them. *Mills v. McDaniel*, 249.

17. *Railroads—Baggage—Custom—Modification of Rule.*—The requisites of the general rule to affect delivery of baggage of a passenger to a railroad company in order to hold the company liable may become

EVIDENCE—*Continued.*

modified by a custom of the latter to consider and treat baggage as received when left at a given place, without further notice. *Williams v. R. R.*, 260.

18. *Husband and Wife — Banks — Shareholders—Trusts and Trustees—"Proxy"—Evidence—Fraud.*—Certificates of bank stock, upon their face, appeared to be issued to a husband as trustee for his wife. The husband was the president of the bank, and it became insolvent: *Held,* the mere fact that the husband had acted in stockholders' meetings as his wife's proxy is no evidence of fraud, and will not, of itself, rebut the beneficial ownership being in the wife, when it appears upon the face of the certificate, so as to hold him liable under the statute. Laws 1897, ch. 298. *Smathers v. Bank,* 283.

19. *Railroads—Principal and Agent—Passengers—Torts—Wrongful Ejecting—Evidence of Agency—Conductors.*—Defendant railroad's traveling passenger agent was on an excursion train assisting the conductor in his duties of collecting fares, etc., and by his bearing and other circumstances evincing his authority over the conductor: *Held,* sufficient evidence to go to the jury of the scope of his agency to bind his principal, the railroad company, by his acts in wrongfully and maliciously causing a passenger to be assaulted and ejected from the train, and the passenger's immediate arrest and trial for a criminal offense. *Berry v. R. R.*, 287.

20. *Master and Servant—Defective Drill—Negligence—Evidence.*—A power drill furnished by the master to the servant for boring holes in iron plates, leaving an exposed set-screw thereon dangerous in operating the drill and which are usually covered or countersunk, is not a proper tool for the purpose, and the master is liable in damages proximately caused by the defect, without fault on plaintiff's part. *Eplee v. R. R.*, 293.

21. *Instruction to Servant—Contributory Negligence—Evidence—Rule of the Prudent Man.*—A servant in the course of his employment was drilling holes in iron plates with an electric drill consisting of a vertical shaft, at the lower end of which was a head or socket into which a drill of the kind and size desired was inserted and held in place by a set-screw. This screw head projected three-fourths of an inch, and was neither covered nor countersunk at the time of the injury, which, from the evidence, was customary. This plaintiff was new to the machine and was put to work there by the defendant's foreman, who started the drill and assured plaintiff that he could work it, and left him there without instructions in its use, except to pour water on the plates when they became hot from the drilling. While drilling the holes and attempting to pour water on the plates as directed, plaintiff's coat sleeve was caught in the exposed head of the set-screw, causing serious injury, for which he demands damages: *Held,* the question of contributory negligence was properly submitted to the jury under the rule of the prudent man. *Ibid.*

22. *Vendor and Vendee—Deceit—False Representations—Fraud—Evidence Sufficient.*—In defense of an action upon a note given for the purchase price of a horse, the defendant alleged that at the time of the sale the plaintiff made false and fraudulent representations as to the age, qualities and condition of the horse, and introduced evidence

EVIDENCE—*Continued.*

tending to show that the horse had glanders, that it was greatly weakened by disease and became worthless, while it had been represented as sound and in good condition, excepting a very slight distemper: *Held*, that the evidence was sufficient upon the questions of false warranty and deceit. *Whitmire v. Heath*, 304.

23. *Same.*—In an action for false warranty and deceit in the sale of a horse, it was *held*, that, in connection with other evidence tending to sustain the allegations, a letter from the vendor to the vendee, in reply to one from the latter, stating that the vendor had "a black horse seven years old, a little thin, but mending fast," which he would sell, but that he preferred the vendee to "come and look at him" before he would make a price, was relevant evidence to be considered by the jury upon the question whether there was a representation as to the age and qualities of the horse, and, if so, whether it was false and fraudulent. *Ibid.*

24. *Evidence—Legal Sufficiency—Questions for Court.*—The judge should decide, as a matter of law, whether there is any legal evidence sufficient to be submitted to the jury. *Wright v. R. R.*, 325.

25. *Nonsuit—Contributory Negligence—Plea Available, When.*—A defendant may avail himself of the plea of contributory negligence on a motion to nonsuit upon evidence introduced by the plaintiff. *Ibid.*

26. *Deeds and Conveyances—Mortgages—Foreclosure—Judgment—Evidence—Unadjudicated Rights—Appeal and Error.*—Proceedings and judgment in suit to foreclose lands put in evidence in a subsequent action to declare certain rights of a purchaser at a sale thereafter arising, will not be considered on appeal of the later action to the Supreme Court when the rights of the parties, as determined in the former cause, were not considered by the court, and the judgment therein did not enter into the verdict in this case or in anywise affect it. *Herring v. Warwick*, 345.

27. *Deeds—Consideration—Services of Surveyor.*—It appeared upon supporting evidence in the report of a referee appointed by the court, that an executor, in the valid exercise of a power contained in the will of deceased respecting his lands, had employed a surveyor for the lands under a parol agreement that he should have certain designated lots thereof for the services thus to be rendered, and that the services so agreed upon were actually rendered by the surveyor. The statute of frauds was neither relied on nor pleaded by any of the parties, nor was any objection taken to the evidence tending to establish the parol sale of the lands: *Held*, the surveyor was entitled to have a deed made to the lands under his parol agreement with the executor, since deceased, and a decree made appointing a commissioner to execute the deed. *Henry v. Hilliard*, 372.

28. *Appeal and Error—Evidence—Demurrer—Consent of Attorney-General—Procedure.*—When it seems to the Attorney-General that justice requires it, the Supreme Court may permit a demurrer to the evidence to be made there, though it should have been done in apt time in the Superior Court, but such practice is not commended or encouraged. *S. v. Houston*, 432.

29. *Witnesses—General Character—Impeaching Questions—Confined as to Time.*—When the prisoner accused of a crime is being tried therefor,

EVIDENCE—*Continued.*

and he has not become a witness in his own defense, evidence tending to impeach his general character should be confined to the time preceding the crime charged. *S. v. Holly*, 485.

30. *Witnesses — General Character — Impeachment—Collateral Matters—Evidence Confined—Instructions.*—It is permissible to test the character of a witness by inquiring as to the sources of his information; and he may be asked if there was not a general reputation, prior to the controversy, as to particular matters, tending to his discredit; but such evidence should be restricted by the judge in his charge to the jury to the credibility of the witness who testifies as to character. *Ibid.*

31. *Evidence—Dying Declaration—Expectation of Death.*—For dying declarations to be admitted as evidence it is essential that they must have been made in expectancy and contemplation of impending death. *S. v. Baldwin*, 495.

EXCESSIVE SPEED. See Contributory Negligence.

EXCUSABLE NEGLECT. See Pleadings.

EXECUTION, STAY OF. See Procedure.

EXECUTORS AND ADMINISTRATORS.

1. *Executors and Administrators—Clerk's Appointment—Collateral Attack.* When acting within their jurisdiction and within the scope of their powers, the decrees of probate courts should be considered and dealt with as orders and decrees of courts of general jurisdiction; and where the jurisdiction over the subject-matter has been properly acquired, these orders and decrees are not, as a rule, subject to collateral attack. *Fann v. R. R.*, 136.

2. *Same.*—It appearing that administrator of decedent had been appointed by the clerk, objection can not be taken to the legality of his appointment upon the question of residence of such administrator, etc. (Revisal, sec. 16), in an action for damages for his negligent killing, for the error, if any committed, must be corrected by proceedings instituted directly for the purpose. *Ibid.*

3. *Same—Independent Action—Assets.*—A right of action to recover damages for the wrongful killing of an intestate constitutes assets; and it appearing that the appointment of the administrator was made in the county wherein the intestate resided and was domiciled at the time of his death, the clerk had full jurisdiction, and the letters of administration are not open to attack in the present suit. *Ibid.*

4. *Executors and Administrators—Clerk's Appointment—Nonresident—Change of Domicile—Intent Evidence.*—In an action for damages for the wrongful killing of plaintiff's intestate, when objection is made to the clerk's appointment of the administrator on the ground of nonresidence, evidence is relevant and competent which tends to show that the administrator was engaged in business in the county of his appointment, had property therein, and was a resident thereof, but had gone temporarily to another county in search of employment, with intent to return without changing his residence. *Ibid.*

FALSE ARREST. See Carriers of Passengers.

FALSE REPRESENTATIONS. See Contracts; Vendor and Vendee.

FEES. See Interpretation of Statutes.

FEME COVERT. See Jurisdiction; Contracts; Trusts and Trustees.

FINDINGS. See Appeal and Error.

FORECLOSURE. See Mortgage.

FRAUD. See Insurance; Contracts.

1. *Deeds and Conveyances—Right of Way—Electricity—Fraud—Parol Evidence—Confidential Relations—Misrepresentations.*—The owner of lands will not be held upon his written contract granting an easement to a power company to erect steel towers upon his land, when it is shown that the agent of the company was well known to him, and he relied upon the assurances of the agent that only a line of one or two poles and wires were included in the conveyances; that the agent of the company read the writing without mentioning the towers which were expressly specified therein, and that at the time actual work had been commenced to the knowledge of the agent and without that of the grantor upon a location of a line of towers and wires that would embrace a greater acreage than verbally represented, though the grantor could have read the grant and have informed himself of its contents at the time of signing it. *Leonard v. Power Co.*, 10.

2. *Deeds and Conveyances—Contracts—Inadequate Consideration—Fraud—Evidence.*—When the inadequacy of the consideration for a contract or conveyance is so gross as to shock the conscience, it is in itself sufficient evidence of fraud to submit the case to the jury; but mere inadequacy thereof, while it may not alone justify setting aside a contract or other paper-writing, may be considered by the jury with other evidence on the question of fraud. *Ibid.*

3. *Written Contracts—Deeds and Conveyances—Bonds for Title—Misrepresentations of Improvements—Parol Evidence.*—Parol evidence that a development company induced the sale of lots platted on its land to purchasers under contract to convey, by guaranteeing certain improvements to be made within a year which would materially affect the desirability of the lots, is consistent with the written contract which specifies the terms of payment and the restrictions and stipulations under which they may acquire the deed. *Anderson v. Corporation*, 131.

4. *Same—Fraud—Rescission—Measure of Damages.*—Upon the failure of a development company to comply with its guaranteed promise of improvements to be made within a year, material to the desirability of its property platted off in lots and relied upon by a purchaser under a bond for title, the purchaser may maintain his action to set aside the contract and recover the money he has paid thereunder, with interest. *Ibid.*

5. *Contracts—Fraud and Deceit—Evidence.*—Evidence considered and held insufficient to establish actionable fraud or deceit. *Ibid.*

6. *Husband and Wife — Banks — Shareholders — Trusts and Trustees — "Proxy"—Evidence—Fraud.*—Certificates of bank stock, upon their face, appeared to be issued to a husband as trustee for his wife. The husband was the president of the bank, and it became insolvent:

FRAUD—*Continued.*

Held, the mere fact that the husband had acted in stockholders' meetings as his wife's proxy is no evidence of fraud, and will not, of itself, rebut the beneficial ownership being in the wife, when it appears upon the face of the certificate, so as to hold him liable under the statute. Laws 1897, ch. 298. *Smathers v. Bank,* 283.

7. *Vendor and Vendee—Deceit—False Representations—Fraud—Evidence Sufficient.*—In defense of an action upon a note given for the purchase price of a horse, the defendant alleged that at the time of the sale the plaintiff made false and fraudulent representations as to the age, qualities and condition of the horse, and introduced evidence tending to show that the horse had glanders, that it was greatly weakened by disease and became worthless, while it had been represented as sound and in good condition, excepting a very slight distemper: *Held,* that the evidence was sufficient upon the questions of false warranty and deceit. *Whitmire v. Heath,* 304.

8. *Same.*—In an action for false warranty and deceit in the sale of a horse, it was *held,* that, in connection with other evidence tending to sustain the allegations, a letter from the vendor to the vendee, in reply to one from the latter, stating that the vendor had "a black horse seven years old, a little thin, but mending fast," which he would sell, but that he preferred the vendee to "come and look at him" before he would make a price, was relevant evidence to be considered by the jury upon the question whether there was a representation as to the age and qualities of the horse, and, if so, whether it was false and fraudulent. *Ibid.*

FRAUDS, STATUTE OF. See Evidence.

GOVERNMENTAL AGENCIES. See Cities and Towns.

HABEAS CORPUS.

Appeal and Error—Trial, "Speedy"—Habeas Corpus—Procedure.—Habeas corpus will not lie to review the lower court in refusing to discharge a prisoner from custody under Revisal, sec. 3155, upon the alleged error that a "speedy" trial under the conditions therein named was not given him. *S. v. Webb,* 426.

HARMLESS ERROR. See Instructions.

HOMICIDE.

1. *Homicide — Provocation — Words Spoken — Conditions—Questions for Jury.*—Upon a trial for a homicide, when unfriendly relations have been shown to have previously existed between the prisoner and deceased, and each had been told by the other never to speak to him again, the disagreement having arisen from the deceased's driving over the clover patch of the prisoner along the side of a road, where the deceased had been forbidden by the prisoner to drive, it is for the jury to say, under the plea of self-defense, and under all the facts and circumstances, whether the prisoner's words first spoken to deceased, "You are not doing what you promised to do, keeping off the clover," were sufficient to provoke an assault made by the deceased upon him, resulting in a fight causing the death of the former. *S. v. Rowe,* 436.

HOMICIDE—*Continued.*

2. *Homicide — Self-defense — "Sudden"—Words and Phrases—Harmless Error.*—A charge by the trial judge to the jury following in other respects the principles of law applicable to self-defense, upon a trial for a homicide, is not erroneous because of an instruction that if the assault on the prisoner was "sudden, serious, and continuous," he had the right to kill in defense of his person, the instruction being favorable to the prisoner. *Ibid.*
3. *Same—Elements of Self-defense.*—An instruction that the prisoner upon trial for homicide under the plea of self-defense had a right to stand his ground and resist the attack upon him, even to the slaying of his adversary, provided the assault was "sudden, serious, and continuous," is erroneous, for it leaves out of consideration the question as to how serious the assault was, and as to whether the deceased intended to kill or to inflict great bodily harm, or whether at the time the assault was made it was calculated to excite in the prisoner's mind a reasonable apprehension of death or great bodily harm; but the error being in favor of the prisoner, he has no right to complain on appeal. *Ibid.*
4. *Homicide—Deadly Weapon—Presumptions—Burden of Proof.*—The killing with a deadly weapon raises at least the presumption of murder in the second degree, placing the burden upon the prisoner to satisfy the jury that such facts and circumstances of mitigation or justification existed as will excuse the homicide or reduce its grade to manslaughter. *Ibid.*
5. *Same—Manslaughter—Harmless Error.*—When the jury upon a trial for homicide, with the plea of self-defense interposed, have, upon sufficient evidence, accepted the theory of the State, that the prisoner did not kill in self-defense, and it appears that he used a deadly weapon, and slew the deceased with it, a verdict for manslaughter was not improper. *Ibid.*
6. *Same—Evidence.*—In this case there was evidence that the prisoner pursued and killed the deceased by firing a shotgun at him without any real or apparent necessity for the act as a measure of self-defense, that being the only plea interposed; that he twice snapped the gun at the 16-year-old son of deceased; that neither the deceased nor his son was armed; that the prisoner and his brother, who was with him, then ran away, giving as the reason for their sudden flight, which the jury rejected, that they were afraid that the boy would shoot them with a pistol; they said he had one, which he did not have: *Held*, a conviction for manslaughter would not be disturbed on appeal, the trial in other respects being free from error. *Ibid.*
7. *Homicide—Manslaughter—Evidence Sufficient.*—Evidence that deceased and prisoner got into a heated dispute over a boundary to their lands, both being armed and cursing each other, when the prisoner said to deceased that he would shoot him, upon which deceased turned and the prisoner fired in his face, causing death: *Held*, sufficient for judgment of manslaughter, upon the theory that both fought willingly, under the facts and circumstances of this case. *S. v. Yates*, 450.
8. *Instructions—Homicide—Verdict—Harmless Error.*—An exception to an instruction relating to murder in the second degree becomes immaterial when the prisoner has been found guilty of manslaughter by the jury. *Ibid.*

HOMICIDE—*Continued.*

9. *Homicide — Manslaughter — Self-defense—Evidence—Requisites.*—It is the duty of one who is assaulted to abandon the difficulty and avoid the necessity of killing, if he can do so with reasonable safety; and one who enters into a fight willingly and does not abandon it, but prefers to stand his ground and continue in the fight, is guilty of manslaughter at least, if he kills. *Ibid.*

10. *Homicide — Poisoning — Evidence, Expert — Hypothetical Questions—Scope—Analysis for Poison—Prejudicial Error.*—Upon a trial for a homicide alleged to have been brought about by means of strychnine, the evidence disclosed that this poison may be in the stomach and death ensue from other causes, and that the quantity contained in the stomach, unassimilated, does not contribute to death; that an analysis had been made of the stomach of the deceased, and an insufficient quantity of strychnine was found to produce death, and that no analysis had been made of the liver or lungs. There was evidence that the deceased may have met his death from other causes; and *held,* reversible error in the trial judge to ask an expert witness a hypothetical question and admitting in evidence an affirmative answer, based upon strychnine having been found in the liver and lungs. *S. v. Holly,* 485.

11. *Homicide—Poison—Evidence—Character Witnesses—Cross-examination—Collateral Matters.*—Upon a trial for a homicide, when the prisoner does not take the stand as a witness, and the indictment has charged him with the killing of the deceased by means of poison, it was competent for the prisoner to introduce witnesses as to his good character, but reversible error to permit a question as to the witness having heard that the prisoner had been accused of killing his wife, with the reply, "Not till after the present charge was brought." *Ibid.*

12. *Same.*—It is competent upon cross-examination of the prisoner's witness to ask questions tending to impeach his general character; but a question permitted to be asked as to a particular matter, as to his previously having been accused of killing his wife, would tend to involve numerous collateral issues to the prejudice of the prisoner, and hence constituted reversible error. *Ibid.*

13. *Homicide—Uncommunicated Threats—Evidence.*—Exclusion of certain uncommunicated threats of the deceased uttered shortly before the homicide and tending to show animosity towards the prisoner and a purpose to do him bodily harm, *held,* error when there is evidence on the part of the prisoner tending to show that the killing was in his self-defense and the proposed evidence would throw light upon the occurrence. *S. v. Baldwin,* 494.

14. *Homicide—Instructions—Willingness—Rightfulness.*—A charge upon a trial for a homicide wherein there is evidence of self-defense is erroneous which instructs the jury that if the deceased and prisoner fought willingly at any time up to the fatal moment, it would be their duty to convict of manslaughter, as this would inculpate the prisoner if he had fought willingly but rightfully in his necessary self-defense. *Ibid.*

15. *Homicide—Insufficient Modifications.*—In this action of homicide, there being evidence of self-defense, it appears that the judge in the con-

HOMICIDE—*Continued.*

cluding sentence of his charge upon the law of self-defense modified an error theretofore committed, but held insufficient as a correction. *Ibid.*

16. *Felony—Manslaughter—Evidence Sufficient—Questions for Jury.*—Evidence is sufficient for conviction of manslaughter which tends to show that the defendants were at a fish-fry, and a fuss arose because a brother of deceased had stepped on the toes of one of the prisoners, for which he apologized, and acting at a suggestion that he again apologize, and while approaching for the purpose, one of the defendants suddenly drew a pistol and fired, and was joined in the firing by the other defendants, and "in less than two seconds" they fired twelve or fifteen shots, immediately after which the deceased fell. *S. v. Houston*, 432.

17. *Felonies — Manslaughter — Instruction — Defense Not Taken—Proper Conviction—Harmless Error.*—A charge of the law upon the principles of self-defense, when there was no evidence thereof, and such was not relied upon, is harmless error of which the defendant, convicted of manslaughter under the evidence, can not complain. *Ibid.*

HUSBAND AND WIFE. See Trusts and Trustees; Evidence.

INDEMNITY. See Negligence; Principal and Surety; Cities and Towns.

INDICTMENT.

Indictment—Clerical Omissions—Corrections—Offense Sufficiently Charged. An indictment charging that the prisoner "unlawfully, willfully and feloniously break and enter" a certain house at night for the purpose of stealing, is not rendered invalid because the word "did" (unlawfully, etc., enter) was omitted, as it appears that the omission was a clerical error and the offense was sufficiently charged. *S. v. Hawkins*, 466.

INJUNCTION.

1. *Equity—Injunction—Personal Property—Damages—Remedy at Law.*—Ordinarily, the equitable jurisdiction of the court can not be invoked to restrain the sale or other disposition of personal property when an action at law may be maintained to recover the property, or when the act sought to be enjoined has been committed. *Yount v. Setzer*, 213.

2. *Same—Insolvency.*—An allegation of defendant's insolvency is generally necessary when a remedy by injunction is sought, except when dispensed with by statute, in cases where compensation in damages affords an adequate remedy. *Ibid.*

3. *Equity—Injunction—Personal Property—Remedy at Law—Inadequacy.* If irreparable injury can be shown by the commission of an act without proof of insolvency a court of equity will intervene by injunction in proper instances. *Ibid.*

4. *Equity—Injunction—Notes—Third Persons—Transfer—Innocent Purchaser—Evidence.*—A restraining order upon defendant against the negotiation of a note will not be refused on the ground that the act anticipated has been committed, when it appears that it was given for moneys of a ward invested by the guardian which defendant

INJUNCTION—*Continued.*

wrongfully induced from him and transferred to the bank without suggestion that it was for value, particularly when the bank makes no claim to the note. *Ibid.*

5. *Equity—Jurisdiction—Police Powers—Roads and Streets—Obstructions—Injunction.*—Courts of equity have no jurisdiction to restrain an incorporated city from the exercise of its governmental authority conferred upon it by its charter regulating the grading of its streets, and an ordinance passed by the city in the exercise of its police power is valid which provides that a railroad company traversing with its track one of its streets in the heart of the business portion, where there are cross streets, shall level the railroad roadbed with the street which had been recently lowered so as to make them conform to a general scheme of street grading. *R. R. v. Goldsboro*, 356.

INNOCENT WOMAN. See Slander.

IN PARI DELICTO. See Negligence; Trusts and Trustees; Principal and Surety.

INSTRUCTIONS. See Evidence.

1. *Appeal and Error—Instructions—Verdict Directing—Evidence, How Considered.*—In passing upon the correctness of a peremptory instruction given by the trial judge to the jury to find for the defendant upon the evidence, the latter will be construed in the most favorable view for the plaintiff. *Denny v. Burlington*, 33.

2. *Resulting Trusts—Instructions, Conflicting.*—When the judge, in an action to declare a resulting trust in favor of the wife in lands purchased by the husband with her money, taking title by conveyance to himself, instructed the jury that the proof must be clear, strong and convincing, and, in another part of the charge, that a preponderance of the evidence is sufficient, the charge is conflicting and erroneous. *McWhirter v. McWhirter*, 145.

3. *Deeds and Conveyances—Resulting Trusts—Proof Required—Conflicting Instructions—Presumptions—New Trial.*—When the judge in one part of his charge instructs the jury correctly and another part incorrectly, as to the question of proof, it will be assumed that the jury acted upon the erroneous part, and a new trial will accordingly be awarded. *Ibid.*

4. *Instructions—Harmless Error.*—A city being indemnified against loss caused by the negligent acts of its contractor for public improvements upon its streets, was sued with the contractor, and damages against both recovered. It appearing of record, upon facts admitted, that the primary liability of the contractor was established, it was harmless error for the trial judge to instruct the jury that the primary liability of the construction company should be determined by the terms of the indemnity bond. *Commissioners v. Indemnity Co.*, 219.

5. *Surface Water—Damages—Instructions.*—Damages being sought by the lower proprietor in his action against the upper proprietor for the wrongful diversion of surface water through a ditch on the latter's lands, which had been dug for more than three years, it is proper for the trial judge to confine the jury in awarding damages to the injury inflicted within the three years. *Roberts v. Baldwin*, 276.

INSTRUCTIONS—*Continued.*

6. *Instructions—Prayers—Substance Given—Appeal and Error.*—When the trial judge instructs the jury substantially as requested in special instructions, it is sufficient. *S. v. Rowe*, 436.

7. *Appeal and Error—Evidence—Questions—Expected Answers—Harmless Error.*—On appeal it must appear that the refusal of the trial judge to admit evidence is with prejudice to the appellant, and when a question is asked, and it does not appear of record what the witness would have answered, or what was expected to be proved by him, no reversible error is shown. *Boney v. R. R.*, 95.

INSURANCE.

1. *Insurance — Policy — Written Contract—Fraud—Misrepresentations—Equity—Correction—Evidence.*—A mistake made by one party alone to a contract of insurance will not afford a ground for rectification or correction thereof, though equity will, in a proper case, afford relief by rescinding the contract. *Clements v. Insurance Co.*, 57.

2. *Same.*—In an action upon a policy of life insurance, when it may fairly be inferred from the evidence that the defendant issued and caused to be delivered to the insured the very policy it was intended he should have, and there is no sufficient evidence that it made any mistake in its terms, there is no equitable ground for reformation or correction. *Ibid.*

3. *Same—Insurance—Policy—Written Contract—Fraud — Misrepresentation—Correction—Cancellation.*—An insured who could read and write and who was afforded a fair opportunity to understand his policy, put it in his trunk and kept it there until it would suit his convenience to read it over. After he had read the policy and discovered, or should have discovered, that a provision which induced him to take the policy was missing, he continued to pay the premiums, and brought this action to reform or set aside the policy on the ground that the agent of the company falsely represented that after he had paid the premiums for a certain period he would, in addition to the insurance afforded, be repaid the full amount of the premiums and interest thereon: *Held*, equity will afford no relief, as the conduct of the insured amounted to an assent to the contract as written and a full acquiescence therein, and any loss he may have suffered was attributable to his own fault. *Ibid.*

4. *Insurance—Contracts—Procurement—Ignorance—Misrepresentations — Fraud.*—It is fraud in law for an agent of an insurance company to induce an illiterate and ignorant old man, trusting in his honesty, to take a policy of insurance by falsely representing that the policy provided for the repayment with interest of all the premiums paid thereon after the expiration of a ten years period of insurance; and the fraud is not waived because the insured requested the agent to read the policy to him, confiding in the fair dealing of the agent, when the policy was falsely read to him. *Briggs v. Insurance Co.*, 73.

5. *Same—Equality of Knowledge.*—An illiterate and ignorant old man dealing with an insurance agent for a policy of insurance is not deemed to have equal knowledge with the agent as to the meaning of the stipulations contained in a policy, and an action to set aside the contract for fraud and deceit will lie when the insured was induced by false and material representations to take out the policy. *Ibid.*

INSURANCE—*Continued.*

6. *Insurance—Principal and Agent—Respondeat Superior.*—The fraudulent misrepresentations of an agent of an insurance company, which would be sufficient if made directly by the principal to set aside a policy thereby procured, binds the company, and the doctrine of *respondeat superior* applies. *Ibid.*

7. *Insurance—Contracts—Fraud—Measure of Damages.*—When an insurance policy has been canceled for fraud in its procurement by the company, the measure of damages is the amount of the premiums paid, with interest. *Ibid.*

8. *Insurance — Parol Evidence—Policy—Merger—Cancellation—Reformation.*—An acceptance of a policy of insurance merges all prior parol agreements and inducements leading up to it, and parol agreements may not vary, alter or contradict the written terms of the policy unless and until reformed or set aside in an action for mistake or fraud. *Wilson v. Insurance Co.*, 173.

9. *Insurance—Fire—Cancellation of Policy—Delivery After Damage—Nonsuit—Parties to New Action.*—Insured and defendant's agent agreed that the former should lapse a fire insurance policy on his store and goods, and that the same should be reissued in another company in its exact reproduction, excepting the change of the insured to a partnership which had been formed; but the policy as delivered did not have this agreed change, and of this the insured wrote the agent with request for correction. The agent then wrote, canceling this policy and enclosed a policy in a different company of the same tenor and amount, which was received by the insured on a day following a loss by fire: *Held*, (1) An action for damages against the defendant which issued the policy and delivered it after the fire was properly nonsuited; (2) the judgment of nonsuit will not prevent the joinder of defendant in another action against the company canceling the policy, the latter of which would seem to be liable on the record now presented. *Joyner v. Insurance Co.*, 255.

10. *Insurance, Fire—Principal and Agent—Standard Policy—Agents Within Authority—Interpretation of Statutes.*—Our statutory standard fire insurance policy providing that "in the matter relating to insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company," does not impose on the insured the duty of showing that the agent who issued the policy had written authority to do so. *Gazzam v. Insurance Co.*, 330.

11. *Insurance, Fire—Standard Policy—Rules of Evidence—Interpretation of Statutes.*—The fact that a standard form of fire insurance has been adopted by statute does not change the rules of evidence applicable to a waiver by the insurer of the terms thereof upon which the policy shall have its inception and become operative. *Ibid.*

12. *Same—Doubtful Terms.*—Whatever doubtful terms or expressions a statutory standard fire insurance policy may contain are to receive the construction favorable to the insured, this rule of interpretation not being changed by virtue of the statute. *Ibid.*

13. *Insurance, Fire—Principal and Agent—Written Authority—Interpretation of Statutes.*—The stipulation in a statutory standard policy that "no person shall be deemed the agent of this company unless author-

INSURANCE—*Continued.*

ized in writing" is not contractual between the company and the insured; but if otherwise, it could only relate to matters connected with the insurance after the policy has become a valid contract, and not the acts of the agent in issuing the policy. *Ibid.*

14. *Insurance, Fire—Reinsurance—Policy Contracts—Consideration.*—The surrender of a fire insurance policy in one company by the insured and the relinquishment of his right to the "return premiums" furnishes a sufficient consideration to support the policy contract given by the reinsurer thereof upon these conditions; and while the reinsurer may not have received the "return premiums," it has acquired the advantage of new business by the arrangement. *Ibid.*

15. *Insurance, Fire—Principal and Agent—Premiums—Payment—Agent's Debt.*—While ordinarily the insured can not pay the premiums on his life insurance policy by satisfying a private debt due him by the agent of the company, it does not apply when the insured has paid his premiums to the agent of the insurer in good faith, and the latter has satisfied his obligation due to another therewith, without the knowledge of the insured. *Ibid.*

16. *Same—Evidence of Agency.*—N. was the general agent of the insurer and A. its local agent. The insurer failed. N. attempted to make an arrangement with the defendant insurance company, through its general agents, to reinsure the risks, with assurance to the said agents that he would take care of the policies of the old company, and they gave him the policy in suit to be sent to plaintiff, which was done. The plaintiff then returned the policy he held in the old company, and released his rights to the return premiums thereon. This arrangement was carried on without the knowledge of the insured, and it is *held*, N. was not the agent of the insured, but was the agent of the defendant insurance company, and that the latter was liable to the plaintiff for a fire loss which was covered by the policy thus issued by it. *Ibid.*

17. *Insurance, Fire—Principal and Agent—Declarations—Evidence.*—The competency of the declarations of an agent of an insurance company rests upon the same footing as the declarations of an agent of an individual, and are properly admitted when they are of matters within the scope of the agency, and concern the very business about which the declaration is made. *Ibid.*

18. *Insurance, Fire—Principal and Agent—Reinsurance—Nearness of Offices—Evidence.*—The plaintiff formerly held a policy of fire insurance in a company that failed, and alleges and introduces evidence tending to show that defendant insurance company reinsured the risk, in his action for loss subsequently sustained by him, on the subject-matter of the policy: *Held*, evidence that the two insurance companies had offices near each other in the same office building is entitled to little consideration, but not error to have admitted it under the facts and circumstances of this case. *Ibid.*

INTERLOCUTORY ORDER. See Appeal and Error.

INTERPRETATION OF STATUTES. See Statutes; Penalty Statutes.

1. *Trial, "Speedy"—Treason or Felony—Right of Accused—Interpretation of Statutes.*—Section 3155 of Revisal, providing in substance that

INTERPRETATION OF STATUTES—*Continued.*

one formally accused and committed for treason or felony shall, on demand properly made, be indicted and tried on or before the second term of court ensuing the commitment, or be discharged from imprisonment, is peremptory in its requirements; and where one so committed has formally complied with the provisions of the statute, it is the duty of the court to discharge the prisoner. *S. v. Webb*, 426.

2. *Solicitor's Fees—Homicide—Insolvent Defendant—Capital Felony—Interpretation of Statutes.*—A trial upon an indictment charging murder in the first degree, with conviction in the second degree, the solicitor having announced on the trial that he would only ask for conviction in the second degree or manslaughter, does not entitle the solicitor to his full fees when the party convicted is insolvent, the exception to the statute where full fees are allowed in such instances being "capital felonies," etc., and murder in the second degree is not a "capital felony." Revisal, sec. 2768. *S. v. Mayhew*, 477.

INTOXICATING LIQUORS.

1. *Intoxicating Liquors — License — Specific Places of Sale — Evidence, Prima Facie—Corroborative.*—Our statute, Revisal, sec. 2060, relating to the sale of intoxicating liquors in prohibition territory, makes the issuance to or possession of a United States revenue license by one charged with the offense *prima facie* evidence of his guilt; and under an indictment charging the unlawful sale at a certain numbered place in a city, a license to the accused to sell at another number therein may be considered in evidence as a relevant circumstance with other evidence tending to establish a sale elsewhere in the city, that the defendant had the intoxicating liquors on hand and was in a condition to violate the law. *S. v. Boynton*, 456.

2. *Same—Liquors on Hand.*—Upon trial on indictment for the sale of intoxicating liquors at a certain city number, testimony that the accused had and kept liquors on hand in other portions of the city is a relevant circumstance tending to show that he had it on hand and was prepared and equipped to make the illegal sale charged in the bill of indictment, and to be considered by the jury with other evidence tending to show that he had sold such liquor at the place charged in the indictment. *Ibid.*

3. *Same—Other Sales.*—The rule of evidence that one illegal sale of intoxicating liquors should not be received as any evidence that another such sale had been made, applies where the sales are entirely separate and distinct transactions, the one having no fair or reasonable tendency to establish the other, but inapplicable when it tends to show that the defendant, accused of violating the prohibition law at a certain city number, with evidence tending to show such violation there, kept the spirituous liquor elsewhere in the city, or under his control, for the purpose of making illegal sales. *Ibid.*

4. *Same.*—Upon indictment for violating the prohibition law, the possession of liquors by the accused, at the time of the offense charged, is always a circumstance admissible against him, and in general the circumstances under which liquors are kept, and even that they are kept at other places or in other rooms, may be shown. *Ibid.*

5. *Same—Instructions—"Place" of Offense Charged.*—There being direct evidence that the prisoner, indicted for a violation of our prohibition

INTOXICATING LIQUORS—*Continued.*

law in a city, sold intoxicating liquors at the time and place therein charged in the indictment, and a United States revenue license being introduced by the State, which, upon its face, permitted him to sell at a different place in the same city, a charge by the court that the revenue license was *prima facie* evidence that the accused was "retailing and selling spirituous liquor under the provisions of that license, at the place specified and mentioned in the indictment," is correct, when it clearly appears from the other relevant portions of the charge that the "place" referred to was the city and not the particular location therein. *Ibid.*

6. *Same.*—The accused being tried for the unlawful sale of intoxicating liquor to a certain person, and at a certain time and place specified in the indictment, and there being evidence that he had sold to others at the same place, and that this was his place of business, where such intoxicants were kept under his control, a charge of the court which confines the evidence of the sale to the others, and to the liquor being kept in his place of business, etc., to corroboration of the evidence of the specific offense, is proper. *Ibid.*

7. *Intoxicating Liquors—Witness—Paid Detective—Interest in Result—Evidence Scrutinized.*—For conviction upon the evidence of a paid detective of violating the prohibition law, the jury should be instructed to make proper allowance for the bias likely to exist in one having such an interest in the outcome of the prosecution, and with reference to any other relevant facts calculated to influence the testimony of the witness, leaving very largely to the discretion of the trial judge the exact terms for the expression of the rule. *Ibid.*

8. *Same—Charge as a Whole—Construction.*—When the accused is being tried for an unlawful sale of intoxicating liquor, and conviction is sought upon the testimony of a paid detective employed for such purposes, an instruction which correctly states the weight with which such testimony should be received is not erroneous because of an expression that it is commendable for a detective or sheriff, etc., to use all reasonable and proper means in the apprehension of those who are violating the law, and when they do so in that spirit it will enable the law to place its hands upon its offenders and violators. *Ibid.*

9. *Intoxicating Liquors—Instructions—Part Error—Correct as a Whole—Jury—Fairness of Consideration.*—Upon trial under an indictment for violating the prohibition law, the judge charged the jury that if any of the jurors were prohibitionists they should try the case as if they were anti-prohibitionists, and *vice versa: Held*, while this of itself might have been misleading, it was not reversible error when in the other pertinent parts of the charge it appeared that he directed the jury, in apt and forceful language, to divest themselves of all prejudice and give the defendant a fair and impartial trial under the law, and on the testimony alone, it being evident that the jury must have understood the charge correctly. *Ibid.*

ISSUES. See Evidence; Carriers.

1. *Issues—Discretion of Court.*—The framing of issues is a matter which is left very largely in the discretion of the trial judge, the limitation

ISSUES—*Continued.*

being that the issues must be sufficiently responsive to the pleadings and determinative of the rights of the parties involved therein. *Williams v. R. R.*, 260.

2. *Issues—Court's Discretion.*—The form of issues is within the discretion of the lower court, provided they are sufficient to determine the rights of the parties and to support the judgment. *Roberts v. Baldwin*, 276.

JOINT AND SEVERAL LIABILITY. See Contracts.

JUDGMENT. See Evidence; Appeal and Error.

1. *Pleadings—General Order for Filing—Cause Excepted—Notice—Judgment Set Aside.*—When the trial judge has made a general order to file pleadings in causes returnable to that term, he may except any cause from the provision of the order upon notice to the parties; and when a party defendant, having a meritorious defense, has relied upon the general order and filed no answer to the complaint under the statute, and judgment has been rendered by default at that term without notice to him, it is proper for the judge holding the subsequent term of the court to set the judgment aside. *Sircey v. Rees*, 296.

2. *Same—Excusable Neglect.*—When a general order has been made to file pleadings, it is not sufficient notice to a party whose case was not excepted that judgment was signed in open court when his attorney was present, without calling to his attention the fact that the judgment was then being rendered, and without his knowledge of the fact. *Ibid.*

3. *Estates—Defeasance—Partition—Judgment.*—Devisees of lands under a will by which they take a fee-simple estate defeasible upon the happening of an uncertain event can not by a judgment in partition proceedings obtain a fee-simple title, or pass a greater or different interest than they acquired by the devise. *Gilliam v. Edmonson*, 154 N. C., 127, cited and distinguished. *Smith v. Lumber Co.*, 390.

JURISDICTION. See Courts; Equity; Appeal and Error.

1. *Contracts—Feme Coverts—Other Jurisdictions—Contractual Rights—Remedies.*—Where a nonresident *feme covert* has entered into an ordinary business executory contract, in a jurisdiction where she has full contractual capacity, the obligation will be binding here, and the obligee may avail himself of any and all remedies provided by our law for the enforcement of his rights. *Bank v. Granite Co.*, 43.

2. *Same—Nonresident—Real Property—Attachment—Publication.*—Notice by publication is sufficient against a nonresident *feme covert* upon her executory contracts when the statutes here applicable have been complied with and attachment is duly levied on her real property situated in North Carolina, if by the law of the State wherein the contract was made a married woman has full contractual rights. *Ibid.*

3. *Contracts—Lex Loci Contractus—Signed Elsewhere—Common Law—Presumptions.*—A contract is held to be executed where the same becomes a binding agreement between the parties, and when it appears that this is done in one of our sister States, the mere fact that it was dated in another one does not affect the matter in relation to the *lex loci contractus. Ibid.*

JURISDICTION—*Continued.*

4. *Insurance—Policy—Fraud or Deceit—Equity—Justice's Court—Jurisdiction.*—A policy of life insurance may not be reformed on the ground of fraud or deceit in a court of a justice of the peace, the remedy sought being equitable, and the justice of the peace having no jurisdiction thereof. *Wilson v. Insurance Co.*, 173.

5. *Same—Appeal—Superior Court.*—When the plaintiff seeks only equitable relief in a court of a justice of the peace, no jurisdiction can be acquired over the subject-matter by the Superior Court on appeal, the proceedings being void *ab initio*. *Ibid.*

6. *Insurance—Justice's Court—Jurisdiction—Contract—Tort.*—An action brought by an insured to recover money due to him by an insurance company under its policy, whether in contract or tort arising in the transaction, is cognizable in a court of a justice of the peace where the recovery sought does not exceed the sum of $50 and no equitable remedy is sought. *Ibid.*

7. *Justice's Court—Appeal—Superior Court—Derivative Jurisdiction.*—The Superior Court has no jurisdiction on appeal from a justice's court of an action erroneously brought in the latter court, and of which the justice's court had no jurisdiction, the jurisdiction of the Superior Court in such case being derivative only. *Cheese Co. v. Pipkin*, 394.

8. *Justice's Court—Contract—Jurisdiction — Counterclaim — Pleadings — Satisfaction.*—When an action, brought upon contract, before a justice of the peace is to recover an amount within the jurisdiction of that court, the defendant may plead in bar a counterclaim exceeding two hundred dollars, and upon judgment being rendered against him for the amount claimed and establishing his counterclaim for the greater sum, he is entitled to go without day, and to recover costs. *Ibid.*

9. *Same—Counterclaim—Recovery for Excess.*—A defendant pleading and establishing his counterclaim, exceeding the sum of two hundred dollars, in an action for damages upon contract properly brought in the court of a justice of the peace, is not entitled to a judgment for the excess of his counterclaim over the demand upon him, also established by the action. *Ibid.*

JURY.

Courts—Jury's Convenience—Deliberations.—A recommendation by the judge to the jury that, the latter "doubtless being weary, they go to their hotel and rest for the balance of the night so that they might deliberate upon their verdict in the morning, when they were fresh," etc., is no just ground for exception. *S. v. Houston*, 432.

JUSTICE'S COURT. See Jurisdiction.

KNOWLEDGE IMPUTED. See Evidence.

LACHES. See Appeal and Error.

LARCENY. See Evidence.

1. *Larceny—Breaking—Ownership of Building—Motion in Arrest—Instructions—Procedure.*—The objection that the evidence is not suffi-

LARCENY—*Continued.*

cient to show ownership of a building which the defendant is charged with breaking into with intent to commit larceny may not be taken advantage of by motion in arrest of judgment, the procedure being by a prayer for instruction. *S. v. Hawkins*, 466.

2. *Larceny—Evidence, Circumstantial—Conflicting Evidence—Questions for Jury.*—Upon a trial under an indictment for entering a certain house at night for the purpose of larceny, there was evidence introduced by the State that the prisoner had been forbidden to be present at a town hall where the ladies were giving an entertainment for the benefit of a charity; that a policeman, who slept in the building, late that night heard a noise as if some one were breaking the lock to the door of the hall, placed there for the purpose of locking up certain articles of value which the ladies had used; that the policeman went at once to the hall and found the door open, the lock gone, which he has not found since; that defendant was within the hall, and sat down by a heating stove as he (the policeman) reached the door: *Held*, evidence sufficient for conviction, it being for the jury to determine whether the prisoner's evidence in explanation should be accepted as true. *S. v. Hawkins*, 466.

3. *Larceny—Intent—Evidence, Circumstantial.*—Upon evidence tending to show that the prisoner broke into a hall in the night, where he had no right to be, where things of value had been locked up and left, there is sufficient evidence of criminal intent to commit larceny to sustain a verdict of guilty. *Ibid.*

"LAST CLEAR CHANCE." See Negligence.

LEGISLATIVE CONTROL. See Cities and Towns.

LEX LOCI CONTRACTUS. See Jurisdiction.

LICENSEE. See Cities and Towns.

LIMITATION OF ACTIONS.

1. *Deeds and Conveyances—Delivery—Title—Registration—Limitation of Actions.*—The delivery of a deed to land passes title to be perfected as to subsequent purchasers and creditors by registration, as to which there is no limitation of time. Revisal, 980. *Brown v. Hutchinson*, 206.

2. *Water and Watercourses—Surface Waters, Diversion of—Limitations of Actions—Evidence—Questions for Jury.*—When there is conflicting evidence upon an issuable question regarding the statute of limitations in an action for damages against an upper proprietor for diverting surface waters from their natural flow to the injury of the lower proprietor, the court can not say, as a matter of law, whether or not the statute is in bar. *Roberts v. Baldwin*, 276.

3. *Water and Watercourses—Surface Water—Wrongful Diversion—Continuous Trespass—Measure of Damages—Limitation of Actions.*—In an action for damages caused to the lands of the lower proprietor by the alleged wrongful diversion of the flow of water by the upper proprietor through a ditch on the lands of the latter, issues tendered by the defendant restricting the inquiry upon the statute of limita-

LIMITATION OF ACTIONS—*Continued.*

tions to the length of time the ditch had been dug is erroneous, as the ditch may have been dug and used continuously for more than three years and have caused damages within that period. *Ibid.*

4. *Same—Instructions.*—Damages being sought by the lower proprietor in his action against the upper proprietor for the wrongful diversion of surface water through a ditch on the latter's lands, which had been dug for more than three years, it is proper for the trial judge to confine the jury in awarding damages to the injury inflicted within the three years. *Ibid.*

LIS PENDENS. See Mortgage.

"LOOK AND LISTEN." See Negligence; Contributory Negligence.

MANSLAUGHTER. See Homicide.

MARRIED WOMEN. See Jurisdiction; Contracts; Trusts and Trustees.

MASTER AND SERVANT. See Contracts; Cities and Towns; Negligence.

MEASURE OF DAMAGES. See Damages; Insurance.

MENTAL ANGUISH. See Telegraphs.

MENTAL CAPACITY. See Evidence.

MISREPRESENTATIONS. See Fraud; Equity; Principal and Agent.

MISTAKE. See Fraud; Equity.

MORTGAGE.

1. *Lis Pendens—Mortgages—Suit of Foreclosure—Situs of Property.*—One who buys a note, and a mortgage of land securing it, during the pendency of a suit and for the foreclosure of another mortgage on the same land in the county wherein it is situated, and after proper complaint is filed therein, acquires his interest in the note and mortgage so purchased by him subject to any judgment that may be obtained in the pending action, the doctrine of *lis pendens* being applicable. *Jones v. Williams*, 179.

2. *Same—Formality.*—When a suit is brought for the foreclosure of a mortgage in the county where the lands embraced therein are situated, it is sufficient notice to those dealing with the mortgagor in respect to the land; and the filing of a formal *lis pendens* is not required to charge a purchaser with such notice. *Ibid.*

3. *Mortgages — Liens — Equities — Legal Title—Foreclosure—Parties.*—A junior mortgagee is not bound by the judgment obtained in a suit by a senior mortgagee for the foreclosure of a mortgage on lands unless he has been made a party to that suit, and he will not be barred of his right to redeem, though not for some purposes a necessary party thereto; and it can make no difference that, in this State, the legal title passes to the mortgagee, and the mortgage is not regarded as a mere security. *Ibid.*

4. *Decisions—Rights Acquired—Reversal.*—Titles or vested interests acquired upon the faith of decisions of this Court will not generally be disturbed or the parties prejudiced by a subsequent reversal thereof. *Ibid.*

MORTGAGE—*Continued.*

5. *Mortgages—Junior Mortgagee—Rights—Parties—Decrees, Effect of.*—The doctrine that junior mortgagees will not be bound by a judgment obtained in a suit for the foreclosure of a senior mortgage, unless they were made parties thereto, has reference only to such as may have had their mortgages recorded under our registration laws. *Ibid.*

6. *Mortgages—Transfer—Legal Title.*—The mere transfer of a note and mortgage securing it does not transfer the legal title to lands, or the power of sale contained in the mortgage. *Ibid.*

7. *Mortgages—Legal Title—Power of Sale—Equity—Foreclosure.*—When the legal title of mortgaged lands, upon which there were several mortgages, is in the first mortgagee, who was not a party to a suit for foreclosure, a sale under the decree of foreclosure can not have the same force and effect as if it had been made under the power contained in the instrument. *Ibid.*

8. *Mortgages — Foreclosure Sales — Legal Title — Parties—Equities—Account.*—When a junior mortgagee is not a party to a foreclosure suit in equity brought by the assignee of a senior mortgage, the effect of the decree is not to deprive him of his equity of redemption, and the purchaser at the sale under such a decree takes subject to his lien for whatever sum may be due him, and to his right of redemption; and in order to ascertain the status and amount of the several claims an account may be taken. *Ibid.*

9. *Mortgages—Collateral—Foreclosure—Special Provisions—Vendor and Vendee—Payment with Services—Advances—Balances.*—The male defendant purchased a logging outfit from the plaintiff and mortgaged the same to secure the purchase price, which was agreed to be paid for in service in a stipulated manner. As collateral to this transaction, the *feme* defendant and her husband executed to the plaintiff a mortgage on her lands. The plaintiff made advancements in provisions and money to male defendant from time to time to enable him to perform his contract, always in excess of the amounts earned by him under the contract, and eventually the latter surrendered to the former the property, with the exception of a horse which had died, and received credit on his purchase price, leaving a balance due the plaintiff in excess of two hundred dollars. The mortgage on *feme* defendant's land provided that the first payment of two hundred dollars on the purchase price of the outfit should cancel her mortgage: *Held*, (1) The mortgage on *feme* defendant's land, being collateral to the chattel mortgage given by her husband to secure the payment of the purchase price of the logging outfit, was entitled to no credits, under the circumstances, for the money earned by her husband under his contract of payment; (2) there is no evidence in this case that any payment had been made in exoneration of the mortgage on the *feme* defendant's land. *Lumber Co. v. Christenbury*, 257.

10. *Deeds and Conveyances—Mortgages—Foreclosure—Judgment—Evidence—Unadjudicated Rights—Appeal and Error.*—Proceedings and judgment in suit to foreclose lands put in evidence in a subsequent action to declare certain rights of a purchaser at a sale thereafter arising, will not be considered on appeal of the later action to the Supreme Court when the rights of the parties, as determined in the former

MORTGAGE—*Continued.*

cause, were not considered by the court, and the judgment therein did not enter into the verdict in this case or in anywise affect it. *Herring v. Warwick*, 345.

MOTION IN ARREST. See Procedure.

NEGLIGENCE. See Master and Servant; Evidence.

NEGOTIABLE INSTRUMENTS.

1. *Notes—"Order or Bearer"—Non-negotiability.*—A note not payable "to the order of a specified person or to bearer" is not negotiable. Revisal, secs. 2158, 2276, 2334. *Johnson v. Lassiter*, 47.

2. *Notes—Non-negotiable—Endorsement—Non-negotiability.*—An endorsement in blank on the back of a non-negotiable note does not render the note negotiable under Revisal, sec. 2159. *Ibid.*

3. *Notes—Negotiability—"Code Repealed"—Common Law.*—Sections 41 and 50 of The Code are repealed by Revisal, sec. 5453, and therefore have no application upon the endorsement in blank, upon a non-negotiable note, and in respect to matters thereunder arising the rights of the parties must be determined at common law. *Ibid.*

4. *Notes—Non-negotiable—Dishonor—Notice—Liability of Endorser.*—The endorser of a non-negotiable note in blank after maturity is held to be a guarantor of payment of the paper, and is not entitled to notice of dishonor, or to his discharge from liability by failure of the endorser to proceed promptly against the maker. *Ibid.*

5. *Same—Statutory Provisions—Interpretation of Statutes.*—The rights of an endorser in blank upon a non-negotiable note are sufficiently protected under Revisal, sec. 2846, providing that a surety or endorser on any note, bill, bond, or written obligation except those held in trust or as collateral, may notify, in writing, the payee or holder, requiring him to bring suit and use all diligence to collect, and if the payee or holder refuses to bring action within thirty days, the surety or holder giving notice is discharged. *Ibid.*

6. *Same—Note—Transfer Before Maturity—Innocent Purchaser—Guardian and Ward.*—When sureties on a guardian's bond have become such upon agreement with the guardian that the securities taken for investments should remain in their hands for their protection, and it is shown by affidavits that the guardian had sold the lands of the ward and received a note for the deferred payments secured by a lien on the land, which the defendant took from the guardian, and that it had not yet reached maturity, a remedy by injunction in favor of the guardian and sureties is proper to restrain the negotiation of the note by defendant until the hearing, so that it may not get into the hands of an innocent purchaser for value. *Yount v. Setzer*, 213.

7. *Vendor and Vendee—Conditional Sales—Bankruptcy—Notes—Endorsers and Sureties—Proof of Claim—Dividends—Presumptions.*—Sureties and endorsers on notes given by a debtor for the purchase price of goods, the title to which has been retained by the creditor as further security, are discharged from liability when the creditor proves his debt as an unsecured claim against the principal debtor, who has become insolvent and a bankrupt and receives a dividend from the

NEGOTIABLE INSTRUMENTS—*Continued.*

bankrupt upon his claim, after permitting the trustee to take the goods for the benefit of the general creditors, as in such a case he is regarded as having intentionally abandoned the property to the trustee in bankruptcy and as ratifying his acts. *Carriage Co. v. Dowd*, 308.

8. *Same—Discharge of Sureties, Etc.*—When a creditor holds a note with collateral for his debt, and also with accommodation endorsers or sureties thereon, he discharges the endorsers or sureties either in full or *pro tanto*, as the case may be, by voluntarily and irrevocably parting with the collaterals. *Ibid.*

9. *Notes—Endorsers and Sureties—Subrogation—Collaterals Released by Creditor—Discharge.*—An endorser paying a note is entitled in equity to an assignment of the collaterals held by the creditor, to secure the same; and if the creditor has voluntarily rendered himself unable to assign the collaterals, or has caused them to become unavailing to the endorser, the latter is discharged, *pro tanto*. *Ibid.*

10. *Same—Conditional Sales—Interpretation—Accommodation Paper—Renewals.*—The plaintiff, under a contract made in another State, shipped to its agent in Alabama a lot of vehicles, and received notes therefor from the agent, under a stipulation in the contract that they should be considered as accommodation paper only, and that the title should not pass to the agent by reason thereof, nor should the notes change the fiduciary relation created by the contract, and that the vehicles, until sold by the agent, should remain the property of the plaintiff, with full control thereof, and the proceeds of any sale to the amount of the invoice price should be paid to the plaintiff. Renewals of the notes were provided for by the contract, and while as to the originals, and all renewals except the last, it was clearly and expressly stated that they were given only for the accommodation of the payee, there was some doubt from the language used as to whether the last renewals were, as they were "to be paid at maturity without reference to the amount of work still on hand unsold" at that time: *Held* (by a majority of the Court), that the renewal notes under the terms of the contract retained the character of the originals as accommodation paper, it being incumbent upon plaintiff, by whom the contract was written, to have expressed itself without ambiguity with reference thereto, and the language being construed most strongly against him: *Held further*, by the Court, whether the notes were accommodation paper or not, the plaintiff released the defendants as endorsers on the notes by proving them in the bankruptcy proceedings against the maker thereof, and voluntarily relinquishing the vehicles to the trustee in bankruptcy for the benefit of all the creditors, and by receiving a dividend on its claim filed in the proceedings from the general assets without asserting any right to or lien upon the property formerly held by its agent. *Ibid.*

11. *Notes—Endorsers and Sureties—Collaterals Relinquished—New Promise—Discharge of Endorser's Liability.*—Endorsers or sureties on a note for which the payee holds other security do not lose their right of subrogation to the security thus held, by having promised, even for a consideration, but before the notes were executed, to pay them

NEGOTIABLE INSTRUMENTS—*Continued.*

at maturity, and a voluntary relinquishment of the security by the creditor, such acts of his as render the collateral unavailable to the endorsers releases them, at least to the extent of their loss. *Ibid.*

NONRESIDENT. See Jurisdiction; Executors and Administrators.

NONSUIT. See Evidence; Insurance.

1. *Negligence—Evidence, Circumstantial—Nonsuit.*—Evidence in this case of a circumstantial character held sufficient upon motion to nonsuit. *Hollar v. Telephone Co.*, 229.

2. *Master and Servant—Safe Appliances—Assumption of Risk—Nonsuit.*—Upon a motion to nonsuit upon the evidence, the evidence must be taken in its most favorable light to the plaintiff, and upon evidence tending to show that the defendant had furnished an improper ladder for the servant to clean out vats within a tannery, and which caused the injury complained of subsequent to notice of the defect given the defendant, and while the servant continued to do the work for a short time under the defendant's promise to repair or make the ladder safe: *Held*, it was for the jury to say whether the servant continued in the service for an unreasonable time after the promise to repair had been broken, or that the danger in using the ladder was so obvious and imminent as to charge him with having assumed the risk, or with contributory negligence. *Reed v. Rees*, 230.

NOTES. See Negotiable Instruments; Arbitration and Award.

NOTICE. See Negligence; Negotiable Instruments; Carriers of Passengers; Pleadings.

NUISANCE.

Water and Watercourses—Sewers—Pollution—Statutory Regulations—Nuisance.—Emptying sewers into such streams as are prohibited by statute, Revisal, sec. 3051, is a nuisance, and the courts will not inquire as to whether the facts in any particular case result in the pollution of the stream, as such matters are well within the regulation of the Legislature in the exercise of its police powers for the benefit of the public health, and the language of the statute is controlling. *Shelby v. Power Co.*, 196.

OBJECTIONS AND EXCEPTIONS. See Removal of Causes; Appeal and Error.

OFFICERS. See Corporations.

ORDINANCES. See Negligence; Cities and Towns.

OWNERSHIP. See Larceny.

PAROL EVIDENCE. See Evidence; Contracts.

PARTIES. See Mortgage.

PARTITION. See Estates.

PARTNERSHIP.

Partnership—Contracts—Counterclaim—Breach of Covenant—Credit on Note.—Defendant partnership, consisting of man and wife, were sued

PARTNERSHIP—*Continued.*

on a note given for the purchase of a livery business, the subject of the partnership. The husband claimed damages for breach of warranty in the purchase of a surrey plaintiff subsequently sold him for the partnership, as a counterclaim: *Held*, the note being joint and several, the damages allowed on the breach of warranty to the husband in the judgment was a proper credit on the note. *Shell v. Aiken*, 212.

"PARTY AGGRIEVED." See Damages; Penalty Statutes.

"PASSENGER." See Carriers of Passengers.

PENALTY. See Cities and Towns.

PENALTY STATUTES.

1. *Carriers of Goods—Penalty Statutes—Title—Subject to Inspection—Party Aggrieved.*—When, by the contract or agreement between a vendor and vendee of goods, the goods are to be "received, inspected and weighed" by the vendee before any part of the purchase price is payable, the title does not vest in the vendee, and the vendor is the "party aggrieved" under the meaning of Revisal, sec. 2632, in an action against the railroad for delayed transportation. *Elliott v. R. R.*, 235.

2. *Same—Consignor and Consignee—Agreement—Public Policy—Notice to Carrier.*—In an action brought by the consignor for the penalty for delayed transportation by a railroad company of a shipment of logs under Revisal, sec. 2632, it appeared that the consignee was to "receive, inspect and weigh" the logs under a contract between the consignor and consignee, of which the carrier had no notice: *Held*, (1) By the terms of the agreement between consignor and consignee, the legal title to the logs did not pass to consignee until they were inspected and measured, there being no evidence of the amount of the purchase price; (2) the statute being passed in the interest of public policy for the prompt shipment of goods generally, it was not necessary to the recovery of the penalty that the carrier should have had notice of the agreement. *Ibid.*

PLEADINGS. See Contributory Negligence; Removal of Causes; Appeal and Error.

1. *Pleadings—Inconsistent Pleas—Negligence—Primary and Secondary Liability—Indemnification—Judgment.*—In an action against a city for permitting the continuance of a negligent act by its licensee, alleged to have caused the injury complained of, it is not inconsistent, but proper, for the city to deny negligence on the part of both defendants, and then to aver that if, as between the plaintiff and the defendants the latter were both guilty of negligence, the licensee is, as between the defendants, primarily liable, and the judgment should be so framed as to indemnify the city and reimburse it for what it will have to pay on account of the negligence of the licensee. *Gregg v. Wilmington*, 18.

2. *Pleadings—"Assumption of Risks."*—The defense of "assumption of risk" must be sufficiently pleaded to be available. Revisal, sec. 2646, has no application. *Eplee v. R. R.*, 293.

PLEADINGS—*Continued.*

3. *Pleadings—General Order for Filing—Cause Excepted—Notice—Judgment Set Aside.*—When the trial judge has made a general order to file pleadings in causes returnable to that term, he may except any cause from the provision of the order upon notice to the parties; and when a party defendant, having a meritorious defense, has relied upon the general order and filed no answer to the complaint under the statute, and judgment has been rendered by default at that term without notice to him, it is proper for the judge holding the subsequent term of the court to set the judgment aside. *Sircey v. Rees*, 296.

4. *Same—Excusable Neglect.*—When a general order has been made to file pleadings, it is not sufficient notice to a party whose case was not excepted that judgment was signed in open court when his attorney was present, without calling to his attention the fact that the judgment was then being rendered, and without his knowledge of the fact. *Ibid.*

5. *Pleadings—Contributory Negligence—Allegations Sufficient.*—A plea of contributory negligence, in an action alleged to have been caused to plaintiff as a result of having crossed defendant's track in a buggy at a public crossing in front of a moving train, is sufficient which alleges that the plaintiff entered upon the track of the defendant without looking and listening, and that he recklessly attempted to cross. *Wright v. R. R.*, 325.

POISONING. See Homicide.

POLICE POWERS. See Cities and Towns.

POSSESSION. See Deeds and Conveyances.

PREMIUMS. See Insurance.

PRESCRIPTION. See Water and Watercourses; Railroads.

PRESUMPTIONS. See Deeds and Conveyances; Insurance; Negligence; Principal and Surety.

PRIMARY LIABILITY. See Negligence.

PRIORITIES. See Trusts and Trustees.

PROBATE. See Deeds and Conveyances.

PROCEDURE. See Drainage Act; Processioning.

1. *Appeal and Error—Verdict Set Aside in Part—Legal Rights—Procedure.* When upon appeal it appears that the trial judge has erroneously set aside issues as to the negligence and liability of one defendant and rendered judgment against the other, it is not an invasion of the discretion of the judge below for the Supreme Court to order a new trial upon all the issues, and it will be so ordered. *Gregg v. Wilmington*, 18.

2. *Appeal and Error—Supreme Court—Retention of Cause—Superior Court—Final Judgment—Procedure.*—The Supreme Court having held on a former appeal in this case that an investment or reinvestment of certain funds ordered by the Superior Court was void and not

PROCEDURE—*Continued.*

within the meaning of Revisal, sec. 1590, and that a hotel in the erection of which the funds had been invested be sold and the heirs to whom the funds belonged be reimbursed, preserving the legal rights of claimants or creditors therein until the sale and final hearing, upon the reports of commissioners appointed to the court below, an application by a former commissioner to have the Supreme Court consider and pass upon certain exceptions noted by him in the progress of the case in the court below as to the superiority of payment of his commissions will be refused, as the cause is in the court below and will not be considered here except on appeal from final judgment. *Smith v. Miller*, 242.

3. *Certiorari—Error of Counsel—Appeal and Error—Final Judgment—Former Record.*—A *certiorari*, except possibly under very exceptional circumstances, will not issue to bring up an appeal from the lower court on account of error of counsel. In this case it appearing that no final judgment has been entered, the petitioner may preserve his exceptions for review in the Supreme Court upon final judgment, and on this appeal the record in a former appeal may be again used. *Ibid.*

4. *Appeal and Error—Execution, Stay of.*—The motion for *certiorari* being refused in this case, should petitioner appeal from final judgment of the court below, as pointed out, a stay of execution can be obtained under Revisal, 598. *Ibid.*

5. *Appeal and Error—Trial, "Speedy"—Certiorari—Procedure.*—A *certiorari* is the proper procedure to review the order of the lower court in refusing to discharge a prisoner from custody under the provisions of Revisal, sec. 3155. *S. v. Webb*, 426.

6. *Appeal and Error—Trial, "Speedy"—Final Judgment—Procedure.*—The defendant was committed by a justice of the peace for a felony, and on the last day of the next subsequent term of the court the action was continued on motion of the State for the absence of a material witness from sickness, whereupon the defendant, having given notice in open court, appeared and demanded that a bill of indictment be found at the next subsequent term, and that he be tried then, and that if an indictment were not then found he would pray for his discharge, which was done accordingly and the case further continued to the next term, owing to the continued sickness of the witness: *Held*, there being no final judgment, an appeal would not lie from the refusal of the motion by the lower court. *Ibid.*

PROCESSIONING.

Processioning Act—Title—Term of Court—Procedure.—When the issue of title is raised before the clerk of the court under the Processioning Act, Revisal, 326, an order of the clerk transferring the cause for trial to the Superior Court, in term, is a proper one. *Brown v. Hutchinson*, 205.

PROOF OF CLAIM. See Bankruptcy.

PROXIMATE CAUSE. See Negligence; Contributory Negligence.

PROXY. See Corporations; Fraud.

PUBLIC POLICY. See Penalty Statutes.

PUBLICATION. See Jurisdiction.

RAILROADS. See Easements.

1. *Railroads—Public Crossings—Gates—Warnings—Negligence—Contributory Negligence—Rule of the Prudent Man—Questions for Jury.*—The defendant and two other railroads each had a track where a public road crossed, protected at each side by gates operated by compressed air, under the charge of a gatekeeper, who, according to custom, rang a gong to give warning of approaching trains. While plaintiff was crossing the tracks in a buggy, his horse at a trot, the gong sounded for an approaching train, and in endeavoring to get through the opposite gate it fell upon his horse, which consequently caused personal injury to the plaintiff. There was conflicting evidence as to whether the gate could be stopped after it had started to be lowered: *Held*, (1) evidence was competent tending to show defendant's custom in ringing the gong to give time for those between the gates to get through; (2) evidence sufficient upon the issue of defendant's negligence; plaintiff was not guilty of contributory negligence, as a matter of law, in not seeking a place of safety between the gates, and this question was properly submitted to the jury under instructions as to the rule of the prudent man. *McLellan v. R. R.*, 1.

2. *Railroads — Engineer — Excessive Speed — Contributory Negligence — Proximate Cause.*—When it appears that plaintiff's intestate, an engineer, was killed by a collision of his passenger train with another train at a station which it was entering, the rules of the company, known to him, prescribing that under the conditions a speed over six miles an hour was prohibited and he was running thirty-five miles an hour, an instruction that the jury should find the intestate guilty of contributory negligence which would bar his recovery, leaves out the essential point that it must proximately cause the injury, and is an improper one. *Boney v. R. R.*, 95.

3. *Pleadings—Contributory Negligence—Instructions.*—In order for a defendant to avail himself of instructions relating to plaintiff's contributory negligence as a bar to his recovery in an action for damages it is necessary for the defendant to set up the defense of contributory negligence in his answer. *Ibid.*

4. *Pleadings—Contributory Negligence—Allegations.*—In this case the defense that plaintiff's intestate, an engineer on defendant's road, was negligently running at a speed in excess of defendant's orders, and that he failed to stop upon a signal given, which caused the death complained of, is a defense of contributory negligence. *Ibid.*

5. *Railroads—Engineer—Light at the Switch—Warnings—Location—Presumptions—Contributory Negligence.*—While running at night on defendant's passenger train and colliding with another train unexpectedly on defendant's main line where it was expected to go, the other train obstructing the track because of a broken switch, and where there were numerous tracks and switches, the plaintiff's intestate is not required, without qualification, to know the exact location of the broken switch so as to impute contributory negligence to him in not observing the rules of the company when there is no light appearing at such locations. *Ibid.*

6. *Railroads—Collisions—Open Switch—Negligence—Presumptions.*—In an action for damages against a railroad company for negligently per-

RAILROADS—*Continued.*

mitting a switch to be open so as to cause a collision at its station between a train run by the intestate, as engineer, and another train, a presumption of negligence on the part of the defendant is raised by the fact of the open track and the collision, and a *prima facie* case being thereby established, the issue as to defendant's negligence is for the determination of the jury. *Ibid.*

7. *Same—"Rule of the Prudent Man."*—When plaintiff's intestate was an engineer on defendant's engine, running at night into a depot where there were numerous tracks and switches, where it was the defendant's duty to have the main line track cleared five minutes before his train was to arrive, and to turn on a red light as a danger signal if danger existed, the mere fact that there was danger of collision with another train on the main line, by reason of a broken switch, and that there was no light thereat, which was under the defendant's rules a signal to the intestate to stop his train, does not of itself bar the plaintiff from recovery, as a matter of contributory negligence, for the death of the intestate caused by a collision with such other train, as such would omit the rule of the prudent man. *Ibid.*

8. *Same—"Last Clear Chance"—Questions for Jury.*—The plaintiff's intestate was killed while running as engineer on defendant's passenger train at night in going into a station, where it collided with another of defendant's trains, on the main line, which, under defendant's rules, should have been cleared for the passenger train five minutes before its arrival. The intestate was running at the rate of thirty-five miles an hour and the rules of the company prohibited an excess of six miles. The rules further required that the intestate should regard the absence of a light at the switch as a signal to stop. There were numerous tracks and switches in the yard. An employee of defendant could have turned on a red light, an understood signal for the intestate to stop in time to have avoided the collision resulting in the intestate's death: *Held*, in this case it was for the jury to determine whether the intestate's negligence or that of the defendant was the proximate cause of the former's death, under the doctrine of the last clear chance. *Ibid.*

9. *Railroads—Warnings—Switches—Lights—Evidence.*—When, in an action against a railroad for damages for the wrongful death of its engineer caused by a collision of the train he was running at night into a station with another train negligently permitted to be on the main line, and the question is material as to whether there was a white light showing at the time, evidence is sufficient to be submitted to the jury which tends to show that the "white glass" was turned to the main line at 8 o'clock that night, and that the injury was inflicted at 2 o'clock the following morning, the yard, lights, etc., being under the supervision and control of the defendant during that time. *Ibid.*

10. *Railroads—"Look and Listen"—Defendant's Negligence—Contributory Negligence—Ordinances—Evidence—Questions for Jury.*—At a public crossing where the defendant had four tracks, two for northbound and two for southbound trains, the plaintiff's intestate was killed by being run over by a northbound train while awaiting the passing of a southbound long freight train. A curve in the track just below shut

RAILROADS—*Continued.*

off the view to some extent, and the passing freight was making a noise, which naturally interfered with the intestate's hearing the approach of the train that caused the injury. There was evidence tending to show that the speed of the latter train exceeded that allowed by a valid ordinance of the city, and that it had failed to give proper signals or warnings of its approach; also that an ordinance prohibited trains passing each other at the public crossing. On these facts, or evidence tending to establish them, the question of contributory negligence on the part of the intestate was for the jury. *Fann v. R. R.*, 136.

11. *Railroads—Crossing—Duty of Pedestrian—"Look and Listen."*—Before crossing a railroad track at a public crossing it is the duty of one traveling along the street or highway to look and listen and to take every reasonable precaution to avoid collision. *Jenkins v. R. R.*, 203.

12. *Railroads—Crossings—Warnings—Duty of Engineer.*—It is the duty of an engineer approaching a railroad crossing with a street or highway to blow his whistle or ring his bell at a reasonable distance therefrom to warn those traveling upon the street or highway of the danger of crossing the railroad at that time. *Ibid.*

13. *Same—Negligence.*—A railroad is held to be negligent and liable for the consequent damages in its train not giving the customary warnings in approaching a crossing of its track by a public road or street, whereby a horse of a traveler upon the highway, without negligence upon his part, becomes frightened by the close passage of the train, and consequently injures the traveler. *Ibid.*

14. *Same—Contributory Negligence.*—When there is evidence tending to show that the plaintiff looked and listened and took proper precautions for his safety before attempting to cross defendant's railroad track at a public crossing, and was injured by reason of the failure of defendant's engineer on a passing train to give the customary warnings, the view of the track being obstructed in the direction of the approaching train, the question of contributory negligence is a proper one for the jury. *Ibid.*

15. *Railroads — Contributory Negligence — Effect — Causal Connection.* — When one has negligently placed himself on a railroad track in danger of an approaching train, and injurious consequences result from other sources, harmless in themselves, such as driving into a post on the other side of the track, the contributory negligence of the person so acting will bar his recovery in his action for damages alleged against the railroad company. *Wright v. R. R.*, 325.

16. *Railroads—Crossings—"Look and Listen"—Contributory Negligence—Nonsuit.*—While passing in a buggy across a railroad track closely in front of defendant's moving train, of which plaintiff did not know beforehand, the plaintiff's horse became frightened by the smoke and noise of the train, and the plaintiff whipped up his horse to get across from the danger of being run over, and ran into a post on the other side of the track, to his injury: *Held*, the failure of plaintiff to look and listen before entering upon the track, and to heed the noises of the approaching train and a warning given by his companion, who jumped out of the buggy in time, was such contributory negligence as to bar his recovery of damages. *Ibid.*

RAILROADS—*Continued.*

17. *Police Powers—Cities and Towns—Roads and Streets—Railroad Obstruction—Gradings—Ordinances.*—The railroad of plaintiff traversed the defendant town on its principal business street, and owing to a general system of grading the streets the street was lowered, so that the plaintiff's railroad bed stood at a higher level of six to eighteen inches, or more, to the danger of the citizens of the town in passing and repassing: *Held*, an ordinance of the town requiring the plaintiff to lower its tracks to a level with the street at the expense of the railroad company was a lawful exercise by the town of its police power. In this case this power of the city was expressly provided for in the charter of the company. *R. R. v. Goldsboro*, 356.

18. *Police Powers — Railroads — Charters — Prescription—Public Requirements—Roads and Streets—Obstructions—Grading.*—A railroad company accepts a charter from the State in contemplation of and subject to the development of the country, and with the expectation that cities and towns would require new or improved streets across rights of way acquired, and, therefore, by prior occupancy a railroad company can obtain no rights which would impede or render dangerous streets of incorporated towns to whom the power had been granted, in the exercise of their police power for the benefit of the citizens. *Ibid.*

19. *Corporation Commission—Railroads—Gradings—Roads and Streets—Cities and Towns—Police Powers—Supplementary Powers.*—Revisal, sec. 1097 (10), authorizing the Corporation Commission to require railroads to raise or lower their tracks at a crossing, is supplementary to and not in derogation of the exercise by the State, or an incorporated town authorized by it, of such police powers. *Ibid.*

20. *Railroads—Negligence—Injury to Fallen Brakeman—Imputed Knowledge to Engineer—Evidence—Nonsuit.*—Plaintiff's intestate, a brakeman on defendant's freight train, while going across the top of three coal cars loaded with wood, a part of the train, for the purpose of putting on the brakes, as the train was being pushed backward onto a siding, fell between the two cars nearest the engine, one of his feet catching in the rubber hose of the air brake: *Held*, a motion to nonsuit was properly allowed upon evidence tending solely to show that the train was slowly moving at about the rate of three or four miles an hour—as a man would walk; that the train stopped, as designed, in the space of a thought, or a moment or so after the brakeman fell, or after he hallooed, which was immediately thereafter; that the engineer could not have seen the intestate's peril from the engine cab; that the train could not have been stopped sooner; that neither the engineer nor a lookout at the further end of the train could have rendered timely assistance, and that the engineer did not hear him cry out. *Cabe v. R. R.*, 402.

21. *Railroads—Negligence—Injury to Fallen Brakeman—Imputed Knowledge to Engineer—"Lookout"—Evidence—Nonsuit.*—To recover damages for the alleged wrongful killing of plaintiff's intestate, a brakeman on defendant's freight train, occasioned by his falling between two cars from the top, where he was engaged in putting on brakes, as three coal cars loaded with wood were being backed upon a siding, and nearly stopped at the intended place, it was necessary in this case for plaintiff to establish actionable negligence by showing:

RAILROADS—*Continued.*

(1) the engineer either saw or had actual knowledge of intestate's peril, (2) or that he should have discovered it in the performance of his legal duty, and that he could have stopped the train in time to have avoided the injury: *Held*, there was no evidence upon these points sufficient to go to the jury, and that a motion to nonsuit was properly allowed. *Ibid.*

22. *Same.*—While backing cars from a freight train onto a siding the engineer is required to look ahead in the direction in which he is moving, and though fixed with knowledge of what thus he should have discovered, he is not required, as a matter of law, to see one who has fallen between two cars onto the track and is endeavoring to work his way out along the sills from danger threatened by the slowly revolving wheels near their stopping place, about a car length from him; and no actionable negligence can be imputed to the engineer or to his company, if, under such circumstances, an injury is inflicted, unless he has seen the danger and could have averted it by the exercise of reasonable care. *Ibid.*

"REASONABLE TIME." See Carriers of Passengers.

RECEIVER. See Corporations.

RECORD. See Procedure.

REFORMATION. See Insurance.

REGISTRATION. See Deeds and Conveyances.

REHEARING. See Appeal and Error.

RELATIONSHIP. See Telegraphs.

RELEASE. See Principal and Surety; Damages; Negligence.

REMOVAL OF CAUSES.

Removal of Causes—Time for Filing Pleadings—Exceptions—Waiver—Implied Consent to Jurisdiction.—The right of removal of a cause from the State to the Federal courts is waived by not excepting to an order extending the time to file pleadings, for in not excepting the defendant is deemed to have consented to the jurisdiction of the former court. *Ford v. Lumber Co.*, 352.

RENEWAL. See Principal and Surety.

RESCISSION. See Fraud.

RESPONDEAT SUPERIOR. See Principal and Agent.

RESULTING TRUSTS. See Trusts and Trustees.

REVISAL. (For exactness, see the appropriate headings under which these various subjects occur.)

SECS.

16. Objection to residence of administrator appointed by clerk must be by proceedings instituted directly for the purpose. *Fann v. R. R.*, 136.

REVISAL—*Continued.*

SECS.

388. This section does not affect the power of a State or municipality to compel a railroad company to grade its tracks, etc., by reason of the lapse of time. *R. R. v. Goldsboro*, 356.

508. *Certiorari* to bring up case for error of counsel being refused, execution in this case may be stayed on appeal from final judgment. *Smith v. Miller*, 242.

1097 (10). The power conferred upon the Corporation Commission to require railroads to make the level of their tracks conform to gradings at crossings does not interfere with the State's or municipal power in relation to police powers applicable. *R. R. v. Goldsboro*, 356.

1590. Investment of certain fund not within the meaning of this section. *S. v. Miller*, 242.

2060. Sale of intoxicants at a different location in a town from the one charged in the indictment may, under certain circumstances, be some evidence of unlawful sale, etc. *S. v. Boynton*, 456.

2158. Notes not payable to "order," etc., or "bearer," not negotiable. *Johnson v. Lassiter*, 47.

2159. Endorsement in blank on non-negotiable note. *Ibid.*

2276. Notes not payable to "order," etc., or "bearer," not negotiable. *Ibid.*

2334. Notes not payable to "order," etc., or "bearer," not negotiable. *Ibid.*

2632. Logs shipped to be received, subject to inspection, the vendor is "party aggrieved," etc., which is not affected by want of notice of the agreement given the carrier. *Elliott v. R. R.*, 235.

2646. This section does not affect the necessity of pleading assumption of risks. *Eplee v. R. R.*, 293.

2768. Murder in second degree is not a capital felony, and the solicitor is not entitled to full fees for conviction. *S. v. Mayhew*, 477.

2846. Rights of endorser on non-negotiable note protected by this section. *Johnson v. Lassiter*, 47.

3051. Power of Legislature to regulate the emptying of sewers into streams; nuisance; subsequent legislation. *Shelby v. Power Co.*, 196.

3155. Right of one accused and committed for treason or felony to "speedy trial." *S. v. Webb*, 426.

3640. The innocence or virtue of a slandered woman are essential elements of the crime. *S. v. Smith*, 473.

3995. This section, providing a method for assessment and apportionment of labor, etc., for repairing, etc., dams, canals, etc., is constitutional. When an action thereunder is dismissed for not complying with its terms, another action, after compliance, may be maintained. It appears herein that the subject-matter is within the provisions of the statute. *Forehand v. Taylor*, 353.

5453, Repeals. Code, secs. 41 and 50, and effect of endorsement on non-negotiable note is determined at common law. *Johnson v. Lassiter*, 47.

ROAD DISTRICTS. See Cities and Towns.

RULE OF THE PRUDENT MAN. See Contributory Negligence; Equity; Negligence.

SALES. See Intoxicating Liquors.

1. *Foreclosure Sales—Equity—Bidder—"Proposer"—Confirmation—Party —Decree.*—One who bids in property at a sale under a decree of foreclosure is a mere proposer until his bid is legally accepted and confirmed, and when made a party after his bid and before confirmation, to a prior suit for foreclosure of which he had constructive notice, he is subject to and bound by the final decree in that suit. *Jones v. Williams*, 179.

2. *Mortgages — Foreclosure Sales — Legal Title — Parties—Equities—Account.*—When a junior mortgagee is not a party to a foreclosure suit in equity brought by the assignee of a senior mortgage, the effect of the decree is not to deprive him of his equity of redemption, and the purchaser at the sale under such a decree takes subject to his lien for whatever sum may be due him, and to his right of redemption; and in order to ascertain the status and amount of the several claims an account may be taken. *Ibid.*

SECONDARY LIABILITY. See Negligence.

SEWERS. See Water and Watercourses.

SHIFTING FREIGHT. See Cities and Towns.

SIGNALS. See Contributory Negligence.

SLANDER.

1. *Slander—"Innocent Woman"—Essential Facts.*—Upon a trial for the slander of an innocent woman under Revisal, sec. 3640, the innocence and virtue of the woman are essential elements of the crime. *S. v. Smith*, 473.

2. *Slander—"Innocent Woman"—Good Character—Instructions—Burden of Proof—Conflicting Charge—Appeal and Error.*—Upon a charge of slander of an innocent woman under Revisal, sec. 3640, the court instructed the jury that the burden was upon the State to show by the preponderance of the evidence that the woman was virtuous or innocent, but further charged, with reference to this matter, that "the law presumes all witnesses are of good character, and it likewise presumes that a woman is of good character until the contrary appears." In analyzing the charge in this case, and giving it a fair and reasonable construction as a whole, *held*, reversible error, as it in effect put the burden on defendant to show that the prosecutrix was not innocent or virtuous, or at least left the jury in doubt where this burden rested. *Ibid.*

SOLICITOR'S FEES. See Interpretation of Statutes.

SPEEDY TRIAL. See Constitutional Law; Appeal and Error.

STATIONS. See Negligence.

STATUTES. See Interpretation of Statutes; Penalty Statutes; Deeds and Conveyances.

1. *Notes — Non-negotiable — Dishonor—Notice—Statutory Provisions—Interpretation of Statutes.*—The rights of an endorser in blank upon a

STATUTES—*Continued.*

non-negotiable note are sufficiently protected under Revisal, sec. 2846, providing that a surety or endorser on any note, bill, bond or written obligation, except those held in trust or as collateral, may notify in writing, the payee or holder, requiring him to bring suit and use all diligence to collect, and if the payee or holder refuses to bring action within thirty days, the surety or holder giving notice is discharged. *Johnson v. Lassiter*, 47.

2. *Police Powers—Legislative Powers—Subsequent Legislation.*—No Legislature can bind a subsequent one in its exercise of the powers conferred in regard to the pollution of streams from which the public drinking supply is taken. Revisal, sec. 3051. *Shelby v. Power Co.*, 196.

3. *Police Powers—Legislative Powers—Waiver.*—The right to exercise its police powers for the general good is inherent in the State for the protection of the people and is of such character that the State may not waive or divest itself thereof. *Ibid.*

4. *Water and Watercourses—Sewers—Pollution—Statutory Regulations—Lawful Taking of Property.*—As no prescriptive right can be acquired by one in emptying sewers into streams from which a public drinking-water supply is obtained, there can be no taking of property for public use under the inhibition of Revisal, 3051, and nothing to compensate for it, the State only prescribing the conditions under which the stream may be used for sewer purposes. *Ibid.*

5. *Trial, "Speedy"—Legislative Definition.*—The word "speedy," as used in these instruments and as relevant to this question, is a word of indeterminate meaning, permitting, to some extent, legislative definition. *S. v. Webb*, 426.

6. *Same—Treason or Felony—Right of Accused—Interpretation of Statutes.*—Section 3155 of Revisal, providing in substance that one formally accused and committed for treason or felony shall, on demand properly made, be indicted and tried on or before the second term of court ensuing the commitment, or be discharged from imprisonment, is peremptory in its requirements; and where one so committed has formally complied with the provisions of the statute, it is the duty of the court to discharge the prisoner. *Ibid.*

7. *Appeal and Error—Trial, "Speedy"—Habeas Corpus—Procedure.*—*Habeas corpus* will not lie to review the lower court in refusing to discharge a prisoner from custody under Revisal, sec. 3155, upon the alleged error that a "speedy" trial under the conditions therein named was not given him. *Ibid.*

STATUTORY POWERS. See Constitutional Law; Statutes.

STOCKHOLDERS. See Banks; Corporations.

SUBROGATION. See Trusts and Trustees; Principal and Agent; Principal and Surety.

SURETIES. See Negotiable Instruments; Principal and Surety.

TAXATION.

1. *Corporation Commission — Taxation — Assessment—Local Property—Deductions.*—Fixing at par the value of a corporation's shares of

TAXATION—*Continued.*

stock by the Corporation Commission under sec. 34, ch. 440, Laws of 1909, in ascertaining the excess for taxation by deducting the value of local real and personal property from the paid-in amount of the capital stock, will not be declared excessive by the courts, it appearing that while there was no accumulated surplus, or that any of the stock had been sold, large dividends were being annually declared. *S. v. Morrison*, 53.

2. *Same—Surplus—Stock in Other Corporations.*—By the language of ch. 440, sec. 34, Laws of 1909, only the value of the real and personal property locally assessed is to be deducted by the Corporation Commission from the total value of the shares of the capital stock to be ascertained in the manner therein prescribed; and no further deduction may be allowed for investments by a corporation in stock in other corporations, ch. 438, sec. 4, Laws of 1909, having no application, when it appears that the complainant had no surplus. *Pullen v. Corporation Commission*, 152 N. C., 548, cited and distinguished. *Ibid.*

3. *Counties and Towns—Road Districts—Taxation—Vote of the People.*—The construction and maintenance of public roads is a governmental purpose, and the cost thereof is a necessary expense which may be paid for by current taxation or issuing bonds, having regard, always, to the requirements, limitations and purpose of the legislation under which these local authorities are acting, and, unless the statute so requires, no election by the people is necessary. *Board of Trustees v. Webb*, 379.

4. *Same.*—When the Legislature has created a municipal corporation to be known as the board of trustees of a certain township, and has given them as such the entire management and control of the public roads of the township, and has conferred upon them power to issue and sell bonds, without requiring their issuance to be submitted to a vote of the people therein, and apply the proceeds to the purpose designated, such bonds so issued are valid. *Ibid.*

TELEGRAPHS.

1. *Telegraphs—Death Message—Funeral Delayed—Evidence.*—Damages being claimed for a delayed telegram in an action against a telegraph company, the message reading, "Ma died today; if any of you can come, will delay funeral," it is competent for the plaintiff to show by his evidence that if the message had been duly received he would have sent an answer requesting a delay of the funeral, which would have enabled him to attend, and that the funeral would have been thus delayed at his request. *Sherrill v. Telegraph Co.*, 250.

2. *Telegraphs — Death Message — Funeral — Train Schedules—Evidence Sufficient.*—In an action upon a delayed telegram wherein it is alleged that damages were caused plaintiff in not being able to attend a funeral, where a long journey by rail was necessary, with certain connections, it is sufficient evidence to go to the jury as to plaintiff's ability to reach his destination in time that he could have done so by regular schedule, and it was not upon him to prove that at the time the trains did not run behind, or that the connections were actually made. *Ibid.*

3. *Telegraphs—Death Message—Funerals—Absence Explained—Evidence —Elements of Damage.*—Plaintiff having testified that if a message

TELEGRAPHS—*Continued.*

announcing a death had been duly delivered he would have taken train to destination, and would have attended the funeral, the failure to so attend being the ground for damages alleged, it is competent to show that he did not go when the message was actually delivered on account of the shock it gave his mother, when the purpose is to show the reason of his not going and not as an element of damages; and harmless when it appears that it was then too late for him to have gone in time to attend the funeral. *Ibid.*

4. *Telegraphs—Relationship—Proof of Affection—Evidence—Measure of Damages.*—While damages will not be presumed from the relationship of aunt and nephew, in a suit upon a delayed telegram by the latter which proximately prevented him from attending the funeral of the former, and laid as the ground for the damages, it is competent to show the affectionate regard in which they held each other, and thus prove the damages alleged. *Ibid.*

5. *Telegraphs—Death Message—Unreasonable Delay—"Mental Anguish"—Evidence.*—An unreasonable delay in the transmission and delivery of a message relating to a funeral, which causes a relative to be absent from the funeral, is sufficient for a recovery of damages for mental anguish in proper instances. *Ibid.*

6. *Telegraphs—Death Message—Duty of Plaintiff—Contributory Negligence—Evidence—Instructions.*—In an action for damages sustained by being prevented from attending a funeral by the negligence of the defendant telegraph company in delaying a telegram announcing a death and asking if plaintiff would attend the funeral, an instruction is proper, when the grounds for damages are correctly laid, that if plaintiff, after receiving the message, made every reasonable effort to reach his destination in time, and by reason of the delay in the message and without fault on his part he could not do so, he is entitled to recover damages. *Ibid.*

7. *Telegraphs—Death Message—Measure of Damages—Common-sense View—Instructions.*—The plaintiff suing for damages in not being able to attend the funeral of a relative, where the affectionate relation is shown to have existed, and which was caused by an unreasonable delay in a telegraph company of a message announcing a death, etc., a charge held correct in this case which differentiates the grief naturally caused by the death and that caused by not being able to attend the funeral, making the defendant only answerable in damages for the latter, and stating that the jury should apply "reasonable, common-sense methods, such as reasonable business men would apply" in awarding the amount of verdict. *Ibid.*

8. *Telegraphs—Delayed Message—Delivery in Time—Negligence—Conflicting Evidence—Instructions—Burden of Proof.*—In an action for damages for mental anguish alleging negligent delay in the delivery of a telegram announcing the sudden and serious illness of plaintiff's mother, where there is conflicting evidence as to whether the defendant was negligent or the plaintiff had time after the delivery of the message to have taken a certain train and thereby have avoided the injury complained of, it is reversible error for the trial judge to refuse or omit to charge in accordance with a special instruction

TELEGRAPHS—*Continued.*

tendered by the defendant, that the burden was upon the plaintiff to show the alleged negligence and that it was the proximate cause of the injury. *Lanning v. Telegraph Co.*, 344.

THREATS. See Homicide.

TITLE. See Bankruptcy; Deeds and Conveyances; Evidence; Processioning.

TORT FEASORS, JOINT. See Damages.

TORTS. See Carriers of Passengers; Contracts.

TRUSTS AND TRUSTEES. See Bankruptcy.

1. *Trusts and Trustees—Trust Funds—Wrongful Loan.*—A loan of a trust fund by a trustee to a business or manufacturing enterprise without order of court is wrongful. *Costner v. Cotton Mills*, 128.

2. *Same—Action of Debt—In Pari Delicto.*—A trustee who has wrongfully loaned his trust funds may maintain his action to recover the same. *Ibid.*

3. *Same — Priorities — Borrower—Receivership—Rights of Creditors.*—A trustee who has loaned his trust funds to a manufacturing corporation, the funds being used by the latter to purchase raw material and in the payment of labor, can acquire no superiority of lien upon the assets of the corporation after insolvency or receivership. *Ibid.*

4. *Trusts and Trustees—Trust Funds—Wrongful Loan—Subrogation.*—The right of subrogation does not exist in behalf of a trust fund which has been wrongfully loaned by a trustee to a corporation afterwards becoming insolvent. *Ibid.*

5. *Trusts and Trustees—Trust Funds—Wrongful Loan—Recoupment.*—The *cestuis qui trustent* can not follow funds wrongfully loaned by their trustee as against the rights of other creditors of the bankrupt borrower. *Ibid.*

6. *Deeds and Conveyances—Wife's Money—Purchaser—Title to Husband—Resulting Trusts—Proof Required.*—When a resulting trust for the wife is sought to be established upon the allegation that the husband purchased land with her money and took a deed to himself which is absolute in form and conveys the legal and equitable title to him, it is necessary that the trust be established by clear, strong and convincing proof. *McWhirter v. McWhirter*, 145.

7. *Equity—Notes—Injunction—Trust Funds.*—A note received by a guardian for moneys invested for the ward are in the nature of a trust fund, and where there is evidence that a third person has induced the guardian to part with the note without a consideration before maturity, so as to raise serious issues to be passed upon by the jury respecting it, the matter comes within the peculiar province of a court of equity in its jurisdiction over trust funds, and an order restraining the negotiation of the note until the hearing is properly granted. *Yount v. Setzer*, 213.

8. *Banks—Shareholders—Married Women—Trusts and Trustees.*—Under the express provisions of Public Laws 1893, ch. 471, funds in the hands of a trustee, and not the trustee, shall be liable when he holds bank stock for the *cestui que trust*, and when a certificate of bank

TRUSTS AND TRUSTEES—*Continued.*

stock was issued to the husband as trustee for his wife, and was so held up to the time of insolvency of the bank, without evidence tending to show that she was not the beneficial owner, the husband, as trustee, can not be adjudged individually liable. Laws 1897, ch. 298. *Smathers v. Bank*, 283.

UNDISCLOSED PRINCIPAL. See Principal and Agent.

USER. See Water and Watercourses.

VENDOR AND VENDEE. See Bankruptcy; Contracts; Mortgages.

VERDICT. See Evidence.

1. *Cities and Towns—License—Negligence—Inconsistent Verdict.*—The verdict, in an action against a city and one who was permitted by it to pile bricks on its sidewalk, alleged to have been so negligently done as to cause the injury complained of, which resulted in the death of the plaintiff's intestate, is inconsistent when it finds that the intestate was killed by the negligence of the city and not by that of its licensee, for the injury could not have occurred except for the alleged negligent act of the latter in piling the brick insecurely. *Gregg v. Wilmington*, 18.

2. *Verdict—Issues Set Aside—Judgment—Legal Rights.*—When the questions involved in an action are so interwoven that they can not be separated, and a new trial allowed as to one or more issues, without prejudicing the rights of one or more parties or preventing a full and just trial of the whole matter, the power which exists in certain cases to set aside a finding upon one of the issues should not be exercised. *Ibid.*

3. *Same—Appeal and Error.*—When a city and its licensee are sued for negligence in the same action, and the negligence of the licensee, if any, is primary, the liability of the city necessarily depends upon the existence of negligence in the licensee; and where the jury find that the city was negligent and the licensee was not, it was error for the trial judge to set aside the issue relating to the negligent act of the licensee and render a judgment upon the other issue against the city. *Ibid.*

VESTED RIGHTS. See Water and Watercourses.

WAIVER. See Contracts.

1. *Corporations—Subscriptions—Waiver.*—A waiver must be made with knowledge of the conditions under which it is sought to be established, so that the intention to waive a right may in some way appear, and when there is contradictory evidence as to such conditions and intention the question is a proper one for the jury. *Alexander v. Savings Bank*, 124.

2. *Police Powers—Legislative Powers—Waiver.*—The right to exercise its police powers for the general good is inherent in the State for the protection of the people and is of such character that the State may not waive or divest itself thereof. *Shelby v. Power Co.*, 196.

3. *Removal of Causes—Time for Filing Pleadings—Exceptions—Waiver—Implied Consent to Jurisdiction.*—The right of removal of a cause

WAIVER—*Continued.*

from the State to the Federal courts is waived by not excepting to an order extending the time to file pleadings, for in not excepting the defendant is deemed to have consented to the jurisdiction of the former court. *Ford v. Lumber Co.*, 352.

WAREHOUSEMAN. See Carriers of Passengers.

WARNING. See Negligence; Contributory Negligence.

WATER AND WATERCOURSES. See Limitations.

1. *Water and Watercourses—Sewers—Pollution—Statutory Regulations—Prescription—Vested Rights.*—No right by prescription can be acquired so as to defeat the operation of a statute made for the preservation of the public health, as, in this case, the right to continue in maintaining a sewerage system which empties into a drain or stream from which a public water supply is obtained, in violation of the terms of a statute. Revisal, 3051. *Shelby v. Power Co.*, 196.

2. *Same—User and Nonuser.*—No title can be acquired against the public by user alone, nor lost to the public by nonuser, unless by legislative enactment, and Revisal, sec. 3051, being passed in the interest of the public health for regulating sewers emptying into waters from which the public drinking supply is taken, no prescriptive right can be available which would exempt the one claiming it from the operation of the statute. *Ibid.*

3. *Water and Watercourses—Sewers—Pollution—Statutory Regulations—Nuisance.*—Emptying sewers into such streams as are prohibited by statute, Revisal, sec. 3051, is a nuisance, and the courts will not inquire as to whether the facts in any particular case result in the pollution of the stream, as such matters are well within the regulation of the Legislature in the exercise of its police powers for the benefit of the public health, and the language of the statute is controlling. *Ibid.*

WIFE'S SEPARATE EXAMINATION. See Deeds and Conveyances.

WILLS.

1. *Wills—Caveat—Insufficient Mental Capacity—Evidence.*—A witness in the trial of a *caveat* to a will for alleged insufficiency of mind of the testator to have made the will, testified of his long acquaintance with the testator, and transactions had with him. His further testimony, "that he still retained his mental faculties to the last," held competent. *Stewart v. Stewart*, 341.

2. *Same—Impeachment—Feeling.*—In proceedings caveating the will of the testator by his son, question asked a witness, "if he had not gone to the home of the testator and removed some of its contents to the house of the caveator," held competent to impeach the witness as tending to show his relations to the parties and a state of feeling between the father and son which may have influenced the former in the disposal of his property. *Ibid.*

3. *Wills — Caveat — Witness—Impeachment—Bias—Relevant Facts—Evidence.*—When a will is sought to be set aside for undue influence, testimony in reply to a question as to the influence the propounder exercised over the testator, "She certainly seemed to do most of the

WILLS—*Continued.*

talking, and he seemed to be under her thumb," is incompetent as an expression of a conclusion which it was the province of the jury to draw from the facts and circumstances placed in evidence. *Ibid.*

4. *Wills—Construction—Intent—Repugnancy.*—In construing a will, the intent of the testator must govern as ascertained from the consideration of the whole instrument in the light of surrounding circumstances, and each and every part should be given effect if it can be done by fair and reasonable intendment before one clause may be construed as repugnant to or irreconcilable with another. *Smith v. Lumber Co.*, 389.

5. *Wills—Estates—Uncertain Event—Fee Simple—Defeasance—"Heirs"—Purchasers.*—An estate devised to certain named children of the testator, with a provision that "if any of my children" mentioned "should die without leaving lawful issue of his or her body surviving, or to be born within the period of gestation," then his or her part "shall descend to and upon the survivors . . . or upon the lawful heirs who may be surviving any of my said children": *Held*, (1) the vesting of the interests under the terms of the will is determined by death of the children named, and not by that of the devisor, each of these children taking an estate in fee simple, defeasible as to each on their "dying without leaving lawful issue of his or her body surviving," in the sense of children, grandchildren, etc.; (2) the "lawful heirs" of the children named take as purchasers, the word "heirs" as thus used not meaning general heirs. *Ibid.*

6. *Same—Partition—Judgment.*—Devisees of lands under a will by which they take a fee-simple estate defeasible upon the happening of an uncertain event can not by a judgment in partition proceedings obtain a fee-simple title, or pass a greater or different interest than they acquired by the devise. *Gillam v. Edmonson*, 154 N. C., 127, cited and distinguished. *Ibid.*

WITNESS. See Evidence.

1. *Homicide—Poison—Evidence—Character Witnesses—Cross-examination—Collateral Matters.*—Upon a trial for a homicide, when the prisoner does not take the stand as a witness, and the indictment has charged him with the killing of the deceased by means of poison, it was competent for the prisoner to introduce witnesses as to his good character, but reversible error to permit a question as to the witness having heard that the prisoner had been accused of killing his wife, with the reply, "Not till after the present charge was brought." *S. v. Holly*, 485.

2. *Same.*—It is competent upon cross-examination of the prisoner's witness to ask questions tending to impeach his general character; but a question permitted to be asked as to a particular matter, as to his previously having been accused of killing his wife, would tend to involve numerous collateral issues to the prejudice of the prisoner, and hence constituted reversible error. *Ibid.*

3. *Witnesses—General Character—Impeaching Question—Confined as to Time.*—When the prisoner accused of a crime is being tried therefor, and he has not become a witness in his own defense, evidence tending to impeach his general character should be confined to the time preceding the crime charged. *Ibid.*

WITNESS—*Continued.*

4. *Witnesses — General Character — Impeachment—Collateral Matters—Evidence Confined—Instructions.*—It is permissible to test the character of a witness by inquiring as to the sources of his information; and he may be asked if there was not a general reputation, prior to the controversy, as to particular matters, tending to his discredit; but such evidence should be restricted by the judge in his charge to the jury to the credibility of the witness who testifies as to character. *Ibid.*

WORDS AND PHRASES.

Homicide—Self-defense—"Sudden"—Words and Phrases—Harmless Error. A charge by the trial judge to the jury following in other respects the principles of law applicable to self-defense, upon a trial for a homicide, is not erroneous because of an instruction that if the assault on the prisoner was "sudden, serious, and continuous," he had the right to kill in defense of his person, the instruction being favorable to the prisoner. *S. v. Rowe*, 436.