ANNOTATIONS INCLUDE 173 N. C.

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VOL. 156

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1911

(IN PART).

ROBERT C. STRONG

REPORTER

ANNOTATED BY

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6 Iredell Equity	"	41	"
7 Iredell Equity	"	42	"
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Busbee Law	"	44	"
Busbee Equity	"	45	"
1 Jones Law	"	46	"
2 Jones Law	"	47	"
3 Jones Law	"	48	"
4 Jones Law	"	49	"
5 Jones Law	"	50	"
6 Jones Law	"	51	"
7 Jones Law	"	52	"
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CASES REPORTED IN THIS VOLUME

A

PAGE

Adams v. R. R. 174
Allen, Conference v. 524
Ashe, Grogan v. 286
Austin v. Lewis 461
Autry v. R. R. 293

B

Bailey v. Matthews 78
Bank v. Duffy 83
Barger v. Smith 323
Barnes v. Telegraph Co. 150
Battle v. Rocky Mount 329
Bell, Rodgers v. 378
Bell v. Power Co. 316
Bissett v. Lumber Co. 162
Bizzell v. Roberts 272
Blount, Carson v. 103
Blow v. Joyner 140
Boss v. R. R. 70
Bowser v. Tarry 35
Braddy v. Dail 30
Brock v. Ins. Co. 112
Brock, Rodgers v. 401
Bunting, Carson v. 29
Burlingham v. Canady 177
Bynum, Fields v. 413

C

Cahoon, Liverman v. 187
Canady, Burlingham v. 177
Carroll v. Wilson 68
Carrow, Tayloe v. 6
Carson v. Blount 103
Carson v. Bunting 29
Carter v. Comrs. 183
Cole, Dalrymple v. 353
Cole, S. v. 618
Coley-Bardin, Impr. Co. v. 255
Comrs., Carter v. 183
Conference v. Allen 524
Cotton Mills, Thompson v. 594
Cromartie v. R. R. 97
Currie v. R. R. 419
Currie v. R. R. 432

D

Dail, Braddy v. 30
Dail v. Taylor 588

PAGE

Dalrymple v. Cole 353
Davenport, S. v. 596
Davidson v. R. R. 578
DeBruhl v. Hood 52
Deppe v. R. R. 56
Dixon, *In re* 26
Dorsett v. R. R. 439
Dove, S. v. 653
Duffy, Bank v. 83
Dunn v. Patrick 248
Durfey, Ellington v. 253

E

Edgerton v. Kirby 347
Edwards, Richardson v. 590
Electrova Co. v. Ins. Co. 232
Ellington v. Durfey 253
Ellis v. Trustees 10
Exum, Park v. 228

F

Fields v. Bynum 413
Fowler, *In re* 340
Furniture Co., Hendricks v. 569

G

Gallimore v. Grubb 575
Gaskins v. Hancock 56
Gibbs, Mann v. 44
Gilbert, Saunders v. 463
Grant v. Mitchell 15
Grogan v. Ashe 286
Grubb, Gallimore v. 575

H

Halton, Robertson v. 215
Hamilton v. Lumber Co. 519
Hancock, Gaskins v. 56
Hardy v. Mitchell 76
Harper, Russ v. 444
Harris, Love v. 88
Harris, McLawhorn v. 107
Harvey v. Pettaway 375
Hendricks v. Furniture Co. 569
Hicks, Hinton v. 24
Hicks, Stephens v. 239
Hines v. R. R. 222
Hinson, *In re* 250
Hinton, School Trustees v. 586

	PAGE
Hinton v. Hicks	24
Hockoday v. Lawrence	319
Holloman, Wall v	275
Hood, DeBruhl v	52
Hooker v. R. R	155
Horner v. Water Co	494
Hornthal, Owens v	19
Howie v. Spittle	180
Hughes v. Ins. Co	592
Huntley, Jones v	410
I	
Ijames, Lodge v	159
Impr. Co. v. Coley-Bardin	255
In re Dixon	26
In re Fowler	340
In re Hinson	250
In re Saville	172
Ins. Co., Brock v	112
Ins. Co., Electrova Co. v	232
Ins. Co., Hughes v	592
Ins. Co., Whitford v	42
Inv. Co. v. Telegraph Co	259
J	
Jackson, Kochs v	326
Jeffress v. R. R	589
Johnson v. Raleigh	269
Jones v. Huntley	410
Joyner, Blow v	140
K	
Kennedy, LaRoque v	360
Kime v. R. R	451
Kirby, Edgerton v	347
Kivett v. Telegraph Co	296
Kochs v. Jackson	326
L	
Lanier, Overman v	537
LaRoque v. Kennedy	360
Lawrence, Hockoday v	319
Leak, S. v	643
Lewis, Austin v	461
Liverman v. Cahoon	187
Lodge v. Ijames	159
Love v. Harris	88
Lumber Co., Bissett v	162
Lumber Co., Hamilton v	519
Lumber Co., Morton v	589
Lumber Co., Nicholson v	59
Lumber Co., Twiddy v	588
Lumber Co., Wiley v	210
Lyons, Sutton v	3
M	
Mann v. Gibbs	44
Marable, S. v	616
Matthews, Bailey v	78
May, Sprunt v	388
Mayo, Sherrod v	144
McKellar v. McKay	283
McLawhorn v. Harris	107
McPherson, Rosemond v	593
Miller, Wilkes v	428
Mitchell, Grant v	15
Mitchell, Hardy v	76
Mitchell, S. v	659
Moore v. Westbrook	482
Morgan v. Morgan	169
Morse v. Schultz	165
Morton v. Lumber Co	589
Mullinax v. Telegraph Co	541
Murphy v. Webb	402
N	
Nicholson v. Lumber Co	59
Nowell, S. v	648
O	
Overman v. Lanier	537
Owens v. Hornthal	19
P	
Park v. Exum	228
Patrick, Dunn v	248
Peele v. Powell	553
Pettaway, Harvey v	375
Pettit v. R. R	119
Plaster Co. v. Plaster Co	455
Pool v. Walker	40
Powell, Peele v	553
Power Co., Bell v	316
R	
R. R., Adams v	174
R. R., Autry v	293
R. R., Boss v	70
R. R., Cromartie v	97
R. R., Currie v	419
R. R., Currie v	432
R. R., Davidson v	578
R. R., Deppe v	56
R. R., Dorsett v	439

	PAGE
R. R., Hines v.	222
R. R., Hooker v.	155
R. R., Jeffress v.	589
R. R., Kime v.	451
R. R., Pettit v.	119
R. R., Urquhart v.	581
R. R., Warren v.	591
R. R., Whitehurst v.	48
R. R., Wyatt v.	307
R. R., Zachary v.	496
Raleigh, Johnson v.	269
Rea v. Rea	529
Richardson v. Edwards	590
Riley v. Sears	267
Roberts, Bizzell v.	272
Robertson v. Halton	215
Rochelle, S. v.	641
Rocky Mount, Battle v.	329
Rodgers v. Bell	378
Rodgers v. Brock	401
Rosemond v. McPherson	593
Russ v. Harper	444
S	
Sandlin, S. v.	624
Saunders v. Gilbert	463
Saville, *In re*	172
School Trustees v. Hinton	586
Schultz, Morse v.	165
Sears, Riley v.	267
Sherrod v. Mayo	144
Sinclair v. Teal	458
Smith, Barger v.	323
Smith, S. v.	628
Smith, Thompson v.	345
Smaw, Swindell v.	1
Spittle, Howie v.	180
Sprunt v. May	388
Starr v. Telephone Co.	435
S. v. Cole	618
S v. Davenport	596
S. v. Dove	653
S. v. Leak	643
S. v. Marable	616
S. v. Mitchell	659
S. v. Nowell	648
S. v. Rochelle	641
S. v. Sandlin	624
S. v. Smith	628
S. v. Stewart	636
S. v. Vaughan	615
Staton, Tarboro v.	504
Stephens v. Hicks	239
Stewart, S. v.	636
Sutton v. Lyons	3
Swindell v. Smaw	1
T	
Tarboro v. Staton	504
Tarry, Bowser v.	35
Tayloe v. Carrow	6
Taylor, Dail v.	588
Teal, Sinclair v.	458
Telegraph Co., Barnes v.	150
Telegraph Co., Inv. Co. v.	259
Telegraph Co., Kivett v.	296
Telegraph Co., Mullinax v.	541
Telephone Co., Starr v.	435
Thompson v. Cotton Mills	594
Thompson v. Smith	345
Trustees, Ellis v.	10
Twiddy v. Lumber Co.	588
U	
Urquhart v. R. R.	581
V	
Vaughan, S. v.	615
W	
Walker, Pool v.	40
Wall v. Holloman	275
Warren v. R. R.	591
Water Co., Horner v.	494
Webb, Murphy v.	402
Wells v. Wells	246
West v. Wilkinson	587
Westbrook, Moore v.	482
Whitehurst v. R. R.	48
Whitford v. Ins. Co.	42
Wiley v. Lumber Co.	210
Wilkes v. Miller	428
Wilkinson, West v.	587
Wilson, Carroll v.	68
Wyatt v. R. R.	307
Z	
Zachary v. R. R.	496

CASES CITED BY THE COURT

A

Adams, S. v. ..... 138 N. C., 693 646
Adams v. Turrentine ..... 30 N. C., 147 334
Adcock v. Fleming ..... 19 N. C., 225 558
Adrian, Mayer v. ..... 77 N. C., 83 ..... 91, 93
Adrian v. Shaw ..... 82 N. C., 474 357
Alexander, Penniman v. ..... 111 N. C., 427 38
Alleghany Co. v. Lumber Co. ..... 131 N. C., 6 161
Allison, Gillespie v. ..... 115 N. C., 548 9
Allison, Rankin v. ..... 64 N. C., 674 43
Allison, Simmons v. ..... 118 N. C., 770 526
Ammons v. R. R. ..... 140 N. C., 199 ..... 143, 144
Anderson v. Wilkins ..... 142 N. C., 159 ..... 3, 244
Ashcraft, Unitype Co. v. ..... 155 N. C., 63 220
Ashe v. Gray ..... 88 N. C., 190 ..... 221, 222
Ashe v. Gray ..... 90 N. C., 137 222
Asheville, Hilliard v. ..... 118 N. C., 845 506
Asheville v. Trust Co. ..... 143 N. C., 360 ..... 506, 507
Ashford v. Robinson ..... 30 N. C., 114 558
Askew, Pope v. ..... 23 N. C., 16 66
Atkinson, Love v. ..... 131 N. C., 544 94
Attorney-General v. Justices ..... 27 N. C., 315 351
Audit Co. v. Taylor ..... 152 N. C., 272 220
Austin v. R. R. ..... 151 N. C., 137 453
Auditor, White v. ..... 126 N. C., 584 339
Aycock v. Marsh ..... 30 N. C., 360 417
Aycock v. R. R. ..... 89 N. C., 329 425

B

Bagley v. Sasser ..... 55 N. C., 350 558
Bailey v. Rutjes ..... 86 N. C., 517 400
Baird, Jackson v. ..... 148 N. C., 29 111
Baker, Morrison v. ..... 81 N. C., 76 ..... 557, 566
Baker v. R. R. ..... 150 N. C., 562 501
Baldwin, Roberts v. ..... 151 N. C., 407 157
Baldwin, Roberts v. ..... 155 N. C., 276 ..... 30, 269
Ball v. Paquin ..... 140 N. C., 83 ..... 239, 244, 533
Bank v. Benbow ..... 150 N. C., 782 536
Bank v. Clark ..... 8 N. C., 36 560
Bank v. Commissioners ..... 119 N. C., 226 540
Bank v. Davidson ..... 70 N. C., 122 54
Bank v. Fountain ..... 148 N. C., 590 231
Bank, Hodgin v. ..... 128 N. C., 110 150
Bank, Horne v. ..... 108 N. C., 119 557
Bank, Martin v. ..... 131 N. C., 123 496
Bank v. Moore ..... 138 N. C., 529 38
Bank, Wilson v. ..... 72 N. C., 621 207
Barco, S. v. ..... 150 N. C., 792 334
Barnes v. Commissioners ..... 135 N. C., 27 ..... 351, 336

Barnes, Peacock v. .....142 N. C., 219..... 460
Barnes, Rowland v. ..... 81 N. C., 239..... 558
Baskerville, Plummer v. ..... 36 N. C., 252..... 65
Basnight v. Jobbing Co.....148 N. C., 350..... 38
Bateman v. Lumber Co.....154 N. C., 248.....213, 574
Baum v. Stevens ..... 24 N. C., 411..... 220
Baylees, Black v. ..... 86 N. C., 527..... 392
Beal v. Fiber Co.....154 N. C., 157..... 319
Beasley, Parker v. .....116 N. C., 1..... 53
Beavan v. Speed ..... 74 N. C., 544..... 357
Beeson v. Smith .....149 N. C., 145..... 392
Bell v. Jeffreys ..... 35 N. C., 356..... 220
Bell, Nichols v. ..... 46 N. C., 32..... 557
Bellamy, Neal v. ..... 73 N. C., 384.....558, 564
Belvin v. Paper Co.....123 N. C., 138..... 26
Benbow, Bank v. .....150 N. C., 782..... 536
Benbow, Mendenhall v. ..... 84 N. C., 650..... 148
Bennett, S. v. ..... 20 N. C., 170..... 602
Bennett v. Thompson ..... 35 N. C., 147..... 276
Bevers, S. v. ..... 86 N. C., 595..... 237
Biles v. R. R. .....139 N. C., 528.....102, 585
Billings v. Observer Co.....150 N. C., 540..... 143
Bissell v. Lumber Co.....152 N. C., 123.....449, 524
Black v. Baylees ..... 86 N. C., 527..... 392
Black v. Black .....110 N. C., 398..... 221
Black, Brink v. ..... 77 N. C., 59..... 219
Blackmore v. Winders .....144 N. C., 212..... 87
Blackwell v. Blackwell .....124 N. C., 269..... 28
Blackwell, Ray v. ..... 94 N. C., 10..... 37
Blackweller, Foggart v. ..... 26 N. C., 230..... 220
Bland v. Warren ..... 65 N. C., 374..... 560
Bledsoe v. Nixon ..... 68 N. C., 521..... 204
Blevins v. Cotton Mills.....150 N. C., 493..... 450
Blevins, S. v. .....138 N. C., 670..... 658
Blyth, Sasser v. ..... 2 N. C., 259..... 28
Bd. of Education v. Makeley.....139 N. C., 35..... 116
Bd. of Trustees v. Webb.....155 N. C., 379..... 12
Bobbitt, Jenkins v. ..... 77 N. C., 385..... 357
Bond, Inge v. ..... 10 N. C., 101..... 220
Bonner, Hill v. ..... 44 N. C., 257..... 336
Borden, Hollowell v. .....148 N. C., 255..... 13
Borders, Weathers v. .....124 N. C., 610..... 244
Bowling v. Burton .....101 N. C., 176..... 87
Boyd, Sydnor v. .....119 N. C., 481..... 532
Boyd, Wilkinson v. .....136 N. C., 47..... 3
Bradshaw v. High Point.....151 N. C., 517..... 405
Brame v. Clark .....148 N. C., 364..... 143
Brewer v. Wynne .....154 N. C., 467.....312, 359
Brewster v. Elizabeth City.....137 N. C., 392..... 153
Brink v. Black ..... 77 N. C., 59..... 219
Brinson, Hahn v. .....133 N. C., 8..... 321
Bristol, Walton v. .....125 N. C., 419..... 532
Britt v. R. R. .....148 N. C., 37.....644, 648
Brittain, S. v. ..... 89 N. C., 481..... 657

Britton v. Thrailkill ..... 50 N. C., 331..... 558
Broom v. Broom .....130 N. C., 563..... 17
Browder, Ramsey v. .....136 N. C., 251..... 346
Brown, Buie v. .....104 N. C., 335..... 86
Brown v. Kinsey ..... 81 N. C., 245.....232, 235
Brunhild v. Freeman ..... 77 N. C., 128..... 400
Bryan, Scott v. ..... 73 N. C., 582..... 558
Bryson, Cope v. ..... 60 N. C., 112..... 53
Buckner, S. v. ..... 61 N. C., 558..... 475
Buie v. Brown .....104 N. C., 335..... 86
Buie v. Carver ..... 73 N. C., 265..... 19
Bullinger v. Marshall ..... 70 N. C., 520..... 221
Bunting, Draughon v. ..... 31 N. C., 10.....557, 558
Bunting v. Jones ..... 78 N. C., 243..... 25
Burgin v. Burgin ..... 82 N. C., 197..... 9
Burgin v. Smith .....151 N. C., 562..... 406
Burnett v. Nicholson ..... 86 N. C., 99..... 250
Burnett, R. R. v. .....123 N. C., 210..... 269
Burns v. Tomlinson .....147 N. C., 645.....382, 383
Burrell, Haun v. .....119 N. C., 547.....557, 558
Burton, Bowling v. .....101 N. C., 176..... 87

C

Cobb v. Rhea .....137 N. C., 298..... 496
Caldwell v. Insurance Co.....140 N. C., 100..... 593
Caldwell v. Wilson .....121 N. C., 473..... 339
Calvert v. Peebles ..... 82 N. C., 334..... 192
Carpenter v. Tucker ..... 98 N. C., 317..... 19
Carpet Co., Stewart v. .....138 N. C., 66..... 117
Carr, Williams v. ..... 80 N. C., 294.....377, 382
Carter v. Jones ..... 40 N. C., 196..... 201
Carter, Hull v. ..... 83 N. C., 249..... 87
Carter, Skinner v. .....108 N. C., 109..... 9
Carver, Buie v. ..... 73 N. C., 265..... 19
Cash Reg. Co. v. Townsend.....137 N. C., 652..... 220
Cason, Gwathney v. ..... 74 N. C., 5.....91, 93
Cedar Co., Lumber Co. v.....142 N. C., 418..... 161
City of Charlotte v. Shepard.....122 N. C., 602..... 14
City of New Bern, White v.....146 N. C., 447..... 271
City of Raleigh, Revis v.....150 N. C., 353..... 271
Chaffin v. Mfg. Co.....135 N. C., 102..... 144
Chaffin, Pratt v. .....136 N. C., 350..... 38
Chambers, Cooper v. ..... 15 N. C., 261..... 558
Cheshire, Condry v. ..... 88 N. C., 375..... 193
Childs, Neil v. ..... 32 N. C., 196..... 104
Church, Humphrey v. .....109 N. C., 137..... 58
Church, S. v. ..... 63 N. C., 15.....474, 609
Clark, Bank v. ..... 8 N. C., 36..... 560
Clark, Brame v. .....148 N. C., 364..... 143
Clayton, S. v. .....138 N. C., 732.....377, 382, 394
Clifton, S. v. .....152 N. C., 802..... 635
Clute, Corbett v. .....137 N. C., 551..... 392
Coal Co. v. Electric Co.....118 N. C., 232..... 269
Cobb, Tunstall v. .....109 N. C., 316..... 66

Cobb, Weisel v. .....114 N. C., 22..... 150
Coble v. Huffines .....133 N. C., 422..... 219
Cockerham v. Nixon..... 33 N. C., 269..... 633
Coffin, Redmond v. ..... 17 N. C., 441..... 450
Coley v. R. R. .....128 N. C., 534.....583, 585
Collier, Sherwood v. ..... 14 N. C., 381.....188, 190, 202
Collins v. Davis .....132 N. C., 106..... 431
Colonial Club, S. v.....154 N. C., 177..... 661
Coltrane, Drake v. ..... 44 N. C., 300..... 203
Combs v. Harshaw ..... 63 N. C., 198.....557, 558
Comrs., Bank v. .....119 N. C., 226..... 540
Comrs., Barnes v. .....135 N. C., 27.....336, 351
Comrs., Evans v. ..... 89 N. C., 154..... 406
Comrs., Fortune v. .....140 N. C., 322.....334, 407
Comrs., French v. ..... 74 N. C., 692..... 512
Comrs., Grady v. ..... 74 N. C., 101..... 334
Comrs., Impr. Co. v. .....146 N. C., 353..... 409
Comrs., Jones v. .....137 N. C., 579.....333, 406
Comrs., McCormac v. ..... 90 N. C., 441..... 335
Comrs., McLeod v. .....148 N. C., 77..... 408
Comrs., Perry v. .....148 N. C., 521..... 406
Comrs., Shuford v. ..... 86 N. C., 552..... 518
Comrs., S. v. ..... 4 N. C., 419..... 338
Comrs., S. v. ..... 48 N. C., 399..... 338
Comrs. v. Packing Co.....135 N. C., 62..... 346
Comrs. v. Stedman .....141 N. C., 448..... 408
Comrs. v. Webb .....148 N. C., 122..... 405
Concord, Fitzgerald v. .....140 N. C., 110..... 271
Concord, Wadsworth v. .....133 N. C., 587..... 405
Condry v. Cheshire ..... 88 N. C., 375..... 193
Contracting Co., Wade v.....149 N. C., 177..... 448
Cook v. Ross .....117 N. C., 193..... 241
Cooper v. Chambers ..... 15 N. C., 261..... 558
Cope v. Bryson ..... 60 N. C., 112..... 53
Corbett v. Clute .....137 N. C., 551..... 392
Cornwell, McFarland v. .....151 N. C., 428..... 22
Corp. Com., Pullen v.....152 N. C., 548..... 408
Corp. Com. v. R. R.....137 N. C., 1..... 339
Cotten, Mayho v. ..... 69 N. C., 293..... 358
Cotton Co., Hosiery Co. v.....140 N. C., 452..... 387
Cotton Mills, Blevins v. .....150 N. C., 493..... 450
Cotton Mills, Hendrix v. .....138 N. C., 170..... 127
Cotton Mills, Malloy v. .....132 N. C., 432..... 346
Covington, S. v. ..... 70 N. C., 71..... 603
Cowell v. Insurance Co.....126 N. C., 684..... 456
Cox v. Jernigan .....154 N. C., 584.....3, 33
Cox v. Lighting and Fuel Co.....152 N. C., 164..... 268
Cox v. R. R. .....149 N. C., 117.....424, 425
Cox v. Williams ..... 58 N. C., 154..... 33
Craft, Hauser v. .....134 N. C., 319..... 3
Craton, S. v. ..... 28 N. C., 164..... 627
Crawford, Johnston v. ..... 61 N. C., 342..... 476
Crowell, Daniel v. .....125 N. C., 519..... 150

D

Dail v. Taylor .....151 N. C., 289..... 523
Dale v. Lumber Co.....152 N. C., 651.....558, 564
Daniel v. Crowell .....125 N. C., 519..... 150
Daniel, Farmer v. ..... 82 N. C., 153..... 193
Daniel, S. v. .....136 N. C., 571..... 609
Daniels v. Fowler .....120 N. C., 14..... 2
Davenport v. Fleming .....154 N. C., 291..... 358
Davenport v. McKee ..... 94 N. C., 326..... 104
Davenport, Phelps v. .....151 N. C., 22..... 577
Davenport, Simmons v. .....140 N. C., 407.....472, 611
Davidson, Bank v. ..... 70 N. C., 122..... 54
Davis, Collins v. .....132 N. C., 106..... 431
Davis v. Frazier .....150 N. C., 451.....213, 572, 574
Davis, Gaskins v. .....115 N. C., 85..... 276
Davis, Gore v. .....124 N. C., 234..... 274
Davis v. Insurance Co..... 84 N. C., 396..... 456
Davis v. Martin .....146 N. C., 281..... 94
Davis, Poindexter v. ..... 67 N. C., 114..... 236
Davis v. R. R. ..... 19 N. C., 451..... 511
Davis, S. v. ..... 80 N. C., 351..... 475
Davis, Watson v. ..... 52 N. C., 178..... 68
Davison v. Gregory .....132 N. C., 389..... 207
Deaver v. Deaver .....137 N. C., 242.....415, 558
Debnam, S. v. ..... 98 N. C., 712..... 611
Delamar, Harris v. ..... 38 N. C., 219..... 392
Dellinger, Kendrick v. .....117 N. C., 491..... 611
Deppe v. R. R. .....152 N. C., 80.....423, 424, 523
Devereux, Hyman v. ..... 63 N. C., 626..... 431
Dewey v. Sugg .....109 N. C., 329..... 431
Dickerson, Moring v. ..... 85 N. C., 466..... 26
Dickerson v. Simmons .....141 N. C., 325.....89, 93
Dixon, S. v. ..... 75 N. C., 275.....231, 654, 657
Dixon, Williams v. ..... 65 N. C., 416..... 634
Dobson v. Telegraph Co.....152 N. C., 766..... 307
Dodson v. Mock ..... 20 N. C., 282.....629, 630, 633
Dollar, Garrard v. ..... 49 N. C., 175..... 142
Dorsey v. Moore .....100 N. C., 44..... 276
Dougherty v. Stepp ..... 18 N. C., 371..... 144
Drake v. Coltrane ..... 44 N. C., 300..... 203
Draughon v. Bunting ..... 31 N. C., 10.....557, 558
Dunavant v. R. R. .....122 N. C.,1001..... 269
Dunbar, Wilkinson v. .....149 N. C., 20.....644, 648
Duncan v. Stalcup ..... 18 N. C., 440..... 143
Dunn v. R. R. .....151 N. C., 313..... 448
Dyeing Co. v. Hosiery Co.....126 N. C., 294..... 560

E

Eaves, S. v. .....106 N. C., 752..... 334
Edenton, Small v. .....146 N. C., 530..... 325
Edgerton v. Edgerton .....153 N. C., 167.....377, 382
Edwards, Grant v. ..... 88 N. C., 246..... 250
Edwards v. Phifer .....121 N. C., 391..... 158
Edwards, Vann v. .....135 N. C., 661.....532, 533, 534, 535

Electric Co., Coal Co. v.....118 N. C., 232..... 269
Electric Co. v. Engineering Co....128 N. C., 201..... 329
Electric Co., Horner v.....153 N. C., 535..... 495
Elizabeth City, Brewster v.....137 N. C., 392..... 153
Ellis v. R. R. ..... 24 N. C., 138..... 423
Ellison v. Williamston .....152 N. C., 147..... 405
Emerson, Ledford v. .....143 N. C., 536..... 182
Engineering Co., Elec. Co. v.....128 N. C., 201..... 329
Erwin v. Lowery ..... 64 N. C., 321..... 88
Evans v. Comrs. ..... 89 N. C., 154..... 406
Ex parte White..... 82 N. C., 378..... 9
Express Co., Thompson v.....147 N. C., 343..... 433
Exum, Thompson v. .....131 N. C., 111..... 106

F

Farmer v. Daniel .....82 N. C., 153..... 193
Farris v. R. R. .....151 N. C., 483..... 503
Fawcett v. Mount Airy.....134 N. C., 125..... 405
Featherstone v. Merrimon .....148 N. C., 199..... 28
Feezer, Machine Co. v.....152 N. C., 516..... 220
Fender, S. v. .....125 N. C., 649..... 602
Fertilizer Co. v. Marshburn.....122 N. C., 414..... 462
Fiber Co., Beal v.....154 N. C., 157..... 319
Fiber Co., Hipp v.....152 N. C., 745..... 448
Field v. Wheeler .....120 N. C., 269..... 496
Finch v. R. R. .....151 N. C., 105..... 295
Finch, Supply Co. v.....147 N. C., 106..... 558
Finger v. Hunter .....130 N. C., 529.....239, 243
Finley, Proctor v. .....119 N. C., 536..... 92
Simpson, S. v. ..... 12 N. C., 504..... 473
Fitzgerald v. Concord .....140 N. C., 110..... 271
Fitzgerald v. Furniture Co.....131 N. C., 645.....127, 134
Fitzgerald v. R. R. .....141 N. C., 534..... 75
Flaum v. Wallace .....103 N. C., 296.....239, 244
Fleming, Adcock v. ..... 19 N. C., 225..... 558
Fleming, Davenport v. .....154 N. C., 291..... 358
Fleming v. Graham .....110 N. C., 374.....353, 359
Foggart v. Blackweller ..... 26 N. C., 230..... 220
Fortune v. Comrs. .....140 N. C., 322.....334, 407
Foscue, Simmons v. ..... 81 N. C., 86..... 8
Fountain, Bank v. .....148 N. C., 590..... 231
Fowle, Moore v. .....139 N. C., 52..... 160
Fowler, Daniels v. .....120 N. C., 14..... 2
Fox, Fuller v. .....101 N. C., 119..... 66
Fraps, Womble v. ..... 77 N. C., 198..... 86
Frazier, Davis v. .....150 N. C., 451.....213, 572, 574
Freeman, Brunhild v. ..... 77 N. C., 128..... 400
Freeman, S. v. .....100 N. C., 434..... 649
French v. Comrs. ..... 74 N. C., 692..... 512
Frost, Stonestreet v. .....123 N. C., 640..... 434
Fuller v. Fox .....101 N. C., 119..... 66
Fuller, S. v. .....114 N. C., 894..... 496
Furguson, S. v. ..... 76 N. C., 197..... 338
Furniture Co., Fitzgerald v.....131 N. C., 645.....127, 134

G

Gainey v. Telegraph Co.....136 N. C., 261..... 153
Gallert, Justice v.....131 N. C., 393..... 611
Garland, S. v. .....138 N. C., 678.....654, 657
Garner, S. v. .....129 N. C., 536..... 646
Garrard v. Dollar ..... 49 N. C., 175..... 142
Garrett-Williams Co. v. Hamill...131 N. C., 57.....558, 559, 568
Gaskins v. Davis .....115 N. C., 85..... 276
Gatlin, Saunders v. ..... 21 N. C., 92..... 111
Gentry v. Wagstaff ..... 14 N. C., 270..... 28
Giles, Lawton v. ..... 90 N. C., 380..... 423
Gillespie v. Allison .....115 N. C., 548..... 9
Gilmer v. Hanks ..... 84 N. C., 317..... 219
Goldsboro, Robinson v. .....135 N. C., 382..... 405
Gore v. Davis .....124 N. C., 234..... 274
Grady v. Commissioners ..... 74 N. C., 101..... 334
Graham, Fleming v. .....110 N. C., 374.....353, 359
Grant v. Edwards ..... 88 N. C., 246..... 250
Graves, Tiddy v. .....129 N. C., 620..... 535
Gray, Ashe v. ..... 88 N. C., 190.....221, 222
Gray, Ashe v. ..... 90 N. C., 137..... 222
Green v. Harmon ..... 15 N. C., 161.....362, 373
Green v. R. R. ..... 77 N. C., 95..... 456
Greensboro, Wharton v. .....146 N. C., 356..... 406
Gregory, Davison v. .....132 N. C., 389..... 207
Griffin, Watts v. .....137 N. C., 572..... 535
Grocery Co., West v.....138 N. C., 168..... 6
Grocery Co., Womble v.....135 N. C., 474..... 117
Groome, Miller v. .....109 N. C., 148.....347, 538, 539
Groves, S. v. .....119 N. C., 822..... 611
Gwathney v. Cason ..... 74 N. C., 5.....91, 93

H

Hager v. Nixon ..... 69 N. C., 108..... 358
Hahn v. Brison .....133 N. C., 8..... 321
Hathcock, S. v. ..... 29 N. C., 52..... 615
Halstead v. Mullen ..... 93 N. C., 252..... 87
Halyburton v. Slagle .....132 N. C., 947..... 535
Hamby, S. v. .....126 N. C.,1066..... 252
Hamill, Garrett-Williams Co. v...131 N. C., 57.....558, 559, 568
Hampton, S. v. ..... 63 N. C., 13..... 603
Hanks, Gilmer v. ..... 84 N. C., 317..... 219
Hansley v. R. R. .....117 N. C., 565..... 477
Hardison, Hassard-Short v. .....114 N. C., 485..... 266
Hardwood Co., Winslow v.....147 N. C., 277..... 117
Hargrove, Harrison v. .....109 N. C., 346..... 286
Harmon, Green v. ..... 15 N. C., 161.....362, 373
Harrell v. Watson ..... 63 N. C., 454..... 235
Harrington v. Wadesboro .....153 N. C., 437..... 86
Harris v. Delamar ..... 38 N. C., 219..... 392
Harris v. Jenkins ..... 72 N. C., 183..... 536
Harris, S. v. ..... 76 N. C., 117..... 602
Harris, S. v. .....120 N. C., 578..... 646
Harris, Thornton v. .....140 N. C., 499..... 527

Harris, Tripp v. .....154 N. C., 296..... 209
Harrison v. Hargrove .....109 N. C., 346..... 286
Harrison, S. v. .....145 N. C., 414..... 651
Harshaw, Combs v. ..... 63 N. C., 198.....557, 558
Hart, Sloan v. .....150 N. C., 269..... 265
Hartsfield, Parrott v. ..... 20 N. C., 242..... 633
Harvell v. Lumber Co.....154 N. C., 262..... 523
Harvey v. Johnson .....133 N. C., 353..... 244
Harvey v. R. R. .....153 N. C., 567.....441, 442
Harvey Swepson v. ..... 66 N. C., 436..... 88
Hassard-Short v. Hardison .....114 N. C., 485..... 266
Hatley, S. v. .....110 N. C., 511..... 252
Haun v. Burrell .....119 N. C., 547.....557, 558
Hauser v. Craft .....134 N. C., 319..... 3
Hauser v. Telegraph Co.....150 N. C., 557.....153, 552
Haywood, S. v. ..... 94 N. C., 847..... 626
Heath v. Morgan .....117 N. C., 505..... 328
Heath, Whitmire v. .....155 N. C., 304.....216, 221
Heltrick, Wozelka v. ..... 93 N. C., 10..... 415
Henderson, Ross v. ..... 77 N. C., 170..... 150
Hendrick v. R. R. ..... 98 N. C., 431..... 587
Hendricks, Simmons v. ..... 43 N. C., 84..... 192
Hendricks v. Telegraph Co.....126 N. C., 312..... 306
Hendrix v. Cotton Mills.....138 N. C., 170..... 127
Hendrix, Stanly v. ..... 35 N. C., 86..... 557
Hinson v. King ..... 48 N. C., 419..... 220
Hicks v. Mfg. Co. .....138 N. C., 319.....450, 524
High Point, Bradshaw v.....151 N. C., 517..... 405
Hildreth, S. v. ..... 32 N. C., 440..... 614
Hill v. Bonner ..... 44 N. C., 257..... 336
Hill v. Hilliard .....103 N. C., 34..... 189
Hill, S. v. .....141 N. C., 769..... 658
Hilliard v. Asheville .....118 N. C., 845..... 506
Hilliard, Hill v. .....103 N. C., 34..... 189
Hilliard v. Newberry .....153 N. C., 104..... 275
Hilton, S. v. .....151 N. C., 687..... 252
Hines v. Hines ..... 84 N. C., 125..... 538
Hinson, Sossamer v. ..... 72 N. C., 578..... 463
Hinson, S. v. ..... 83 N. C., 640.....475, 603
Hinton, Jennings v. .....126 N. C., 51..... 533
Hipp v. Fiber Co.....152 N. C., 745..... 448
Hobbs, Hospital Assn. v.....153 N. C., 188..... 557
Hockoday v. Parker ..... 53 N. C., 17..... 558
Hocutt v. R. R. .....124 N. C., 214..... 157
Hocutt v. Telegraph Co.....147 N. C., 186.....153, 552
Hodges, Hughes v. .....102 N. C., 237.....353, 355
Hodgin v. Bank .....128 N. C., 110..... 150
Holden v. Peace ..... 38 N. C., 228..... 491
Holden v. Strickland .....116 N. C., 185..... 207
Holden v. Warren .....118 N. C., 327..... 87
Holley, *In re* .....154 N. C., 163..... 251
Holley, Jenkins v. .....140 N. C., 379.....557, 562
Holley v. Smith .....132 N. C., 36..... 269
Holley, S. v. .....155 N. C., 485.....640, 658
Hollowell v. Borden .....148 N. C., 255..... 13

Holt-Morgan Mills, Norris v.....154 N. C., 474..... 449
Horne v. Bank .....108 N. C., 119..... 557
Horner v. Electric Co.....153 N. C., 535..... 495
Hornthal v. Howcott .....154 N. C., 228.....213, 572, 574
Hosiery Co. v. Cotton Co.....140 N. C., 452..... 387
Hosiery Co., Dyeing Co. v.....126 N. C., 294..... 560
Hosiery Mills v. R. R.....131 N. C., 238..... 423
Hospital Assn. v. Hobbs.....153 N. C., 188..... 557
Hough, S. v. .....138 N. C., 663..... 658
Houghtalling, Knight v. ..... 85 N. C., 17..... 612
House, Parker v. ..... 66 N. C., 374..... 142
House v. R. R. .....152 N. C., 397..... 448
Howcott, Hornthal v. .....154 N. C., 228.....213, 572, 574
Howell v. Reams ..... 73 N. C., 393..... 203
Huffines, Coble v. .....133 N. C., 422..... 219
Huggins, S. v. .....126 N. C.,1055..... 646
Huggins v. Waters .....154 N. C., 444..... 257
Hughes v. Hodges .....102 N. C., 237.....353, 355
Hughes v. Knott .....138 N. C., 105..... 577
Hull v. Carter ..... 83 N. C., 249..... 87
Humphrey v. Church.....109 N. C., 137..... 58
Hunter, Finger v. .....130 N. C., 529.....239, 243
Hunter v. Kirk ..... 11 N. C., 277..... 179
Hurdle, Outlaw v. ..... 46 N. C., 150..... 68
Hussey v. Kirkman ..... 95 N. C., 64..... 493
Hyman v. Devereux ..... 63 N. C., 626..... 431
Hyman, Whitehurst v. ..... 90 N. C., 487.....557, 563

I

Improvement Co. v. Comrs.....146 N. C., 353..... 409
Industrial Co., Moore v.....138 N. C., 304..... 241
Inge v. Bond ..... 10 N. C., 101..... 220
Ingram v. Watkins ..... 18 N. C., 444..... 19
In re Holley .....154 N. C., 163..... 251
Ins. Co., Caldwell v. .....140 N. C., 100..... 593
Ins. Co., Cowell v. .....126 N. C., 684..... 456
Ins. Co., Davis v. ..... 84 N. C., 396..... 456
Ins. Co., Jones v. .....151 N. C., 54..... 593
Ins. Co., Jones v. .....153 N. C., 388..... 593
Ins. Co., Lanier v. .....142 N. C., 15..... 100
Ins. Co., Pretzfelder v. .....123 N. C., 165..... 577
Ins. Co., Stroud v. .....148 N. C., 54..... 593
Ins. Co., Sykes v. .....148 N. C., 13..... 593
Ins. Co., Whitehurst v. .....149 N. C., 273.....221, 230, 593

J

Jackson v. Baird .....148 N. C., 29..... 111
Jackson v. Telephone Co.....139 N. C., 347..... 477
Jacobosky, Leroy v. .....136 N. C., 443..... 96
Jaynes, S. v. ..... 78 N. C., 504..... 642
Jeffreys, Bell v. ..... 35 N. C., 356..... 220
Jeffreys, S. v. .....117 N. C., 743..... 609
Jenkins v. Bobbitt ..... 77 N. C., 385..... 357
Jenkins, Harris v. ..... 72 N. C., 183..... 536

Jenkins, Holley v. .....140 N. C., 379.....557, 562
Jenkins v. Ore Co..... 65 N. C., 563..... 613
Jenkins, Sutton v. .....147 N. C., 16..... 111
Jennings v. Hinton .....126 N. C., 51..... 533
Jernigan, Cox v. .....154 N. C., 584.....3, 33
Jobbing Co., Basnight v.....148 N. C., 350..... 38
Johnson, Harvey v. .....133 N. C., 353..... 244
Johnson, Leach v. .....114 N. C., 88..... 578
Johnson, S. v. ..... 48 N. C., 266..... 657
Johnston v. Crawford ..... 61 N. C., 342..... 476
Jones, Bunting v. ..... 78 N. C., 243..... 25
Jones, Carter v. ..... 40 N. C., 196..... 201
Jones v. Comrs. .....137 N. C., 579.....333, 406
Jones v. Insurance Co.....151 N. C., 54..... 593
Jones v. Insurance Co.....153 N. C., 388..... 593
Jones, McKesson v. ..... 66 N. C., 264..... 236
Jones v. New Bern.....152 N. C., 64..... 406
Jones, Pendleton v. ..... 82 N. C., 249..... 400
Jones v. R. R. .....148 N. C., 586..... 453
Jones v. R. R. .....153 N. C., 419..... 279
Jones, Simpson v. ..... 82 N. C., 323.....169, 171
Jones v. Ward ..... 48 N. C., 26..... 18
Jones v. Warehouse Co.....138 N. C., 546..... 523
Jones, Whissenhunt v. ..... 78 N. C., 361..... 250
Joyner v. Sugg .....132 N. C., 580..... 358
Joyner, Tyson v. .....139 N. C., 69..... 230
Justice v. Gallert .....131 N. C., 393..... 611
Justices, Attorney-General v. ..... 27 N. C., 315..... 351
Justices, S. v. ..... 24 N. C., 430..... 351

K

Kearney v. Vann .....154 N. C., 311.....244, 535, 536
Kearns v. R. R. .....139 N. C., 471..... 227
Kelly v. Oliver .....113 N. C., 442..... 38
Kendall, S. v. .....143 N. C., 659..... 657
Kendrick v. Dellinger .....117 N. C., 491..... 611
Kennedy, S. v. ..... 91 N. C., 572..... 658
Kime v. R. R. .....153 N. C., 400..... 453
Kindley, Satterfield v. .....144 N. C., 455..... 558
King, Henson v. ..... 48 N C., 419..... 220
King, Smith v. .....107 N. C., 273..... 322
Kinnery, Lambert v. ..... 74 N. C., 348..... 357
Kinney v. R. R. .....122 N. C., 961..... 175
Kinsey, Brown v. ..... 81 N. C., 245.....232, 235
Kinsey v. Kinston .....145 N. C., 108..... 271
Kinston, Kinsey v. .....145 N. C., 108..... 271
Kinston v. Loftin .....149 N. C., 255.....505, 506
Kinston v. Wooten .....150 N. C., 295.....506, 513
Kirby, Remington v. .....120 N. C., 320..... 478
Kirk, Hunter v. ..... 11 N. C., 277..... 179
Kirkman, Hussey v. ..... 95 N. C., 64..... 493
Kivett v. McKeithan ..... 90 N. C., 106..... 266
Knapp, Telegraph Co. v..... 90 N. C., 171..... 142
Knight v. Houghtalling ..... 85 N. C., 17..... 612
Knight, Martin v. .....147 N. C., 564..... 66

Knott, Hughes v. .....138 N. C., 105..... 577
Knott v. R. R. .....142 N. C., 238..... 424
Kornegay v. Kornegay .....109 N. C., 191..... 78
Kornegay v. R. R. .....154 N. C., 392.....423, 424

L

Ladd v. Ladd .....121 N. C., 118..... 87
Lambert v. Kinnery ..... 74 N. C., 348..... 357
Lambertson v. Vann .....134 N. C., 108..... 346
Land Co., R. R. v.....137 N. C., 330..... 315
Landis, York v. ..... 65 N. C., 535..... 207
Lane, Withers v. .....144 N. C., 184..... 231
Laney, S. v. ..... 87 N. C., 535.....475, 603
Lanier v. Insurance Co.....142 N. C., 15..... 100
Latham, S. v. ..... 35 N. C., 33..... 630
Lawton v. Giles ..... 90 N. C., 380..... 423
Leach v. Johnson .....114 N. C., 88..... 578
Leach, Osborne v. .....133 N. C., 428..... 142
Leathers v. Tobacco Co.....144 N. C., 342..... 127
Ledbetter v. Pinner .....120 N. C., 455..... 8
Ledford v. Emerson .....143 N. C., 536..... 182
Ledford, S. v. .....133 N. C., 722..... 639
Lee v. Manley .....154 N. C., 244..... 53
Lee v. Pearce ..... 68 N. C., 76..... 22
Leroy v. Jacobosky .....136 N. C., 443..... 96
Lewis, S. v. .....142 N. C., 626..... 386
Lewis v. Rountree ..... 78 N. C., 323..... 220
Lewis v. Telegraph Co.....117 N. C., 436..... 154
Lighting and Fuel Co., Cox v.....152 N. C., 164..... 268
Lilly v. Purcell ..... 78 N. C., 82..... 463
Lily v. Taylor ..... 88 N. C., 490..... 406
Linebarger v. Linebarger .....143 N. C., 229..... 342
Little v. McCarter ..... 89 N. C., 233..... 558
Littlefield, S. v. ..... 93 N. C., 615..... 245
Lloyd S. v. ..... 85 N. C., 573.....474, 603
Locust, S. v. ..... 63 N. C., 575..... 538
Loftin, Kinston v. .....149 N. C., 255.....505, 506
Logan v. R. R. .....116 N. C., 941..... 500
Loomis, May v. .....140 N. C., 350..... 230
Love v. Atkinson .....131 N. C., 544..... 94
Love, Rhodes v. .....153 N. C., 468..... 350
Lowery, Erwin v. ..... 64 N. C., 321..... 88
Lowing v. Rintles ..... 97 N. C., 350..... 572
Lukin, Sanderlin v. .....152 N. C., 744..... 187
Lumber Co., Alleghany Co. v.....131 N. C., 6..... 161
Lumber Co., Bateman v. .....154 N. C., 248.....213, 574
Lumber Co., Bissell v. .....152 N. C., 123.....449, 524
Lumber Co., Dale v. .....152 N. C., 651.....558, 564
Lumber Co., Harvell v. .....154 N. C., 262..... 523
Lumber Co., Noble v. .....151 N. C., 76..... 523
Lumber Co., Tanner v. .....140 N. C., 475.....449, 524
Lumber Co., Twiddy v. .....154 N. C., 237..... 588
Lumber Co., Whitfield v. .....152 N. C., 214..... 315
Lumber Co. v. Cedar Co. .....142 N. C., 418..... 161
Lumber Co. v. R. R. .....143 N. C., 324..... 423
Lunn v. Shermer ..... 93 N. C., 164..... 221

M

Machine Co. v. Feezer.....152 N. C., 516..... 220
Machine Co. v. Seago.....128 N. C., 160..... 6
Makeley, Bd. Education v.....139 N. C., 35..... 116
Malloy v. Cotton Mills.....132 N. C., 432..... 646
Manley, Lee v. .....154 N. C., 244..... 53
Mfg. Co., Chaffin v. .....135 N. C., 102..... 144
Mfg. Co., Hicks v. .....138 N. C., 319.....450, 524
Mfg. Co., Midgette v. .....150 N. C., 341..... 5
Mfg. Co., Shaw v. .....146 N. C., 235..... 523
Mfg. Co., Snipes v. .....152 N. C., 46..... 226
Mfg. Co., Starnes v. .....147 N. C., 563..... 127
Mfg. Co. v. R. R. .....121 N. C., 514..... 74
Mfg. Co. v. R. R. .....122 N. C., 881..... 423
Mfg. Co. v. R. R. .....128 N. C., 284..... 74
Marcom v. R. R. .....126 N. C., 200..... 175
Marquette v. Telegraph Co.....153 N. C., 156..... 153
Marsh, Aycock v. ..... 30 N. C., 360..... 417
Marshall, Bullinger v. ..... 70 N. C., 520..... 221
Marshburn, Fertilizer Co. v.....122 N. C., 414..... 462
Martin v. Bank .....131 N. C., 123..... 496
Martin, Davis v. .....146 N. C., 281..... 94
Martin v. Knight .....147 N. C., 564..... 66
Martin, Ryan v. ..... 91 N. C., 465..... 84
Martin v. Sloan ..... 69 N. C., 128..... 321
Martin, S. v. ..... 85 N. C., 508..... 609
Mason v. Miles ..... 63 N. C., 564..... 179
Mason v. Wilson ..... 84 N. C., 53..... 557
Maultsby, S. v. .....130 N. C., 664..... 649
May v. Loomis .....140 N. C., 350..... 230
Mayer v. Adrian ..... 77 N. C., 83.....91, 93
Mayers v. McRimmon .....140 N. C., 640..... 230
Mayho v. Cotten ..... 69 N. C., 293..... 358
McAdams, Rice v. .....149 N. C., 29..... 415
McAden v. Palmer .....140 N. C., 258..... 204
McCarter, Little v. ..... 89 N. C., 233..... 558
McCauless, S. v. ..... 31 N. C., 375..... 603
McCormac v. Comrs. ..... 90 N. C., 441..... 335
McCurry v. McCurry ..... 82 N. C., 296..... 415
McDevitt, Norton v. .....122 N. C., 755..... 87
McEachin v. Stewart .....106 N. C., 336..... 87
McFarland v. Cornwell .....151 N. C., 428..... 22
McGinnis, S. v. .....138 N. C., 724.....377, 382, 394
McGowan, Mizell v. .....129 N. C., 93..... 157
McIntosh, McKinnon v. ..... 98 N. C., 89..... 220
McIver, Patterson v. ..... 90 N. C., 493..... 158
McKee, Davenport v. ..... 94 N. C., 326..... 104
McKeithan, Kivett v. ..... 90 N. C., 106..... 266
McKesson v. Jones ..... 66 N. C., 264..... 236
McKinnon v. McIntosh ..... 98 N. C., 89..... 220
McKinnon v. Morrison .....104 N. C., 354..... 611
McLean v. Shaw .....125 N. C., 492..... 2
McLendon, Threadgill v. ..... 76 N. C., 24.....557, 561
McLeod v. Comrs. .....148 N. C., 77..... 408
McLeod v. Nimocks .....122 N. C., 438..... 142

McMillan v. McMillan .....123 N. C., 577..... 8
McMinn, S. v. ..... 83 N. C., 668..... 661
McRae, Prince v. ..... 84 N. C., 675..... 400
McRimmon, Mayers v. .....140 N. C., 640..... 230
Medicine Co. v. Mizell.....148 N. C., 384..... 38
Mendenhall v. Benbow ..... 84 N. C., 650..... 148
Meredith v. R. R. .....137 N. C., 488..... 74
Merrill v. Merrill ..... 92 N. C., 657..... 158
Merrimon, Featherstone v. .....148 N. C., 199..... 28
Midgette v. Mfg. Co.....150 N. C., 341..... 5
Miles, Mason v. ..... 63 N. C., 564..... 179
Miller v. Groome .....109 N. C., 148.....347, 538, 539
Miller v. R. R. .....154 N. C., 441..... 359
Miller, Walker v. .....139 N. C., 448..... 150
Mills, Norris v. .....154 N. C., 474.....449, 524
Mills, S. v. .....104 N. C., 905..... 603
Mining Co., Morrison v. .....143 N. C., 250..... 242
Mitchell, Wells v. ..... 23 N. C., 489..... 149
Mitchem, Rankin v. .....141 N. C., 277.....377, 382
Mizell v. McGowan .....129 N. C., 93..... 157
Mizell, Medicine Co. v.....148 N. C., 384..... 38
Mizzell v. Ruffin .....118 N. C., 69..... 87
Mock, Dodson v. ..... 20 N. C., 282.....629, 630, 633
Moore, Bank v. .....138 N. C., 529..... 38
Moore, Dorsey v. .....100 N. C., 44..... 276
Moore v. Fowle .....139 N. C., 52..... 160
Moore v. Industrial Co.....138 N. C., 304..... 241
Moore, Smith v. .....142 N. C., 277..... 341
Moore, Smith v. .....149 N. C., 198..... 22
Morgan, Heath v. .....117 N. C., 505..... 328
Moring v. Dickerson ..... 85 N. C., 466..... 26
Morisey v. Swinson .....104 N. C., 555..... 250
Morrison v. Baker ..... 81 N. C., 76.....557, 566
Morrison, McKinnon v. .....104 N. C., 354..... 611
Morrison v. Mining Co.....143 N. C., 250..... 242
Morrison, S. v. ..... 85 N. C., 561..... 601
Morse v. Nixon ..... 51 N. C., 293..... 631
Morton, Nash v. ..... 48 N. C., 3..... 231
Mott, Tate v. ..... 96 N. C., 19..... 322
Mount Airy, Fawcett v.....134 N. C., 125..... 405
Mowery v. Salisbury ..... 82 N. C., 177..... 630
Mullen, Halstead v. ..... 93 N. C., 252..... 87
Murphy, S. v. ..... 84 N. C., 742..... 646
Murray v. Penny .....108 N. C., 324..... 492
Myers v. Petty .....153 N. C., 462..... 230

N

Nash v. Morton ..... 48 N. C., 3..... 231
Nash v. Southwick .....120 N. C., 459..... 241
Nash, S. v. ..... 88 N. C., 618..... 472
Neal, S. v. .....120 N. C., 614..... 631
Neal v. Bellamy ..... 73 N. C., 384.....558, 564
Neil v. Childs ..... 32 N. C., 195..... 104
New Bern, Jones v.....152 N. C., 64..... 406
Newberry, Hilliard v. .....153 N. C., 104..... 275

Newton, Sheppard v. .....139 N. C., 535.....554, 557, 558, 562
Nichols v. Bell ..... 46 N. C., 32..... 557
Nicholson, Burnett v. ..... 86 N. C., 99..... 250
Nelson, Wildes v. .....154 N. C., 590..... 450
Nimocks, McLeod v. .....122 N. C., 438..... 142
Nixon, Bledsoe v. ..... 68 N. C., 521..... 204
Nixon, Cookerham v. ..... 38 N. C., 269..... 633
Nixon, Hager v. ..... 69 N. C., 108..... 358
Nixon, Morse v. ..... 51 N. C., 293..... 631
Nixon v. Williams ..... 95 N. C., 103..... 28
Noble v. Lumber Co.....151 N. C., 76..... 523
Norman, Wilkins v. .....139 N. C., 41.....26, 28
Norris v. Mills .....154 N. C., 474.....449, 524
Norton v. McDevitt .....122 N. C., 755..... 87

O

Observer Co., Billings v. .....150 N. C., 540..... 143
Odell, Ward v. .....126 N. C., 948.....127, 134, 136
Oliver, Kelly v. .....113 N. C., 442..... 38
Ore Co., Jenkins v. ..... 65 N. C., 563..... 613
Osborne v. Leach .....133 N. C., 428..... 142
Outlaw v. Hurdle ..... 46 N. C., 150..... 68

P

Packing Co., Comrs. v.....135 N. C., 62..... 346
Page, S. v. .....127 N. C., 512..... 646
Page, Weir v. .....109 N. C., 220..... 244
Paine v. Roberts ..... 82 N. C., 452..... 19
Palmer, McAden v. .....140 N. C., 258..... 204
Paper Co., Belvin v.....123 N. C., 138..... 26
Paquin, Ball v. .....140 N. C., 83.....239, 244, 533
Parish, S. v. .....104 N. C., 679.....600, 646
Parker v. Beasley .....116 N. C., 1..... 53
Parker, Hockaday v. ..... 53 N. C., 17..... 558
Parker v. House ..... 66 N. C., 374..... 142
Parker v. R. R. .....123 N. C., 71..... 157
Parker v. Smith ..... 64 N. C., 291..... 142
Parker, S. v. .....132 N. C.,1018..... 616
Parrott v. Hartsfield ..... 20 N. C., 242..... 633
Patterson v. McIver ..... 90 N. C., 493..... 158
Patterson, Runyan v. ..... 87 N. C., 343..... 634
Patton v. Patton ..... 60 N. C., 572..... 148
Patton, Summey v. ..... 60 N. C., 601..... 148
Peace, Holden v. ..... 39 N. C., 228..... 491
Peace, Raleigh v. .....110 N. C., 32.....506, 507, 518
Peacock v. Barnes .....142 N. C., 219..... 460
Peanut Co. v. R. R. .....155 N. C., 148..... 434
Pearce, Lee v. ..... 68 N. C., 76..... 22
Pearman, S. v. ..... 61 N. C., 371..... 603
Pedrick v. R. R. .....143 N. C., 486..... 50
Peebles, Calvert v. ..... 82 N. C., 334..... 192
Pendleton v. Jones ..... 82 N. C., 249..... 400
Penniman v. Alexander .....111 N. C., 427..... 38
Penny, Murray v. .....108 N. C., 324..... 492
Perry v. Comrs. .....148 N. C., 521..... 406

Perry v. Phipps ..... 32 N. C., 259..... 630
Perry v. R. R. .....129 N. C., 333..... 269
Perry, S. v. ..... 50 N. C., 9..... 475
Petty, Myers v. .....153 N. C., 462..... 230
Phelps v. Davenport .....151 N. C., 22..... 577
Phifer, Edwards v. .....121 N. C., 391..... 158
Phillips v. R. R. .....138 N. C., 19..... 315
Phipps, Perry v. ..... 32 N. C., 259..... 630
Pinner, Ledbetter v. .....120 N. C., 455..... 8
Plummer v. Baskerville ..... 36 N. C., 252..... 65
Poindexter v. Davis ..... 67 N. C., 114..... 236
Pollock, S. v. ..... 26 N. C., 305.....603, 606
Pope v. Askew ..... 23 N. C., 16..... 66
Porter v. R. R. .....148 N. C., 563..... 159
Porter, Voorhees v. .....134 N. C., 604..... 557
Powell v. R. R. .....125 N. C., 370..... 135
Powell v. Smith ..... 66 N. C., 401..... 236
Powers, S. v. ..... 75 N. C., 281..... 623
Pratt v. Chaffin .....136 N. C., 350..... 38
Pressly v. Yarn Mills.....138 N. C., 410.....139, 449, 450
Pretzfelder v. Insurance Co.....123 N. C., 165..... 577
Prince v. McRae ..... 84 N. C., 675..... 400
Proctor v. Finley .....119 N. C., 536..... 92
Pullen v. Corp. Com.....152 N. C., 548..... 408
Purcell, Lilly v. ..... 78 N. C., 82..... 463
Purcell v. R. R. .....108 N. C., 414..... 87
Purnell v. R. R. .....122 N. C., 832..... 501

R

R. R., Ammons v. .....140 N. C., 199.....143, 144
R. R., Austin v. .....151 N. C., 137..... 453
R. R., Aycock v. ..... 89 N. C., 329..... 425
R. R., Baker v. .....150 N. C., 562..... 501
R. R., Biles v. .....139 N. C., 528.....102, 585
R. R., Britt v. .....148 N. C., 37.....644, 648
R. R., Coley v. .....128 N. C., 534.....583, 585
R. R., Corp. Com. v. .....137 N. C., 1..... 339
R. R., Cox v. .....149 N. C., 117.....424, 425
R. R., Davis v. ..... 19 N. C., 451..... 511
R. R., Deppe v. .....152 N. C., 80.....423, 424, 523
R. R., Dunavant v. .....122 N. C.,1001..... 269
R. R., Dunn v. .....151 N. C., 313..... 448
R. R., Ellis v. ..... 24 N. C., 138..... 423
R. R., Farris v. .....151 N. C., 483..... 503
R. R., Finch v. .....151 N. C., 105..... 295
R. R., Fitzgerald v. .....141 N. C., 534..... 75
R. R., Green v. ..... 77 N. C., 95..... 456
R. R., Hansley v. .....117 N. C., 565..... 477
R. R., Harvey v. .....153 N. C., 567.....441, 442
R. R., Hendrick v. ..... 98 N. C., 431..... 587
R. R., Hocutt v. .....124 N. C., 214..... 157
R. R., Hosiery Mills v. .....131 N. C., 238..... 423
R. R., House v. .....152 N. C., 397..... 448
R. R., Jones v. .....148 N. C., 586..... 453
R. R., Jones v. .....153 N. C., 419..... 279

R. R., Kearns v. ....139 N. C., 471.... 227
R. R., Kime v. ....153 N. C., 400.... 453
R. R., Kinney v. ....122 N. C., 961.... 175
R. R., Knott v. ....142 N. C., 238.... 424
R. R., Kornegay v. ....154 N. C., 392....423, 424
R. R., Logan v. ....116 N. C., 941.... 500
R. R., Lumber Co. v. ....143 N. C., 324.... 423
R. R., Mfg. Co. v. ....121 N. C., 514.... 74
R. R., Mfg. Co. v. ....122 N. C., 881.... 423
R. R., Mfg. Co. v. ....128 N. C., 284.... 74
R. R., Marcom v. ....126 N. C., 200.... 175
R. R., Meredith v. ....137 N. C., 488.... 74
R. R., Miller v. ....154 N. C., 441.... 359
R. R., Parker v. ....123 N. C., 71.... 157
R. R., Peanut Co. v. ....155 N. C., 148.... 434
R. R., Pedrick v. ....143 N. C., 486.... 50
R. R., Perry v. ....129 N. C., 333.... 269
R. R., Phillips v. ....138 N. C., 19.... 315
R. R., Porter v. ....148 N. C., 563.... 159
R. R., Powell v. ....125 N. C., 370.... 135
R. R., Purcell v. ....108 N. C., 414.... 87
R. R., Purnell v. ....122 N. C., 832.... 501
R. R., Ray v. ....141 N. C., 84.... 501
R. R., Ridley v. ....124 N. C., 37.... 315
R. R., S. v. ....149 N. C., 508.... 231
R. R., Selby v. ....113 N. C., 588.... 453
R. R., Sherrill v. ....140 N. C., 255.... 503
R. R., Smith v. ....132 N. C., 819.... 501
R. R., Stanly v. .... 89 N. C., 331....85, 328
R. R., Stewart v. ....137 N. C., 689.... 175
R. R., Strickland v. ....150 N. C., 4.... 501
R. R., Telegraph Co. v. .... 83 N. C., 420.... 587
R. R., Thomas v. ....129 N. C., 392.... 102
R. R., West v. ....140 N. C., 620.... 159
R. R., Williams v ....130 N. C., 116....420, 424
R. R., Williams v. ....140 N. C., 623....313, 424, 425
R. R., Williams v. ....144 N. C., 498....477, 478
R. R., Wolf v. ....154 N. C., 571.... 503
R. R., Wooten v. ....128 N. C., 119.... 534
R. R., Wright v. ....127 N. C., 229.... 175
R. R. v. Burnett ....123 N. C., 210.... 269
R. R. v. Land Co. ....137 N. C., 330.... 315
R. R. v. Walker .... 45 N. C., 575.... 195
R. R. v. Warren .... 92 N. C., 620.... 587
Rainey, Tuttle v. .... 98 N. C., 513.... 67
Raleigh v. Peace ....110 N. C., 32....506, 507, 518
Ramsey v. Browder ....136 N. C., 251.... 346
Randall, S. v. .... 87 N. C., 571.... 627
Rankin v. Allison .... 64 N. C., 674.... 43
Rankin v. Mitchem ....141 N. C., 277....377, 382
Rawls, S. v. .... 65 N. C., 334....470, 473, 609
Ray v. Blackwell .... 94 N. C., 10.... 37
Ray v. R. R. ....141 N. C., 84.... 501
Ray, S. v. .... 32 N. C., 39.... 603
Reams, Howell v. .... 73 N. C., 393.... 203

Redmond v. Coffin ..... 17 N. C., 441..... 450
Remington v. Kirby .....120 N. C., 320..... 478
Revis v. Raleigh .....150 N. C., 353..... 271
Rhea, Cobb v. .....137 N. C., 298..... 496
Rhodes v. Love .....153 N. C., 468..... 350
Rice v. McAdams .....149 N. C., 29..... 415
Rice, Trull v. ..... 92 N. C., 572..... 8
Ridley v. R. R. .....124 N. C., 37..... 315
Rintles, Lowing v. ..... 97 N. C., 350..... 572
Robbins, S. v. ..... 78 N. C., 431..... 475
Roberts v. Baldwin .....151 N. C., 407..... 157
Roberts v. Baldwin .....155 N. C., 276.....30, 269
Roberts, Paine v. ..... 82 N. C., 452..... 19
Robinson, Ashford v. ..... 30 N. C., 114..... 558
Robinson v. Goldsboro .....135 N. C., 382..... 405
Rogers v. Rogers ..... 51 N. C., 300..... 558
Rolin v. Tobacco Co.....141 N. C., 310..... 127
Rorke, Rowland v. ..... 49 N. C., 337..... 558
Ross, Cook v. .....117 N. C., 193..... 241
Ross v. Henderson ..... 77 N. C., 170..... 150
Ross, S. v. ..... 49 N. C., 315.....603, 604
Rountree, Lewis v. ..... 78 N. C., 323..... 220
Rowland v. Barnes ..... 81 N. C., 239..... 558
Rowland v. Rorke ..... 49 N. C., 337..... 558
Ruffin, Mizzell v. .....118 N. C., 69..... 87
Runyan v. Patterson ..... 87 N. C., 343..... 634
Rutjes, Bailey v. ..... 86 N. C., 517..... 400
Ryan v. Martin ..... 91 N. C., 465..... 84

S

Salisbury, Mowery v. ..... 82 N. C., 177..... 630
Sanderlin v. Lukin .....152 N. C., 744..... 187
Sasser, Bagley v. ..... 55 N. C., 350..... 558
Sasser v. Blyth ..... 2 N. C., 259..... 28
Satterfield v. Kindley .....144 N. C., 455..... 558
Saunders v. Gatlin ..... 21 N. C., 92..... 111
School Trustees, Smith v.....141 N. C., 143..... 12
Scott v. Bryan ..... 73 N. C., 582..... 558
Scott, Springs v. .....132 N. C., 548..... 244
Seago, Machine Co. v.....128 N. C., 160..... 6
Selby v. R. R. .....113 N. C., 588..... 453
Shaw, Adrian v. ..... 82 N. C., 474..... 357
Shaw v. Mfg. Co.....146 N. C., 235..... 523
Shaw, McLean v. .....125 N C., 492..... 2
Shepard, City of Charlotte v.....122 N. C., 602..... 14
Shepard v. Telegraph Co.....143 N. C., 244..... 116
Shepard, S. v. ..... 82 N. C., 614..... 604
Shepard, Smithwick v. ..... 49 N. C., 197..... 558
Sheppard v. Newton .....139 N C., 535.....554, 557, 558, 562
Shermer, Lunn v. ..... 93 N. C., 164..... 221
Sherrill v. R. R. .....140 N. C., 255..... 503
Sherrill v. Telegraph Co.....109 N. C., 532..... 154
Sherwood v. Collier ..... 14 N. C., 381.....188, 190, 202
Shipman, S. v. ..... 81 N. C., 513..... 609
Shuford v. Comrs. ..... 86 N. C., 552..... 518

Simmons v. Allison .....118 N. C., 770..... 526
Simmons v. Davenport .....140 N. C., 407.....472, 611
Simmons, Dickerson v. .....141 N. C., 325.....89, 93
Simmons v. Foscue ..... 81 N. C., 86..... 8
Simmons v. Hendricks ..... 43 N. C., 84..... 192
Simpson v. Jones ..... 82 N. C., 323.....169, 171
Simpson, S. v. .....133 N. C., 677..... 616
Skinner v. Carter .....108 N. C., 109..... 9
Slagle, Halyburton v. .....132 N. C., 947..... 535
Sloan v. Hart .....150 N. C., 269..... 265
Sloan, Martin v. ..... 69 N. C., 128..... 321
Small v. Edenton .....146 N. C., 530..... 325
Smith, Beeson v. .....149 N. C., 145..... 392
Smith, Burgin v. .....151 N. C., 562..... 406
Smith, Holley v. .....132 N. C., 36..... 269
Smith v. King .....107 N. C., 273..... 322
Smith v. Moore .....142 N. C., 277..... 341
Smith v. Moore .....149 N. C., 198..... 22
Smith, Parker v. ..... 64 N. C., 291..... 142
Smith, Powell v. ..... 66 N. C., 401..... 236
Smith v. R. R. .....132 N. C., 819..... 501
Smith, S. v. .....125 N. C., 618..... 613
Smith v. School Trustees.....141 N. C., 143..... 12
Smith v. Smith .....108 N. C., 369..... 322
Smith, Whitaker v. ..... 81 N. C., 340..... 240
Smithwick v. Shepard ..... 49 N. C., 197..... 558
Smithwick v. Ward ..... 52 N. C., 64.....450, 476
Snipes v. Mfg. Co.....152 N. C., 46..... 226
Sossamer v. Hinson ..... 72 N. C., 578..... 463
Southwick Nash v. .....120 N. C., 459..... 241
Sowers v. Sowers ..... 87 N. C., 303..... 476
Speed, Beavan v. ..... 74 N. C., 544..... 357
Springs v. Scott .....132 N. C., 548..... 244
Sprinkle v. Wellborn .....140 N. C., 177..... 193
Stalcup, Duncan v. ..... 18 N. C., 440..... 143
Stanly v. R. R. ..... 89 N. C., 331.....85, 328
Stanly v. Hendrix ..... 35 N. C., 86..... 557
Starnes v. Mfg. Co.....147 N. C., 563..... 127
S. v. Adams .....138 N. C., 693..... 646
S. v. Barco .....150 N. C., 792..... 334
S. v. Bennett ..... 20 N. C., 170..... 602
S. v. Bevers ..... 86 N. C., 595..... 237
S. v. Blevins .....138 N. C., 670..... 658
S. v. Brittain ..... 89 N. C., 481..... 657
S. v. Buckner ..... 61 N. C., 558..... 475
S. v. Church ..... 63 N. C., 15.....474, 609
S. v. Clayton .....138 N. C., 732.....377, 382, 394
S. v. Clifton .....152 N. C., 802..... 635
S. v. Colonial Club .....154 N. C., 177..... 661
S. v. Comrs. ..... 4 N. C., 419..... 338
S. v. Comrs. ..... 48 N. C., 399..... 338
S. v. Covington ..... 70 N. C., 71..... 603
S. v. Craton ..... 28 N. C., 164..... 627
S. v. Daniel .....136 N. C., 571..... 609
S. v. Davis ..... 80 N. C., 351..... 475

S. v. Debnam ..... 98 N. C., 712..... 611
S. v. Dixon ..... 75 N. C., 275.....231, 654, 657
S. v. Eaves .....106 N. C., 752..... 334
S. v. Fender .....125 N. C., 649..... 602
S. v. Freeman .....100 N. C., 434..... 649
S. v. Fuller .....114 N. C., 894..... 496
S. v. Furguson ..... 76 N. C., 197..... 338
S. v. Garland .....138 N. C., 678.....654, 657
S. v. Garner .....129 N. C., 536..... 646
S. v. Groves .....119 N. C., 822..... 611
S. v. Hathcock ..... 29 N. C., 52..... 615
S. v. Hamby .....126 N. C.,1066..... 252
S. v. Hampton ..... 63 N. C., 13..... 609
S. v. Harris ..... 76 N. C., 117..... 602
S. v. Harris .....120 N. C., 578..... 646
S. v. Harrison .....145 N. C., 414..... 651
S. v. Hatley .....110 N. C., 522..... 252
S. v. Haywood ..... 94 N. C., 847..... 626
S. v. Hildreth ..... 32 N. C., 440..... 614
S. v. Hill .....141 N. C., 769..... 658
S. v. Hilton .....151 N. C., 687..... 252
S. v. Hinson ..... 83 N. C., 640.....475, 603
S. v. Holley .....155 N. C., 485.....640, 658
S. v. Hough .....138 N. C., 663..... 658
S. v. Huggins .....126 N. C.,1055..... 646
S. v. Jaynes ..... 78 N. C., 504..... 642
S. v. Jeffreys .....117 N. C., 743..... 609
S. v. Johnson ..... 48 N. C., 266..... 657
S. v. Justices ..... 24 N. C., 430..... 351
S. v. Kendall .....134 N. C., 659..... 657
S. v. Kennedy ..... 91 N. C., 572..... 658
S. v. Laney ..... 87 N. C., 535.....475, 603
S. v. Latham ..... 35 N. C., 33..... 630
S. v. Ledford .....133 N. C., 722..... 639
S. v. Lewis .....142 N. C., 626..... 386
S. v. Littlefield ..... 93 N. C., 615..... 245
S. v. Lloyd ..... 85 N. C., 573.....474, 603
S. v. Locust ..... 63 N. C., 575..... 538
S. v. Martin ..... 85 N. C., 508..... 609
S. v. Maultsby .....130 N. C., 664..... 649
S. v. McCauless ..... 31 N. C., 375..... 603
S. v. McGinnis .....138 N. C., 724.....377, 382, 394
S. v. McMinn ..... 83 N. C., 668..... 661
S. v. Mills .....104 N. C., 905..... 603
S. v. Morrison ..... 85 N. C., 561..... 601
S. v. Murphy ..... 84 N. C., 742..... 646
S. v. Nash ..... 88 N. C., 618..... 472
S. v. Neal .....120 N. C., 614..... 631
S. v. Page .....127 N. C., 512..... 646
S. v. Parish .....104 N. C., 679.....600, 646
S. v. Parker .....132 N. C.,1018..... 616
S. v. Pearman ..... 61 N. C., 371..... 603
S. v. Perry ..... 50 N. C., 9..... 475
S. v. Pollok ..... 26 N. C., 305.....603, 606
S. v. Powers ..... 75 N. C., 281..... 623

S. v. Randall ..... 87 N. C., 571..... 627
S. v. Rawls ..... 65 N. C., 334.....470, 473, 609
S. v. Ray ..... 32 N. C., 39..... 603
S. v. Robbins ..... 78 N. C., 431..... 475
S. v. Ross ..... 49 N. C., 315.....603, 604
S. v. R. R. .....149 N. C., 508..... 231
S. v. Shepard ..... 82 N. C., 614..... 604
S. v. Shipman ..... 81 N. C., 513..... 609
S. v. Simpson .....133 N. C., 677..... 616
S. v. Simpson ..... 12 N. C., 504..... 473
S. v. Smith .....125 N. C., 618..... 613
S. v. Tyson .....133 N. C., 698.....611, 612
S. v. Weaver .....104 N. C., 758..... 219
S. v. Webster .....121 N. C., 586..... 602
S. v. Widenhouse ..... 71 N. C., 279..... 475
S. v. Wilcox .....131 N. C., 707..... 651
S. v. Williams ..... 34 N. C., 172..... 338
S. v. Williams ..... 65 N. C., 398..... 652
S. v. Williams .....129 N. C., 582..... 646
S. v. Woodward .....119 N. C., 838..... 603
S. v. Worthington ..... 64 N. C., 594..... 470
S. v. Wynne .....118 N. C.,1206..... 623
S. v. York ..... 70 N. C., 66..... 615
Stedman, Comrs. v. .....141 N. C., 448..... 408
Stephenson v. Stephenson ..... 49 N. C., 472..... 173
Stepp, Dougherty v. ..... 18 N. C., 371..... 144
Stevens, Baum v. ..... 24 N. C., 411..... 220
Stewart v. Carpet Co.....138 N. C., 66..... 117
Stewart, McEachin v. .....106 N. C., 336..... 87
Stewart v. R. R. .....137 N. C., 689..... 175
Stokes v. Taylor .....104 N. C., 394..... 87
Stonestreet v. Frost .....123 N. C., 640..... 434
Stowe, Wright v. ..... 49 N. C., 518..... 19
Strickland, Holden v. .....116 N. C., 185..... 207
Strickland v. R. R. .....150 N. C., 4..... 501
Stroud v. Insurance Co.....148 N. C., 54..... 593
Stroud v. Stroud ..... 61 N. C., 525..... 148
Sugg, Dewey v. .....109 N. C., 329..... 431
Sugg, Joyner v. .....132 N. C., 580..... 358
Summey v. Patton ..... 60 N. C., 601..... 148
Supply Co. v. Finch.....147 N. C., 106..... 558
Sutton v. Jenkins .....147 N. C., 16..... 111
Swepson v. Harvey ..... 66 N. C., 436..... 88
Swinson, Morisey v. .....104 N. C., 555..... 250
Sydnor v. Boyd .....119 N. C., 481..... 532
Sykes v. Insurance Co.....148 N. C., 13..... 593
Sykes v. Telegraph Co.....150 N. C., 431..... 154

T

Tanner v. Lumber Co.....140 N. C., 475.....449, 524
Tate v. Mott ..... 96 N. C., 19..... 322
Tate, Thompson v. ..... 5 N. C., 97..... 220
Taylor, Audit Co. v.....152 N. C., 272..... 220
Taylor, Dail v. .....151 N. C., 289..... 523

Taylor, Lily v. ..... 88 N. C., 490..... 406
Taylor, Stokes v. .....104 N. C., 394..... 87
Taylor, Thompson v. .....110 N. C., 70..... 244
Taylor, Wilson v. .....154 N. C., 215.....298, 307
Telegraph Co., Dobson v. .....152 N. C., 766..... 307
Telegraph Co., Gainey v. .....136 N. C., 261..... 153
Telegraph Co., Hauser v. .....150 N. C., 557.....153, 552
Telegraph Co., Hendricks v. .....126 N. C., 312..... 306
Telegraph Co., Hocutt v. .....147 N. C., 186.....153, 552
Telegraph Co., Lewis v. .....117 N. C., 436..... 154
Telegraph Co., Marquette v. .....153 N. C., 156..... 153
Telegraph Co., Shepard v. .....143 N. C., 244..... 116
Telegraph Co., Sherrill v. .....109 N. C., 532..... 154
Telegraph Co., Sykes v. .....150 N. C., 431..... 154
Telegraph Co. v. Knapp ..... 90 N. C., 171..... 142
Telegraph Co. v. R. R. ..... 83 N. C., 420..... 587
Telephone Co., Jackson v.....139 N. C., 347..... 477
Thomas v. R. R. .....129 N. C., 392..... 102
Thomas, Williams v. ..... 78 N. C., 47..... 68
Thompson, Bennett v. ..... 35 N. C., 147..... 276
Thompson v. Express Co. .....147 N. C., 343..... 433
Thompson v. Exum .....131 N. C., 111..... 106
Thompson v. Tate ..... 5 N. C., 97..... 220
Thompson v. Taylor .....110 N. C., 70..... 244
Thornton v. Harris .....140 N. C., 499..... 527
Thrailkill, Britton v. ..... 50 N. C., 331..... 558
Threadgill v. McLendon ..... 76 N. C., 24.....557, 561
Tiddy v. Graves .....126 N. C., 620..... 535
Tobacco Co., Leathers v. .....144 N. C., 342..... 127
Tobacco Co., Rolin v. .....141 N. C., 310..... 127
Tomlinson, Burns v. .....147 N. C., 645.....382, 383
Townsend, Cash Reg. Co. v.....137 N. C., 652..... 220
Triplett v. Williams .....149 N. C., 396..... 29
Tripp v. Harris .....154 N. C., 296..... 209
Tripp, White v. .....125 N. C., 523..... 563
Trull v. Rice ..... 92 N. C., 572..... 8
Trust Co., Asheville v.....143 N. C., 360.....506, 507
Tucker, Carpenter v. ..... 98 N. C., 317..... 19
Tunstall v. Cobb .....109 N. C., 316..... 66
Turrentine, Adams v. ..... 30 N. C., 147..... 334
Tuttle v. Rainy ..... 98 N. C., 513..... 67
Tuttle v. Tuttle .....146 N. C., 487..... 577
Twiddy v. Lumber Co.....154 N. C., 237..... 588
Tyson v. Joyner .....139 N. C., 69..... 230
Tyson, S. v. .....133 N. C., 698.....611, 612

U

Unitype Co. v. Ashcraft.....155 N. C., 63..... 220

V

Vann v. Edwards .....135 N. C., 661.....532, 533, 534, 535
Vann, Kearney v. .....154 N. C., 311.....244, 535, 536
Vann, Lambertson v. .....134 N. C., 108..... 346

Venters, Walker v. .....148 N. C., 388..... 38
Voorhees v. Porter .....134 N. C., 604..... 557

W

Wacksmuth v. Relief Dept.....157 N. C., 34..... 450
Wade v. Contracting Co.....149 N. C., 177..... 448
Wadesboro, Harrington v. .....153 N. C., 437..... 86
Wadsworth v. Concord .....133 N. C., 587..... 405
Wagstaff, Gentry v. ..... 14 N. C., 270..... 28
Walker v. Miller .....139 N. C., 448..... 150
Walker, R. R. v. ..... 45 N. C., 575..... 195
Walker v. Venters .....148 N. C., 388..... 38
Wall v. Wall .....126 N. C., 405..... 28
Wallace, Flaum v. .....103 N. C., 296.....239, 244
Walton v. Bristol .....125 N. C., 419..... 532
Ward, Jones v. ..... 48 N. C., 26..... 18
Ward v. Odell .....126 N. C., 948.....127, 134, 136
Ward, Smithwick v. ..... 52 N. C., 64.....450, 476
Warehouse Co., Jones v.....138 N. C., 546..... 523
Warren, Bland v. ..... 65 N. C., 374..... 560
Warren, Holden v. .....118 N. C., 327..... 87
Warren, R. R. v. ..... 92 N. C., 620..... 587
Waters, Huggins v. .....154 N. C., 444..... 257
Watkins, Ingram v. ..... 18 N. C., 444..... 19
Watson v. Davis ..... 52 N. C., 178..... 68
Watson, Harrell v. ..... 63 N. C., 454..... 235
Watts v. Griffin .....137 N. C., 572..... 535
Weathers v. Borders .....124 N. C., 610..... 244
Weaver, S. v. .....104 N. C., 758..... 219
Webb, Bd. of Trustees v.....155 N. C., 379..... 12
Webster, S. v. .....121 N. C., 586..... 602
Webb, Comrs. v. .....148 N. C., 122..... 405
Weir v. Page .....109 N. C., 220..... 244
Weisel v. Cobb .....114 N. C., 22..... 150
Wellborn, Sprinkle v. .....140 N. C., 177..... 193
Wells v. Mitchell ..... 23 N. C., 489..... 149
West v. Grocery Co.....138 N. C., 168..... 6
West v. R. R. .....140 N. C., 620..... 159
Wharton v. Greensboro .....146 N. C., 356..... 406
Whissenhunt v. Jones ..... 78 N. C., 361..... 250
Wheeler, Field v. .....120 N. C., 269..... 496
Whitaker v. Smith ..... 81 N. C., 340..... 240
White v. Auditor .....126 N. C., 584..... 339
White v. City of New Bern.....146 N. C., 447..... 271
White, *Ex parte* ..... 82 N. C., 378..... 9
White v. Tripp .....125 N. C., 523..... 563
Whitehurst v. Hyman ..... 90 N. C., 487.....557, 563
Whitehurst v. Insurance Co.....149 N. C., 273.....221, 230, 593
Whitfield v. Lumber Co.....152 N. C., 214..... 315
Whitmire v. Heath .....155 N. C., 304.....216, 221
Widenhouse, S. v. ..... 71 N. C., 279..... 475
Wilkins, Anderson v. .....142 N. C., 161.....3, 244
Wilcox, S. v. .....131 N. C., 707..... 651

Wildes v. Nelson .....154 N. C., 590..... 450
Wilkins v. Norman .....139 N. C., 41.....26, 28
Wilkinson v. Boyd .....136 N. C., 47..... 3
Wilkinson v. Dunbar .....149 N. C., 20.....644, 648
Williams v. Carr ..... 80 N. C., 294.....377, 382
Williams, Cox v. ..... 58 N. C., 154..... 33
Williams v. Dixon ..... 65 N. C., 416..... 634
Williams, Nixon v. ..... 95 N. C., 103..... 28
Williams v. R. R. .....130 N. C., 116.....420, 424
Williams v. R. R. .....140 N. C., 623.....313, 424, 425
Williams v. R. R. .....144 N. C., 498.....477, 478
Williams S. v. ..... 34 N. C., 172..... 338
Williams, S. v. ..... 65 N. C., 398..... 652
Williams, S. v. .....129 N. C., 582..... 646
Williams v. Thomas ..... 78 N. C., 47..... 68
Williams, Triplett v. .....149 N. C., 396..... 29
Williamston, Ellison v. .....152 N. C., 147..... 405
Wilson v. Bank ..... 72 N. C., 621..... 207
Wilson, Caldwell v. .....121 N. C., 473..... 339
Wilson, Mason v. ..... 84 N. C., 53..... 557
Wilson v. Taylor .....154 N. C., 216.....298, 307
Winders, Blackmore v. .....144 N. C., 212..... 87
Winslow v. Hardwood Co. .....147 N. C., 277..... 117
Withers v. Lane .....144 N. C., 184..... 231
Wolf v. R. R. .....154 N. C., 571..... 503
Womble v. Fraps ..... 77 N. C., 193..... 86
Womble v. Grocery Co. .....135 N. C., 474..... 117
Woodward, S. v. .....119 N. C., 838..... 603
Wooten, Kinston v. .....150 N. C., 295.....506, 513
Wooten v. R. R. .....128 N. C., 119..... 534
Worthington, S. v. ..... 64 N. C., 594..... 470
Wozelka v. Heltrick ..... 93 N. C., 10..... 415
Wright v. R. R. .....127 N. C., 229..... 175
Wright v. Stowe ..... 49 N. C., 518..... 19
Wynne, Brewer v. .....154 N. C., 467.....312, 359
Wynne, S. v. .....118 N. C.,1206..... 623

Y

Yarn Mills, Pressley v.....138 N. C., 410.....139, 449, 450
Yeates v. Yeates ..... 76 N. C., 142..... 66
York v. Landis ..... 65 N. C., 535..... 207
York, S. v. ..... 70 N. C., 66..... 615

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1911

GEORGE L. SWINDELL ET AL. v. S. V. SMAW.

(Filed 13 September, 1911.)

Wills—Construction—Intent—Life Estate—Specific Devises.

A. devised to the husband, S., "all my possessions, land, stock, farming implements, household and kitchen furniture, him all I have, his lifetime (if I leave no heirs); he must pay all my debts, if any, . . ." with "request of him if I leave no heirs. I would like for him to give all to E. and M., M. my organ and watch and chain after his death": *Held*, though the devise is inartificially drawn, the word "heirs" meant children; and the husband took the devised property for life, with limitation to the children, if any, at the time of her death; if no children, then over to E. and M., with special provision that M. should have the organ and watch and chain.

APPEAL by defendant from *O. H. Allen, J.*, at May Term, 1911, of BEAUFORT.

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

Nicholson & Daniel for plaintiff.
Ward & Grimes for defendant.

CLARK, C. J. Mollie S. Smaw died, leaving as her last will and testament the following paper-writing:

"I, Mollie S. Smaw, while in good health and right mind, give unto my husband, Samuel V. Smaw, all my possessions, land, store, farming

implements, household and kitchen furniture, him all I have, his
(2) lifetime (if I leave know heirs); he must pay all my debts, if any. I leave him executor to my will.

"I will make a request of him, if I leave know heirs: I would like for him to give all to Earnest and Myrtle Swindell; Myrtle S. my organ and watch and chain after his death.

"This is my only and last will. As have settled all my father's debts and payed all the heirs, I feel as I can do as I choose with what little I have.

"Signed this day, 21 June, 1899.

"(Duly witnessed.) MOLLIE S. SMAW [SEAL]."

This action is brought by certain of the heirs at law of the deceased against her husband, who is in possession of the property, to remove a cloud upon title, under Rev., 1589, alleging that he is claiming the same in fee simple, whereas the alleged will is void for uncertainty and the defendant is entitled only to a life estate as tenant by the curtesy, or, at most, under the will he has a life estate only. Such action can now be brought, though the plaintiff is not in possession. *Daniels v. Fowler,* 120 N. C., 14; *McLean v. Shaw,* 125 N. C., 492.

The will is very inartificially drawn, but we do not think it is so unmeaning as to be void. The devise to the husband is as specifically for "his lifetime," and there is nothing in the will to extend it beyond that time. The request that if she should leave no heirs she wishes him to give all to Ernest and Myrtle Swindell does not show that she intended for him to have more than a life estate, but the contrary. It is badly expressed, but the meaning is that they are to have all her property after her husband's death if she should die leaving no heirs. By the word "heirs" she evidently meant "children," which is not an unusual use of the word among those who do not know its technical meaning in the law. The testatrix intended by this will, as we understand it, that the property should go to her husband for life, then to her children, should she leave any at her death, and, if none, then over to Ernest and Myrtle Swindell, with a special provision that Myrtle should have her organ and watch and chain.

(3) In *Hauser v. Craft,* 134 N. C., 319, as to an item in a will very similar to this, where there was a devise of property to A. for life, and should A. die without leaving children, then over to the testator's heirs, the Court held that A. held a life estate, with a remainder to the children. This has been cited and approved in *Wilkinson v. Boyd,* 136 N. C., 47; *Anderson v. Wilkins,* 142 N. C., 161; *Cox v. Jernigan,* 154 N. C., 584.

Ernest and Myrtle Swindell should have been made parties to this proceeding. But as the decision is in their favor, we do not hold the case up till they are made parties. When the case goes back for final judgment below, upon the facts agreed, it will be well to have them made parties, also any other heirs and next of kin of the testatrix, if any, who are not already parties to this action.

Reversed.

Cited: Bullock v. Oil Co., 165 N. C., 68; *Albright v. Albright*, 172 N. C., 353.

H. V. SUTTON v. HANNAH LYONS ET AL.

(Filed 13 September, 1911.)

1. Negligence—Defective Machinery—Sawmill—Ownership—Evidence.

For the purposes of plaintiff's action for damages alleged to have been received at the defendant's sawmill while at work as an employee, evidence which tends to show that the mill was attached to defendant's land as a part of the realty, or, if unattached thereto, that it was easily moved, remained on the land for a year unused, and defendant had ordered the plaintiff not to go on the premises, is evidence of ownership.

2. Evidence—Personal Property—Possession—Title.

The possession of personal property is evidence of ownership.

3. Same—Operation.

The plaintiff sued for damages alleged to have been received while working for defendant at his sawmill. Defendant denied the ownership of the mill or that he operated it: *Held*, evidence that defendant was the owner of the mill on her land, which was sawing her timber, was some evidence that the defendant was operating it.

4. Principal and Agent—Tax List—Declarations—Evidence.

An abstract of taxes made by one purporting to be an agent is incompetent as against the principal in the absence of other evidence of agency, it being necessary that an agency be proved *aliunde* the declarations of the agent.

5. Principal and Agent—Evidence Aliunde.

Agency may be proved by the testimony of the agent.

APPEAL from *Justice, J.*, at the February Term, 1911, of (4) CURRITUCK.

This is an action to recover damages for personal injury. The plaintiff alleges that he was injured by the negligence of the defendant on 7

August, 1906, while working at her mill, and that the negligence consisted in a defect in the machinery. The defendant denies negligence, and also denies that she was the owner of the mill or that she operated it.

The defendant admits in her answer that the mill is located on her land, and that it was engaged in sawing some of the timber on the land, but says that it has not been in operation for twelve months. The defendant further alleges that the plaintiff was a trespasser in going upon said premises, and that he was there contrary to the express orders and directions of the defendant.

It was in evidence that W. J. Tate managed the mill, and for the purpose of showing that he was agent of the defendant Lyon, the plaintiff offered in evidence the tax list of the plaintiff for 1906, signed "W. J. Tate, agent," which was excluded, and the plaintiff excepted.

There was some evidence of negligence, and that this was the cause of the plaintiff's injury, but his Honor, being of opinion that there was no evidence that the defendant Lyon was the owner of the mill and operated it, entered a judgment of nonsuit, on motion of the defendant, and the plaintiff excepted and appealed.

W. M. Bond and Ward & Grimes for plaintiff.

J. C. B. Ehringhaus and E. F. Aydlett for defendant.

(5) ALLEN, J., after stating the case: In our opinion, there was evidence fit to be submitted to the jury. It is not conclusive in its nature, and may be weakened or strengthened, when all the facts are developed.

The admission that she is the owner of the land on which the mill is located is some evidence that she is the owner of the mill. If affixed to the soil it would be a part of the land, nothing else appearing, and if not, and it was personalty, the fact that it is on her land is evidence of possession, and evidence of the possession of personalty is evidence of title, in the absence of other proof. There is also evidence that the defendant was exercising dominion over the property, as she says she had given direction for the plaintiff to stay off the premises.

The circumstances that the mill "is situated" on the land, and "has not been in operation during the past twelve months," is entitled to some weight, as ordinarily valuable property, not in use, is not left so long on the land of another.

If there is evidence that the defendant is the owner of the mill on her land, and sawing her timber, this could be considered by the jury on the question of the operation of the mill.

"Where the plaintiff has suffered an injury from the negligent management of a vehicle, such as a boat, car or carriage, it is sufficient *prima*

facie evidence that the negligence was imputable to the defendant to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant, leaving him to show, if he can, that the property was not under his control at the time, and that the accident was occasioned by the fault of a stranger, an independent contractor or other person, for whose negligence the owner would not be answerable. 1 Sherm. and Redf. Neg., 71. Any other rule, especially where persons are dealing with corporations, which can act only through agents and servants, would render it almost impossible for a plaintiff to recover for injuries sustained by defective machinery or negligent use of machinery." *Midgette v. Mfg. Co.*, 150 N. C., 341.

The abstract of taxes was not admissible in evidence. It was (6) offered to show that Tate was the agent of the defendant, but it amounted to no more than a declaration, and an agency cannot be proved in this way.

"That an agency must be proved *aliunde* the declarations of the alleged agent is elementary law, and this is true both as to the establishment of the agency and the nature and extent of the authority." *West v. Grocery Co.*, 138 N. C., 168. It may, however, be established by the testimony of the agent under oath. *Machine Co. v. Seago*, 128 N. C., 160. The judgment of nonsuit is

Reversed.

Cited: Embler v. Lumber Co., 167 N. C., 460; *Allen v. R. R.*, 170 N. C., 334.

JOSEPH F. TAYLOR v. MRS. ANNIE H. CARROW AND HUSBAND ET AL.

(Filed 13 September, 1911.)

1. Tenants in Common—Partition—Appeal from Clerk—Judge's Discretion—Appeal and Error.

In proceedings under a petition for partition of lands, the action of the judge in setting aside the report of the clerk for a partial division and ordering a sale, for the reason that he has found as a fact that the land cannot be fairly divided, is within his discretion, and is not reviewable on appeal.

2. Partition—Tenants in Common—Actual Partition—Sale.

Prima facie, tenants in common are entitled to actual partition; but only when such partition can be made without injury to any of the parties. Revisal, 2512.

3. Tenants in Common—Partition—Interlocutory Orders—Final Decree.

Until the decree of confirmation by the judge, the proceedings for the partition of lands are not final, but interlocutory, and rest in his discretion.

4. Same—Rereference.

Before the decree of confirmation, orders made by the judge in proceedings for partition, as to a part sale and part actual division, allotting a certain part of the lands to one of the petitioners, are interlocutory, and it is within his discretion thereafter and before entering the final order of confirmation to refer the matter to new commissioners under an order to sell the land for a division of the proceeds, having found that his former order would not have been fair to all the parties interested.

5. Partition—Appeal from Clerk—Different Judges—Interlocutory Orders.

When appeals from the clerk in proceedings for partition are made successively to different judges, a judge before whom comes a later appeal may set aside or modify a former interlocutory order, it not being required for that purpose that the same judge should have passed upon the former appeals.

(7) APPEAL by plaintiffs from *Ward, J.*, at March Term, 1911, of BEAUFORT.

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

W. C. Rodman, Small, McLean & McMullan for petitioner.
Nicholson & Daniel for appellant.
Martin & Critcher for defendant Godwin.

CLARK, C. J. This is a petition for sale of land for partition, the plaintiff alleging that the land was not susceptible of actual partition. Some of the defendants answered, asking that the land be actually divided. The clerk made an order directing actual partition and appointing commissioners. To this order the petitioner and certain of the defendants excepted. The commissioners attempted to make actual partition, and filed a report, but two of them reported further that owing to the shape, area, and topography of the land the best interest of all the parties would be subserved by a sale. This the clerk overruled and confirmed the report. Upon appeal to the judge the partition was set aside and the commissioners were directed to set apart and allot one-seventh in value of the land to the defendant, Annie Carrow (who alone insisted on actual partition), and ordered a sale of

the remainder for partition. The second set of commissioners made their report, which was confirmed by the clerk; but on appeal the judge set aside the report of the commissioners and directed that the entire property be sold for partition, finding as a fact that this property could not be fairly divided and that a sale would best sub- (8) serve the interests of all parties.

In *Ledbetter v. Pinner,* 120 N. C., 455, the Court said: "The only controverted fact arising on the pleadings was as to the advisability of sale for partition or an actual partition. This was not an issue of fact, but a question of fact for the decision of the clerk in the first instance, subject to review by the judge on appeal."

This action of the judge in setting aside the report and ordering a sale is not reviewable unless there is an error of law committed. In *Simmons v. Foscue,* 81 N. C., 86, the Court said: "Of the force and effect of the evidence in inducing the exercise of that reasonable discretion reposed by law in the judge when called on to confirm the action of the commissioners, he alone must determine, and if no error in law was committed we cannot reverse his decision." This has been cited and approved, *Trull v. Rice,* 92 N. C., 572; *McMillan v. McMillan,* 123 N. C., 577.

The appellant, Annie Carrow, insists that error in law was committed in that the judge having decreed actual allotment to her of one-seventh and a sale of the remainder, the matter was *res judicata,* and he could not, upon setting aside the report, decree a sale of the part allotted to her. Rev., 2516, authorizes the judge to decree actual partition of a part of the land and a sale of the remainder, but his decree to that effect is interlocutory, as much so as the decree for the sale of the remainder. Until the confirmation of the report, the whole matter rests in the judgment of the clerk, subject to review by the judge, whose action is binding on us unless an error of law has been committed. A judge might well find on the coming in of a report that the clerk's former order directing actual partition was impracticable, as the judge found here upon the report of two of the commissioners, and direct, as his Honor has done, that the report be set aside and actual partition made of part and a sale made for partition of the rest. For the same reason he might find, as he has done on the second report coming in, that the evidence showed that the actual allotment of a part of the land to one tenant in common was impracticable, or that it (9) damaged the sale of the remainder of the tract. He has so found as a fact in the case and thereupon it was eminently proper that he should set aside the report and with it the former order directing the allotment to Annie Carrow, and decree a sale of the whole tract at an upset price, both in parcels and as a whole (as he has done here), and

on coming in of the report of this sale it will be competent for the judge, upon appeal from the clerk, to confirm said sale or set aside the report and direct actual or partial partition, or a resale, as he may then find to be to the interest of the parties. Such orders, being interlocutory, rest in the discretion of the court.

Prima facie, tenants in common are entitled to actual partition, but only when such partition can be made without injury to any of the parties. Rev., 2512; *Gillespie v. Allison,* 115 N. C., 548. In *Skinner v. Carter,* 108 N. C., 109, it is said that the judge, "having the power to set aside the report, he might also make any order that could formerly have been made either by the clerk or the judge under such circumstances." The judge in the beginning was vested with the power to decree actual partition or a partial partition or a sale for partition. Having set aside the report, as he had power to do, the matter was then open to him, as *res nova.* Being better advised by the report or further evidence, he could not only refer it to new commissioners, but he could direct actual partition of the whole tract, or a sale of the whole or a partition of part and a sale of the remainder, just as he could originally. No title vested until the decree of confirmation upon the final report of the commissioners. Until the decree of confirmation the proceedings are not final, but interlocutory, and rest in the discretion of the court, even though the purchase money has been paid and the purchaser taken possession of the premises. Knapp on Partition, 335. On the other hand, even when there has been a decree of confirmation, title will not be executed until the purchase money has been paid. *Burgin v. Burgin,* 82 N. C., 197; *White, ex parte, ib.,* 378.

It makes no difference that the appeals may go up to differ-
(10) ent judges. The appeals are all from the clerk to the judge of the Superior Court. The former judgments of the judge, being interlocutory, are subject to be set aside or modified by him or his successors.

The minutiæ of the controverted details as to the successive appeals from the clerk to the judge need not be discussed by us. The judge below correctly held that they were immaterial irregularities at the most.

Affirmed.

Brown, J., did not sit.

Cited: *Patillo v. Lytle,* 158 N. C., 97; *Mills v. McDaniel,* 161 N. C., 115; *Thompson v. Rospigliosi,* 162 N. C., 156; *Vanderbilt v. Roberts, ib.,* 275.

S. V. ELLIS v. TRUSTEES OF THE GRADED SCHOOL OF OXFORD.

(Filed 13 September, 1911.)

1. **School Districts—Indebtedness—Constitutional Law—Vote of People.**
A special school district created by the Legislature is subject to the restrictions and limitations of the Constitution in reference to municipal indebtedness, and to the methods and powers of taxation therein prescribed.

2. **Same—Bond Issues—Schoolhouse—Necessary Expense—Injunction.**
The erection of a school building is not a necessary expense within the meaning of Art. VII, sec. 7, of our Constitution, and an issue of bonds for that purpose by a special school district is invalid and may be enjoined, unless the proposed issue shall have accordingly been submitted to a vote of the people.

3. **Bond Issues—Municipal Indebtedness—School Districts—Taxation.**
The payment of bonds constituting a valid municipal indebtedness may be enforced by appropriate taxation.

4. **Same—Power to Mortgage—General Indebtedness—Vote of People.**
A legislative enactment authorizing a special school district to "purchase and hold real and personal property and to sell, mortgage, and transfer the same for school purposes," etc., and approved by a majority of the qualified voters of the school district, at most only authorizes a mortgage on specific property, and is not sufficient to the validity of bonds issued by the trustees for school purposes, which constitute a general indebtedness of the district, and where their payment may be enforced by taxation.

APPEAL from *O. H. Allen, J.*, at August Term, 1911, of (11) GRANVILLE.

Case agreed. Defendants, the Trustees of the Graded School of the Town of Oxford, N. C., Inc., having determined to issue bonds to the amount of $20,000 as a debt of said Graded School District, Incorporated, and having advertised same for sale, the plaintiff, a citizen and taxpayer of the town, instituted the present action to restrain the said bond issue, claiming that said proposed action was unlawful because the proposition had not been approved by the vote of the people. The court, being of opinion that the board on the facts presented had the power to issue and sell the bonds, gave judgment that the preliminary restraining order be dissolved and that the trustees be allowed to proceed, whereupon plaintiff appealed.

Graham & Devin for defendant.
Plaintiff not represented.

HOKE, J. On the hearing, it was made to appear that the General Assembly, by chapter 333, Laws of 1903, had incorporated the Graded

School District of the Town of Oxford, conferring upon the board of trustees the power of general supervision and control of school matters within said district, and among other things making provision as follows: "The said board of graded school trustees hereby created shall be a body politic and corporate, by the name and style of The Board of Graded School Trustees of the Town of Oxford, and by that name shall be capable of receiving gifts and grants, purchasing and holding real and personal property, selling, mortgaging and transferring the same for school purposes, and of prosecuting and defending suits for or against the corporation hereby created. Conveyances to said board shall be to it and its successors in office, and all deeds, mortgages and other agreements affecting real estate and personal property shall be deemed sufficiently executed when signed by the chairman of said
(12) board of graded school trustees and attested by the secretary."

The act conferring power also to levy a tax not exceeding 30 cents on the $100 valuation of property and 90 cents on the poll for the support of the graded schools of the district had been duly submitted and approved by a vote of the people of the district, as directed by the statute itself and in accord with constitutional requirement. In the case agreed the facts pertinent to the inquiry are further stated as follows:

"4. That by chapter 108, Private Laws of 1911, legislative authority was granted to defendant board to issue bonds for the erection of a graded school building in said town for school purposes, said act of 1911 setting out the manner thereof, with authority to execute deed of trust on said property to secure same. This act of 1911 does not provide for any tax levy in addition to that provided by the act of 1903. It is agreed that the act of 1911 may be read in full as if inserted here.

"5. That no election was provided or held under said act of 1911.

"6. That the defendant board has advertised for sale and is now offering for sale $20,000 in bonds executed by said board, and unless restrained will issue said bonds as the obligation of said board."

On these facts, the Court is of opinion that the bonds in question would not be valid obligations of the school district, and that their issue in the form as now proposed should be permanently enjoined. While it is now well established with us that the "Legislature may create special public *quasi* corporations for governmental purposes in designated portions of the State's territory," and confer upon them power to contract debts, levy taxes, etc., (*Trustees v. Webb.*, 155 N. C., 379), it is also as fully recognized that when in the exercise of such power a given district has been created, the restrictions and limitations provided by the Constitution in reference to municipal indebtedness, and

as to the methods and powers of taxation of such corporations, must be observed. *Smith v. School Trustees,* 141 N. C., 143.

In Article VII, sec. 7, of the Constitution, this being the section more directly relevant to this inquiry, it is provided, "That (13) no county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or contracted by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." And the doctrine as above stated in reference to this and other restrictive provisions of the Constitution which are applicable will be found very well stated in the 3d and 4th headnotes of *Smith v. School Trustees, supra,* as follows:

"3. The Legislature can create a specific school district within the precincts of a county, incorporate its controlling authorities, confer upon them certain governmental powers, and when accepted and sanctioned by a vote of the qualified electors within the prescribed territory as required by our Constitution, Article VII, sec. 7, may delegate to such authorities power to levy a tax and issue bonds in furtherance of the corporate purpose.

"4. School districts are public *quasi* corporations, included in the term municipal corporations as used in Article VII, sec. 7, of our Constitution, and so come within the express provisions of section 7, that 'No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, etc.; nor shall any tax be levied, etc., unless by a vote of the majority of the qualified voters therein.' And the principle of uniformity is established and required by section 9 of this article."

Again, in *Hollowell v. Borden,* 148 N. C., 255, it was held:

"1. A legally qualified board of trustees of the graded schools of a town is a municipal corporation within the meaning and purport of Article VII, sec. 7, of the State Constitution.

"2. The expense of a public school system of a town is not a necessary municipal expense, and a bond issue to pay a debt contracted for that purpose, to be constitutional, must be submitted to a vote of the qualified voters of the township."

The erection of this school building, therefore, not being a necessary expense within the meaning of the constitutional provision, it follows from these and other decisions of similar import, that (14) the proposed indebtedness could not be lawfully incurred, "unless approved by a majority of the qualified voters of the school district."

It is insisted for defendants that although no election has been had and none provided for under the statute of 1911, the power was conferred by the former statute, to wit, chapter 333, Laws 1903, which was submitted to and approved by the voters, and this by virtue of that clause in the act by which trustees were authorized to "purchase and hold real and personal property and to sell, mortgage, and transfer the same for school purposes, etc."; but the position, in our opinion, cannot be sustained.

It may be that if the proposition now presented was to issue these bonds, secure the same by mortgage on the building, and with the stipulation that the owner could in no event hold the municipality for any sum greater than could be realized by foreclosure sale under the mortgage, the authority to mortgage contained in the act of 1903 would suffice; but such is not the proposition embodied in the case agreed. There is no allegation that this indebtedness shall be restricted to the proceeds of the mortgage. We do not find it stated that a mortgage is even intended. On the contrary, these bonds, to the amount of $20,000, whether secured by a mortgage on the building or not, are to constitute a valid municipl indebtedness, and where this is true it is very generally held that payment may be enforced by appropriate taxation, and this whether provision is expressly made for such taxation or not. *Charlotte v. Shepard,* 122 N. C., 602; Abbott on Municipal Corporations, p. 360. In the last citation the general principle is expressed as follows: "Corporate indebtedness legally incurred for a public purpose by the corporation in its capacity as a public or governmental agent is generally paid through the imposition and collection of taxes, and, as will be noted in succeeding section, 310, the payment of valid indebtedness is considered a public purpose and one authorizing such action. In the absence of a constitutional or statutory limitation upon the power to tax, the granting of the authority to incur an indebtedness impliedly authorizes the levy of taxes sufficient to pay the debt and the interest as it becomes due. 311. Though some few (15) cases hold to the contrary, the weight of authority is sustained by the better reason."

A statute conferring power to create a debt to be secured by mortgage on a specific piece of property in its ordinary management is a very different proposition from the power to contract for a large municipal indebtedness, enforcible by taxation on all the property in a given district. A voter might very well be disposed to approve the one and be entirely opposed to the other. We are of opinion, therefore, that the proposed bond issue comes directly within the provisions of Article

VII, sec. 7, of the Constitution, that no vote of the people has been had thereon and that the issue in the form as now proposed should be permanently enjoined.

There is error, and judgment shall be entered below according to this opinion.

Reversed.

Cited: *Sprague v. Comrs.*, 165 N. C., 604; *Moran v. Comrs.*, 168 N. C., 290; *Stephens v. Charlotte*, 172 N. C., 567.

CLAUDE GRANT v. JOHN W. MITCHELL.

(Filed 13 September, 1911.)

1. Criminal Conversation—Husband and Wife—Evidence.

In an action brought by the husband for damages for criminal conversation with his wife, the evidence of the wife in behalf of the defendant to rebut the evidence of the plaintiff is incompetent. Revisal, sec. 1636.

2. Parol Evidence—Letters—Contents — Substance — Effect — Questions for Jury.

Witnesses testifying to the contents of letters, when such testimony is admissible, should state their substance as near as may be, and not their effect; and when in an action by the husband for damages for criminal conversation with the wife, a witness is allowed to testify upon the question of defendant's relationship with the wife as to the contents of ten or twelve letters the defendant has written her, it is reversible error for the witness to state, "They were all what I would call love letters, and were couched in very passionate terms."

3. Criminal Conversation—Evidence—Letters from Defendant—Defendant's Conduct—Witness's Conversation.

A relevant letter written by the defendant to plaintiff's wife, in an action for damages for criminal conversation brought by the husband, is competent evidence; as also the conduct of the defendant when questioned as to his relationship and conversations by the witnesses with him respecting it, which are germane to the issue.

APPEAL from *Carter, J.*, at May Term, 1911, of BERTIE. (16)

This is an action, brought by the husband, to recover damages for criminal conversation with his wife.

The plaintiff introduced evidence tending to prove the allegations of his complaint, and evidence to the contrary was introduced by the defendant.

In support of the contention that an improper relationship existed between the wife of the plaintiff and the defendant, the plaintiff intro-

duced J. N. Vann, who after testifying that he knew the handwriting of the defendant, and to facts from which the court found that secondary evidence was admissible, testified as follows:

"I read the whole batch of letters given me by Asa Rice, and can give the substance of them. There were ten or a dozen, or maybe fifteen of them. They were written to plaintiff's wife, and were what I would call love letters, and were couched in very passionate terms. They were written by the defendant."

The defendant in apt time objected to all of the above testimony. Objection overruled, and defendant excepted.

The defendant offered the wife of the plaintiff as a witness to rebut the evidence of the plaintiff. She was held to be incompetent, and the defendant excepted.

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

Peebles & Harris and Winston & Matthews for plaintiff.

Martin, Winborne & Winborne, J. R. Mitchell, and John H. Kerr for defendant.

ALLEN, J. The wife of the plaintiff was not a competent witness under Rev., sec. 1636, which reads as follows:

(17) "In any trial or inquiry in any suit, action, or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action, or proceeding is brought, prosecuted, opposed, or defended, shall, except as herein stated, be competent and compellable to give evidence as any other witness on behalf of any party to such suit, action, or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation. No husband or wife shall be compellable to disclose any confidential communications made by one to the other during their marriage."

The wife was incompetent as a witness for or against the husband at common law. The statute removes this disability in certain actions, but specifies those actions in which she cannot testify, and as to the one under consideration, "on account of criminal conversation," says:

"Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding on account of criminal conversation."

The rule denying the right to the wife to be heard when her character is so seriously assailed seems cruel, but we cannot permit this consideration to induce us to refuse to give effect to the legislative act. She was offered as a witness against her husband in an action on account of criminal conversation, and this the statute says cannot be done. *Broom v. Broom,* 130 N. C., 563, which was an action for divorce, is not an authority for the plaintiff.

In that case the wife was a party, and the decision is upon the ground that she was not testifying "for or against" her husband, but in her own defense.

The objection to the evidence of the witness Vann is well (18) taken. He was introduced to testify to the contents of ten, twelve, or fifteen letters, and instead of telling what was in the letters, he gives the impression made on his mind in one sentence: "They were what I would call love letters, and were couched in very passionate terms."

Evidence of the contents of a paper, which has been lost; of conversations, and of the testimony of a deceased witness on a former trial, rest on the same principle. It is not required that the words used should be repeated, but the witness must be able to state the substance of what was written or said, and not its effect.

"In attempting to supply the loss of the testimony of a deceased witness, the secondary evidence ought, manifestly, to be as full, and as nearly the same as that for which it is offered as a substitute, as possible. The very words which the deceased witness spoke would be the best, and were formerly supposed to be necessary (see *King v. Joliffe,* 4 Term., 290); but that strictness, having made the rule impracticable, has long since been abandoned. The secondary witness may now give the *substance,* but not the mere *effect* of the former testimony. To allow him to state the latter only would be to permit him to decide upon the effect of the testimony, instead of submitting it to the jury, to whom it properly belongs." *Jones v. Ward,* 48 N. C., 26.

"Upon the death of a witness who has been examined in a judicial proceeding, such examination is admissible as secondary evidence in a subsequent trial between the same parties. Here it is required that the secondary evidence should be full, because it is offered as a substitute. The testimony of the deceased witness should be placed before the new, as the law required it to be placed before the former triers. Both are entitled not only to the truth, but to the whole truth. The copy must be ascertained to be faithful before it is admitted as rep-

resentative of the original. Besides, to receive an avowedly imperfect account of what had been formerly testified in lieu of the former testimony itself would be to encourage the party to offer partial instead of full secondary evidence. He would be interested to seek out such
(19) witnesses as remembered only those portions of the former testimony as made in his favor." *Ingram v. Watkins,* 18 N. C., 444.

The principle here announced has been approved many times in this Court. *Wright v. Stone,* 49 N. C., 518; *Buie v. Carver,* 73 N. C., 265; *Paine v. Roberts,* 82 N. C., 452; *Carpenter v. Tucker,* 98 N. C., 317.

The purpose of the rule is to place before the jurors, as near as possible, the substitute for the original, and let them pass on its effect.

If it were otherwise, the opinion of an adverse witness would be evidence, or the jury might hear the parts of a writing prejudicial to a party, when in the same writing there are expressions qualifying what is testified to, of which the jurors would have no knowledge.

The letter of the defendant to the wife of the plaintiff was competent, as was also the evidence of witnesses as to the conduct of the defendant and conversations with him.

We find no error in the charge of his Honor, or in his refusal to give certain instructions prayed for by the defendant.

There must be a

New trial.

Cited: McCall v. Galloway, 162 N. C., 355; *Powell v. Strickland,* 163 N. C., 401; *Lumber Co. v. Lumber Co.,* 169 N. C., 98; *Cooper v. R. R.,* 170 N. C., 493.

L. L. OWENS AND WIFE v. L. H. HORNTHAL ET AL.

(Filed 13 September, 1911.)

1. Mortgages, Constructive—Possession—Beyond Court's Jurisdiction—Limitation of Actions—Equity.

When a sale of mortgaged lands is made by the mortgagees under a power contained in the instrument, who remain beyond the borders of the State and the jurisdiction of our courts, claiming constructive possession through their tenants, the statute of limitations will not run as against the mortgagors, for the foreclosure of a mortgage is equitable, with the right of the mortgagor to an accounting for rents and profits, and differs from an action in ejectment, because the latter is of a possessory character.

2. Mortgages — Sales — Fraud — Relationship — Presumptions — Evidence — Questions for Jury.

No presumption of fraud arises from the mere fact that a son of the mortgagee purchased the mortgaged lands at a foreclosure sale made under a power contained in the instrument; but the near relationship of the purchaser to the mortgagee is a circumstance in evidence which, taken with other evidence that the purchaser was insolvent, a very young man, dependent upon his father, the mortgagee, to whom he reconveyed at the same recited consideration as this bid, there being no advertisement of the land and the bid being for a third or half the value of the land, is sufficient to go to the jury upon the question of a fraudulent sale.

3. Mortgages — Mortgagees in Possession — Timber — Accounting — Deeds — Value — Evidence.

When mortgagees are held to an accounting for the value of the timber they have sold from the mortgaged premises, having entered possession under a void foreclosure deed, their timber deeds are evidence against them of the value of the timber they have sold at the times of the sales, without reference to whether it was a long time after the foreclosure sale or at a time when it had immensely increased.

4. Mortgages — Fraud — Relationship — Evidence — Questions for Jury.

An erroneous charge of the trial judge, that the plaintiff had made a *prima facie* case of fraud in his action to set aside a deed given to the purchaser under a foreclosure sale of a mortgage, appearing to be an inadvertence, is harmless when it appears from the whole charge that the burden of proof was properly put upon the plaintiff.

APPEAL from *Ward, J.*, at January Special Term, 1911, of (20) WASHINGTON.

Mrs. Caroline B. Hilliard was the owner of a half interest in the lands set out in complaint, known as the Polly Garrett lands. On 13 February, 1885, Caroline B. Hilliard and her husband, J. P. Hilliard, executed a mortgage on said one-half interest to the defendant L. H. Hornthal and his copartner, L. Hornthal. The mortgage had the usual power of sale. L. H. Hornthal afterwards acquired the interest of his brother and comortgagee.

After said mortgage was executed, the said Caroline B. Hilliard, the owner of the one-half interest, died, leaving four children, the *feme* plaintiff being one, and therefore the owner by descent of (21) a one-eighth interest in said lands.

On 2 March, 1896, in default of payment, the mortgagees sold the land under power contained in the mortgage, at the courthouse, when L. P. Hornthal, son of L. H. and nephew of L. Hornthal, became the purchaser at $1,000, the mortgagees executing a deed to him dated 2 March, 1896. By deed dated 27 March, 1896, for a recited consideration of $1,000, L. P. Hornthal reconveyed the land to the two mortgagees, L. H. and L. Hornthal.

The plaintiff brings this action to set aside the sale (claiming that it was fraudulent and void and that L. P. Hornthal purchased for the mortgagees), and for an accounting of rents and profits.

The court submitted these issues:

1. Does the defendant L. H. Hornthal hold one-eighth interest in the Polly Garrett tract of land mentioned in the pleadings as mortgagee for the plaintiff? Answer: Yes.

2. What is the amount now due on said one-eighth interest to the defendant on said mortgage? Answer: One-fourth of $3,182.14= $795.54.

3. What is the net aggregate rental on said one-eighth interest since 2 March, 1896? Answer: $505.

4. What is one-eighth value of timber sold by said defendant from said land? Answer: $518.75.

5. Is said cause of action barred by the statute of limitations? Answer: No.

There was a motion for new trial, which was refused. From the judgment rendered defendants appealed.

W. M. Bond, W. M. Bond, Jr., and Ward & Grimes for plaintiffs.
E. F. Aydlett for defendants.

BROWN, J. 1. It is contended by defendants that the cause of action is barred by the statute of limitations.

The undisputed evidence shows that on 2 March, 1896, the date of the attempted foreclosure, the *feme plaintiff*, the owner of the one-eighth interest, was married and a minor, and continued under
(22) disability beyond 1898; that in 1897 or 1898 both mortgagees removed to Norfolk, and have never resided in this State since. The defendants' evidence establishes that the mortgagees and those claiming under them have been in possession of the lands since the sale 2 March, 1896.

It is contended that the absence of the defendant Hornthal from the State does not prevent the running of the statute. It is true that in an action of ejectment, where there is a tenant or person in possession against whom action may be brought, the absence of the true owner from the State does not suspend the running of the statute. *McFarland v. Cornwell,* 151 N. C., 428. That is because ejectment is a possessory action, and may be maintained against the person in possession. But this proceeding is essentially equitable in its nature, and the mortgagees who made the sale and who are asked to account for rents and profits are necessary parties. It is governed by Rev., sec. 391, subsec. 4. The point is expressly ruled in *McFarland v. Cornwell, supra.*.

2. It is contended that his Honor erred in denying the motion to nonsuit, because there is no evidence that the mortgagees purchased the land at their own sale through L. P. Hornthal.

Although he is the son of one and the nephew of the other mortgagee, no presumption of fraud arises because of such relationship.

There are cases which support such presumption when a deed for his property is made by one in failing circumstances to a near relative. *Lee v. Pearce,* 68 N. C., 76; *Smith v. Moore,* 149 N. C., 198. But no such presumption arises because of the sole fact that a son of full age buys under a mortgage sale made by his father, the mortgagee. We do not understand his Honor to have held to the contrary.

But there is evidence in this record which justified his Honor in submitting to the jury the question of the validity and *bona fides* of the sale of 2 March, 1896. While in this case no presumption of fraud arises from it, near relationship to the mortgagees is a circumstance in evidence. It is not sufficient of itself to warrant a verdict, but in this case it is supported by other evidence of a pregnant character. The plaintiff's evidence tends to prove that L. P. Hornthal was (23) insolvent and in debt; that he was a very young man, dependent on his father; that the consideration recited in the reconveyance made shortly after the sale was exactly the sum bid for the land; that there was no advertisement of the land and that it was bid off by the son for a third or half of its actual value.

It is true this evidence is controverted, but it is of such probative force that his Honor was justified in submitting the issue to the jury.

3. The timber deeds from the Hornthals were competent evidence tending to show what they had received for timber sold off this land. So long as the statute does not bar, it is immaterial that the timber was sold by Hornthal long after the attempted foreclosure. If that was a nullity, the relation of mortgagor and mortgagee continues and Hornthal must account for whatever he received for the timber at the time he sold it. The fact that gum timber had increased immensely in value between 1896 and 1909 cannot change a well-settled rule of law.

It is unfortunate for the defendant Hornthal that he did not proceed to foreclose in a manner more impregnable than the method pursued.

4. In concluding his charge, his Honor said to the jury, "that the whole evidence of the plaintiff makes out a *prima facie* case to go to you for what it is worth, and it, with the evidence of the defendant, is left with you to say, the burden of proving the issue being on the plaintiff, to say how you will answer the issue. It is evidence from which you may or may not answer the issue Yes."

We think his Honor was inadvertent in using the words *"prima facie* case," and if he had gone no further we would be compelled to award a new trial. But the remainder of the sentence, as well as the entire preceding charge, indicates clearly that the burden of establishing the issue was placed on the plaintiff, where it properly belonged. While the use of the words *"prima facie* case" was erroneous, it was evidently an inadvertence which, taking the charge as a whole, could not have misled the jury.

We have considered the remaining assignments of error and (24) find them to be without merit.

No error.

C. L. HINTON v. G. W. HICKS AND J. G. ETHERIDGE.

(Filed 13 September, 1911.)

Mortgages — Deeds and Conveyances — Purchase Money — Registration — Priority.

A deed made to lands by a vendor and contemporaneously executed with a mortgage back to secure the purchase price are regarded in law as concurrent acts, or the same act, the title vesting only a moment in the vendee and passing simultaneously into the purchase-money mortgagee. Hence, when the deed and mortgage are excuted at the same time, and the vendee attempts to mortgage the land to a third person, who has his deed registered first, no priority can thereby be obtained over the purchase-money mortgagee.

APPEAL from *Justice, J.,* at the March Term, 1911, of CAMDEN.

At conclusion of the evidence motion to nonsuit was sustained. Plaintiff excepted and appealed.

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

W. A. Worth for plaintiff.
W. A. Halstead for defendants.

BROWN, J. The plaintiff's evidence tends to prove these facts: In November, 1907, D. E. Williams and W. T. Stafford agreed to sell to G. W. Hicks the tract of land described in the pleadings; a deed was prepared by Williams and Stafford for the purpose of conveying to Hicks the said lands, and the mortgage to secure the purchase price was also prepared. Both instruments were dated 8 November, 1907. The evidence shows that Stafford was out of the State at the time the contract to sell was made, and Williams held the deed until Stafford's return, when on 2 December, 1907, they both signed and acknowledged

the deed, and Hicks, having previously acknowledged the mortgage for the purchase money, delivered the mortgage and note (25) to Williams, who, on the same day of acknowledgment, to wit, 2 December, 1907, placed the deed and mortgage in an envelope and mailed them together to the register of deeds for registration. The mortgage given by Hicks was for the purpose of securing the purchase money of the lands.

On 19 November, 1907, G. W. Hicks executed and delivered to Willie Hicks, a mortgage wherein he attempted to convey the lands contracted to be conveyed to him by Williams and Stafford, to secure the payment of $300 alleged to be due Willie Hicks. This latter mortgage was recorded on 23 November, 1907, before G. W. Hicks had acquired any title whatever in the lands.

Hicks failing to pay the note given to Williams and Stafford to secure the purchase price, these mortgagees made sale and conveyed the property to the plaintiff in this action. Willie Hicks also foreclosed under his mortgage because of the nonpayment of the indebtedness therein mentioned, and made deed, as mortgagee, to the defendant Etheridge.

Under this evidence his Honor ruled that plaintiff could not recover, presumably on the ground that the mortgage to Williams and Stafford to secure the purchase money was recorded *after* the mortgage given by G. W. Hicks to Willie Hicks, and that therefore the latter took precedence.

In this there is error. The question appears to be well settled by adjudications of this Court.

The execution and registration of the deed to the purchaser and of the mortgage for the purchase money were not only intended to be, but in law were, concurrent acts, and concurrent acts are one act. The title was not in G. W. Hicks when the mortgage to Willie Hicks was registered.

It vested in G. W. Hicks but for a moment, possibly, when the vendor's deed was filed for registration, but passed simultaneously into the purchase-money mortgagees, as that mortgage was filed at the same moment. As said by *Justice Reade* in *Bunting v. Jones,* 78 N. C., 243 (a similar case): "The title did vest, but it did not vest in Jones; but like the borealis' race, that flits ere you can point (26) its place."

See, also, *Moring v. Dickerson,* 85 N. C., 466; *Belvin Paper Co.,* 123 N. C., 138.

New trial.

Cited: Trust Co. v. Sterchie, 169 N. C., 23.

IN RE GUARDIANSHIP OF ROBERTA C. DIXON.

(Filed 20 September, 1911.)

1. Deeds and Conveyances—Reservation of Life Estate.

A reservation of a life estate for himself and wife by the grantor in his deed to lands is valid, and the deed does not become effective until his own and his wife's death, though as to the latter the reservation cannot operate as a conveyance.

2. Same—Tenant by Curtesy—Wife's Possession.

A deed to grantor's daughter, reserving a life estate in himself, does not make the husband of the grantee a tenant by curtesy when he has issue born alive, etc., if the wife predeceases the grantor, the requisite of her possession of the lands being wanting; and the title to the land upon the death of the grantor passes directly to her heirs.

3. Same—Guardian and Ward—Removal—Conflicting Interests.

A father, guardian for his child, claiming as tenant by curtesy the rents and profits of lands to which his wife had not acquired possession or right of possession, and which had descended to his ward as heir at law, is such an adverse claimant to the rights of the ward as will entitle the latter to his removal. Rev., 1806.

4. Deeds and Conveyances—Interpretation—Reservation of Life Estate—Repugnancy.

In this case, construing the deed as a whole, there is no repugnancy therein apparent by reason of a reservation of a life estate in the lands in the grantor.

APPEAL by Roberta C. Dixon from *Ferguson, J.*, at May Term, 1911, of GREENE.

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

George M. Lindsay for appellant.
Aycock & Winston and T. C. Wooten for J. W. Dixon.

CLARK, C. J. The clerk of the Superior Court, after citation to J. W. Dixon, guardian of Roberta Dixon, and upon his answer filed, removed him from his guardianship upon the ground that he had failed to file his account as guardian, and, further, because said guardian (27) claimed an interest in the property adverse to his ward. On appeal to the judge this order was reversed, and the ward, Roberta C. Dixon, appealed to this Court, prosecuting said appeal through her guardian *ad litem,* appointed by the court by consent.

It is found by the judge upon facts admitted, that Robert A. L. Carr executed a deed to his daughter, the mother of the ward, Roberta Dixon; that in said deed, after the warranty clause, said grantor added:

"I, the said R. A. L. Carr, reserving a life interest for myself and wife, Sarah A. L. Carr, in the above described land." The grantee, the mother of said ward, and the daughter of the grantor, died first of all, then the grantor, and lastly his wife died. It was admitted that there was birth of issue of the marriage of the grantee in said deed, and J. W. Dixon, the guardian, contended that he was entitled to the rents and profits of said land as tenant by the curtesy, and was not accountable to said ward for said rents.

The reservation in the deed is valid, and said deed did not become effective till after the death of the grantor and his wife. It is true that the exception in favor of the grantor's wife could not operate as a conveyance to her, but the question as to the title to rents and profits after death of the grantor and until the death of his widow is a question to be settled between their personal respresentatives, and in no wise concerns the guardian, J. W. Dixon. The sole question as to him is whether he became tenant by the curtesy of this land. His wife, having predeceased the grantor, was never seized of the premises, and upon the expiration of the particular estate by the death of Mrs. Carr, the title passed directly to Roberta Dixon as heir at law of her mother. J. W. Dixon's claim to be tenant by the curtesy is therefore unfounded. His refusal to account for the rents and profits and his claim to the rent, adverse to his ward, were sufficient grounds to justify (28) his removal. Rev., 1806.

In *Nixon v. Williams*, 95 N. C., 103, it was held that to entitle a husband to curtesy in his wife's land, either the wife, or the husband in right of his wife, must have had seizin in deed, which is the actual possession of the land. In this case it is admitted that neither Dixon nor his wife had any possession of said land during the life of the grantor and his wife. In *Gentry v. Wagstaff*, 14 N. C., 270, it was held that the husband acquires by marriage no estate in any land of his wife of which neither he nor his wife had possession, and that where the wife's interest in real estate is in reversion or remainder dependent on a preceding freehold estate in another, she has no seizin until the determination of that estate.

In *Sasser v. Blyth*, 2 N. C., 259, it was held, upon facts exactly similar to those in this case, that where a man executed a deed to his son in fee simple, reserving a life estate, such reservation is valid. The learned reporter (Judge John Haywood) appends a note that this is not a case or repugnancy, because it is "by no means inconsistent with the estate in fee in remainder that another should first have the estate for life." The rule that the first words in a deed and the last in a will control in cases of repugnant provisions does not apply. Construing the whole deed as written, there is here a reservation of the estate

for the life of the grantor and his wife, with remainder in fee to their daughter. *Blackwell v. Blackwell,* 124 N. C., 269; *Wall v. Wall,* 126 N. C., 405. This is not like *Wilkins v. Norman,* 139 N. C., 41, where an estate in fee simple was conveyed and there was a subsequent clause which conveyed the land to another after the death of the grantee in fee. The last clause was held repugnant and void.

In *Featherstone v. Merrimon,* 148 N. C., 199, *Walker, J.,* says: "In construing a deed the Court will examine the entire instrument and construe it as a whole, consistent with reason and common sense, to effectuate the intention of the parties. There can be no question here as to the intention of the grantor, which is very clearly expressed."

To the same effect is *Triplett v. Williams,* 149 N. C., 396, in
(29) which *Brown, J.,* says that the courts will look at the whole instrument to ascertain its intention and will "not regard as very material in what part of the deed such intention is manifested."

The judgment of his Honor is

Reversed.

Cited: Morgan v. Morgan, post, 171; *Thomas v. Runch,* 158 N. C., 179; *Baggett v. Jackson,* 160 N. C., 31; *Beacom v. Amos,* 161 N. C., 366; *Jones v. Whichard,* 163 N. C., 246; *Brown v. Brown,* 168 N. C., 14.

J. J. CARSON v. J. R. BUNTING AND SOUTHERN OIL COMPANY.

(Filed 20 September, 1911.)

Appeal and Error—Second Appeal—Former Decision—Form of Judgment Below.

A former judgment of the Supreme Court will not be considered on another appeal from the Superior Court, and on this appeal the only question presented is whether the form of the judgment entered by the lower court is in conformity with the former opinion.

APPEAL by defendant from *O. H. Allen, J.,* at Spring Term, 1911, of TYRRELL.

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

Jarvis & Blow and Harry Skinner for plaintiff.
Moore & Long for defendants.

CLARK, C. J. This cause was decided at last term, *Carson v. Bunting,* 154 N. C., 530, in which we held that upon the pleadings and is-

sues found the judgment ought to have been rendered for the plaintiff upon the second cause of action. The judge below, upon the certificate of the opinion of this Court, rendered judgment accordingly.

The defendant excepted to the judgment and appealed. This presents for our consideration only the form of the judgment rendered, which is in strict conformity with our opinion. The appeal is in fact, and the argument of the defendant is so based, upon the ground that the former judgment of this Court was erroneous. No other question is presented.

In *Roberts v. Baldwin,* 155 N. C., 276, *Allen, J.,* citing many cases, said: "It has been repeatedly decided that a judgment of (30) this Court cannot be reviewed by a second appeal."

We need not discuss a decision which has been so repeatedly made. Affirmed.

E. A. BRADDY AND WIFE v. GEORGE I. DAIL, TRUSTEE, ET AL.

(Filed 20 September, 1911.)

1. Deeds in Trust—Intent of Grantor—Interpretation.

The owner of lands may convey them to a trustee for the benefit of another, with such restrictions and upon such terms as he sees proper, and the courts will construe and carry out his intent if it be not unlawful or against public policy.

2. Deeds in Trust—Intent—Interpretation—Power of Sale—Proceeds—Reinvestment—Life Estates—Remainders.

A deed in trust for the purpose, expressed in the preamble, of making provision for grantor's daughter against future contingencies, and expressing a desire that the daughter should enjoy the "proceeds, rents, and income" during her natural life, free from liabilities or interference of any one whatsoever, with a power in the body of the conveyance to convey the land "to such person or persons as she" may designate, "if in the judgment of ....., trustee, it is desirable to make the change, and invest the proceeds" for the daughter: *Held,* the proceeds of such sale, made in pursuance of the deed, are to be reinvested by the trustee, and held upon the uses and trusts expressed in the conveyances for the benefit of the daughter for life. Upon a sale, the daughter would not be entitled to have the value of her life estate turned over to her.

APPEAL by plaintiffs from *O. H. Allen, J.,* at June Term, 1911, of BEAUFORT.

The plaintiffs in this action are Rena E. Braddy, who before her marriage was Rena E. Thomason and a daughter of Macon B. Thomason, and her husband, E. A. Braddy; and the defendants are George I.

Dail, trustee, Beulah Thomason, Jasper Thomason, Lawrence Thomason, Bonner Thomason, and Louise Thomason, the last five being children of Macon B. Thomason, and under the age of twenty-one years.

(31) Macon B. Thomason was formerly the owner of the land in controversy, and on 6 April, 1906, he executed a deed in trust in the following words:

North Carolina—Beaufort County.

This indenture, made and entered into this the 6th day of April, 1906, by and between Macon B. Thomason and wife, Eliza L. Thomason, parties of the first part, and George I. Dail, as trustee, party of the second part, all of the State of North Carolina, county of Beaufort, witnesseth:

That whereas said Macon B. Thomason is desirous of making provision for his daughter, Rena E. Thomason, now of the age of sixteen years, against future contingencies and for the maintenance and support of the said Rena E. Thomason; and whereas the said Macon B. Thomason is desirous that the said Rena E. Thomason should enjoy the proceeds, rents, and income of the real estate herein more particularly described, during the natural life of the said Rena E. Thomason, free from liabilities or interference of any one whatsoever:

Now, therefore, in consideration of the premises and the sum of one dollar to him paid by the party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part has bargained, sold, and conveyed, and by these presents doth bargain, sell, and convey unto the said party of the second part, as trustee, all that certain lot of land situate in the city of Washington, N. C., bounded and described as follows: [A full description is given.]

To have and to hold the above mentioned and described premises, together with the appurtenances, unto the said George I. Dail, trustee, his successors and assigns, in trust, and upon the uses, trusts, and purposes hereinafter mentioned, viz.:

First. To allow the said Rena E. Thomason to occupy the said premises free of rent so long as she can pay the taxes and assessments and repairs upon said premises; should she be unable to do so, then George I. Dail, trustee, will take charge of the premises, and rent the property, collect and receive the rents, and out of the same to keep the

(32) premises in good order and repair, properly insured, and pay all the taxes, assessments, and charges that may be imposed thereon, and the surplus pay to the said Rena E. Thomason, and take her receipt therefor, which will serve as a proper voucher to the said George I. Dail, trustee.

Second. To convey the said land and premises to such person or persons as she, the said Rena E. Thomason, may designate, if in the judgment of George I. Dail, trustee, it is desirable to make a change, and invest the proceeds of such sale in a suitable home for my said daughter, upon the same terms and conditions as hereinbefore mentioned.

And the said Macon B. Thomason hereby declares that upon the decease of the said Rena E. Thomason, the said trusts hereby created shall cease and determine, and the land and premises above described shall be in fee simple absolute to the heirs at law of the said Macon B. Thomason, if any should be living.

And the said party of the second part doth hereby signify his acceptance of this trust, and does hereby covenant and agree to and with the said party of the first part faithfully to discharge and execute the same according to the true intent and meaning of these presents.

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

M. B. THOMASON (SEAL).

ELIZA (Her mark) L. THOMASON (SEAL).

The plaintiffs and George I Dail, trustee, purporting to act under said deed, have sold the land conveyed therein to Junius D. Grimes for $2,000, which is a full and fair price for the same. The plaintiff, Rena E. Braddy, contends that an equitable estate for life in said land was conveyed to her by said deed, and that she is entitled to have the value of the same ascertained and paid over to her, to be used as she sees fit.

The defendants deny that the deed to said Grimes is valid, but contend, if it does convey a good title, that the whole fund must be reinvested.

His Honor held that the deed of the plaintiffs and said trustee (33) to said Grimes conveyed an estate in fee, and further adjudged:

"2. That the said George I. Dail, trustee, has no power to pay to the plaintiffs the value of the life estate of the said Rena E. Braddy, but is directed to reinvest the said sum of $2,000, the proceeds of sale to Grimes, in its entirety in another piece of property, such as he may deem proper, the title to be taken upon the identical uses and trusts set out in the deed from Macon B. Thomason and wife to George I. Dail, trustee, recorded in book 138, page 475, of the Beaufort County records."

The plaintiff excepted and appealed.

Ward & Grimes for plaintiff.
C. H. Harding for guardian ad litem.
Small, McLean & McMullan for Dail, trustee.

ALLEN, J., after stating the case: It is not clear that the plaintiff, Rena E. Braddy, is entitled to a life estate in the land in controversy, under the deed in trust. No estate, legal or equitable, is, in terms, conveyed to her, and a construction would be permissible that it was the purpose of the grantor to give her the rents and profits of the land for her support, and no more.

This question is not, however, raised by the appeal, and *Cox v. Jernigan,* 154 N. C., 584, seems to sustain the contention of the plaintiff as to the extent of her interest.

Conceding, therefore, that she acquired an equitable estate for life under the deed, we are of opinion that this does not confer on her the right to have the value of this interest ascertained and delivered to her for her own use. As was said in *Cox v. Williams,* 58 N. C., 154, the owner of property "has the right to give it with such restrictions and upon such terms as he sees proper, and the courts are bound to carry his intentions into effect, unless there be something unlawful and against public policy." We find nothing unlawful or against public policy in the deed, and the language used, as it seems to us, admits of but one construction as to the question in controversy.

(34) The land is conveyed to the trustee in fee, under the act of 1879, and the trusts specifically declared. Authority is given to the trustee to convey to such person as the said Rena E. may designate, but this power is limited by the provision that the trustee must first determine that a change is desirable, so that the plaintiff cannot compel a conveyance against his judgment, honestly exercised.

The conveyance authorized is evidently one to consummate a sale of the property, as in the same sentence conferring the power the trustee is directed "to invest the proceeds of such sale." The proceeds are to be invested in a suitable home for the plaintiff, to be held "upon the same terms and conditions as hereinbefore mentioned," and upon the death of the plaintiff the trust is to determine, and "the land and premises above described" are to belong to the heirs of the grantor "in fee simple absolute." If the grantor had the right to dispose of his property as he wished, he could direct that it be sold, and, if sold, that the proceeds be invested on such terms as he thought wise and just.

He could give the use of it to the plaintiff during her life, and direct that it be held in its original form or as reinvested until her death, and then that it go to his heirs. The language indicates clearly that this was his intention.

He does not say that a part of the land shall go to the heirs, but "the land and premises above described," meaning all of it.

If the construction contended for by the plaintiff should be adopted, a serious injustice might arise.

The plaintiff is one of six children, all of whom are heirs of the grantor. At the time the deed was executed, in 1906, she was sixteen years of age, and is now twenty-one, and has an expectancy of 41.5 years. The value of her life estate in the proceeds of the sale of the land ($2,000), based on her expectancy, would be about $1,500.

If this should be ascertained and turned over to her, and she should die within a year, the money would belong to her husband, and the five minor children, for whom the grantor intended property (35) of the value of $2,000, would get $500.

We think the judgment was in accordance with law, and it is in all respects.

Affirmed.

S. F. BOWSER & CO. (INC.) v. H. B. TARRY.

(Filed 20 September, 1911.)

1. Written Contracts—Parol Evidence—Conditions Precedent.

While the express terms of a written contract may not be varied by a contemporaneous oral agreement, it may be shown by parol evidence that such delivery was on condition that the written contract was not to be operative until the happening of some contingent event, or that it was not to be regarded as a contract until the happening of the specified event.

2. Same.

A written order or contract of purchase by defendant of a certain gasoline tank was put in evidence, containing certain provisions that the order was not subject to countermand, and there should be no defense for nonpayment. The tank was shipped by rail and taken from the depot by defendant to prevent the accrual of demurrage charges. The defendant reshipped the tank to plaintiff, and in an action for the purchase price it is held competent for the defendant to show by parol evidence that he purchased the tank subject to a contemporaneous oral agreement that the order was subject to his being able to get permission from the town, wherein he conducted his store, to bury the tank under the sidewalk, and that this permission had been refused; and that he had not notified the plaintiff before shipment, for the reason that it had been made sooner than he was led to believe it would be made.

APPEAL from *J. S. Adams, J.*, at March Term, 1911, of HALIFAX.

Action tried on appeal from a justice's court. Plaintiffs sued on an instrument alleged to be a written contract bearing date 16 December,

1909, for the purchase of a gasoline tank with incidental appliances, at the price of $140. The tank was shipped from Fort Wayne, Indiana, on 15 December, 1909, and arrived at Littleton, N. C., some time in the latter part of the month, and was taken out of rail-
(36) road depot by defendant, as he stated, for purpose of saving storage. Defendant having denied liability, on issue submitted the court charged the jury that if they believed the evidence the plaintiff was entitled to recover the contract price, $140, etc. Verdict for same in plaintiff's favor. Judgment, and defendant excepted and appealed, assigning errors chiefly in the rulings of the court on questions of evidence.

George Green and Murray Allen for plaintiff.
J. M. Picot and Joseph J. Pippen for defendant.

HOKE, J. The written instrument purporting to bear date 16 December, 1909, expressed a definite order for the tank and appliances at the stated price of $140, and contained further stipulations as follows: "It is agreed by purchaser that this order shall not be countermanded and, when filled and due as per specifications and terms herein stated, that there shall be no defense for nonpayment. It is further agreed that in default of payment, S. F. Bowser & Co., Incorporated, or their agent, may take possession of and remove said goods without legal process, unless such default be granted by special letter from S. F. Bowser & Co., Incorporated." This paper-writing having been received in evidence without objection, plaintiff put defendant on the stand, who testified, on his examination in chief, that he signed the instrument and that he had not paid the price or any part of same. On cross-examination the witness was allowed to state: "The agent for the Bowser Company came in to see me some time in December, 1909, and explained to me the uses and need for his gasoline tank. I told him that I thought it was a fine thing and would certainly like to have one, and that I would buy one if I could get permission from the town authorities to bury the tank under the street. The agent replied that there was no possible danger from the use of the tank, and that he could not see how the town authorities could object. I told him that I would buy the tank with the understanding that if I could not get permission from the town authorities I could not and would not accept the tank.
(37) The agent replied that his factory was greatly overrun with orders, and that it would be impossible to ship the tank before 1 February, 1910, and that in the meantime I would have ample time and opportunity to see the town authorities and arrange to place the tank, and that if I could not do so, then I could countermand the order

and need not take the tank. All of this conversation and every word of it was prior to my signing the contract, though after signing the same we had general talk, but as to what was stated by either of us in the general talk, after signing the contract, I cannot and do not swear to. The agent left. Before the first day of January, 1910, the tank, which he had told me would not be shipped or could not be shipped until the first of February, 1910, arrived. I had not then seen the town authorities, not having had the opportunity to, and not expecting the tank before the time promised by the agent. I took the tank out of the warehouse to save storage charges and pending permission to plant the same by the town authorities. I immediately went to the street commissioner of the town of Littleton, who is the proper authority to give permission in such cases, and he positively refused to permit me to bury the tank in the street. I then asked my landlord if I might bury the tank under his building, and he refused me permission to do so. (I then wrote the Bowser Company that they had shipped the tank before the time agreed by their agent, and that I could not, after having tried, get permission from the town authorities nor from my landlord to place the tank where I could use it, and it was therefore valueless to me.) I went at once and shipped the tank back to the Bowser Company, prepaying freight, and have never been notified by the railroad that the shipment was refused." On objection by plaintiff, this statement was excluded, and in this ruling we think there was error.

The general principle insisted and relied upon by plaintiff is undoubted, that oral evidence will not be received to contradict or vary a written contract. In *Ray v. Blackwell,* 94 N. C., 10, *Chief Justice Smith,* speaking to the question, said: "It is a settled rule too firmly established in the law of evidence to need a reference to authority in its support, that parol evidence will not be heard to contra- (38) dict or alter the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose." And again in the same opinion: "The cases which are apparently to the contrary do not contravene this rule," but rest upon the idea that the writing does not contain the contract, but is in part execution of it. Numerous decisions in the State before and since are in affirmance and application of the principle. *Walker v. Venters,* 148 N. C., 388; *Medicine Co. v. Mizell,* 148 N. C., 384; *Basnight v. Jobbing Co.,* 148 N. C., 350; *Bank v. Moore,* 138 N. C., 529. Even when a contemporaneous oral stipulation would be otherwise received, because it too was a part of the contract, this will not be allowed when it contradicts the portion of the agreement which is reduced to writing. This is well stated by the present *Chief Justice* in *Walker v. Venters* as fol-

lows: "It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and in such case the oral part of the agreement may be shown; but this is subject to the well-established rule that a cotemporaneous agreement shall not contradict that which is written. The written word abides."

While this position is unquestioned, it is also fully understood that although a written instrument purporting to be a definite contract has been signed and delivered, it may be shown by parol evidence that such delivery was on condition that the same was not to be operative as a contract until the happening of some contingent event, and this on the idea, not that a written contract could be contradicted or varied by parol, but that until the specified event occurred the instrument did not become a binding agreement between the parties. It never in fact became their contract. The principle has been applied with us in several well-considered decisions, as in *Pratt v. Chaffin,* 136 N. C., 350; *Kelly v. Oliver,* 113 N. C., 442; *Penniman v. Alexander,* 111 N. C., 427, and is now very generally recognized. *Ware v. Allen,* 128 U. S., 590; *Wilson v. Powers,* 131 Mass., 539; *Rym v. Cambill,* 88 E. C. L., 370; Clark on Contracts, p. 391; Lawson on Contracts, sec. 376; Anson on Contracts (Amer. Ed.), p. 318, and except in deeds conveying
(39) real estate obtains, though the instrument is under seal and delivery has been to the other party. *Blewitt v. Boorum,* 142 N. Y., 357. In *Ware v. Allen, supra,* the rule is expressed thus: "Parol evidence is admissible in an action between the parties to show that a written instrument executed and delivered by the party obligor to the party obligee absolute on its face was conditional and not intended to take effect until another event should take place." And in Anson on Contracts, *supra,* it is said: "In like manner the parties to a written contract may agree that until the happening of a condition which is not put in writing, the contract is to remain inoperative." Applying the principle, we are of opinion that the proposed evidence should have been received. The statement by permissible interpretation presents the view that the instrument, though in writing and in the form of a definite contract, was delivered to plaintiff's agent on condition that same was not to become a binding agreement and operative unless and until the town authorities gave their permission to bury the tank in the street. There is also the permissible view, with evidence tending to support it, that the instrument was delivered with the intent that same should presently bind as a contract of sale, and on the facts as they now appear the issue should be determined by the jury on the question whether the instrument was delivered on the condition stated or with the intent that the parties should be presently bound. And in this last event it would not be open to defendant to show by parol that he had

reserved the right to countermand the order. That would be to annex a condition subsequent and in direct contradiction of the express stipulation of the written instrument.

There is error, and defendant is entitled to have the cause tried before another jury.

New trial.

Cited: Jeffords v. Waterworks Co., 157 N. C., 12; *Fertilizer Works v. McLawhorn*, 158 N. C., 277; *Garrison v. Machine Co.*, 159 N. C., 289; *Machine Co. v. Bullock*, 161 N. C., 13; *Piano Co. v. Strickland*, 163 N. C., 253; *Mercantile Co. v. Parker, ib.*, 277; *Rousseau v. Call*, 169 N. C., 177.

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(40)

S. E. POOL v. J. L. WALKER, ADMINISTRATOR.

(Filed 20 September, 1911.)

1. Contracts, Continuous—Agreement to Take Output of Mill—Termination at Will.

A contract to take the output of plaintiff's shingle mill, wherein no time is fixed during which it is to last and none is fixed by usage, may be determined at the will of either party upon notice.

2. Same.

Nothing appearing of record to show that a contract alleged by plaintiff with the defendant, whereby the latter was to take the output of the shingle mill of the former, contained any agreement of the period of time in which he was to do so, and there being no evidence that any shingles were made or offered to defendant, or that the plaintiff could get timber to make any more shingles when he shut down the mill, or of the capital invested, etc.: *Held*, no error of which the plaintiff could complain as to the amount of recovery in this case for the failure of defendant to continue to take the output of the mill.

APPEAL from *O. H. Allen, J.*, at Spring Term, 1911, of TYRRELL.

It appeared that in 1906 plaintiff borrowed of J. D. Overton, the intestate, a sum of money and to secure payment of the loan executed a mortgage on real property with power of sale, etc.; that Overton died in 1908, and defendant, administrator, having made several efforts to obtain payment, proceeded to advertise the property for sale under the mortgage, the sale to take place 17 January, 1910. Thereupon plaintiff instituted the present action and obtained an injunction staying the sale on affidavits alleging that J. D. Overton in 1906 had contracted and agreed to take the output of plaintiff's shingle mill, which he was then erecting,

at a specified price per thousand; that said Overton had wrongfully failed and refused to comply with said contract, and the damages caused by said breach of contract was more than sufficient to pay off and discharge the loan. Pleadings having been duly filed, issues were submitted and responded to by the jury, in effect, that the amount due on the note was $2,998; that the amount due plaintiff from intestate by reason of breach of contract in reference to shingle mill was $350, with
(41) interest from 14 September, 1908. Judgment was thereupon given crediting defendant's claim with the $350 and interest. Judgment of foreclosure entered for the balance of the debt. Plaintiff excepted and appealed.

M. Majette and E. F. Aydlett for plaintiff.
W. M. Bond, T. H. Woodley, and Meekins & Tillett for defendant.

HOKE, J. There is no error. It appeared in evidence that plaintiff's shingle mill was completed and began operations on or about 18 or 19 June, 1908, and closed down on 2 September of the same year, having manufactured 175,000 shingles, which plaintiff sold at a loss of $2 per thousand on the alleged contract price. This loss was allowed plaintiff by the verdict and has been credited on defendant's claim. There was no stated time alleged in the pleadings or shown forth in evidence during which the intestate was to take the output of plaintiff's mill and it is well understood that on these continuous contracts where no time is fixed during which it is to last and none is fixed by law or usage, it may be determined at the will of either party upon notice. Clark on Contracts, p. 430. And on the testimony no good reason appears for a greater recovery than the loss sustained on the shingles, which were in fact manufactured. In this connection the case on appeal further states: "There was no evidence that any of the shingles made were ever tendered or offered to Overton or to defendant, or that plaintiff when he stopped the mill had or could get timber to make any more shingles, or that he kept the mill, or whether it was used thereafter or remained idle, nor any evidence as to the amount of capital invested in it or that plaintiff offered to make any more shingles."

On this record there is no error certainly which gives plaintiff any just ground for complaint, and the judgment is therefore affirmed.

No error.

(42)

G. A. WHITFORD, ADMINISTRATOR, v. NORTH STATE LIFE INSURANCE COMPANY.

(Filed 20 September, 1911.)

Executors and Administrators—Removal of Causes—Action by Administrator—Venue.

An action by an administrator upon a life insurance policy of his intestate is properly brought in the county where the administrator resides, not necessarily where the bond is filed, the addition of the words, "administrator, etc.," being descriptive of his title or the capacity in which he sues (Revisal, secs. 424 and 421); and Revisal, sec. 421, makes a distinction between actions in which the administrator is sued, for then the action shall be brought in the county where the bond is filed. Revisal, secs. 419, 421, have no application.

APPEAL from *Ferguson, J.*, at June Term, 1911, of CRAVEN.

This is a motion to remove an action from CRAVEN to LENOIR for trial.

The admitted facts are:

(1) The plaintiff is G. A. Whitford, administrator of W. B. Burgess.

(2) The defendant is a domestic corporation, whose principal place of business is in Lenoir County.

(3) The action is to recover the amount of a life insurance policy.

(4) The intestate Burgess was a resident of Lenoir County at the time of his death.

(5) The plaintiff qualified as administrator in Lenoir County.

(6) The plaintiff, G. A. Whitford, is a resident of Craven County.

The motion was allowed, and the plaintiff excepted and appealed.

Guion & Guion for plaintiff.
Rouse & Land for defendant.

ALLEN, J. The cause of action alleged in the complaint is not one of those provided for in section 419 of Revisal, which must be tried in the county "in which the subject of the action, or some part (43) thereof, is situated"; nor is it one of those mentioned in section 420 of Revisal, which are to be tried in the county "where the cause or some part thereof arose."

The section requiring actions against administrators to be instituted in the county where the bond of the administrator is given, has no application, because this is not an action against an administrator, but one brought by him.

As no provision is made elsewhere as to the place of trials of actions instituted by administrators, it follows that the controversy between the plaintiff and the defendant is dependent upon the construction of that part of section 424 of Revisal saying: "In all other cases the action

shall be tried in the county in which the plaintiffs or the defendants, or any of them, shall reside at the commencement of the action."

The question is settled when we determine who are the parties to the record, because if G. A. Whitford is the party plaintiff, he is a resident of Craven and entitled to sue there.

In our opinion, by proper construction of section 424, in connection with section 421, he is the party plaintiff, and the addition of "administrator of W. B. Burgess" to his name is merely descriptive of his title or the capacity in which he sues. If this is not the correct view, and it was the intention of the Legislature that the place where letters of administration were taken out should determine the residence of the administrator, why is it that provision was not made in section 421 for actions by administrators as well as for actions against them?

The clear inference from the last section is that it was the purpose of the Legislature to make a distinction between actions by and against administrators, and when it is said that actions against administrators shall be brought in the county where the bond is filed, and nothing is said as to actions by administrators, it excludes the idea that actions instituted by the administrators are necessarily to be brought in the county in which letters are granted.

Rankin v. Allison, 64 N. C., 674, seems to be in accord with this view. In that case the action was brought in Caldwell County in the name of Jesse Rankin, guardian of John S. McRorie, against two defend-
(44) ants, one of whom was a nonresident of the State and the other a resident of Iredell County. The answer alleged that John S. McRorie was a resident of Iredell County at the commencement of the action. The Court treats the answer as an application for removal, and says: "We might regard the answer in this case as such an application; but then it does not allege that Rankin, the plaintiff of record, resides in Iredell County, and consequently, as for such a purpose the Court can only look to the parties of record, it could not be allowed." Here there is a direct statement that the Court can only look at the parties of record in deciding where the action shall be tried, and that Rankin, although suing as guardian of John S. McRorie, was the plaintiff of record.

The same rule is stated in Cyc., vol. 18, p. 912, as follows: "Actions which are transitory and not local in their nature need not be brought by a personal representative in the county where the estate is being administered."

We conclude that the order of removal was erroneous, and it is

Reversed.

Cited: Smith v. Patterson, 159 N. C., 140; *Biggs v. Bowen,* 170 N. C., 35.

STATE EX REL. T. C. MANN v. T. H. B. GIBBS.

(Filed 20 September, 1911.)

1. Appeal and Error—Drainage Commissioners—Motion to Dismiss—Premature Appeal.

The appeal by defendant from the refusal of the court to dismiss this action brought against him to determine the title to the office of drainage commissioner is premature and the appeal dismissed.

2. Drainage Districts—Special District—Commissioners—Appointment—Interpretation of Statutes.

The appointment of commissioners for the Drainage District for Mattamuskeet Lake and adjoining lands, ch. 509, sec. 3, Laws of 1909, is to be made, two by the State Board of Education and one by the clerk of the court, without reference to sec. 19, ch. 442, Laws of 1909, requiring an election by the owners of the land within the drainage or levee district. *Semble*, the requirements of section 19 are but recommendatory.

APPEAL from *O. H. Allen, J.*, at the Spring Term, 1911, of (45) HYDE.

This action is brought to determine whether the relator Mann or the defendant Gibbs is a drainage commissioner in the Drainage District for Mattamuskeet Lake and the lands adjoining thereto.

The relator alleges that an election was held for drainage commissioner under ch. 442, sec. 19, Laws of 1909; that he and the defendant were the only candidates for the position; that he was legally elected; that a majority of the votes cast were in favor of the defendant, but that enough of these were illegal to change the result; that the Clerk of Hyde County, before whom the petition for the drainage district was filed, appointed the defendant a commissioner, and that he, the relator, is eligible to the position and entitled thereto.

The defendant denies that any illegal votes were cast for him, alleges that he was duly elected, and admits that he has been appointed by the clerk, under sec, 3, ch. 509, Laws of 1909.

The defendant moved to dismiss the action, and, upon the denial of his motion, excepted and appealed.

J. C. B. Ehringhaus and W. M. Bond for plaintiff.
Mann & Jones and E. F. Aydlett for defendant.

ALLEN, J. It requires no citation of authority to sustain the proposition that the appeal is premature and must be dismissed, but as both parties request it and much expense may be saved by the determination of the right of the relator to maintain his action if he sustains his allega-

tion that he received a majority of the legal votes cast, we proceed to consider it. The question involves the construction of sec. 19, ch. 442, Laws 1909, and sec. 3, ch. 509, Laws 1909.

The first of these stautes is a general law, applicable to the whole State, and is for the establishment of drainage districts upon petition filed before the clerk, while the second relates to a particular
(46) drainage district, and is, "An act to authorize the State Board of Education to unite with certain landowners in Hyde County in establishing a drainage district, including Mattamuskeet Lake and the lands adjacent thereto."

The language of the two sections upon which the controversy arises is as follows:

Ch. 442, sec. 19, Laws 1909: "After the said drainage district shall have been declared established, as aforesaid, and the survey and plan therefor approved, the court shall appoint three persons, who shall be designated as the board of drainage commissioners. Such drainage commissioners shall first be elected by the owners of the land within the drainage or levee district, or by a majority of the same, in such manner as the court shall prescribe. The court shall appoint those receiving a majority of the votes. If any one or more of such proposed commissioners shall not receive a vote of a majority of such landowners the court shall appoint all or the remainder from among those voted for in the election. Any vacancy thereafter occurring shall be filled in like manner."

Ch. 509, sec. 3, Laws 1909: "Two members of the board of drainage commissioners provided for in section 19 of the general drainage law shall be appointed by the State Board of Education and one appointed by the court before which the petition is filed. The corporate name of said district shall be 'Board of Drainage Commissioners of Mattamuskett District,' and the State Treasurer shall be the *ex officio* treasurer of said board."

The contention of the relator is that the two statutes should be construed together, and that when so construed, by correct interpretation, the provisions as to elections contained in the first are applicable to appointments made by the clerk under the second.

In the view we take of the case, it is not necessary to pass upon the effect of an election under section 19 of chapter 442, but we incline to the opinion that it is recommendatory in its nature and does not confer title. There is an absence of all the usual requirements attending elections for general or special purposes, and the qualifications of an
(47) elector are not those prescribed by the Constitution. The owners of land within the district, and no others, are entitled to vote, thereby excluding those who are not landowners from the right to vote,

and including infants and married women who own lands. There is no provision for holding an election, for the count of the vote, for returns, or for declaring the result. We do not mean that no election can be held under a statute unless these regulations appear, but that the absence of them, when taken in connection with the language of the act, and its purpose, indicates that by an election was meant a meeting of the landowners and an expression of their opinion, expecting the clerk to follow it. The latter part of section 19 adds force to this view: "If any one or more of such proposed commissioners shall not receive the vote of a majority of the landowners, the court shall appoint all or the remainder from those voted for at said election," thus providing for the appointment of commissioners who are not the choice of a majority of the landowners.

If, however, it be conceded that an election is necessary under sec. 19, ch. 442, and the clerk must appoint one who receives a majority of the votes, we are of opinion that this provision is not incorporated in sec. 3, ch. 509, and is not applicable thereto.

The reference to the general drainage law in section 3 is for the purpose of indicating the number of commissioners and the nature of their duties, and not to designate how they shall be appointed or elected. The section says, without qualification, that two of the commissioners shall be appointed by the State Board of Education and one by the clerk. If it had been the intention of the Legislature for the clerk to make the appointment under the provisions of section 19, it would have been easy to add to the power conferred on the clerk, "as prescribed in section 19 of chapter 442," and not leave the matter to conjecture.

There was a reason for the difference in the two acts. Under the first the landowners of the drainage district were the only parties interested, and it was right and advisable that their choice should be respected in the selection of commissioners, while under the second (48) the State Board of Education was uniting with certain landowners to form a district, upon the understanding that the State board should name a majority of the commissioners. The plan, therefore, outlined in section 19 could not be applied to the new scheme, and another was adopted.

We conclude that the relator, upon the facts submitted, is not entitled to maintain his action.

The appeal is dismissed as premature.

Appeal dismissed.

Cited: Shelton v. White, 163 N. C., 93.

G. W. WHITEHURST v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 20 September, 1911.)

1. Navigable Waters — Drawbridges — Construction — State's Powers—Nuisance.

Subject to the supervisory power of the National Government, a State may authorize the construction of a drawbridge over navigable bodies of water within its borders, and no cause of action arises against a railroad for an illegal obstruction in such waters by reason of thus erecting a bridge for public purposes and benefit, leaving reasonable spaces for the passage of vessels, for structures of this character are lawful and not nuisances.

2. Navigable Waters—Drawbridges—Construction—Damages to Vessels—Negligence—Accident—Evidence.

Defendant was erecting a bridge for railroad purposes across the navigable waters of Albemarle Sound, under authority duly conferred by the State. There were two draws therein, a large one near the northern shore and a smaller one, 70 feet long, near the southern shore. The plaintiff was "tacking" his sailing vessel against the wind, in the daytime, for the purpose of going through the northern draw, when informed that it was not operated or open, and then changed his course for the southern draw. The latter was open about 35 feet on one side and the other side was obstructed by a large pile driver, used in the construction of the bridge. Seeing the obstruction, the skipper attempted to tack and stand away from the bridge so as to lay his course through the open space, but his vessel for some unexplained reason failed to "go about," fell off before the wind, and the sails filled in a strong breeze, which causd the vessel to be wrecked on a shoal: *Held*, upon this evidence, the proximate cause of the loss was an accident, the failure of the vessel to respond, and the defendant was not liable for the damages sustained.

(49) APPEAL from *Justice, J.*, at January Term, 1911, of PASQUOTANK.

These issues were submitted:

First. Was plaintiff's boat and cargo damaged by the negligence of defendant railway company, as alleged? Answer: "Yes."

Second. What damage, if any, has plaintiff sustained? Answer: "Boat and cargo, $1,500."

In apt time defendants moved to nonsuit, which motion was denied and defendants excepted. From the judgment rendered the defendants appealed.

E. F. Aydlett and J. C. B. Ehringhaus for plaintiff.

W. M. Bond for defendants.

BROWN, J. On 22 December, 1909, the defendant company by its contractors, the construction company, was constructing a railway bridge

about 6 miles long from Mackey's Ferry, across Albemarle Sound to its northern shore near Edenton. The bridge was not entirely completed nor in use by the railroad company. In the northern part of this bridge is located a large drawbridge, over deep water intended for passage of vessels. This was about completed, but could not be opened on day named because the cement had not had time to set.

There is also another pivot drawbridge in southern portion of the bridge about 1½ miles from the southern shore. This drawbridge is over 70 feet long. It turns upon a central pillar and leaves 35 feet clear space open on each side of the pillar for passage of vessels. On date named the pivot draw was opened, that is, extended east and west, the main bridge running north and south. The 35-foot space on northern side of the pivotal pillar was obstructed by a pile driver at work on the bridge abutment. The other side of the draw was clear and open (50) for passage of vessels. There was nothing to prevent a vessel passing through it, wind and weather permitting.

The evidence of plaintiff shows that on date named he was beating (tacking) his schooner *Alva* up Albemarle Sound bound for Avoca loaded with 2,000 bushels of oyster shell. The wind was blowing from west northwest, being almost dead ahead for Avoca, which is some miles west of the bridge.

The plaintiff was tacking back and forth, making for the large northern draw at 9 A. M., when he was told by the skipper of the *Waterboy* that the northern draw was closed. Plaintiff at once steered south for the southern draw. When he was opposite it he saw that the northern side was blocked by a pile driver at work. He attempted to tack and stand away from the bridge so as to lay his course and go through the open space on southern side of the long drawbridge. When he put his helm down to tack, the *Alva* "missed stays," that is, failed to "go about" and put her bow into the wind; instead, she fell off before the wind, and her sails filling in a strong breeze caused her to be wrecked on a shoal.

The *Alva* was 25 years old and the plaintiff, her owner and captain, 62, with 40 years experience on the waters of Albemarle Sound.

It is admitted the bridge in question was constructed under the authority of the General Assembly of this State and under the supervisory powers conferred on the Government of the United States in such cases by act of Congress.

The right of the State, subject to the power of the National Government, to authorize such structures across navigable bodies of water within its borders is too well settled to be now discussed. *Pedrick v. R. R.*, 143 N. C., 486, and cases cited; *Works v. R. R.*, Fed. Cases, No. 18046.

It is settled beyond controversy that where a bridge over a navigable stream is erected by authority of law for public purposes and benefit, and leaves reasonable spaces for the passage of vessels, it is not a
(51) nuisance, but a lawful structure. *Pedrick v. R. R., supra.* For the convenience and safety of navigation, it is well known that the plans and specifications of such structures as this and its draw-bridges must be approved by the proper Federal officials.

It is manifest that plaintiff has no cause of action arising out of an illegal obstruction of Albemarle Sound by the erection of this bridge across it.

Nor are we able to perceive that the defendant was guilty of negligence and wanting in the discharge of any duty it owed the plaintiff, while constructing this bridge. Its "draws" had not been completed and could not be used with the facility for passing vessels that they now afford. It is manifest that in constructing these draws navigation must necessarily be much more inconvenienced and impeded than when they are in a completed state and properly operated. Such temporary inconvenience must be suffered for the public weal.

It is manifest from plaintiff's evidence that the proximate cause of his loss was an accident which neither he nor any one else could foresee or prevent. The plaintiff was beating to windward against a strong north nor'westerly wind, heading for the northern draw. Before he reached it he was informed from the *Waterboy* that it was closed. The plaintiff doubtless "eased off his sheets" and pointed towards the southern draw. It was no trouble for him to "stand away" from the bridge as far off as he pleased, for the bridge was to his windward and the wind blowing him away from it. Plaintiff says he was given no notice or signal that the northern side of the southern draw was blocked by a pile driver. It was 9 o'clock in the morning and any reasonable vigilance could have discovered such a lofty object as a pile driver 100 yards away. Plaintiff, however, says he did see the obstruction when he got opposite the draw. At that time he was in open water and in no danger in case his vessel worked all right. He then "tacked ship" with the evident intention of getting in a position and then laying his course through the open draw, but unfortunately the *Alva* failed him at the critical moment. Instead of "coming about" in obedience to her helm, she fell off, and before he could recover her she grounded on the shoal, which
(52) according to the uncontradicted evidence was 250 yards from the bridge and 2,000 feet from the southern draw.

The failure to answer her helm and tack at the critical moment has wrecked sailing craft before the *Alva*. Her misbehavior was plainly the proximate cause of her grounding on the shoal. It is a superstition among sailors that sailing craft have their individual peculiarities and

idiosyncrasies and become unmanageable when least expected. Some one, doubtless a crusty and disappointed bachelor, has said that is the reason they are given the feminine gender and called *"She."*

This plaintiff, an experienced sailor, knew his craft and that she was heavily laden and not so active as when light. It may have been the part of wisdom to have dropped anchor and waited for a more favorable breeze rather than attempt to beat through a drawbridge against a strong head wind.

However that may be we see nothing in the record which justly renders the defendants liable for the loss of plaintiff's vessel.

The motion to nonsuit is sustained and the action dismissed.

Reversed.

Cited: Townsend v. Construction Co., 159 N. C., 506.

C. J. DEBRUHL v. J. T. HOOD.

(Filed 20 September, 1911.)

1. Tender—Profert—Readiness to Pay—Suit—Payment Into Court.

To constitute a valid tender, the party claiming its benefit must allege and show that since its refusal he has always been ready to pay the same, and upon suit brought he must pay the money into court.

2. Same—Verdict.

The verdict of the jury rendered in an action upon a mortgage note will not be affected by a tender of a larger amount made before the commencement of the action, which was refused and not kept good; for the refusal thereof left the matter open and at large, and the court could find the true amount.

APPEAL by defendant from *Ferguson, J.,* at May Term, 1911, (53) of CRAVEN.

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

Moore & Dunn for plaintiff.
Guion & Guion for defendant.

WALKER, J. This action was brought to enjoin the defendant from selling certain property under powers of sale contained in two mortgages, originally executed by plaintiff to Mrs. Sophia B. Duffy and the Citizens Bank of New Bern, to secure notes of the plaintiff, and by them sold and transferred to the defendant. It is alleged in the complaint that several cash payments were made upon said indebtedness by the

plaintiff, which, with the proceeds of certain timber cut from the land and received by the defendant, which, by reason of the contract between the parties, should have been applied to the debt, have reduced the amount thereof to $273.68, which sum was tendered by the plaintiff to the defendant, who refused to accept the same. No money was deposited in court in order to keep the tender good. It is the universal rule that, in order to constitute a valid and effectual tender, the party who makes it must allege and show that since the refusal to accept the money he has always been ready to pay the same, and must bring the amount of the tender into court, and it has been said that he should take a rule on the plaintiff or party to whom the debt is due, to accept the same or proceed at his peril. *Cope v. Bryson,* 60 N. C., 112. In *Bilzell v. Hayward,* 96 U. S., 580, it was said, with reference to a sufficient tender: "To have the effect of stopping interest or costs, a tender must be kept good; and it ceases to have the effect when the money is used by the debtor for other purposes." A plea of tender not accompanied by *profert in curiam* is bad. *Saper v. Jones,* 56 Md., 503. The subject is fully discussed in *Parker v. Beasley,* 116 N. C., 1, with ample reference to the authorities. *Justice Allen,* in a very recent case decided by this Court (*Lee v. Manley,* 154 N. C., 244), adopts the statement of *Wilde, C. J.,* in *Dixon v. Clark,* 57 E. C. L., 376, as follows: "The principle of the plea of tender,
(54) in our apprehension, is that the defendant has been always ready *(toujours prist)* to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluding a complete performance by refusing to receive it. And as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready *(uncore prist),* but must be accompanied by a *profert in curiam* of the money tendered." The case of *Dixon v. Clark* was cited with approval also in *Bank v. Davidson,* 70 N. C., 122.

The defendant in his answer insisted that the amount due upon the indebtedness secured by the mortgages was not $273.68, as alleged by the plaintiff, but a much larger sum, to wit, $1,180.96, and demanded the payment of that amount."

The jury found that the true sum was neither of the said amounts, but $203. It was urged by the defendant in the court below that this verdict was erroneous, as he was entitled to recover at least $273.68, the amount of the tender. We do not see upon what ground any such claim can be based. The tender was rejected, and, as the money was not paid into court, it left the matter open and at large, the same as if no such tender had been made. The defendant should have taken the money when it was tendered, if he wished to avail himself of the tender. It is

now too late for him to get the benefit of the same. The law will not compel the plaintiff to renew his tender, so that the defendant, who has submitted his cause to the jury and been defeated in his contention, may have another chance to accept it. This would be giving him two chances, to which he is not entitled, either in law or equity. Good faith requires that he be made to abide by his first decision. The fact that a greater sum was tendered than was actually due did not entitle the defendant to that sum if he rejected the offer, so as to prevent the court from ascertaining the true amount for which judgment should be given. In *Glos v. Goodrich,* 175 Ill., 20, the Court, in dealing with a similar question, said: "The objection that the sum of $30 was tendered and (55) the decree only required the payment of $25.50 cannot be held well taken, because in a chancery proceeding the offer to bring the money into court and abide by the order of the court as to its payment is a sufficient tender, and being incorporated in the bill, the court may find the actual amount due and require that sum to be paid, and is not required to find a greater amount due than actually exists because a tender for such greater sum has theretofore been made."

We see from this case that even when the tender was held to be good and continuing, by reason of what was said to be equivalent to actual payment into court, the court has the right to find the correct amount and enter judgment for it, and not for the larger amount which was tendered, and *a fortiori* this can be done when the tender was made out of court and under the circumstances stated in this case.

In *Abel v. Opel,* 24 Ind., 250, the Court held that, while a tender is an admission of the amount due upon the debt, it is not conclusive, no more than any other admission of fact, and does not preclude the court from inquiring as to the true amount, nor does it exclude the consideration of all other evidence upon the subject, and, further, that if too much has been tendered, no obligation arises to pay the larger sum or to keep the tender good at that amount. That case was very much like this. The mortgagor tendered $1,440, when only the sum of $1,309 was found to be due, and it was held proper to enter judgment for the smaller amount, notwithstanding the tender. See, also, 28 A. & E. Enc., pp. 15 and 16, title, "Tender as admission of liability."

The jury have decided against the defendant, mortgagee (who was oppressively demanding far more than he was justly entitled to recover), and upon evidence, as we think, sufficient to sustain the verdict, and there was no error committed during the trial which invalidates that verdict. We, therefore, affirm the judgment.

No error.

Cited: Medicine Co. v. Davenport, 163 N. C., 298.

(56)

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

(Filed 27 September, 1911.)

In this case no substantial error was found.

APPEAL by defendant from *Ferguson, J.*, at April Term, 1911, of CRAVEN.

D. L. Ward, D. E. Henderson, E. M. Green, and Rodman Guion for plaintiff.

Moore & Dunn for defendant.

CLARK, C. J. This case was before us, 152 N. C., 79-83, where the facts are fully set out, and again, 154 N. C., 523.

On this last trial the case was tried in accordance with the principles of law laid down in the two former appeals. The evidence was substantially the same as on the former trials, with the addition of other witnesses, whose evidence was largely cumulative.

Numerous exceptions were taken, but we do not think that discussion of them is necessary. The learned and impartial judge ruled out much of the plaintiff's testimony and evidently labored to bring the case strictly within the former decisions of this Court in this case. We think he has done so, at least to the extent that no substantial error has been committed which entitles the defendant to still another trial of the case before a jury.

No error.

W. L. GASKINS v. H. S. HANCOCK.

(Filed 27 September, 1911.)

1. Public Highways—Bridges—Vehicles—Automobiles—Negligent Operation—Questions for Jury.

In an action for damages for injury alleged to have been sustained because of the defendant's negligence in running his automobile over a bridge, without observing proper caution for plaintiff's safety, overtaking plaintiff thereon and frightening his mules so that they became uncontrollable, throwing plaintiff to the floor of the bridge under their feet, and running his conveyance over him, there was conflicting evidence as to the speed of the automobile and the ability of defendant to slow up in time to avoid the injury: *Held*, in this case, the charge of the court was correct under Laws 1909, ch. 445, secs. 9, 10, 11, and 12, regulating the operation of moving vehicles in use on the highways; (2) the case was almost entirely one of fact, and properly submitted to the jury.

2. Public Highways—Bridges—Automobiles—Negligent Operation—Damages —Implied Notice.

One driving an automobile along public highways and over bridges is liable for such compensatory damages as are proximately caused by his negligence in not exercising proper care in looking out for horses, etc., thereon; and he is required to take notice that such machines are liable to scare them.

3. Public Highways—Conveyances—Automobiles—Nuisance.

It is not negligence *per se* for a person to use an automobile in traveling along public highways and across public bridges.

APPEAL by defendant from *Ferguson, J.*, at May Term, 1911, (57) of CRAVEN.

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

E. M. Green and Guion & Guion for plaintiff.
W. D. McIver for defendant.

CLARK, C. J. According to plaintiff's evidence he was driving a pair of mules across Neuse River bridge, a structure about 1 mile in length and 18 feet wide, perfectly straight. A few yards ahead when plaintiff first drove upon the bridge, the defendant was crossing the bridge in an automobile, and when plaintiff had crossed probably one-half the bridge, going at the rate of about 3 miles an hour, he saw defendant returning and coming towards him at a rate of speed of about 10 miles an hour; his mules showed signs of fright, whereupon the negro riding with him on the back of the cart, at the direction of plaintiff, signaled and called to the defendant, when at a distance of about 40 yards, requesting him to stop his machine; he came on, and the mules becoming uncontrollable. plaintiff, an old man, was thrown to the floor of the bridge under the mules' feet, and the two wheels of the double horse wagon, with the negro upon the rear, passed over and acroos the small of plaintiff's back, from which injury he sustained great suffering (58) and for several months was disabled to labor.

There was conflicting evidence as to the distance at which the plaintiff signaled the defendant and also the speed at which the automobile was traveling. The defendant's evidence put the speed at less than 5 miles an hour, while the plaintiff's witnesses placed it at more than that. The defendant's testimony was that he could not have stopped his machine sooner without injury to occupants.

The judge read to the jury the statute regulating the operation of moving vehicles in the use of highways, Laws 1909, ch. 445, secs. 9, 10,

11, and 12, and gave a careful charge in accordance therewith, applying the law to the various phases of the facts as might be found by the jury, in which charge we find no error.

The exception as to the form of the issues cannot be sustained, as upon them every phase of the controversy could be, and was, fairly submitted to the jury. *Humphrey v. Church,* 109 N. C., 137, and cases there cited. The exceptions of the defendant are largely addressed to the refusal of the court to grant a nonsuit and refusal to instruct the jury to answer each of the issues, *seriatim,* in favor of the defendant. In refusing to do so there was no error.

The case is almost entirely one of fact, and was properly submitted to the jury, who evidently gave a moderate verdict. The judge cautioned them very properly that they were to give only compensatory damages and nothing by way of punishment. He also instructed them that an automobile is not a nuisance in itself and that it was not negligence *per se* for a person to use one in traveling along public highways and across public bridges, and that the owner is liable for damages only when caused by his negligence; that he is required to take notice that such machines are liable to scare horses along the highway, and he should keep a proper lookout, not to cause any injury to others which could be avoided by proper care in the use of his machine.

No error.

Cited: Curry v. Fleer, 157 N. C., 19.

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(59)

P. A. NICHOLSON AND J. T. NICHOLSON v. EUREKA LUMBER COMPANY.

(Filed 27 September, 1911.)

1. Evidence—Ancient Documents—Self-evidence—Circumstances.

Ancient documents relative to the inquiry, bearing date or purporting to bear date at or before a period of thirty years prior to the time they are offered in evidence, are admissible without the ordinary requirements of proof of execution or as to handwriting, when produced from a proper or natural custody, free from suspicious circumstances or those indicative of fraud or invalidity; and these preliminary requirements are for the determination of the court.

2. Same—Supporting Evidence—Questions for Jury.

It is not now necessary that when an ancient document is offered in evidence as a muniment of title it should be fortified by some evidence of possession or occupation under and consistent with the purport of the

instrument; but its presence or absence is a relevant circumstance for the consideration of the jury after the document has been received in evidence.

3. Evidence—Handwriting—Nonexpert Witnesses.

A witness, whether an expert or another, who has acquired knowledge and formed an opinion as to the character of a person's handwriting from having seen such person write or from having, in the ordinary course of business, seen writings purporting to be his and which he has acknowledged or upon which he has acted or been charged, may give such opinion in evidence when a relevant circumstance.

4. Same—Comparisons.

A witness, whether an expert or not, who has been properly allowed to express an opinion as to the handwriting of a given paper, on being shown a writing admitted to be genuine, etc., may show the two papers to the jury and, by making comparisons between them, explain and point out the similarity or difference between the two.

5. Same—Ancient Documents—Muniments of Title.

It is competent for a witness to testify to the genuineness of the signature or handwriting of an ancient document, who in the course of his duties has had full opportunity and frequent occasion to observe and note the handwriting in other ancient documents which are entirely free from suspicion, and who states that he has thus been enabled to form a satisfactory opinion as to the handwriting of the document in question.

6. Same.

In an action involving title to lands, where the location of a certain corner will control the location of the *locus in quo*, and wherein the genuineness of a certain certificate of survey purporting to have been made by the common ancestor is germane to the inquiry, it is competent for the witness, a grandson, to testify to the genuineness of the writing when shown to him on the stand, after he has testified that he and his father are surveyors; that he knew by his family reputation that his grandfather was one likewise; that since he had become a surveyor his father had frequently, while looking over the old papers of his grandfather, informed him, "This is your grandfather's signature"; and that the witness had been afforded opportunity to observe and note such signature as surveyor to numerous papers coming under inspection in the line of his duty.

7. Evidence—Plats, etc.—Jury's Deliberations—Appeal and Error.

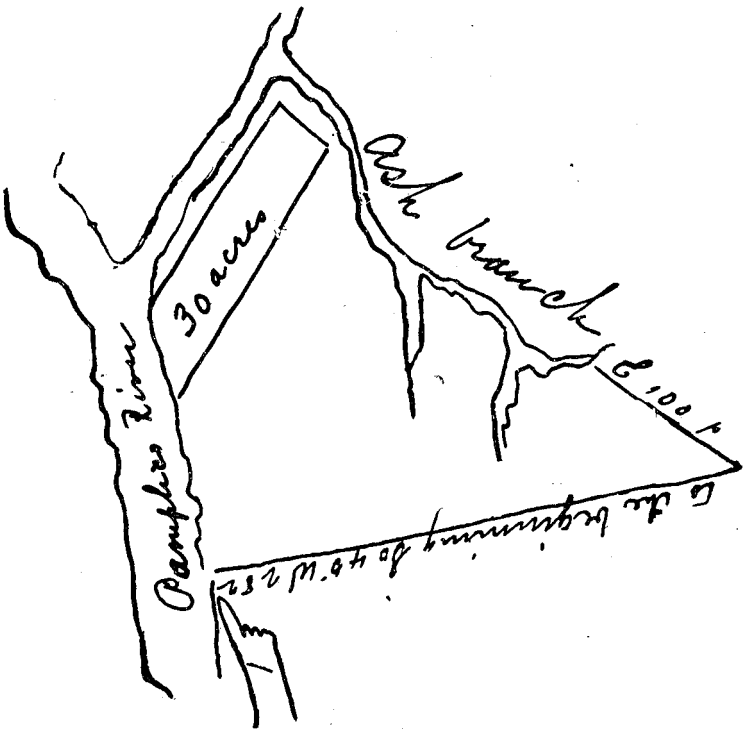
It is reversible error for the trial judge, under objection, to permit the jury to take plats of or certificates relating to the location of disputed lands to their room and inspect them in their deliberations.

APPEAL by plaintiff from *Joseph S. Adams, J.*, at December (60) Term, 1910, of BEAUFORT.

Trespass, involving an issue as to title. On said issue as to title there was verdict for defendant, judgment, and plaintiff excepted and appealed.

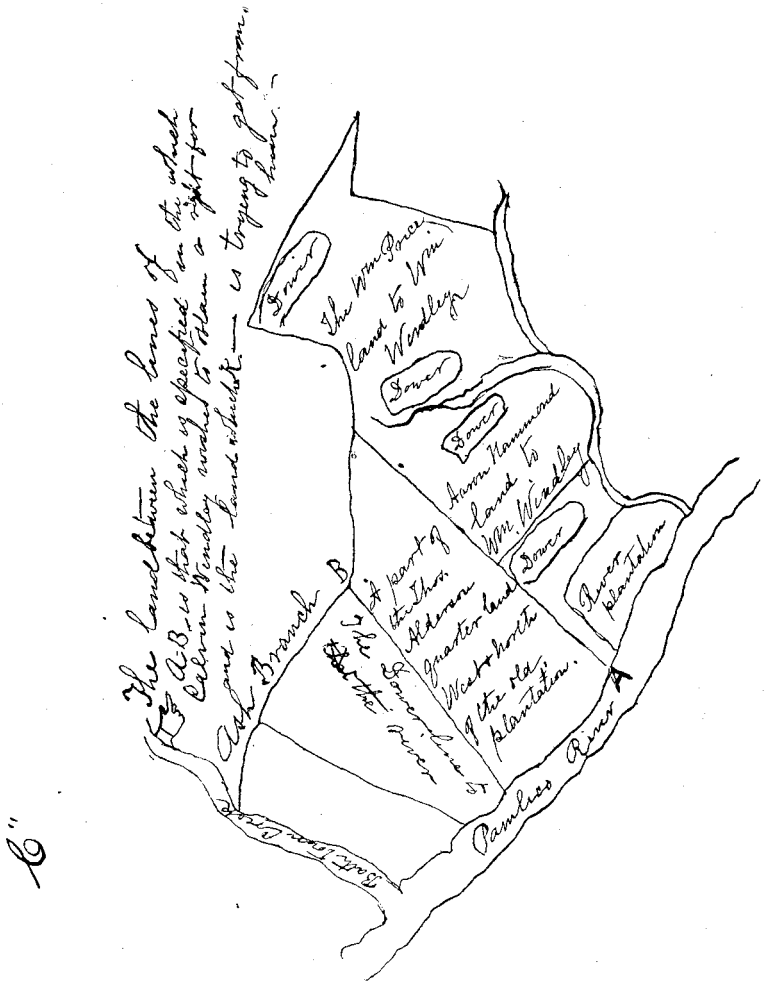
Nicholson & Daniel for plaintiffs.
Wiley C. Rodman for defendant.

HOKE, J. On the trial it appeared that both parties claimed under Ruel Windley, deceased, who by his last will and testament, bearing date in 1854, made disposition of certain real estate as follows: "I give and devise to my two grandsons, George C. Respess and John B. Respess,



all of my river shore lands, lying on the north side of Pamlico River and known as the William Windley, deceased, lands, excepting 100 acres which I shall lend to Ruel W. Jordan and given to his children, and also except 100 acres which I shall give to my friend, James
(61) Windley, and the rest of the said tract to be equally divided between the said George and John B. Respess.

"Item 2: I give and bequeath to my friend and relative, James Windley, for favors done me by him, the following tract of land lying near the waters of Old Town Creek and beginning at or near the head of Ash Branch at an oak, and from thence south 80 east 17 poles to a



"A" is the division line of the Alderson quarter land from the River plantation and the Aaron Hammond land.

"B" is the westernmost line of the widow's dower.

corner; thence with William Windley's own line east 129 poles to a corner; thence north 15 west 66 poles to a corner stake in the savannah; thence north 76 west 160 poles to a corner; thence south 10 east 16 poles to said Ash Branch, and then to the beginning, containing 100
(63) acres, more or less, and was patented by William Windley, deceased; to have and to hold to him and his heirs in fee simple forever."

Plaintiff claimed the 100 acres devised in this will to James Windley under a deed from a surviving child and one of the devisees of said James, and defendant claimed under a deed from the said John B. Respess, to whom the said George Respess, codevisee, had conveyed his interest, and which said deed purported to convey the land devised to John B. and George Respess, under said will of Ruel Windley; and on matters relevant to this appeal the issue as to title was made to depend largely on the correct location of this devise of 100 acres to James Windley, defendant alleging that plaintiff had failed to locate the said land at all, and that any correct location of same, if made, would not include the *locus in quo*. On this question of location there was evidence on part of plaintiff tending to fix the beginning corner of the 100 acres as a certain "oak at or near the head of Ash Branch" as called for in the devise and subsequent deeds, and that the placing as contended for would result in locating this land so as to include the *locus in quo;* and in rebuttal of his testimony, defendant offered, and same was received in evidence over plaintiff's objection, a certificate of survey for a land warrant and grant to Calvin Windley for 200 acres of land in Beaufort County. This certificate, bearing date or purporting to bear date in 1841, contained a plat of land, with the courses and distances, and was signed by Ruel Windley, surveyor, and also the chainbearers, was without erasure or interlineations of any kind, and as we understand the record was the plat and survey accompanying a grant to Calvin Windley, of same date, for a tract of land in that neighborhood of the quantity stated, and was produced from the proper custody. This plat was introduced because it apparently showed a placing of Ash Branch entirely different from that claimed by plaintiff and tending to show that a correct location of the 100 acres would not cover the *locus in quo*. Before the same was admitted, John B. Respess, Jr., a witness for defendant, testified as follows:

"Q. Do you know Ruel Windley's handwriting? A. I know
(64) it in this way: he raised my father and was very much devoted to him, and often in looking over his papers, which I have now, my father would show me and say, 'This is grandfather's signature.'

"Q. Have you seen a great deal of that writing? A. Yes, sir. Since

I have been surveying I have seen quite a lot of it. By family reputation, my greatgrandfather was a surveyor, and my father was a surveyor."

A small map, marked "A," was handed to witness, and he was asked:

"Q. Whose handwriting is this, if you know? A. That is Ruel Windley's, from the source of information that I have.

"By the Court: Q. Do you mean to say that somebody told you that that identical paper was in Ruel Windley's own handwriting? A. Not this one.

"By counsel for defendant: Q. From the writing you have seen purporting to have been written by Ruel Windley, is that, or is it not, his handwriting? A. Yes, sir; that is his handwriting."

On these facts and accompanying testimony, we are of opinion that the plat with the certificate was properly received in evidence, being admissible as an ancient document and also by reason of competent testimony tending to show that the certificate just below the plat, and giving the corners of same, was signed or subscribed in the handwriting of Ruel Windley, deceased. It is well established that ancient documents, that is, documents relevant to the inquiry and bearing date or purporting to bear date at or before a period of thirty years prior to the time the same are offered in evidence, prove themselves, that is, they are admissible in evidence without the ordinary requirements as to proof of execution or as to handwriting, the recognized limitation being that they should be produced from proper or a natural custody and be free from suspicious circumstances, indicative of fraud or invalidity. McKelvey on Evidence (2 Ed.), p. 440. These preliminary requirements being for the determination of the court. The principle is stated in Stevens' Digest of the Law of Evidence, as follows: "Where any document purporting to be thirty years old is produced from any custody (65) which the judge in the particular case considers proper, it is presumed that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested; and the attestation or execution need not be proved, even if the attesting witness is alive and in court. Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be, but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render the origin probable."

This statement, copied with approval in 2 Elliott on Evidence, sec. 431, will be found very generally sustained, and applies, except where

modified or restricted by statute, not only to deeds, but to wills, leases, letters, records, contracts, maps, certificates, and all other writings which are relevant to the inquiry and may need authentication. 3 Wigmore, sec. 2145; 2 Elliott, sec. 1333; Starkie on Evidence, sec. 521 *et seq.;* 2 A. & E., p. 322. Where such a document is offered as a muniment of title it was formerly held that it should be fortified by some evidence of possession or occupation, under and consistent with the purport of the instrument, a position referred to as prevailing in *Plummer v. Baskerville,* 36 N. C., pp. 252-269; but the view which now more generally obtains does not seem to make this evidence of cotemporaneous or accompanying occupation a necessary requirement to the introduction of the paper, but its presence or absence is a relevant circumstance for the consideration of the jury after the same has been received in evidence, the presumption as to the authenticity of an ancient document being a rebuttal one. McKelvey on Evidence, p. 441; Wigmore on Evidence, sec. 2441; Starkie on Evidence, sec. 524; Wharton Law of Evidence, 1358, 1359.

Again, as stated, we think the testimony of John B. Respess, (66) concerning the document, would require that the same be received in evidence. While the doctrine of opinion evidence, by what is in strictness termed a comparison of handwriting, as a rule, is only permitted in this State in the case of expert witnesses, and then in a restricted line of cases, as shown in *Tunstall v. Cobb,* 109 N. C., 316; *Yeates v. Yeates,* 76 N. C., 142, a witness, expert or other, who has acquired knowledge and formed an opinion as to the character of a person's handwriting from having seen such person write or having, in the ordinary course of business, seen writings purporting to be his and which he has acknowledged or upon which he has acted or been charged, as in the case of business correspondence, etc., may give such opinion in evidence when a relevant circumstance. *Pope v. Askew,* 23 N. C., 16; Stephens on Evidence, 98; Abbott's Trial Evidence, 485-86. And the position excluding proof of handwriting by comparison is now so far relaxed with us that although a jury is not allowed to make comparisons for themselves (*Fuller v. Fox,* 101 N. C., 119), a witness, expert or not, who has been properly allowed to express an opinion as to the handwriting of a given paper, on being shown a writing admitted to be genuine, may "show the two papers to the jury and, by making comparisons between them, explain and point out to the jury the similarity or difference between the two." *Martin v. Knight,* 147 N. C., 564. And the means of acquiring the requisite knowledge to enable one to form and express an opinion as to handwriting has, in a case of ancient documents, and of necessity, been extended to include a witness who, in the course of his duty, has had full opportunity and frequent occasion to observe and

note the handwriting in other ancient documents entirely free from suspicion, and states that he has thus been enabled to form a satisfactory opinion as to the handwriting of the ancient document in question. 3 Taylor Evidence, Amer. Notes, 1229, 21; Chamberlain Best on Evidence, p. 231; Starkie on Evidence, sec. 521.

Writers on evidence usually refer to such testimony as coming only from expert witnesses, but we doubt if an examination of the decisions would justify the statement. The opinions in these cases, so far as examined, seem rather to lay stress on the fact as stated, that the witness had charge and custody of numbers of documents, with full (67) opportunity and frequent occasion to examine them, rather than the fact that a witness was in strictness and technically an expert. *The Fitzwalter Peerage case,* 10 C. & F., 193; *Canty v. Platt,* 11 S. C., 260; *Swegart v. Richards,* 8 Pa. St., 436; *Jackson v. Brooks,* 8 Wendell, 426. In this last case the doctrine is stated as follows: "Where witnesses to ancient writings are dead, and such a period of time has elapsed since the execution of the instruments that no person can be presumed to be living who can testify to the handwriting of the parties or witnesses, evidence by a witness verifying the signatures of the parties and witnesses is admissible, although his knowledge of such genuineness is derived solely from an inspection of other ancient writings having the same signatures, which have been treated and preserved as muniments of title to estates." And generally on the question of the admissibility of this evidence, see *Tuttle v. Rainy,* 98 N. C., 513; *Strother v. Lucas,* 31 U. S., 763; *Hogans v. Carruth,* 19 Fla., 84; *Floyd v. Tewksbury,* 129 Mass., 362.

A proper application of these authorities fully supports the ruling of the court in admitting the certificate and plat in question, and, as stated, on both grounds. It was an ancient document, produced from a custody both reasonable and natural and apparently without any fact or suggestion casting doubt or suspicion upon it. (2) The witness John B. Respess fully qualified himself to give an opinion as to the handwriting of Ruel Windley in testifying that he had had occasion and full opportunity to examine and note other ancient documents having Ruel Windley's signature in care and keeping of his father and himself, the son and grandson of Ruel Windley, and to observe and note his signature as surveyor to numerous papers coming under his inspection in the line of his duty.

While we uphold the action of the court on the question suggested, the plaintiff is entitled to a new trial by reason of another exception duly entered, for that the court, over plaintiff's objection, allowed the jury to take this plat and certificate to their room and inspect the same in their

deliberations. This is contrary to our practice and has been condemned in several decisions of the Court. *Williams v. Thomas,* 78 N. C., (68) 47; *Outlaw v. Hurdle,* 46 N. C., 150; *Watson v. Davis,* 52 N. C., 178-81. For this error, as stated, plaintiff is entitled to a new trial, and it is so ordered.

New trial.

CLARK, C. J., did not sit.

Cited: Bissett v. Lumber Co., post, 164; *La Roque v. Kennedy, post,* 370; *Rangeley v. Harris,* 165 N. C., 362; *Boyd v. Leatherwood, ib.,* 616, 618; *Bank v. McArthur,* 168 N. C., 55; *Lupton v. Express Co.,* 169 N. C., 674; *Morgan v. Fraternal Assn.,* 170 N. C., 82.

L. C. CARROLL v. MARTHA AND ISAAC JAMES AND A. L. WILSON.

(Filed 27 September, 1911.)

Claim and Delivery—Mortgages—Payments—Other Property—Pleadings—Admissions—Burden of Proof—Appeal and Error.

In defense to an action of claim and delivery of mortgaged property, the defendant contended, among other things, that certain tobacco delivered to the plaintiff, not embraced in the mortgage, was sold by the plaintiff, who retained the proceeds of the sale, except $112, which he paid to a certain agricultural lienor, at the request of the plaintiff. The amount due under this lien was admitted in the pleadings, and, *Held,* error for the trial judge to put upon the plaintiff the burden of proving it. A new trial is ordered, as the record does not disclose whether the jury, in their verdict, allowed plaintiff this as a credit.

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

This is an action to recover personal property under a chattel mortgage executed by Cæsar James, who is dead. The property was seized under claim and delivery proceedings issued in this action, and delivered to the plaintiff, and sold by him.

The defendants are the administrator of Cæsar James and his grandson. They allege in their answer that a part of the property seized was not embraced in the chattel mortgage; that other parts of the property were bought by the plaintiff, at the sale under the mortgage, for less than its value, and that after the death of Cæsar James, the plaintiff took into his possession and sold 5,000 pounds of tobacco belonging to James, and that he retained all of the proceeds of the sale of the tobacco, except $112, which he paid Y. Z. and A. O. Newberry, at the (69) request of the defendants.

The sum of $112 paid to Newberry, at the request of the defendants, out of the proceeds of the sale of the tobacco, was due on an agricultural lien executed by Cæsar James to E. H. and J. A. Meadows, and transferred by them to Newberry.

There was a controversy between the parties as to the amount of property that went into the hands of the plaintiff, its value, and as to the state of the account between them.

The plaintiff, among other things, contended he was entitled to charge aganist the defendants the sum of $112 paid to Newberry.

The court charged the jury on this contention as follows: "In order for the plaintiff to get credit for the amount of the Meadows mortgage, it was incumbent upon him to show what was due on the Meadows mortgage, because the mortgage was an agricultural lien; it was a promise to advance so much money, and not to exceed so much money, and when the plaintiff saw fit to pay on the Meadows mortgage $112, in order to sustain that payment it was necessary for him to show that Meadows had at that time advanced on that agricultural lien $112, including the interest that was due; there was no interest due on the Meadows claim until 1 November, 1908."

Plaintiff excepts. There was a verdict and judgment for the defendants, and the plaintiff excepted and appealed.

Simmons & Ward and C. R. Wheatley for plaintiff.
Abernethy & Davis for defendant.

ALLEN, J., after stating the case: The charge of his Honor, placing the burden on the plaintiff to prove the item of $112, is erroneous and entitles the plaintiff to a new trial. It would have been correct but for the fact that the defendants allege in their answer that this sum was paid by the plaintiff out of the proceeds of the sale of the tobacco, at the request of the defendants, and the plaintiff admits this in his reply.

Being a fact admitted by the pleadings, it was not in contro- (70) versy, and the burden was not on the plaintiff to establish it.

The error was the result of an inadvertence, as shown by the statement made by the presiding judge, which is attached to the case on appeal. He says that he overlooked the answer of the defendants as to the $112, and that his attention was not called to it.

As the item is admitted, we would direct it to be credited on the amount recovered by the defendants, instead of ordering a new trial, if we had any means of ascertaining the decision of the jury with reference to it; but we cannot say, on the record, that it has not already been allowed, and as the question was submitted to them erroneously, we must order a

New trial.

J. C. BOSS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 27 September, 1911.)

1. Carriers of Goods—Evidence—Condition of Goods at Destination—Negligence—Presumption—Rebuttal—Questions for Jury.

When goods are shipped over several connected lines of carriers and are found in a damaged condition at destination, there is a presumption that the injury was negligently inflicted by the last carrier, subject to be rebutted by evidence, and when the evidence in rebuttal is sufficient a question for determination by the jury is raised.

2. Same—Unbroken Seals.

In an action for damages to goods which had been transported by several carriers over their lines, there was evidence tending to show that the final carrier received the goods in car-load shipment with the seals on the car unbroken, but when the car and its contents were inspected at destination the back end of the car was nearly empty, its contents piled in the front end, broken and defaced. There was also evidence that the car had been properly packed at the initial point, and on behalf of the terminal carrier that its transportation had been on schedule time, without accident to its train: *Held*, (1) it was competent for the terminal carrier to show as a reason for accepting the shipment that it received the car with the seals unbroken from the former carrier; (2) that the evidence was sufficient for the jury to consider upon the negligence of the former carrier in failing to properly transport the shipment for delivery to its connecting line, and to rebut the presumption of negligence as to the latter one.

(71) APPEAL by defendant from *Justice, J.*, at January Term, 1911, of PASQUOTANK.

Action to recover damages for injury to household goods while in the course of transportation. The defendants are the Norfolk Southern Railroad Company and the Atlantic Coast Line Railroad Company.

The goods were shipped from Washington, D. C., on 20th October, over the Washington and Southern Railroad, which issued the bill of lading, to Richmond, and thence by the Atlantic Coast Line to Plymouth and from Plymouth over the Norfolk Southern Railroad to Elizabeth City. They arrived at Plymouth on 23 October, when the Atlantic Coast Line at once notified its connecting line, the Norfolk Southern, of their arrival, but the last company, under the direction of the plaintiff, refused to receive the car until 12th November, when it did receive it and carried it over its line to Elizabeth City, a distance of fifty-two miles; that it arrived in Elizabeth City on 13th November, on schedule time, in about twenty-four hours after it left Plymouth.

When the car reached Plymouth, and likewise when it was delivered by the Atlantic Coast Line to the Norfolk Southern Railroad for shipment to Elizabeth City, the original seal was unbroken and the car was received without exception or protest by the Norfolk Southern.

The plaintiff notified the Norfolk Southern Company not to accept the car when it arrived at Plymouth, because of an overcharge of freight.

The plaintiff testified that the goods were well packed and crated when delivered to the Washington and Southern Railroad at Washington, D. C.; that they were received at Elizabeth City about four weeks after shipment over the Washington and Southern Railroad. The original seals were unbroken, and the Norfolk Southern agent broke the seals and sent a man with him to look in; found the back end (72) of the car nearly empty; the furniture, etc., was piled in front end and broken and defaced, and looked as if it had been in a collision. The car was an Atlantic Coast Line car.

The Norfolk Southern Company introduced the following evidence:

One Nicholson, agent at Plymouth of the Norfolk Southern, testified that the Atlantic Coast Line Railroad Company brought the car to Plymouth with charges $50.40. "I received the car finally by instruction of Mr. Garrett, the Norfolk Southern agent at Elizabeth City, and shipped it immediately, 12th November, to Elizabeth City, where it arrived next day, 13th. The car remained in Plymouth ten or fifteen days; came there on 23d October, and offered to me the same day, and for lack of credentials I did not take it, because charges were not prepaid or guaranteed. It stayed on the side-track. The distance from Plymouth to Elizabeth City is fifty-two miles. When I forwarded the car to Elizabeth City the original seals on the car were unbroken."

One Garrett, agent of the Norfolk Southern at Elizabeth City, testified that he told plaintiff the car was at Plymouth when it arrived there and what charges were against it. Plaintiff directed him not to receive it. "In about a week, 12th November, I wired, at plaintiff's direction, to receive it, and on the 13th it arrived in Elizabeth City on schedule time. The distance from Elizabeth City to Plymouth is fifty-two miles. It came in about twenty-four hours or less."

One Bernard testified that he was flagman on train between Plymouth and Mackey's Ferry, which had plaintiff's furniture in charge; that he saw it landed on the steamer *Garrett* at Mackey's Ferry en route to Elizabeth City, but that he stopped there and went no further, the distance being eleven miles from Plymouth on the way to Elizabeth City. He further testified that no accident or injury occurred to this car while he was with it, but he knew nothing about it after it left Mackey's Ferry on its route to Elizabeth City.

The Atlantic Coast Line Company introduced no testimony whatever, and there was no further testimony introduced by the (73) plaintiff or the Norfolk Southern Railroad Company.

His Honor, among other things, charged the jury: "That, primarily, the law raises the presumption that the injury, if you find injury

to the plaintiff's property, occurred while in the hands of the Norfolk Southern Railroad Company, and it would devolve on it to rebut the presumption by proof that it did not injure the goods. If, however, you find by the greater weight of the evidence that the Atlantic Coast Line Railroad had the goods and brought the same to Plymouth and there turned the same over to the Norfolk Southern Railroad; and if you further find as a fact that Norfolk Southern Railroad Company did not cause the injury, and find that the presumption has been rebutted, then and in that case the presumption would arise that the damage occurred while the goods were in the hands of the Atlantic Coast Line and it would devolve upon the Atlantic Coast Line to rebut that presumption by showing that the injury was not caused by it, being a matter peculiarly within its own knowledge."

The Atlantic Coast Line Company does not challenge the correctness of the legal principle involved in this charge, but does except upon the ground that there is no evidence to rebut the presumption that the Norfolk Southern Company caused the injury.

The same question is also presented by a motion to nonsuit and by a prayer for instruction.

The jury rendered the following verdict:

"First. Was the plaintiff's furniture and goods injured by the negligence of the receivers of the Norfolk Southern Railroad Company, as alleged in the complaint? Answer: No.

"Second. Was the plaintiff's furniture and goods injured by the negligence of the Atlantic Coast Line Railroad Company, as alleged in the complaint? Answer: Yes.

"Third. What damage, if any, is plaintiff entitled to recover? Answer: $276.25. Delay of goods, $15. Total, $291.25."

Judgment was entered against the Coast Line Company, and it excepted and appealed.

(74) The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Allen.*

No counsel for plaintiff.
Pruden & Prudne for defendant.

ALLEN, J., after stating the case: The goods were found, in a damaged condition, in the possession of the Norfolk Southern Company, and his Honor properly held that this raised the presumption that they were injured by the negligence of that company. *Mfg. Co. v. R. R.*, 121 N. C., 514; *Mfg. Co., v. R. R.*, 128 N. C., 284; *Meredith v. R. R.*, 137 N. C., 488.

This presumption was sufficient, standing alone, and in the absence of other testimony, to sustain a verdict in favor of the plaintiff.

If evidence in rebuttal was offered, it was for the jury to determine its weight.

Recognizing this as a correct statement of the law, the Norfolk Southern Company has introduced evidence which, it contends, rebuts the presumption of negligence on its part.

Has it done so? If it has, there is no error in the trial. The evidence is not as full as it ought to have been, and the failure of the Norfolk Southern Company to introduce one of its own employees on the train, to show that there was no accident or collision between Mackey's Ferry and Elizabeth City, ought to have had weight with the jury.

We cannot, however, pass on the sufficiency of the evidence. This is for the jury, and our duty ceases when we inquire whether there was evidence for their consideration. We think there was.

The goods were securely packed and crated at Washington City, and when they reached Elizabeth City the back end of the car was nearly empty, and the furniture was piled in the front end, broken and defaced.

This would indicate that the injury did not occur in the ordinary operation of the train. No one could afford to ship furniture, nor would railroads be willing to accept it for carriage, if such damage usually occurred in the prudent management of their trains.

The plaintiff testified, without objection, that the furniture looked like it had been in a collision. (75)

The Norfolk Southern Company offered evidence that the original seal on the car was unbroken, thus explaining its acceptance of the car without protest, and that it received the car on 12 November, and delivered it at Elizabeth City on 13 November, *on schedule time.*

The car was in the possession of the Coast Line Company from ten to fifteen days, and in the possession of the Norfolk Southern one day, and it had been transported by one from Richmond to Plymouth, and by the other fifty-two miles.

The goods were in a car of the Atlantic Coast Line, and the seals were unbroken.

If there was evidence against the Coast Line Company that the injury was caused by an extraordinary event; that the car was in the possession of this compny ten or fifteen days; that it transported the goods from Richmond to Plymouth, a distance of about one hundred and fifty miles; that the goods were delivered at Washington to the Norfolk Southern Railway and arrived at Plymouth in a Coast Line car; and evidence in favor of the Norfolk Southern Company that

it received the car on 12 November and delivered it on 13 November, at Elizabeth City, on schedule time, having possession of the car one day and carrying it fifty-two miles; and that the original seal was unbroken—was it not permissible to contend that the probabilities were greater that the injury occurred while in possession of the Coast Line Company?

There was evidence of these facts, and if, accepting them as true, the probability of injury by the Coast Line Company was more reasonable, it was for the jury to say what inference should be drawn from them. *Fitzgerald v. R. R.*, 141 N. C., 534.

The evidence is not conclusive, and the jury would have been justified in finding that the presumption of negligence raised against the Norfolk Southern had not been rebutted, but we cannot say there was no evidence to support the verdict and judgment.

No error.

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(76)

R. H. HARDY AND N. D. MEWBORN v. N. C. MITCHELL.

(Filed 27 September, 1911.)

1. Negotiable Instruments—Indorsees—Consideration—Notice—Verdict Inconsistent—Procedure.

In an action brought by the indorsees of a negotiable instrument before maturity to recover against the makers, the defense was that the note was without consideration and that the indorsees bought with notice at the time of purchase. Upon a former trial the jury found: (1) That the note was indorsed in due course before maturity; (2) that it was not given for a valuable consideration; (3) that the plaintiffs were not purchasers with notice. The presiding judge set aside the verdict on the third issue, and at a subsequent term the jury found that the plaintiffs were purchasers with notice, and the trial judge rendered judgment for plaintiff: *Held*, the findings of the issues by the two juries were inconsistent, and the verdict should have been set aside.

2. Negotiable Instruments—Want of Consideration—Defense.

The absence of consideration for a negotiable instrument is a defense against any one not a holder in due course. Revisal, sec. 2176.

3. Negotiable Instruments—Due Course—Inconsistent Verdict.

A finding by the jury, in an action upon a negotiable instrument, that the note was indorsed to plaintiff in due course, involves the finding that the plaintiff was a purchaser for value, before due, and without notice of any infirmity, and is inconsistent with a further finding that the note was without consideration and that plaintiff purchased with notice.

APPEAL by defendant from *Peebles, J.*, at May Term, 1910, of GREENE.

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

L. V. Morrill and Aycock & Winston for plaintiff.
J. P. Frizzelle and G. V. Cowper for defendant.

ALLEN, J. This action was instituted to recover the amount of a note for $250, executed by the defendant to J. T. Canady, and indorsed by him to R. G. Canady and by R. G. Canady to the plaintiffs.

The plaintiffs allege that they purchased said note before it was due, and that they are the holders thereof in due course. (77)

The defendant alleges that the note was without consideration, and that the plaintiffs had notice of this infirmity at the time they bought it.

At May Term, 1910, of the Superior Court, the action came on for trial, and the following verdict was rendered by the jury:

"1. Was the note indorsed to plaintiffs in due course before maturity? Answer: Yes.

"2. Was the note given for a valuable consideration? Answer: No.

"3. If not, did plaintiffs have notice of such want of consideration at the time they purchased the note, if they did purchase the same? Answer: No.

"4. Was the note sued on purchased by fraud and under circumstances against public policy, as set out in the answer? Answer: No."

The judge who presided at said term, in the exercise of his discretion, set aside the finding of the jury on the third issue, and ordered that it be tried anew, and declined to set aside the findings on the first, second, and fourth issues.

The action again came on for trial at May Term, 1911, of said court, and the jury answered the third issue, "Yes."

The judge who presided did not set aside the finding of the jury, but rendered judgment in favor of the plaintiff.

In this condition of the record a new trial must be ordered of the issues raised by the pleadings, because of the inconsistent findings of the two juries.

The first jury has found, in response to the first issue, that the plaintiffs are the holders of the note in due course, and, if so, they purchased it for value, before it was due and without notice of any infirmity. These are necessary elements to constitute one a holder in due course, as is shown by Rev., sec. 2201:

"2201. *What constitutes a holder in due course.* A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was over-
(78) due and without notice that it has been previously dishonored, if such was the fact; (3) that he took it for good faith and value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The first jury also says there was no valuable consideration given for the note, and the second jury finds that the plaintiffs had notice of the want of consideration at the time of their purchase.

Under section 2176 of the Revisal, absence of consideration is a defense against any one not a holder in due course. In other words, the plaintiffs were entitled to judgment on the first issue, because it involved the finding that they were purchasers for value, before due, and without notice of any infirmity, and the defendant was entitled to judgment on the second and third issues, finding that the note was without consideration and that the plaintiffs had notice of the infirmity.

As was said in *Kornegay v. Kornegay,* 109 N. C., 191, in reference to inconsistent findings of a jury: "In such a state of uncertainty, the verdict must be treated as void, and a new trial directed to be had."

New trial.

Cited: *S. c.,* 161 N. C., 352.

W. S. BAILEY v. JOHN C. MATTHEWS.

(Filed 27 September, 1911.)

1. Pleadings—Preparation—Discovery—Affidavits—Procedure.

When the record or proceedings do not disclose the facts upon which a motion is made to examine a defendant for the purpose of preparing a complaint in an action, the mover must show by affidavit such facts as will entitle him to the order he asks, so that it may appear that it is material and necessary that the examination should be had, and that the information desired is not already accessible to the applicant. Revisal, sec. 865.

2. Same—Materiality—Good Faith—Courts.

The court is not bound to order an examination of a defendant for the purpose of preparing a complaint, unless it is made to appear under

oath of the mover that such an order is necessary, that the evidence sought to be elicited is material, and that the application is made in good faith.

3. Pleadings—Preparation—Discovery—Place of Examination.

An examination of defendant to discover facts necessary to be obtained in preparing a complaint must be made in the county of his residence. Revisal, sec. 866. The right of respondent to refuse to answer incriminating questions touched upon.

APPEAL by plaintiff from *Ward, J.*, first March Term, 1911, (79) of NASH.

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

E. B. Grantham for plaintiff.
Bunn & Spruill and Jacob Battle for defendant.

WALKER, J. This action seems to have been brought by the plaintiff against his wife, Mrs. Ella Frances Bailey (*née* Ella Frances Finch), Susie Nelson Finch, stepdaughter of plaintiff (now Susan N. Hester, wife of Dr. Joseph Hester), and others, to recover damages for a libel committed in conspiring with each other to make and in making fraudulent, libelous, and slanderous charges of and concerning the plaintiff, who at the time was postmaster at Spring Hope, N. C., for the purpose of preventing the Postoffice Department at Washington, D. C., from issuing a commission to him as postmaster; John C. Matthews, one of the defendants, acting postmaster at Spring Hope, being a rival candidate for the said appointment. We gather this much from the unsworn statement of the plaintiff, no complaint having been filed.

The plaintiff appealed to the court below for an order for the examination of one of the defendants, Mrs. Susan N. Hester, under Revisal, sec. 865, before the Clerk of the Superior Court of Nash County, on 9 March, 1911, in order that he might ascertain facts necessary to be known for the purpose of preparing and filing his complaint. Mrs. Hester objected to the granting of the order, upon the following grounds:

1. The summons was served upon her in Halifax County, she now being a resident of Wake County, and, therefore, she cannot be compelled by order of the court to submit to examination in Nash County, under Revisal, sec. 866. (80)

2. No complaint has been filed, and no affidavit, showing the nature or probable nature of the cause of action, or other facts entitling the plaintiff to the relief he seeks.

3. If the action is for libel, and as she cannot be compelled to discover any matter or any facts which would incriminate her or tend to do so, and as she claims her constitutional privilege exempting her from examination in such a case, and as any testimony that she could give in this cause would necessarily tend to that result, the plaintiff is not entitled to an order for her examination, under Revisal, sec. 865.

We are of the opinion that the second ground of objection is a valid one, and that the order of T. A. Sills, clerk of the Superior Court (affirmed by the judge), was right, though their decision was based, not upon the reason we now give for its correctness, but upon the third of the grounds assigned by the respondent.

It is the general rule and the custom in judicial proceedings, that a motion for an order should be based upon an affidavit stating the facts which entitle the mover to the order for which he asks, and the reason of the thing fully justifies the rule. It is said by the text-writers that, "Where a motion is founded upon extrinsic facts, and not solely upon matters apparent upon the face of the record or proceeding, it must, of course, be supported by evidence or proof." (14 Enc. Pl. & Pr., 147), though in passing upon this kind of proof the ordinary rules of evidence are not strictly observed. The form of this proof may vary with the particular nature of the case. Affidavits, depositions, admissions in pleadings, may be considered, but the usual form of the proof is an affidavit; that is, the evidence must be under oath. It is again said in 14 Enc. of Pl. & Pr., at p. 158: "Where the right to the relief sought is based upon facts not apparent of record, the existence of such facts must be proved by affidavits or other competent evidence. And conversely, where the motion is grounded solely upon matters apparent upon the face of the record or proceeding, it need not be thus supported." And again: "In practice, affidavits are most frequently used to initiate legal proceedings, and to further the various (81) stages therein; to certify and prove the service of process, or other matters relating to the proceedings in a cause; and to support or oppose motions, in cases where a court determines matters in a summary way; and for various other purposes." 1 Enc. Pl. & Pr., at page 333. Numerous cases are cited in the notes to these passages, sustaining the rule as thus stated. In a proceeding of this kind, it is of the first importance that the application for an order of examination should be under oath, stating facts which will show the nature of the cause of action, so that the relevancy of the testimony may be seen and the court may otherwise act intelligently in the matter, and it should appear in some way, or upon the facts alleged, that it is material and necessary that the examination should be had and that the information desired is not already accessible to the applicant. It should also ap-

pear that the motion is made honestly and in good faith and not maliciously—in other words, that it is meritorious. 8 Enc. of Pl. & Pr., p. 41 *et seq.* Surely, a clerk or judge is not bound to grant such an order if it appears to be unnecessary, or if the evidence sought to be elicited is immaterial, or the application appears to be made in bad faith. It is but just and right that the application should be made under the obligation and responsibility of an oath to protect the respondent against false and malicious accusations and vexatious proceedings. The law will not permit a party to spread a dragnet for his adversary in the suit, in order to gather facts upon which he may be sued, nor will it countenance any attempt, under the guise of a fair examination, to harass or oppress his opponent. It is a very rare case that requires the exercise of this function of the court, and the order should not be made without careful consideration and scrunity. 8 Enc. Pl. & Pr., 35 *et seq.* In *Jenkins v. Putnam,* 106 N. Y., 272, the Court said: "Where the judge can see that the examination is sought merely for annoyance or for delay, and that it is not in fact necessary and material, he ought not to be required, and cannot absolutely be required, to make the order." Whether this provision of the statute is mandatory or not, we do not decide. It is sufficient now to hold that the order in this case should have been made without a proper (82) affidavit to sustain it.

In some States, notably New York, the statutes are very stringent in their provisions, and require a detailed affidavit fully setting out the facts upon which the right to the examination is claimed. Stovers' N. Y. Anno. Code (6 Ed.), sec. 872 and notes; 16 Am. Digest (Century Ed.), p. 2058, sec. 65, where the cases are collected.

It would seem that the party should be examined in the county of his residence. Rev., sec. 866. The other question, as to the privilege of the respondent arising out of the criminatory nature of the testimony, need not be considered at this time, for the purpose of a decision upon it, though it may be proper to refer to the statement of the doctrine in 8 Enc. Pl. & Pr., 49: "A party cannot be forced to answer questions which tend to criminate him or to subject him to a statutory penalty. It is held in some cases, however, that he cannot on this ground rest an application for an order for his examination, but may avail himself of his privilege at the time the objectionable questions are propounded to him; while in others it is held that if the only material evidence sought is criminating, the examination will not be allowed, otherwise the party will be left to his privilege at the examination, and this seems to be the general rule." It might be difficult sometimes to determine, in advance of the actual examination, whether or not the testimony proposed to be elicited will tend to criminate the

party to be examined, but we express no opinion in regard to the question, as it may not arise again, and if it does, we prefer to give it more careful study before reaching a conclusion.

No error.

Cited: Fields v. Coleman, 160 N. C., 14; *Bank v. McArthur,* 165 N. C., 375.

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(83)

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

(Filed 27 September, 1911.)

1. Pleadings—Demurrer—Corporate Existence—Sufficient Averment.

A demurrer to a complaint, in an action against the maker of a note, brought by a bank, an indorsee for value, which was entered upon the ground that the corporate existence of the plaintiff had not been alleged, will not be sustained when it appears from the averments of the complaint that the defendant had dealt with the plaintiff as if it had a lawful right to contract with him, and that he impliedly admitted its corporate existence by indorsing the note to it as acting in a corporate capacity.

2. Pleadings—Demurrer—Notes—Default of Interest—Maturity—Demand—Evidence—Summons.

In an action brought upon a note before its maturity under a provision that the note would be due and payable ten days after demand for payment of interest thereon due, a demurrer to the complaint will be denied when there are allegations that demand had been made for the payment of interest after default, which necessarily implies that the demand was made on the defendant, and that the same had not been paid; and it appears from an inspection of the summons, which it is proper for the court to make in such instances, that the stated period of time had elapsed before the institution of the action.

3. Pleadings—Interpretation—Cause of Action—Demurrer.

The allegations of a pleading will be liberally construed in favor of the pleader for the purpose of ascertaining its meaning and determining its effect, with a view of doing substantial justice between the parties (Revisal, sec. 495), and if it can be seen from its general scope that a party has set out a cause of action or defense, though inartificially stated, he will not be deprived of it upon demurrer.

4. Pleadings—Interpretation—Demurrer—Frivolous—Practice.

The courts do not encourage the practice of parties moving for judgment upon an answer or demurrer upon the ground that they are frivolous, and if it raises a question, whether of law or fact, fit for consideration or discussion, a judgment upon that ground will be denied.

APPEAL by defendant from *Ferguson, J.*, at May Term, 1911, (84) of CRAVEN.

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

Moore & Dunn for plaintiff.
Simmons & Ward for defendant.

WALKER, J. This is an action upon a note, originally made by R. N. Duffy and A. C. Burnett to D. H. Green, and by the latter indorsed for value to the plaintiff. In a former suit we directed that a judgment be entered against R. N. Duffy and that the cause proceed against D. H. Green, for whom a new summons was issued and executed. A. C. Burnett has never been served with process and is, therefore, not a party to the suit so as to be bound by any judgment therein. The facts are stated in a case by the same title, 153 N. C., 62.

Defendant demurred to the complaint upon the following grounds: 1. That the corporate existence of the plaintiff is not alleged. It appears by allegations of the complaint, that defendant, D. H. Green, dealt with the plaintiff as if it had lawful right to contract with him and he indorsed the paper to plaintiff, thereby impliedly admitting that it is a corporation, as it purported to be. In *Ryan v. Martin,* 91 N. C., 465, *Judge Merrimon* said: "It is true that it must appear that there was a corporate existence, either *de jure* or *de facto* at least. And if the corporation itself were suing, it would be necessary for it to prove its charter, and an organization in accordance therewith, if these matters were properly put in issue. But if a person entered into a contract with a body purporting to be a corporation, or which claims to hold property purchased, and derives title thereto from it, (85) this is *prima facie* evidence against such person that such corporation was in existence, *de facto* at least, at the time of the contract with or purchase from it, and the presumption arises in such case that the existence of the corporation continues at the bringing of the action. Accordingly, it has been held in an action against the maker of a promissory note executed to a corporation as payee, in its corporate name, that the production of the note duly indorsed to the plaintiff was sufficient evidence that the corporation was duly organized and competent to transact business. *Williams v. Cherry,* 3 Gray, 215, 220. It was said in that case that the defendants, by giving their notes to the corporation in their corporate names as payees, admitted their legal existence and capacity to make and enforce the contracts declared on, so far at least as to render the proof on that point unnecessary in the opening of the plaintiff's case." So in *Stanly v. R. R.,* 89 N. C., 331, it was held

that a railroad company in a suit against it may be designated as a company by its corporate name, without an averment of its corporate capacity; and if this is disputed, it should be by answer and not by demurrer. Where the defendant's counsel insisted that a declaration describing the defendant as a company, without showing whether or not it was a corporation, was open to a demurrer, *Mr. Justice Maule* said: "There is no positive rule, that I am aware of, which requires such a mode of description as the defendant's counsel insists upon in this case, nor is the description which is given at all out of the usual form. *It impliedly amounts to an allegation that the defendant is a corporate body.*" *Wolfe v. Steamboat Co.*, 62 E. C. L., 103.

The note was to become due at a day certain, with a provision that if there was a default in payment of any installment of interest at its maturity, and for ten days after a demand, plaintiff might sue upon the note before the day fixed for its maturity. Plaintiff alleged that demand had been made for the payment of interest after default, and that the same has not been paid. It is argued by the defendant's counsel that there is neither an allegation that demand was made upon this defendant nor that, if made, ten days had expired before this suit was com-
(86) menced, so as to bring the demand within the terms and requirements of the bond. The record shows that the suit was begun on 20 April, 1911, and summons served on 24 April, 1911. We may look at the summons to ascertain this fact. *Harrington v. Wadesboro,* 153 N. C., 437, where a learned discussion of the subject by *Justice Hoke* will be found, backed by a copious citation of authorities. So that this ground of demurrer is not true in fact. That the demand was made upon this defendant, D. H. Green, sufficiently appears in the complaint. He is now the only defendant, and we cannot assume that the plaintiff made a demand upon some one who did not owe the debt, or upon a person who had not been sued. The allegation, by fair construction and intendment, means that it was made upon D. H. Green. We have had occasion to state the rule by which, under The Code, a pleading should be construed so as to ascertain its meaning, and it is to this effect: The uniform rule prevailing in our present system is that, for the purpose of ascertaining the meaning and determining the effect of a pleading, its allegations shall be liberally construed, with a view to substantial justice between the parties. Revisal, sec. 495. This does not mean that a pleading shall be construed to say what it does not, but that if it can be seen from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it. *Buie v. Brown,* 104 N. C., 335. As a corollary of this rule, therefore, it may be said that a complaint cannot be over-

thrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements; for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient. 4 Enc. Pl. & Pr., 74 *et seq.; Stokes v. Taylor,* 104 N. C., 394; *McEachin v. Stewart,* 106 N. C., 336; *Halstead v. Mullen,* 93 N. C., 252; (87) *Purcell v. R. R.,* 108 N. C., 414; *Holden v. Warren,* 118 N. C., 327. There should, of course, be at least substantial accuracy in the averments. *Norton v. McDevitt,* 122 N. C., 755. It is also required that there should be not only certainty, but clearness and conciseness, and a compliance with the other essential rules in the science of pleading which have been adopted for the purpose of evolving the real issues from the controversy; but if there is any formal defect in this respect which renders the pleading unintelligible, or the precise nature of the charge or defense be not apparent by reason thereof, it can be corrected on motion (Revisal, sec. 496), or in some case where there is a defective statement, as the omission of a necessary allegation, which can be cured by amendment, a demurrer will lie. *Bowling v. Burton,* 101 N. C., 176; *Mizzell v. Ruffin,* 118 N. C., 69; *Ladd v. Ladd,* 121 N. C., 118; *Blackmore v. Winders,* 144 N. C., 212.

Tested by this rule, the complaint, while not very explicit in its statements, is sufficiently so to resist and repel the attack of a demurrer.

We will not adjudge this demurrer to be frivolous, as the plaintiff alleges it to be, but it narrowly escapes such a condemnation. The able and ingenious argument of the learned counsel has convinced us that it should not be so characterized, and has thus rescued it from the fate to which we have been asked to consign it. We have held that a pleading will not be adjudged frivolous, irrelevant, or impertinent, so as to entitle the other party to a judgment *non obstante placito,* unless it is clearly and palpably so. *Hull v. Carter,* 83 N. C., 249. If it raises a question, whether of law or fact, fit for consideration or discussion, we will not adjudge it to be irrelevant and as not standing in the way of a summary judgment upon the pleadings. *Womble v. Fraps,* 77 N. C., 198. Even under the old system of pleading and practice, the courts hesitated to give judgment upon a pleading unless it plainly raised no real issue of law or fact, for *Baron Parke* said in *Linwood v. Squire,* 5 Exch. (W. H. & G.), 234: "I do not say that the plea is a good plea, as it is not necessary to decide that question, but a plaintiff has no right to sign judgment if the plea raises a serious question and (88)

one which is fit for discussion." The courts do not encourage the practice of moving for judgment upon an answer or demurrer as being frivolous. *Womble v. Fraps, supra; Swepson v. Harvey,* 66 N. C., 436; *Erwin v. Lowery,* 64 N. C., 321. The more recent cases upon this subject are collected in the excellent note of Judge Pell, in his annotations to section 472 of the Revisal, a reference to which will suffice, without further remark upon the decisions. We have found it necessary, in this case, to discuss the question presented by the demurrer, especially as to the demand, in order to decide it.

We find no error in the ruling of the court.

No error.

Cited: Hospital v. R. R., 157 N. C., 461; *Eddleman v. Lentz,* 158 N. C., 69; *Womack v. Carter,* 160 N. C., 290; *Renn v. R. R.,* 170 N. C., 137; *Elevator Co. v. Hotel Co.,* 172 N. C., 319.

W. T. LOVE v. CALEB HARRIS.

(Filed 27 September, 1911.)

1. Mortgages—Auctioneer—Memorandum—Statute of Frauds—Principal and Agent.

At a foreclosure sale of land under a mortgage, the auctioneer is the agent of the vendor thereunder for the purposes of the sale, and of the vendee who has become such under the prescribed conditions thereto.

2. Same—Signature of Vendee—Intent.

It is not necessary that the auctioneer at a foreclosure sale subscribe the vendee's name to the memorandum of sale; it is sufficient if the vendee's name appears in the memorandium made by the auctioneer and the intention is manifested thereby to bind him to the sale.

3. Same.

A memorandum made on the back of a notice of sale of lands under a mortgage, immediately after the last and highest bid, "Sold to C. J. for $1,500, 22 January, 1910," is a sufficient memorandum to bind the vendee under the statute of frauds, the notice being an offer to sell the property and the memorandum written on the notice an acceptance according to its terms. *Dickerson v. Simmons,* 141 N. C., 325, cited and distinguished.

4. Mortgages—Valid Sale—Resale—Title—Second Purchaser—Notice—Mortgagor—Guarantee—Implied Warranty.

A purchaser at a valid mortgage sale of lands having refused to comply with the terms of his bid, the vendor again on the same day put up the lands for sale under the mortgage, without the consent of the mortgagor

and after the bidders had dispersed, whereat it was bid in by another. But the first purchaser having subsequently agreed to take the lands according to the terms of sale, a deed was made to him, the purchase price received and applied to the mortgage and the cost of sale, and a surplus paid over to the mortgagor: *Held*, (1) the second purchaser acquired no right to the title to the land; (2) he purchased with notice of the infirmity of the second sale; (3) the first sale being valid, the first purchaser had a right to demand a deed to the land; (4) by making the second sale there were no elements of warranty or an implied guarantee of a ratification by the mortgagor.

APPEAL from *Justice, J.*, at January Term, 1911, of PASQUOTANK. (89)

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

J. Heywood Sawyer for plaintiff.
E. F. Aydlett for defendant.

WALKER, J. This action was brought to recover damages of the defendant for failure to comply with a bid made by the plaintiff at a sale, under a power contained in a mortgage to him. On 9 January, 1905, Richard Harris and wife executed to the defendant, Caleb Harris, a mortgage on land, to secure the payment of a certain indebtedness, with power of sale in case of default by the said Richard Harris in the payment of the debt. On 21 December, 1909, the mortgagor having failed to pay the debt, the defendant advertised the land for sale, (90) under and by virtue of the power vested in him by the deed of mortgage, and on 22 January, 1910, he sold the same through an auctioneer, J. C. Spence, at public outcry, and one Cader Jennings, who was and is solvent, bid the sum of $1,500 for the land and it was struck off to him at the said price. The auctioneer immediately made, on the back of the notice of sale, the following entry: "Sold to Cader Jennings for $1,500, 22 January, 1910." After the sale had been completed and after the bidders had dispersed, the said Jennings refused to comply with his bid, and stated to the auctioneer, in the presence of the defendant, that he was bidding for Elijah Harrell; that he did not want the land himself, and that he would have to sell it again. Under the advice of a friend, the auctioneer sold the land again on the same day, after the bidders had dispersed, the defendant being present at the sale, and also the said Cader Jennings, and the plaintiff became the purchaser at the price of $1,175, there being only a few persons at the sale and no new advertisement of the sale having been made. The defendant refused to make title to the plaintiff, and executed a deed for the land to Cader Jennings, who, in the meantime, had agreed to abide by his pur-

chase. Out of the money paid by Jennings, the defendant retained a sufficient amount to pay his debt and expenses of sale, and paid the balance over to the mortgagor, whose consent was never given to the second sale. The plaintiff now sues to recover the difference between the real value of the land, that is, $1,500, the amount bid by Jennings, and the amount bid by himself at the second sale. When the plaintiff bought at the second sale the auctioneer made the same kind of entry on the notice as he had done when Jennings bid, that is, an entry to the effect that he had sold the land to the plaintiff on the said day for the sum of $1,175.

At the close of the evidence for the plaintiff, the defendant demurred thereto and moved to dismiss, or for judgment as of nonsuit, under the statute. The motion was allowed. Judgment was entered for the defendant and the plaintiff appealed.

We are of the opinion that the judge correctly decided the case. When a sale is made at auction, the auctioneer is the agent both of the
(91) vendor and the vendee. It has been said that, until the fall of the hammer, he is the agent of the vendor, but when the property is struck off to the purchaser by the auctioneer he then becomes the agent of the vendee. The vendor employes the auctioneer to make the memorandum of sale, and the buyer, by bidding, sanctions the authority of the officer to do so. He, therefore, has the power to sign the memorandum, so as to bind the vendee to the terms of the sale. 1 Reed Statute of Frauds, secs. 315 and 316, and cases cited in the notes. The principle is recognized in *Mayer v. Adrian,* 77 N. C., 83, where it was assumed that the auctioneer has the right to sign the memorandum for the vendee, though in that case it was held that the memorandum was not sufficient, as it was not physically attached to the written notice or offer of sale, nor did it in any way refer to that paper, so as to constitute, with it, a complete memorandum, showing the names of the parties and the terms of the contract of sale. See, also, *Gwathmey v. Cason,* 74 N. C., 5, where it is said that an auctioneer is authorized by the bidder to sign his name to the memorandum or contract of sale. It is not necessary that the vendee's name should be subscribed to the memorandum, but it is sufficient if it appears in the body of the instrument and the intention is manifested thereby to bind the vendee by the instrument. Smith on Contracts (7 Ed.), at marg. p. 93, states the law very clearly in regard to this matter when he says: "There is a third point common to all the five contracts mentioned in the 4th section; it is with regard to the signature. The words are, you will recollect, '*signed by the party to be charged* therewith, or some other person thereunto by him lawfully authorized.' The signature, it is obvious, is most regularly and properly placed at the foot or end of the instrument signed; but it

is decided in many cases that although the signature be in the middle or beginning of the instrument, it is as binding as if at the foot; although, if not signed regularly at the foot, there is always a question whether the party meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing show- (92) ing the terms of the contract, and signed by him. Therefore, where in the case of the sale of a quantity of cotton yarn a bill of parcels was sent by the seller to the purchaser, headed: 'London, 24 October, 1812. Messrs. John Schneider & Co., bought of Thomas Norris & Co., agents, cotton yarn and piece goods. No. 3, Freeman's Court, Cornhill.' Following this was a list of the articles sold, the particulars, quantities, and prices. It was held, in an action for not delivering the yarn, to contain a sufficient memorandum to satisfy the requirement of the statute as to the signature of the party to be charged. In this case the whole of the heading of the bill of parcels was printed, except the words, 'Messrs. John Schneider & Co.' But as it was then given out to the other contracting party by the party to be charged, recognizing the printed name as much as if he had subscribed his mark to it, he had recognized and avowed it as his signature." The auctioneer's memorandum in this case was made at the very time of the sale and was written on the notice, and this was sufficient to make a complete contract of sale, the memorandum being physically attached to the notice, or so connected with it as to constitute a sufficient reference to it and so that they may be read together as parts of one and the same paper, the latter being an offer to sell the property (describing it), and the memorandum on the notice being an acceptance of the offer upon the terms contained therein.

In *Proctor v. Finley,* 119 N. C., 536, this Court held that advertising a sale of land at auction is an offer to sell at the highest bid, and the person who makes the last and highest bid thereby accepts the offer and the sale is complete, the auctioneer being the agent of the vendor to sell the land, and of the bidder to complete the sale by making and signing a proper memorandum thereof, and that the statute of frauds, as adopted in this State, does not require that the name or signature of the bidder should be *subscribed to the memorandum,* but the latter may be in any form which indicates that he has accepted the offer and agrees to be bound by the contract of sale. The name of the bidder and the price, in that case, were written on the side of the notice, and this was held to be a good memorandum, citing *Gwathmey v. Cason,* (93) 74 N. C., 5, and *Mayer v. Adrain,* 77 N. C., 83; Brown on Statute of Frauds, sec. 369; 3 A. & E. Enc., 848 and 849. The

rule is thus stated in 29 A. & E. Enc., 856: "When the statute requires the memorandum to be 'signed,' it is immaterial in what part of the instrument the name of the party appears, whether at the top, in the middle, or at the bottom thereof, if applicable to the whole substance of the agreement, and written by the party, or by his authority, with the intention of thereby executing the same as a binding obligation. A printed name upon a paper which is delivered under circumstances showing an intention to regard the printed name as the person's own, will suffice, as will an entry in a book containing the owner's name at the top of the page. When the statute requires that the memorandum be 'subscribed,' the signing must be a literal one at the end of the instrument. It is not necessary that the signature should be a part of the agreement itself. It is sufficient if it be indorsed upon it as a notification of the assent of the party, or if it be written in a letter or memorandum which refers to the agreement. The statute does not require that both parties shall sign one paper containing the contract. The subscription may be upon separate papers, as where counterpart memoranda are made and signed by the respective parties, or where an offer in writing is followed by a written acceptance of the same."

Dickerson v. Simmons, 141 N. C., 325 (opinion by *Justice Brown*), is distinguishable. There no sufficient memorandum referring to the written notice or offer of sale was made, but the principle herein stated was fully recognized. In our case the entry on the notice was equivalent to an acceptance of the offer of sale at the price, and as much so as if the acceptance had been expressed in explicit terms and signed by the auctioneer as agent for the vendee. It is just as indicative of his purpose to buy upon the terms of the offer and at the amount of the bid as was the entry in the *Proctor case,* if not more so. But if the first memo-

(94) randum had not been sufficient, the plaintiff cannot profit by the defect, as his memorandum is identical with it, and he therefore acquired no right, under the statute, by his bid and the entry of the auctioneer upon the notice of sale, to call for a deed.

As both parties signed the memorandum in this case, the mortgagee having signed the notice which was witnessed by the auctioneer and the defendant having, within the meaning of the statute, signed the memorandum by his agent duly authorized, it is unnecessary to decide another question in regard to what is a sufficient signing of the memorandum. The statute says it must be "signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." Commenting on this part of the statute, Smith on Contracts, at marg. p. 96, says: "The signature is to be that of the party *to be charged;* and, therefore, though, as I have pointed out to you, both sides of the agreement must appear in the writing, it is not necessary that it should be

signed by both the parties; it is sufficient if the party suing on it is able to produce a writing signed by the party whom he is seeking to *charge*. And such a writing signed is sufficient to satisfy the 4th section, though it be only a proposal accepted by parol by the party to whom it is made. The person, however, who seeks to enforce the agreement has not the other altogether at his mercy, but must either do, or be ready to do, his own part of the agreement, before he can seek performance on the part of the person who has signed. *Davis v. Martin,* 146 N. C., 281; *Love v. Atkinson,* 131 N. C., 544.

But while the memorandum was sufficient within the statute of frauds, the sale to the plaintiff by the defendant and the auctioneer was invalid. If the purchaser at an auction sale is unable or refuses to comply with his bid before the bidders disperse, the property may be sold without a fresh advertisement, or the property may be afterwards sold if it has been newly advertised.

Discussing this subject, it is said in 27 Cyc., at p. 1486, that the bidder is liable for the amount of his bid, which may be recovered in a proper suit against him, or, if he is unable to comply with his bid, the property may be put up for sale a second time. This may be done immediately, if the purchaser's refusal or inability is clearly manifested, and the necessity of advertising a second time or (95) giving new notices may be avoided if the resale is made on the spot and before the bidders disperse, although otherwise there must be a new publication and evidence of the trustee's or mortgagee's continuing authority to make the sale. It is no valid objection to such a resale that the property did not bring as much as at the first sale.

In *Barnhardt v. Duncan,* 38 Mo., 170, the very question we have here was presented. The bidder had refused, after the sale, to accept the deed because it did not contain covenants of warranty; and with reference to this, the Court said: "Upon the refusal to accept it, the trustee proceeded at once to put up the property for sale again, at the same place, on the same day, without readvertising or any new notice, and, few persons being present, the property was resold for $25. This proceeding can neither be justified nor sustained. It was, in practical effect, a sale without notice. The sale, as advertised, had taken place several hours before, and all bidders had departed. Though yet within the hours mentioned in the advertisement, it cannot be considered a fair and valid sale pursuant to notice. There should have been a new publication of notice for another day." It was so held in the case of *Dover v. Kennerly,* 38 Mo., 469, the following being the headnote, which fairly states the substance of the opinion: "Where property offered for sale at auction by a trustee in a deed of trust is knocked down to the highest bidder, the sale may be enforced in equity in a suit for a specific per-

formance, or the bidder may be held liable at law for the damages sustained. When the purchaser to whom the property is struck off at a trustee's sale at auction fails to complete his purchase, the property must be readvertised for sale." *McClung v. Trust Co.*, 137 Mo., 106.

In this case it appears that the second sale was made after the bidders had dispersed and without any new advertisement. The trustee and autioneer had no power or authority from the mortgagor to release the first bidder and sell to the second bidder for a less price. The mortgagor was vitally interested in this transaction, as if we should hold that the second sale was vaild, he would lose $325. Jenning was
(96) bound by his bid, and as we have seen, it could have been enforced against him by a suit in equity, now a civil action.

We hold the second sale, which was made to the plaintiff, to be invalid, for the reasons stated, and as the mortgagee has made a deed to Jennings in accordance with his bid, for the full amount of $1,500, and as the mortgagor has assented to the execution of this deed by receiving the balance of the purchase money, after paying the debts, costs, and expenses, we think Jennings must be declared to be the owner of the land, and the plaintiff is not entitled to recover against the mortgagor, who is the defendant in this action, the difference between his bid and the real value of the land, according to his contention. It can make no difference, so far as he is concerned, whether Jennings acquired title to the land under his bid and the subsequent deed from the mortgagee, for it is sufficient to decide that the plaintiff acquired no right or title by virtue of his bid at the second sale, as the mortgagee had no power or authority to sell to him.

The plaintiff cannot recover upon the ground that the mortgagee assumed to exercise a power to sell which he did not have and that he was thereby misled or deceived to his injury, for the simple reason that he bought with full knowledge of all the facts, and as he is presumed to know the law, he was fixed with notice of the fact that the mortgagee did not have the power to sell under the circumstances, and, therefore, he was in no sense defrauded.

In *Leroy v. Jacobosky*, 136 N. C., 443; *Justice Connor*, quoting from Reinhardt on Agency, sec. 308, and other authorities, says: "If the party with whom the agent has contracted knew that the agent had no authority, or was cognizant of all the facts upon which the assumption of authority was based—as, for example, when both parties labored under a mistake of law with reference to the liability of the principal—the agent is not liable either in tort or upon the contract.' *Newport v. Smith*, 61 Minn., 277; *Baltzen v. McClay*, 53 N. Y., 467. In *Michael v. Jones*, 84 Mo., 578, the Justice writing for the Court says: 'But I am satisfied that under the best considered modern decisions the

principle invoked by the plaintiff cannot be carried to such an (97) extent. The true rule, I think, is that as to the liability of the principal, the fact that the principal cannot be held is no ground for charging the agent with liability.' *Ruffin, J.,* in *Fowle v. Kerchner,* says: 'The general rule is that whenever a party assumes to act as agent for another, if he has no authority, or if he exceeds his authority, he will be held to be personally liable to the party with whom he deals, for the reason that by holding himself out as having authority, he misleads the other party into making the agreement. But the rule is founded upon the supposition . . . that the want of authority is unknown to the other party, or, if known, that the agent undertakes to guarantee a ratification of the act, and when this want of authority is known, and it is clear that the agent did not undertake to guarantee a ratification, it results that the agent is not personally bound.' "

In this case, as we have indicated, the plaintiff had full notice of the situation, and will be held, therefore, to have known all the facts, and it is clear that the mortgagee did not undertake to guarantee a ratification by the mortgagor, so that the essential elements of a warranty as to the authority of the defendant to sell to him is lacking, and he cannot justly claim to have been deceived or defrauded. There is, therefore,

No error.

A. A. CROMARTIE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 27 September, 1911.)

1. Appeal and Error—Continuance—Discretion, Abuse of.

Having continued the case for defendant at a former term, for the sickness and absence of a witness, under condition that defendant would take his depositions and that the cause would peremptorily be tried on a certain day of a subsequent term, the refusal to again continue the case for defendant was in the discretion of the trial judge, and the fact that the depositions had not been taken owing to the temporary recovery of the witness, and his absence was unexpectedly caused by his relapse, is not a gross abuse of this discretion.

2. Evidence—Negligence—Proximate Cause—Questions for Jury.

The plaintiff, a brakeman on defendant's train, got upon the pilot of the engine, according to a known custom, upon entering a freight yard at a station, for the purpose of opening switches for the train, with the knowledge of the engineer operating the train. In this yard there were several switches to be thrown open, some distance apart. Plaintiff was standing in the foothold of the pilot made for the purpose, holding by his

hands to a rod of iron crossing the pilot at the top, his back to the front and looking towards the cab windows of the engineer and fireman, to give signals by hand-waving. The engine front shut off the view of the engineer, and the fireman was not in his window. While thus situated the V-shaped pilot plowed through a pile of cinders or something on the track, knocking plaintiff's foot off the foothold onto the track between the rails, and throwing his weight upon the bar to which he was holding. This bar gave way, and plaintiff caught the lift-lever to prevent his further slipping, and while in this condition, screaming for help, the pilot pushed his foot onto the rails, causing the injury complained of. The train could have been stopped, at the speed it was going, almost instantly: *Held*, the failure of the engineer to be on lookout and to stop the train upon hearing the unusual commotion (he testified that he took plaintiff's screams for a woman laughing), together with the other circumstances of the case, was sufficient evidence to go to the jury upon the questions of defendant's negligence and its proximate cause of the injury.

(98) APPEAL from *Ferguson, J.*, at April Term, 1911, of PITT.

Action to recover damages for personal injury. These issues were submitted:

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

2. Did the plaintiff by his own negligence contribute to his injury? Answer: No.

3. Notwithstanding plaintiff's negligence, could the defendant company by the exercise of reasonable care have avoided said injury? Answer: Yes.

(99) 4. What damage, if any, is plaintiff entitled to recover? Answer: $6,300.

From the judgment the defendant appealed.

Ward & Grimes and Julius Brown for plaintiff.

Harry Skinner for defendant.

BROWN, J. The defendant excepts to the refusal of the court to continue the case on account of the absence of two of the defendant's witnesses, claiming that the refusal in this instance amounts to a gross abuse of discretion.

The facts stated in the record acquit his Honor of any abuse of the discretion vested in him. They are as follows: On 1 May, 1911, when this case was called for trial, defendant stated that it could not go to trial. The reason assigned, that at the former term this case was continued by consent, owing to the fact that a witness under subpœna for the defendant company (W. D. Medley, engineer) was then sick. The court, after hearing the affidavits and telegrams connected with Engineer Medley's condition, stated that it would continue the case, but that it

would fix Monday, 1 May, peremptorily, for the case to be called for trial, and in the meantime gave permission that depositions necessary should be taken.

On the day before the day appointed for taking the deposition attorney for defendant received telegrams that Medley was then up and out, and that his physicians stated that he would be able to attend court on Monday, 1 May. Under these conditions and circumstances, with the consent of plaintiff's counsel, the taking of the depositions was called off.

On Saturday, 29 April, attorney for defendant received telegrams saying that Medley had had a relapse, and would not be able to attend court at Greenville on 1 May. On receipt of these telegrams counsel for defendant informed counsel for plaintiff of their contents and notified them that, although it was irregular, they would take the depositions of W. D. Medley, engineer, on the night of 29 April, at Rocky Mount, unless they would agree to continue the case. Counsel for plaintiff refused either to continue the case or to take the depositions. Therefore, counsel for defendant notified counsel for plaintiff that he would take a statement from Engineer Medley on Saturday night, 29 April, and would use it as a basis for continuance on the calling of the (100) case on 1 May, and on this being refused, would ask that the statements contained therein be admitted in evidence on affidavit. When the case was called on Monday, 1 May, these statements were made in open court and not disputed.

The court held that it would not continue the case, as defendant should have taken the deposition in regular order, but would permit the written statement made by Medley to be read to the jury as the testimony of Medley as if he were present.

In this there is nothing indicating any abuse of discretion. The defendant had opportunity to take the depositions, but failed to do so. Nevertheless, Medley's *ex parte* statement was read to the jury and is set out in the record. We think his Honor was very liberal in his treatment of the defendant under the circumstances.

It is well settled that a motion for continuance is addressed to the sound discretion of the presiding judge. The exercise of such discretion is not reviewable except in a case where it is grossly abused. *Lanier v. Ins. Co.*, 142 N. C., 15.

A motion to nonsuit was made, overruled, and exception duly taken, and is the first assignment of error discussed at length in the brief of the learned counsel for defendant.

The plaintiff's evidence tended to prove that plaintiff was a brakeman on defendant's train. On 5 April, 1909, he was on duty on a freight running from Rocky Mount to Florence. His duties were opening and closing switches and shunting off cars. The train on this day went into

the yards at Florence about 5:40 o'clock P.M. These yards contained many switches. As the train approached the yard plaintiff got on the pilot to open the main-line switch, and rode on into the yards. There were four or five switches to open and close; after throwing a switch, the train continuing to run on. The next switch, fifty or one hundred yards away, was on the opposite side of the train to that of the one last thrown. Plaintiff crossed over the pilot in front to get over to the other side to throw the switch. He got safely over and was standing in the foothold made for the purpose of standing in it, on the front and bottom of the pilot, nine inches wide and four or five inches high, hold-
(101) ing by his hands to a rod of iron which crosses the pilot at the top, his back to the front and looking toward the cab windows of the engineman and fireman, to give signals by hand-waving. While so standing, the pilot plowed through a pile of cinders or something piled on the track. The pilot is V-shape. The substance on the track knocked plaintiff's foot off the foothold upon the track between the rails. As he fell plaintiff threw his weight upon the iron rod. This gave way, plaintiff slipping by his weight toward the side of the pilot five or six inches. Plaintiff held on to the lift-lever, his heel on the ground between the rails. The beam on the pilot pressing on his instep pushed plaintiff's heel across the ties and on the track backwards. Plaintiff testified that he held firmly to the lift-lever unable to extricate his foot dragging on rail; that all the time he was screaming for help as loud as possible and looking at fireman's window. That fireman was not in his window and the engineer was at the throttle. Plaintiff testifies that he knew there was a switch and frog just ahead and that it would hold his foot, break his hold, and pull him backwards before the moving train. He held on for some forty yards and then turned loose and fell, and the wheels crushed his foot and ankle. Plaintiff testifies that at speed engine was going it could have stopped "almost instantly." Plaintiff had been riding on the pilot in this way to throw switches during his entire employment, nearly three years. The trainmasters, conductors, and engineers had known of his riding there and had directed him to do so. The conductor of that particular train had ridden by his side on same pilot going into the same yards. The engineer, Medley, testifies that he knew that plaintiff was on the pilot for purpose of changing switches, and further, that he heard the hollering, but thought it was a woman laughing, but he did not stop his engine.

We will not discuss the many assignments of error presented in the record and discussed in the brief. In our view, there is sufficient evidence to support the findings of the jury upon the first and third issues, which renders it unnecessary to consider the defense of contributory negligence so earnestly discussed by counsel.

The evidence shows that it was a very common custom for (102) brakemen to ride on the pilots of engines in order more expeditiously to change switches in the defendant's yards. In this case the evidence is abundant that plaintiff had done so constantly for years with the knowledge and by direction of his superiors. But assuming, for argument's sake, that he had violated a rule of the company, that does not necessarily bar recovery. *Thomas v. R. R.*, 129 N. C., 392; *Biles v. R. R.*, 139 N. C., 528. The plaintiff was actually on the pilot with the knowledge of the engineer and conductor for the purpose of opening the switches.

Under such conditions it was the peculiar duty of the engineer to keep a careful lookout for the brakeman, so as to protect him from injury if possible. He knew the brakeman was on the opposite side of pilot and he could see him from the window at the throttle. He heard the hollering or screaming of plaintiff, but thought it was a "woman laughing." There is no evidence that there was a woman anywhere in the neighborhood. Knowing plaintiff's dangerous position and hearing the unusual and extraordinary sounds in front of his engine, it was the plain duty of the engineer to resolve all doubts in favor of human life and stop his engine at once.

The engineer says he was running three and one-half miles per hour. There is evidence that he could have stopped almost instantly; that plaintiff was dragged forty yards, "screaming at top of his voice all the time."

This evidence is scarcely controverted and fully justifies the conclusion that the injury was occasioned by the negligence of defendant's servant, and that such negligence was the immediate or proximate cause of plaintiff's injury.

This view of the case renders it unnecessary to discuss other assignments of error of the defendant or other phases of the evidence of negligence presented by plaintiff's counsel. The motion for new trial on account of newly discovered evidence is denied.

No error.

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(103)

J. J. CARSON v. M. O. BLOUNT.

(Filed 27 September, 1911.)

1. Evidence—Goods Sold and Delivered—Memoranda—Corroboration.

In an action to recover the price of cotton seed sold and delivered, it is competent in corroboration of the witness of defendant to introduce the

seed book of defendant showing prices paid by the defendant for seed during the time in question, when the entries had been made by the witness himself.

2. Evidence, Corroborative—Goods Sold and Delivered—Market Price—Different Points.

In an action to recover for cotton seed sold and delivered, it is competent, in corroboration of defendant's evidence as to the market price at the time, to show the market price at a certain other point, only six miles distant by rail, as tending to establish the general market price in that section of the country.

3. Evidence—Similar Contracts—Corroboration—Inference.

The plaintiff sued for an alleged contract price of cotton seed sold and delivered to the defendant during a certain period of time, claiming that the defendant had agreed to pay therefor at the market price on any day that plaintiff should call for a settlement. The defendant, on the contrary, claimed that he was to pay for the cotton at the market price at the date of delivery: *Held*, evidence was competent to show that defendant had made a similar contract with plaintiff's witness, to induce which the defendant told the witness he had shipped the plaintiff's cotton also, it being a circumstantial fact from which an inference may be drawn tending to corroborate the plaintiff's version of the contract.

APPEAL from *Ferguson, J.*, at May Term, 1911, of PITT.

Action to recover damages for an alleged breach of contract in the sale of cotton and cotton seed. These issues were submitted:

1. Is the defendant indebted to the plaintiff on account of the cotton, as alleged; if so, in what amount? Answer: No.

2. Is the defendant indebted to the plaintiff on account of the cotton seed, as alleged; if so, in what amount? Answer: No.

From the judgment rendered, plaintiff appealed.

(104) *Harry Skinner, Julius Brown, and F. G. Harding for plaintiff.*
F. G. James & Son and Albion Dunn for defendant.

BROWN, J. The complaint sets out two distinct causes of action: (1) Breach of contract on account of certain cotton sold to defendant by plaintiff. (2) Breach of contract on account of certain cotton seed sold to defendant by plaintiff.

We will consider the second cause of action first. The plaintiff contends that he delivered 946 bushels of cotton seed to the defendant during the fall of 1909 under agreement that settlement would be made therefor on any day called for by plaintiff at the market price on such day; that he demanded settlement on 28 December, 1909, when the market price of seed was 55 cents per bushel, but received therefor only the sum of 45 cents, and brings this action to recover the difference. The defendant admits the purchase of the seed, but denies that he

agreed to take the seed on the terms contended by plaintiff. Defendant avers that he agreed to take the seed and pay plaintiff the market price for same as they were delivered and allow him 50 cents per ton in addition; that from the opening of the market there was a gradual rise in the price of seed during the fall; that plaintiff became dissatisfied with the contract as made, and that on 8 December, in order to settle the controversy, he offered to give and plaintiff accepted 45 cents per bushel for all seed delivered to that time; that this was the market price on this day, and plaintiff was given credit as of that day for said seed.

Upon this cause of action two errors are assigned:

First. In that the court committed error in permitting the defendant to introduce the seed book of defendant, showing the prices paid by defendant for cotton seed during the fall and winter of 1909 and 1910, and permitting the witness Boroughs to testify to same over the objection of plaintiff. This exception cannot be sustained. The entries in the book were made by Boroughs himself, and it was competent to use them to corroborate that witness. This has been frequently decided. *Neil v. Childs*, 32 N. C., 195; *Davenport v. McKee*, 94 N. C., 326; Greenleaf Ev., sec. 436 *et seq.*

But as the contest was over the price to be paid for the seed, (105) and not over the quantity delivered, we fail to see the materiality of the evidence.

Second. In that the court committed error in permitting defendant's witness, Ashburn, manager of Conetoe Oil Mills, over the objection of the plaintiff, to testify to the market price of cotton seed at Conetoe during the course of the fall season of 1909, after the witness had previously stated that he did not know the price of cotton seed at Bethel. It is admitted that Conetoe is on same railway and only six miles from Bethel. We think the evidence competent to establish the general market price of cotton seed in that section of the country and to corroborate defendant's contention that it did not exceed 45 cents per bushel on 8 December, at Bethel. It is not conclusive evidence of the price at the latter place. We find no error in the trial of the second cause of action.

As to the first cause of action, there is only one assignment of error, viz., in that the court committed error in excluding the following testimony of plaintiff's witness, R. D. Whitehurst: "That in the fall of 1909 witness had conversation with defendant about Carson's cotton, in which defendant told witness he had shipped Carson's cotton. Blount said to me, 'You are putting your cotton in the yard and letting it rot. I have got a proposition for you. Instead of letting your cotton lie in the yard and rot, I will take it and ship it and give you weights and

grades and ship it to Norfolk, you pay storage and freight, and you can close out any day you please at Norfolk prices. I have shipped J. J. Carson.'"

The plaintiff contends that the defendant agreed to pay him the Norfolk market price for his cotton on any day plaintiff wished to close it out; that defendant misrepresented the Norfolk price and settled for 23 bales at 15 1-8 cents per pound, when in fact on that day the Norfolk market price was 16 1-4 cents per pound.

The defendant denies the contract as well as the misrepresentation.

The evidence was excluded upon the ground that it was irrelevant and tended to prove nothing. It is said in 16 Cyc., 939: "A
(106) voluntary and certain statement, oral or written, of the existence of any relevant matter of fact is competent evidence against the party by whom or by whose authority it is made, as a fact tending to show the truth of the statement."

This is not an attempt to prove that because A. made a contract with B. for the sale of his cotton on a certain date he therefore made a similar contract with C. because made on same date and concerning the same subject-matter. *Thompson v. Exum,* 131 N. C., 111.

The plaintiff contends that in talking to Whitehurst about shipping his cotton it was irrelevant and unnecessary to refer to the shipment of Carson's cotton unless for the purpose of producing on Whitehurst's mind the impression that the defendant had shipped Carson's cotton on the same terms then offered Whitehurst.

We think the inference a legitimate one, and while the jurors may or may not draw it, the evidence should have been submitted for what it is worth.

This conversation with Whitehurst is not exactly substantive evidence, which standing alone would be sufficient to support a verdict, but it is a circumstantial fact from which an inference may be drawn tending to corroborate the plaintiff's version of the contract.

As pertinently said by counsel in their brief: "What did Blount mean if not that he had shipped J. J. Carson's cotton on the same terms which he was then offering witness? It might have meant a great deal to the witness that defendant had offered the same proposition to the plaintiff, or any other man of good judgment, and that it had been accepted; but without this meaning, does the statement made under the existing circumstances amount to anything? And if we, in simple manner, reason thus, why not the jury?"

We think the court erred in excluding the evidence, for which error we direct a new trial upon the first issue. Let the costs of this Court be equally divided.

Partial new trial.

(107)

TOBE McLAWHORN ET AL. v. WILLIAM HARRIS AND WIFE, BETTIE.

(Filed 4 October, 1911.)

1. Jurors—Deputy Sheriffs—Discretion of Court—Appeal and Error.

It is within the discretion of the trial judge to excuse as a juror a deputy sheriff who, during the term of court, has summoned and mingled with the other jurors and has had charge of them, and not reviewable on appeal. While there is no statute forbidding it, such juror should not be permitted to serve.

2. Deeds and Conveyances—Parol Trusts—Conflicting Evidence—Questions for Jury.

When there is sufficient but conflicting evidence as to an express parol trust engrafted upon a purchase of land, the question is one for the jury, under proper instructions from the court.

3. Deeds and Conveyances—Trusts and Trustees—Sales—Mortgage—Purchaser.

Under a fair and open sale of lands made by the trustee according to the terms of a deed in trust securing a bond for money loaned, the owner of the bond may bid in the lands and become the purchaser in his own right.

4. Tenants in Common—Unity of Possession—Tenant a Purchaser—Interests Acquired.

Destroying the unity of possession of cotenants in common will dissolve the tenancy, and thereafter a former tenant in common may acquire the entire property.

5. Deeds and Conveyances—Parol Trusts—Trusts and Trustees—Mortgage—Sales—Mortgagee a Purchaser—Bona Fide—Evidence.

Two brothers, R. and F., bought certain lands, and to secure the purchase price executed a deed in trust to S., giving certain cotton bonds payable to L. and S. Before the death of R., L. and S. assigned the bonds to E. Brothers, and upon default the lands were sold by S. under the terms of the deed in trust, and conveyed to the purchaser, E., of the firm of E. Brothers. Subsequently, E. sold the lands to F. for the same amount of cotton bonds, *i. e.*, bonds payable in a certain amount of merchantable lint cotton. In an action brought by the heirs at law of R. to declare a parol trust in their favor in the lands thus conveyed to F.: *Held*, that while the fact that F. bought the land from E. for exactly the same amount of lint cotton that R. and F. had agreed to pay L. and S., it was open to explanation, and, different inferences being capable of being drawn from the facts, the question was properly left for the jury to say whether, under the circumstances of the case, F. was a *bona fide* purchaser of the lands in his own right, or as a tenant in common with R.

APPEAL from *Ferguson, J.*, at March Term, 1911, of PITT. (108)

The plaintiffs, children and heirs of Robert A. McLawhorn, deceased, bring this action against the *feme* defendant, Bettie Harris,

only child and heir of L. Francis McLawhorn, deceased, to set up and establish a parol trust as against said Francis McLawhorn in the lands described in the pleadings, claiming to own one undivided half of the lands in common with the said Francis. His Honor submitted these issues:

1. Did L. F. McLawhorn take title to said land from J. P. Elliott in trust to hold one-half of the same for the benefit of plaintiffs? Answer: No.

2. At the time of the purchase of the land described in the complaint by L. F. McLawhorn, did he agree to take and hold said land as trustee for himself and the children of R. A. McLawhorn? Answer. No.

The plaintiffs moved for a new trial. Motion overruled. The plaintiffs excepted and appealed from the judgment rendered.

Harry Skinner for plaintiffs.
F. G. James & Son and L. I. Moore for defendants.

BROWN, J. The land in controversy was conveyed to Robert and Francis McLawhorn, brothers, in 1890, by Harry Skinner, the purchase price payable in cotton bonds. To secure the delivery of the cotton, certain bonds were taken payable to the copartnership of Latham & Skinner and secured by deed in trust to Harry Skinner. Before the death of Robert McLawhorn, which occurred in 1893, the cotton bonds were duly assigned by Latham & Skinner to Elliott Brothers, of Baltimore.

In default of the discharge of the bonds, the land was advertised and sold under the trust on 24 March, 1894, by Harry Skinner, who
(109) conveyed it on said date to J. P. Elliott of said firm. On 28 May, 1894, J. P. Elliott conveyed the land to L. Francis McLawhorn, defendant Bettie's father, and took from him on same day a mortgage on the land securing the purchase price, to wit, 100 bales, 500 pounds each, merchantable lint cotton. This is the same price in cotton which the brothers, Robert A. and L. Francis McLawhorn, contracted to pay Latham & Skinner for the land.

There are nine assignment of error, all of which have received our consideration. None of them are of sufficient importance to justify an extended discussion, except the sixth.

As one exception relates to a juror, we say that we do not think it is well that deputy sheriffs who summon jurors, mingle with and have charge of them, should serve as such during the terms of court when they are acting for the sheriff.

In their discretion, the trial judges may well excuse them, but there is no statute, of which we are aware, which disqualifies them. But

in this case Manning, the juror challenged, was not a deputy sheriff, but had been an officer in charge of another jury.

There were certain deeds and records introduced, over plaintiff's objection, which are excepted to as irrelevant and incompetent, but it is manifest that they did not bear upon the real issue, and if erroneously received, the error was entirely harmless.

If there is any error it lies in the refusal of the court to charge the jury that if they believe the evidence in the case to answer the first issue "Yes."

The plaintiffs rest their case upon two contentions, viz.:

a. That Francis McLawhorn purchased the land from J. P. Elliott in May, 1894, upon an express agreement that he would hold the land in trust for himself and the plaintiffs, his brother's children. This claim is embodied in the second issue. Under this issue the plaintiffs attempted to establish an express trust, and it must be admitted that they introduced parol evidence which would have well warranted the jury in finding it for them. But the fact was controverted and other evidence offered tending to deny the existence of any such agreement. The charge of the court upon this phase of the case presented the plaintiff's contention with fullness and clearness and was as (110) favorable to them as they were entitled to.

b. The other contention is based upon two theories: First, that J. P. Elliott bought at his own sale, and consequently the sale was void; that the relation of mortgagor and mortgagee continues to exist, and that therefore the tenancy in common between the plaintiffs and Francis McLawhorn has never been severed.

We do not find anything in the record upon which to found such claim. The pleadings state that the sale was made by Skinner, the trustee in the deed, and the deed to Elliott executed by him and introduced by plaintiffs contains every essential recital—among others, that Skinner advertised the land according to the terms of the deed and sold it to Elliott, the highest bidder. There is no evidence whatever which tends to controvert this or to show that Elliott or his attorney made the sale or controlled it.

As the holder of the bonds secured in the deed, Elliott had a right to bid at the sale by the trustee. It was not his sale, but Skinner's, the person appointed by the mortgagors to make it, and in whom reposed the legal title.

There is no evidence or even suggestion of any fraud, undue advantage, or oppression. So far as the record discloses, the sale was fair, open and "aboveboard," and made by the person vested with the power to sell.

The second theory is that J. P. Elliott purchased the land, not for himself, but for Francis McLawhorn, and that inasmuch as he could not legally acquire title to the land adverse to his cotenants at said sale, Elliott could not do so for him.

The only evidence upon which to base this contention is that Elliott bought the land on 24 March, 1894, and conveyed it to L. F. McLawhorn on the 28th of following May, and the further fact that he sold it for 100 bales of cotton, the same price that the two brothers had agreed to pay Latham & Skinner for it.

These may be suspicious circumstances, but it is manifest they do not warrant the charge asked for by plaintiffs. They are open to
(111) explanation and different inferences may be drawn from them. They were properly submitted to the jury for what they were worth.

Assuming that Elliott purchased the land for himself or his firm to save his debt, we cannot agree with the learned counsel for plaintiff, that Francis McLawhorn could not afterwards acquire title adverse to the plaintiffs, his former cotenants.

We recognize the just principle that a cotenant, while such relation exists, may not acquire an outstanding title or lien upon the common property and hold it for his own exclusive benefit. His cotenants may share it with him. *Jackson v. Baird,* 148 N. C., 29. But, nevertheless, a tenant in common as such is not a trustee for his cotenant. *Saunders v. Gatlin,* 21 N. C., 92.

It is also true that where a cotenant in common acquires title from a sale under a deed of trust made by all the cotenants for a debt binding all, and the sale is caused by his failure to pay his share of the debt, he cannot under his rights, so derived, hold the land against his cotenants. *Reed v. Buchanan,* 57 S. E., 769, 61 W. Va., 552.

But the jury has not accepted the theory that Elliott purchased for Francis McLawhorn, and there was very little evidence, so far as Elliott was concerned, to support that claim. Therefore, when the trustee conveyed all the land to Elliott, the unity of possession was destroyed and the tenancy in common ended. Unity of possession is the only unity essential to such cotenancy. Anything that operates to destroy this unity will dissolve the cotenancy in common. *Sutton v. Jenkins,* 147 N. C., 16; 17 A. & E., 711.

After the tenancy in common is actually dissolved, there is nothing in the law which forbids a former tenant in common from acquiring the entire property. He then has the same rights as any other individual. *Sutton v. Jenkins, supra; Jackson v. Baird,* 148 N. C., 29.

Upon a review of the record we find

No error.

(112)

JAMES E. BROCK v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 4 October, 1911.)

1. Insurance, Life—Application—Misrepresentations—Proof of Loss—Statements—Prima Facie Case—Evidence—Questions for Jury.

A statement made in a proof of loss after the death of the insured by her father and next of kin, beneficiary under the policy sued on, that the insured had had pneumonia prior to her application for the policy, and in contradiction of her representation in her application that previously thereto she had not had it, is *prima facie* evidence only of the falsity of her representations, leaving it for the plaintiff to satisfy the jury, upon all the evidence, that she did not have it prior to her application.

2. Same—Mistake—Weight of Evidence.

When the proof of loss contains a statement that would invalidate the policy of life insurance sued on, if true, that the insured had had pneumonia prior to the time of her application, contrary to her representations therein made, the statement made in the proof of loss affects only the weight of the evidence for the jury to consider, when there is also evidence that the statement was made under a mistake.

3. Same.

The insured, in her application for life insurance, represented that she had not previously had pneumonia. After her decease, the beneficiary, in his proof of loss, made a statement that she had had pneumonia previous to her application: *Held*, evidence sufficient to go to the jury in rebuttal of the *prima facie* case made out for the defendant in the plaintiff's suit upon the policy, that plaintiff was mistaken and was speaking from hearsay and not from his personal knowledge, and that the insured had not had pneumonia, as stated in her application.

4. Evidence—Prima Facie Case—Weight of Evidence—Questions for Jury.

The party against whom a *prima facie* case is raised by the law is not bound to overcome it by the greater weight of the evidence, but may combat it before the jury, when there is conflicting evidence, as being insufficient evidence of the ultimate fact under the circumstances of the case.

5. Insurance, Life — Misrepresentation — Disease — Witnesses, Nonexpert — Harmless Error.

The defense in an action to recover upon a life insurance policy being the misrepresentation of the insured that she had not had pneumonia previous to her application for the policy, exceptions to testimony of nonexpert witnesses that they did not know whether or not she had suffered from this disease, upon the ground that only physicians could testify on the subject, will not be sustained, as their testimony would not tend to establish the fact either way.

6. Insurance, Life—Misrepresentations—Medical Examiner—Evidence.

The defense to an action to recover upon a life insurance policy being that the insured had falsely represented in her application for the policy that she had never had pneumonia: *Held,* competent, as evidence, for the company's medical examiner to testify that he recommended the risk upon his own examination and diagnosis of her physical condition, as tending to rebut the allegation that she had had pneumonia, for the fact that he had thus passed her was some evidence that she had not had the disease.

(113) APPEAL from *Justice, J.,* at January Term, 1911, of LENOIR.

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

D. L. Ward, Loftin & Dawson, and McLean, Varser & McLean for plaintiff.

Aycock & Winston and George V. Cowper for defendant.

WALKER, J. This action was brought to recover the aggregate amount of two policies of insurance, one for $500 and the other for $154, which were issued, in July and September, 1908, by the defendant company on the life of Emma Davis, the daughter of the plaintiff. The case was tried upon issues to which there was no exception and which, with the answers thereto, were as follows:

1. Did the insured, Emma Davis, represent in her application for the policy for $500 that she had never had pneumonia? Answer: Yes.

(114) 2. Had Emma Davis had pneumonia prior to the filing of her application for the policy for $500? Answer: No.

3. Did the insured, Emma Davis, represent in her application for the policy for $500 that she had never had consumption? Answer: Yes.

4. Had the insured, Emma Davis, prior to said application ever had consumption? Answer: No.

5. Did the insured, Emma Davis, in her application for the policy for $500 represent that she had not been under the care of any other physician within two years for any serious illness than Dr. Tull for chills, 19 May, 1908? Answer: Yes.

6. Was the insured under the care of any physician within two years for any serious illness other than Dr. Tull for chills, 19 May, 1908? Answer: No.

7. Did the insured in her application for the policy for $154 represent that she had not been attended by a physician for any serious disease or complaint? Answer: Yes.

8. Had the insured, Emma Davis, prior to said application, been attended by any physician for any serious disease or complaint? Answer: No.

9. What amount, if any, is plaintiff entitled to recover of defendant on said policies? Answer: $654, with interest from 9 June, 1909.

Judgment was given for the plaintiff, and defendant appealed.

It appears that in the application for the policy the insured represented and stated that she had never had pneumonia or consumption, nor had she ever been treated by a physician for any serious illness. She was not able to pay the premium on the policy or even to take out the policy, and her father did this for her, and after her death, as her next of kin and the beneficiary under the policy, he filed with the company a proof of loss, in which he stated that she had an attack of pneumonia in February, 1906, prior to the date of her application, of about three weeks duration, and had chills and fevers occasionally all the time. There was evidence, we think, to show that this was a mistake, though it must be admitted that the state of the entire evidence was such as to justify the claim of the defendant's counsel that it pre- (115) ponderated in his favor. But we are not permitted to interfere with verdicts, by determining with whom the mere weight of the evidence lies. If there is any testimony fit for the jury to consider upon the issue made by the pleadings, we must abide by the verdict and consider and decide only upon questions or inferences of law. The court charged the jury, substantially, with reference to the statement of the plaintiff in the proof of loss, or in what is called in the case his written claim for the insurance, that it was *prima facie* evidence of the fact that the deceased had pneumonia in 1906 and was otherwise ill, as stated, but that it devolved upon the plaintiff to satisfy them, upon all the evidence, that she did not have pneumonia prior to the date of her application. The defendant's counsel, in their able and learned brief, state that "It was around this point that the battle waged from the beginning to the end of the case." They requested the court to charge that there was not sufficient evidence to rebut this *prima facie* case made by the statement of the plaintiff in the application. Assuming, for the sake of discussion, that the judge laid down a correct rule of law, as to the force and effect of plaintiff's statement in the proof of loss, as to the deceased having had pneumonia—and we do not mean to question it in the least—we yet are of the opinion that there was evidence to rebut or overthrow the *prima facie* case thus raised. There was testimony, for example, which tended to show that the plaintiff was mistaken and was speaking from hearsay, and not from his personal knowledge, when he made the statement, besides other competent and sufficient proof that the insured had not been a victim of pneumonia or consumption, or any

other serious malady. The case, in this respect, was fairly submitted to the jury by *Judge Justice*, with his accustomed lucidity and accuracy in stating legal principles, as applied to the essential facts of a case; and, moreover, in this particular instance the charge of his Honor, if anything, placed the burden a shade too much upon the plaintiff, for where a *prima facie* case is established by the proof of a single fact or a series or concatenation of facts—a chain of evidence, as we call it—
it is, at last, as we will see has been said by the Supreme Court
(116) of the United States, only proof, though it may be strong, of the
ultimate fact or facts to be shown as necessary to the party's recovery or success. It is not conclusive, but must be submitted to the jury, either by itself or along with the other evidence, for them to find the ultimate, final, and constitutent facts which, in law, are the true basis of recovery, whether by plaintiff or defendant. In other words, and to make this doctrine clearer, if possible, the *prima facie* case is only evidence, stronger, to be sure, than ordinary proof, and the party against whom it is raised by the law is not bound to overthrow it and prove the contrary by the greater weight of evidence, but if he fails to introduce proof to overcome it, he merely takes the chance of an adverse verdict, and this is practically the full force and effect given by the law to this *prima facie* case. He is entitled to go to the jury upon it and to combat it, as being insufficient proof of the ultimate fact under the circumstances of the case, but he takes the risk in so doing, instead, of introducing evidence. We believe this is thoroughly in accord with our authorities.

In *Shepard v. Telegraph Co.*, 143 N. C., 244, the present *Chief Justice*, citing *Board of Education v. Makeley*, 139 N. C., 35, and adopting as a correct statement of the law what is quoted in that case from 1 Elliott on Evidence, sec. 139 (not only a standard work, but one of the best we have on the law of evidence), said: "The burden of the issue, that is, the burden of proof, in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts; but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a *prima facie* case or presumption
in favor of the issue is not bound to disprove the actor's case by
(117) a preponderance of the evidence, for the actor must fail if, upon
the whole evidence, he does not have a preponderance, no matter

whether it is because the weight of evidence is with the other party or because the scales are equally balanced." The *Chief Justice,* in commenting upon this rule, stated the law of this State thus: "The burden of the issue as to negligence was upon the plaintiff. If no evidence had been offered in rebuttal, the court might have told the jury that if they believed the evidence, to answer that issue 'Yes.' But when evidence was offered in rebuttal, it was not incumbent upon the defendant to prove it by a preponderance of testimony, but upon all the testimony it was the duty of the plaintiff to satify the jury by a preponderance of the evidence that the defendant was guilty of negligence." This agrees with what was said in *Womble v. Grocery Co.,* 135 N. C., 474, and *Stewart v. Carpet Co.,* 138 N. C., 66, and *Winslow v. Hardwood Co.,* 147 N. C., 277, except in this, that the jury must be satisfied upon the *prima facie* case of the right to a verdict.

So in this case the judge might well have submitted the *prima facie* case alone to the jury, if there had been no other evidence for their consideration; and still he should have charged them that it is not conclusive, but they must say whether it is really according to the truth of the matter, or, to adopt the idea as expressed by the Supreme Court of the United States, a *prima facie* case is, at the most, merely sufficient proof to establish the fact, and if not rebutted it remains sufficient, but is not conclusive. In the recent case of *Bailey v. Alabama,* 219 U. S., 219, the Court says: "*Prima facie* evidence is sufficient evidence to outweigh the presumption of innocence and, if not met by opposing evidence, to support a verdict of guilty. 'It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose.'" But the Court also held that *prima facie* evidence is at last only some evidence of the main facts, sufficient, it is true, to support a verdict, but not absolutely controlling upon the jury, who may convict or not upon it, as they may see fit, or who, in a civil case, may find a verdict in accordance with it, or, by disregarding it, as being insufficient to convince them, may return the opposite verdict. And so in *Bailey v. State,* 161 Ala., at p. 78 (same (118) case, the Court says: "It must be borne in mind that the rule of evidence fixed by the statute does not make it the duty of the jury to convict on the evidence referred to in the enactment, if unrebutted, whether satisfied thereby of the guilt of the accused beyond a reasonable doubt or not. On the contrary, with such evidence before them, the jury are still left free to find the accused guilty or not guilty, according as they may be satisfied of his guilt or not, by the whole evidence."

It was objected and argued by defendant's counsel that the court had permitted nonexpert witnesses for the plaintiff to testify that the deceased had never had pneumonia, but we do not think their negative

testimony can bear this construction. They merely said, as we understand them, that they did not know whether or not she suffered from this disease. They did not profess to say, or to give a medical opinion, upon facts known to them or otherwise, as to whether she had pneumonia. A fair interpretation of what they said would lead us to the inference that they simply had not heard of any such thing.

The testimony of Dr. Pollock, the medical examiner of the company, that he recommended the risk, not upon her statement that she had never had pneumonia or consumption, but upon his own examination and diagnosis of her physical condition, was clearly competent. Of course, as contended by defendant's counsel the question was not whether the medical examiner was influenced in giving his certificate of her physical soundness by any statement she had made, but rather whether the *defendant* was induced thereby to issue the policy or to enter into the contract of insurance with her, and his testimony was competent and relevant, in this view, to rebut the allegation that she had ever actually been afflicted with the disease mentioned, for he stated, also, that she had not been so affected, and the very fact that he examined and "passed her," in view of the questions asked in the application, was some evidence, under all the circumstances of this case, that she had never suffered from pneumonia or consumption or any other serious disease. We have found

No error.

(119)

SALLIE PETTIT, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 4 October, 1911.)

1. Employment of Children—To What Confined—Interpretation of Statutes.

The provisions of Revisal, sec. 1981a, "that . . no child under twelve years of age shall be employed in any factory or manufacturing establishment in this State," are not interpreted so as to extend the employment of such child to include employments not within its letter or spirit.

2. Railroads—Master and Servant—Messenger Boys—Employment of Children—Dangerous Employment—Negligence — Causal Connection — Evidence.

The plaintiff's intestate was a boy under twelve years of age, employed by the defendant railroad company as a messenger boy, with the duties of carrying dispatches and messages from and between its certain officers, necessitating his going over defendant's yard where there were numerous tracks whereon the trains continuously were passing, in the course of his employment: *Held*, evidence only that the intestate was last seen before

the injury riding on the corner of defendant's box car, and that he was found thereafter lying on defendant's track in the injured condition which within a few hours caused his death, is insufficient to take the case to the jury upon the question of defendant's negligence, and a motion to nonsuit was properly sustained.

3. Railroads — Master and Servant — Employment of Children — Dangerous Duties—Instructions to Servant—Scope of Employment—Evidence.

In an action to recover damages of defendant for its negligent killing of plaintiff's intestate, a boy under twelve years of age, employed to carry dispatches or messages across defendant's numerous tracks, where trains were continuously passing and repassing, the question as to whether the defendant had instructed the intestate as to the dangerous character of his employment becomes immaterial when there is no evidence tending to show that the intestate was engaged in his duties to the defendant under the scope of his employment at the time in question or that the injury occurred by reason thereof, the burden of showing which was upon the plaintiff.

APPEAL from *Whedbee, J.*, at June Special Term, 1911, of (120) EDGECOMBE.

This is an action brought by the administratrix of Joe Pettit, to recover damages.

The complaint alleges the death of the intestate, his employment by the defendant as a messenger boy, the nature of his duties, a description of the place where he had to work, and then alleges specifically the acts of negligence complained of as follows:

"On 28 April, 1907, the said infant was given a message by the defendant, and carelessly and negligently directed by the defendant to deliver the same to another one of its employees, and to do so required the infant to go somewhere on the yard to track No. 9 or 10. About this time an engine with a number of cars of defendant, going south, passed, when the said infant undertook to go upon said slowly moving train to the point where the message was to be delivered. He stood upon the iron steps of a flat car in the said train, and suddenly the said car upon which he was standing, failing to clear another car standing on a track of the defendant, said infant was knocked from his position by coming in contact with the said car on the adjoining track; he was thrown between the wheels of the moving train and was so badly injured that he died the same afternoon."

The following evidence was introduced by the plaintiff:

Mrs. J. W. Spiers, formerly Mrs. Sallie Pettit, testified as follows:

Q. Your name is Mrs. J. W. Spiers? A. Yes.

Q. You are the mother of the young man, Joe Pettit, that was killed at South Rocky Mount? A. Yes.

Q. When were you married the last time? A. Last December, three years ago.

Q. At the time of your son's death you were Sallie Pettit? A. Yes, sir.

Q. You have a record of the date of the birth of your son Joe? A. Yes, sir.

Q. Will you please open this Bible and turn to the page in (121) question; is this a memorandum as to the date of the birth of your son Joe? A. Yes.

Q. And that record is that he was born on the 22d of June, 1895 or 1896? A. I can't tell.

Q. Do you remember the date? A. No, sir.

Q. Do you know who made this record? A. Yes.

Q. Who? A. Next to my oldest daughter. For about four years it was my brother's Bible, and I had her draw mine off from his. He had the old record of all his children and mine.

Q. The date was recorded in your brother's Bible? A. Yes.

Q. And these dates were recorded at the time of the birth of the children? A. Yes.

Q. Do you know of your own knowledge how old he was? A. Yes; he was eleven years old; would have been twelve in June, 1907.

Q. Did you ever give your consent that this boy should go to that company to engage in this work? A. No.

Q. How was the boy dressed with reference to long or short pants? A. Short, knee pants.

Q. What number of clothes did he wear, with reference to pants? A. No. 12; No. 11 all the time before.

Q. Was he large or small for his age? A. He was not large at all; just ordinary size.

Q. About what time in the day was he killed? A. Somewhere about 12; I was sitting at the dinner table.

Q. How long after that before your child died? A. I think it was somewhere about 4 that same afternoon.

Cross-examination:

Q. When was the first time, Mrs. Spiers, that you heard that your boy was working for the railroad? A. When he got his job he told me.

Q. How long before this accident did he tell you he had a job? A. He told me as soon as he got his job.

Q. See if you can't remember how long before his accident? A. At the last time he had been at work for a week.

Q. How long the first time? A. About two months.

Q. It is alleged that he had been in the employment about (122) four days? A. Well, somewhere about a week; the last time I think it was on Tuesday he began, and was killed Sunday.

Q. But before he had been working about two months? A. Somewhere about that time.

Q. When he went there the second time did you tell him not to take it? A. No, sir; I don't think I did, but he said, "I am going back and take my same job, and—"

Q. Did you say not to do it? A. I don't remember what I said to him.

Q. The first time, did you tell him not to take it? A. I don't know, sir.

Redirect examination:

Q. Did you know just what duties he had? A. He told me he was a messenger boy; but I didn't know anything about it.

Q. Did you know anything about the danger attached to the job? A. No, sir. I had never been on the yard and I didn't know anything about it.

Q. Did you know how many tracks or trains there were there? A. No.

Q. Mrs. Pettit, how many other children have you? I have seven besides him.

Q. He told you he took the messages from one office to the other? A. Yes.

Q. Brought his money home? A. Yes, to me.

Mr. J. W. Spiers testified as follows:

Q. Mr. Spiers, you are the husband of the lady who left the stand? A. Yes.

Q. Mr. Spiers, you have been in the employment, off and on, of the railroad at Rocky Mount? A. Yes.

Q. You knew the condition of the yard at South Rocky Mount in April, 1907? A. Yes, sir.

Q. Do you happen to know what duties Joe Pettit was discharging at the time of his employment? A. Messenger boy.

Q. In the office of Mr. E. S. Dodge? A. Yes, chief train dispatcher.

Q. And where were most of the messages to be carried? A. To the yardmaster's office; his office was placed diagonally (123) across from the dispatcher's at that time.

Q. And over how many tracks did he have to go? A. At that time he had to cross somewhere between eight or ten tracks; I don't exactly know at that time.

Q. The yard has been torn up and removed and these tracks have been torn up? A. Yes.

Q. Over these ten or twelve tracks between Dodge's office and the other office how many trains moved and how often? A. I can't tell; there was continuous shifting all the time. All the yard engines from the roundhouse had to be delivered there.

Q. When the trains come in were not all trains handled over these tracks? A. Norfolk and Charleston passenger trains were.

Q. What about the making up of these trains? A. Well, they were made up in the south yard and were left down in the south yard; they had to go over these tracks; all trains leading north.

Q. What became of the cars going north? A. They passed through the same tracks; they were made up in the northern end of the yard and passed over the main-line track.

Q. To what extent were these tracks being used? A. For classifying freight, loading and shipping freight, etc.

Q. How often? A. Continuously.

Q. What did you say Joe's duties were? A. Messenger boy.

Q. Took messages from the dispatcher's office to the yardmaster? A. Yes.

Mr. J. R. Pettit testified as follows:

Q. Look at that; do you remember that? A. Yes.

Q. Speaking with reference to that, that is what year? A. 1907.

Q. A wire that your brother has been hurt? A. Yes.

Q. You were living here at that time? A. No, sir; I was living at Rocky Mount, but I was over here that day.

Q. Did you know what your brother's duties were? A. Messenger boy to carry messages to any office he was sent.

Q. Court: Were there any other duties? A. He was supposed
(124) to deliver messages to Mr. Robinson, Mr. Trueblood, and other offices on the yard.

Q. Just locate where these offices were and how many trains and tracks there were? A. Mr. Gorham's office was in the end of the principal shed and there were twelve tracks, I think, or more there at that time, and he had to cross these tracks to his office. Mr. Trueblood's office was across these tracks over between Mr. Gorham's office and the shop.

Q. What about the tracks there? A. He had to cross these same tracks. There was continued shifting and making up trains all the time during the day.

Q. What about Mr. Robinson's office? A. Robinson's office was back of the shop.

Q. How many tracks would he have to cross going to Robinson's office from the dispatcher's office? A. About fifteen or sixteen; it was behind the shop.

Q. Where was the office of the chief train dispatcher, Mr. Dodge, with reference to the main tracks of the A. C. L.? A. It was above the Coast Line restaurant.

Q. How far away from the main-line tracks? A. I don't really know exactly.

Q. As far as what? A. It was the distance of this building, or may have been more.

Q. About fifty feet? A. I suppose it was fifty feet or more.

Q. These tracks were in front of Dodge's office? A. Yes.

Q. How many of these tracks were there? A. There were only two main-line tracks and other tracks leading to them.

Q. How many of these? A. A good many of them; I don't remember how many.

Q. How many trains and shifting engines and engines and cars passed over these tracks? A. There was continuous shifting by trains for different points, Richmond, Florence, and Norfolk, over these tracks.

Q. Mr. Pettit, do you happen to know what your brother was receiving? A. $12.50 per month.

Cross-examination: (125)

Q. Mr. Pettit, you have spoken of his duties and the messages to take to the offices; how would he proceed to carry it there? A. Well, I suppose he would walk.

Q. Don't you know it was his business to walk from the point? A. Yes, I suppose that was the point of it.

Q. That was his business? A. Yes; that was part of it.

Q. Now, was there anything in his duty that required him to undertake to go upon a slowly moving train to the point where the message was to be delivered and ride upon iron steps of a freight car? A. I don't know.

Q. So when he attempted to ride a slowly moving train he did that because he wanted to? A. He did as all the others did.

Q. Didn't he do that because he wanted to? Yes, sir; and not only him, but all the others that age; there were more than him.

Redirect examination:

Q. There were other young children employed around the shop? A. Yes.

Q. The dispatches this boy had to deliver were telegrams? A. Yes.

Recross-examination:

Q. There were orders as well as telegrams? A. Any messages he might be given from the dispatcher's office.

Q. He would take any message? A. Yes.

Mr. Batts testified as follows:

Q. What is your name? A. J. W. Batts.

Q. Where do you reside? A. South Rocky Mount.

Q. What is your employment? A. Train engineer. I was fireman at the time of this accident.

Q. Fireman in April, 1907? A. Yes.

Q. In whose service? A. Atlantic Coast Line.

Q. Where were you on the day that Joe Pettit was killed? A. I was on the yard; had been out at work and just started home.

Q. At what time? A. Between 11 and 12.

Q. Did you see Joe Pettit that day? A. Once; I saw him on (126) the corner of the car.

Q. State what position he occupied on the car? A. He was standing on the steps and holding to the lower round.

Q. What kind of a car? A. Box car.

Q. In motion? A. Yes, moving.

Q. In what direction was it moving and where was the engine? A. At the southern end, the car was moving north.

Q. Did you see Pettit again this day? A. Yes, after he was run over.

Q. What attracted your attention? A. I heard some one scream out.

Q. Where did you find Pettit? A. He was lying on the track.

Q. What was his condition? A. One leg off.

Q. Do you know to what extent the tracks are used for the making up of trains and the classification of cars of the Coast Line? A. Yes.

Q. What was it; go ahead and state to the jury for what purpose they were used? A. They were put there for incoming trains and for making up trains going out.

Q. How frequently are engines and trains passing back and forth through the yard? A. Most all the time.

Mr. K. S. Lancaster testified as follows:

Q. Mr. Lancaster, do you know the condition of the yard of South Rocky Mount in April, 1907? A. I think so.

Q. Go ahead and tell the jury; describe it? A. Well, there was trains continually over the tracks; it was going and coming all the time; hardly ever more than two or three minutes without trains going backwards and forwards; about fifteen tracks there at that time.

Q. You were in the employment of the Coast Line at that time? A. Yes.

Q. Your duties called you upon the yard? A. Yes.

The plaintiff rested. The defendant moved for judgment of nonsuit; motion allowed, and plaintiff excepted.

sue on the promise, implied from his payment, that he should be reimbursed. But the plaintiff does not sue himself, at least under our present system. He simply sues his debtor, who has failed to comply with his promise to pay his ratable part, the plaintiff having already paid his, and having satisfied the debt, as between debtor and creditor, all left due being that which, in equity and good conscience, comes to him by the default of his coöbligor. The obligation of the paying debtor has been satisfied and there is nothing due save what his defaulting fellow owes to him, and for this he must sue the latter, being under no obligation, as between them, to pay any part of it; but his codebtor being under the duty, in law and equity, to pay to his faithful coprincipal that part of the debt he promised to pay. Equity then steps in and compels the defaulter to do justise without regard to the mere forms of law or the legal title.

It is not to be denied that courts generally have held, at common law and under the statute, that a surety, or coöbligor—which is the same thing—who pays off a specialty debt is to be considered, in equity at least, and in all respects, as a specialty creditor of his principal. This was so held in *Robinson v. Wilson,* 2 Maddock Ch., 569. There is an implied contract between the principal and the surety, or between coprincipals, that if one of them shall pay more than his share, the other shall be entitled to an assignment of the bond or other security, or shall have, in law and equity, precisely the same remedies as the creditor would have if the debt had been paid to him. *Robinson v. Wilson, supra; Barrows v. McWhann,* 1 Dess Eq. (S. C.), 409. In the last cited case, which is very much in point, the Court held that, in order to preserve and protect the right, legal and equitable, of the paying coöbligor, an (203) assignment would be decreed, or the court would proceed as if it had been made, and that the limitation of seven years as to the implied promise did not apply, but that in regard to equitable actions; and it was further held that in order to enforce this clear equity the court would order any payment or satisfaction of the debt entered upon the record to be canceled, and would decree that the obligor, who has paid his part and also the share of his coöbligor, should stand literally in the shoes of the creditor, as to his legal and equitable rights, and with the priority and full privilege of a specialty creditor in every regard, if the debt which he paid was evidenced by an instrument under seal. *Drake v. Coltrane,* 44 N. C., 300. This was more distinctly and sharply decided in *Stokes v. Hodges,* 29 S. C. (11 Rich. Eq.), 135, it having been ruled that the paying debtor would be considered as a specialty creditor, as to rights and remedies, in all respects; and is this not in accordance with a just and perfectly fair consideration of the rights of him who has borne, not only his own share, but the share of others equally liable?

Howell v. Reams, 73 N. C., at marg. p. 393, *Judge Bynum* says: "The cosurety who pays the bond debt for which the other is equally bound shall be deemed a bond creditor in the administration of the estate of the deceased cosurety. The same bond which makes them the bond debtors of the obligee, by force of the statute binds them mutually to contribution. In carrying out the beneficial purposes of the statute there can be no reason why they should not occupy the same relation to each other that they do to the principal, instead of becoming by the same act of payment the bond creditors of the principal and only the simple contract creditors of each other."

But however the law may have been before the adoption of our Code system, it cannot be successfully contended that now there is any reason for adding to or upholding the old and technical rule prevailing in courts of common-law jurisdiction. We have jurisdiction both in law and equity and can decree according to the equitable merits of the
(204) case, without resorting to two courts. This doctrine is well settled in *Dunlop v. James,* 174 N. Y., 411, as follows: "In modern times courts of law have dealt with subrogation as they would with assignments, and, when the right of action to which the plaintiff asks to be subrogated is a legal right of action, a court of law may treat a plaintiff who is entitled in equity to subrogation as an assignee, and allow him to maintain an action of a legal nature upon the right to which he claims to be subrogated." In *Bledsoe v. Nixon,* 68 N. C., 521 (cited in the opinion of the Court), *Judge Rodman* strongly intimates that the harsh rule by which a surety or coöbligor who pays off a bond must bring his action within three years on the implied promise, is confined solely to *courts of law,* and does not apply to the equitable remedy. This was so held because the right of the obligor, who pays the entire debt, to recover from his coöbligor, equally bound for the debt, depends at law, without an assignment, upon the implied promise, which being a matter arising out of contract, is barred in three years; but not so where the obligor elects to sue in equity, for in that case the ten-years statute applies, as the right is not based upon contract, but arises out of equitable principles, and it has been so expressly held in States having statutes like ours. *Zuellig v. Hemerlie,* 60 Ohio St., 27 (71 Am. St. Rep., 707); *Neal v. Nash,* 23 Ohio St., 483. And so it was held in *McAden v. Palmer,* 140 N. C., 258, that section 399 of the Revisal, providing that actions for equitable relief, or in cases where the cause of action is equitable in its nature, shall be brought within ten years after the cause of action accrues, applies to all actions of an equitable nature; and the very next section of The Code (Revisal, sec. 400) not only per-

mits but requires that all actions shall be brought by the real party in interest, thereby abolishing forever the necessity for suing in the name of a nominal plaintiff to his use.

But the express agreement of the parties in this case is to be considered. Can any one doubt that what they meant was that the plaintiff should pay the whole debt and rely, not upon the defendant's implied promise to reimburse him, but upon the note itself and the latter's obligation thereunder to pay? In other words, that by the express contract the plaintiff should take the place of the creditor in the (205) note as to the defendant's share of the obligation, and be entitled to *all* of the creditor's rights and remedies. In a case exactly similar, it was held that the obligor, who paid all of the debt, was entitled in law and equity to the rights of the creditor in the note, to the extent of the defaulting obligor's part, and with reference to this the Court said: "Whatever may formerly have been held as to the effect of the transaction as above stated, the recent decisions of this Court, paying more regard than formerly to the intention of the parties and to the equities of the case, have determined that the payment, or, as it may rather be called, the advance to the creditor by one of two joint obligors of a sum equal to the entire demand, under such an agreement as is above stated, does not extinguish the entire obligation, but may leave it in force as furnishing a remedy for doing justice to the obligor who has made the advance. In other words, one coöbligor is allowed to purchase the remedy of the obligee against the other obligor, and to enforce it at law in the name of the obligee for procuring contribution or full payment, as he may be entitled, to the one or the other." *Smith v. Latimer,* 54 Ky., 75.

Is not this case directly in point, and is it not in consonance with justice and right? If it has never received the sanction of the law in this State, and I think it has, is it not quite time that we were accepting it as the true and only just doctrine?

I again quote from that case, at p. 79, as it so clearly and strongly states the only true principle, and with direct application to the facts of this case: "As it is an obvious principle of equity long recognized and enforced as such, that the payment of an obligation by one who is a mere surety, whether so originally or made so by subsequent facts, entitles him to subrogation to the rights of the obligee for his own indemnity, though there be no agreement to that effect, we do not see why an express agreement to the same effect, made at the time of payment, and therefore entering into and qualifying that fact, may not be regarded and enforced by a court of law. The case of assignments of choses in action, which though one considered by courts of law as wholly (206) inoperative against the assignor, have under the influence of equitable principles, come to be respected and enforced by those courts

in actions in the name of the obligee, affords an example, and, by analogy, a precedent for the advances towards equity made by this Court in giving effect to agreements between the holder of a note or bond and one of the obligors, with respect to the consequences of a payment made by him."

We must consider that the obligor or surety, who pays the debt, has three remedies against his coöbligor:

1. He may sue in *assumpsit* on the implied promise, or, in this case, on the express promise, when three years inaction will be a bar.

2. He may sue on the specialty, when ten years is the limit.

3. He may sue upon his equitable cause of action, his right being founded solely upon the equity, when ten years will bar under Revisal, sec. 399.

It is true, *Judge Ruffin* says, in *Sherwood v. Collier,* the idea that a man can sue himself or receive assignment of his own debt involves an absurdity, but it does not apply to this case. He is not suing himself, as the cases I have cited clearly show, but is proceeding by action on the specialty, or by the equitable action to recover from the defendant his fair proportion of the joint liability—that which he promised to pay, and which he should be made to pay. It is something this plaintiff does not owe, but which is owing to him by the defendant. We should not be subtle or astute to apply the statute in his case and bar the action, for if there ever was a just claim, this is one, and we cannot deny the relief the plaintiff seeks, even if we should proceed under the hoary principles of the ancient law, which existed in the days of the "learned Mr. Tidd," when a litigant's success depended more upon the comparative wits of the opposing special pleaders than upon the real merits of the case.

It cannot be doubted that the request of the defendant to the plaintiff, that the latter pay the money to the creditor and hold the note until he could pay his share, and the indorsement *without recourse,* meant but one thing, that the plaintiff should be substituted not only to all (207) the rights in, but to all the remedies upon the note which belonged to the creditor—that he should step into his shoes. It was not intended that the note should be satisfied as between the coöbligors, but kept alive for the plaintiff's benefit. Why indorse *without recourse,* if the note was not to be kept afoot?

We must not forget that *Sherwood v. Collier* was an action at law—"debt upon a bond"—and *Judge Ruffin,* a great chancellor, was not deciding what would have been the right of the plaintiff in equity.

It may be said that Sykes was not a party to the express agreement, but this makes no difference. Equity will compel him to assign or to become a party for the purpose of protecting the obligor, who has paid him, giving him, of course, adequate indemnity against costs. How is he

on the stirrup of the moving car for his own amusement and diversion, and not in the discharge of any duty as messenger, or in the course of his employment as such. Not only this, but it appears that his companions and playmates, who were of his own age, warned him not to ride on the car; so that he was not too young to be unaware of the danger, even if he had been in the line of his employment, and, in the absence of a statute making it unlawful to employ a boy of his age in such business, it would have been a question for the jury to determine, upon the evidence, the degree of his intelligence and his capacity to know and understand the risk, even if the question of negligence had been in any way involved in the case. It is clear that the mere fact of his employment, coupled with his youth, does not show actionable negligence, even though the extreme view of the law be adopted, unless the injury can be referred to those facts as its proximate cause; and this, we see, cannot be done. He was not carrying a message, but playing, and the company is no more liable for his injury than if he had been hurt while engaged in any other sport or pastime. His being under age is, therefore, an irrelevant matter, as it did not cause the injury. This is a case where there has been a loss without an injury (*damnum absque injuria*). The railway company is no more liable to the plaintiff than if the boy had not been in its employ, but was injured while engaged in some sport or play, such as shinney or baseball. There is an entire lack of cause and effect. If a man or boy is hurt, he is not entitled to recover, even of a railway company, because he was employed by it, unless the injury was brought about by some neglect of duty to him on the part of the company. The latter must have owed him a duty and failed to perform it, thereby causing the injury. But there is no such case here, and none that bears any resemblance to it. The boy was hurt by accident resulting from his own daring, for which the railway company is in no way responsible. We sympathize with the plaintiff, but in deciding his case we must not be influenced by our feelings. It is not a matter of sentiment, but a question of law to be solved by the consideration alone of the cold and unyielding facts of the case. It is the safe and only rule, when making a decision, never to lose sight of the facts, but to keep them steadily and constantly before us, for whatever is outside of the facts is also outside of the law of the case, which consequently becomes a mere abstraction.

(133)

BROWN, J. I concur fully in the opinion of the Court written by *Mr. Justice Allen.*

As he has clearly demonstrated, I think the question as to whether the defendant company had the right to employ a boy of eleven and a half years of age as a messenger in its telegraph dispatcher's office at South

Rocky Mount is not presented in this case. I do not think the Court should pass on matters not necessary to a decision of a case. When courts go further than this, their expression of views are regarded as not authoritative, and mere *obiter dicta.*

The matter of the employment of child labor in certain vocations is very largely a matter for the wisdom of the General Assembly and not for the courts. I think we should be careful not to enter the domain of the lawmaking power.

The matter of child labor has been discussed at several sessions of the Legislature, and so far it has not interfered, except in the case of manufacturing establishments.

There is no legislative restriction upon the employment of boys even under twelve years as messengers in telegraph offices, whether such offices are operated by railways or other corporations. Such employment is very general.

CLARK, C. J., dissenting: The plaintiff was not accorded the privilege of a jury trial to determine the facts. Therefore the evidence must be taken in the most favorable aspect for him and in the light of the most favorable inferences which could have been drawn therefrom by the jury. His intestate was a child, small for his age, which was under twelve, and had not taken off knee.pants. He was employed at South Rocky Mount to carry messages across a yard filled with eighteen or twenty tracks, with engines and trains moving backwards and
(134) forwards, every few minutes. Among these were through trains and also the shifting engines, moving freight and passenger cars to make up trains. His duties required him to carry messages over and across this yard. A more deadly and perilous place could not be imagined. Such duty would have taxed the discretion and judgment of a much maturer person. The defendant did not attempt to show that they had given the child any caution or instruction whatever.

In *Fitzgerald v. Furniture Co.,* 131 N. C., 645, this Court cited with approval the following language from Thompson on Negligence: "The law puts upon a master, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business and of instructing him how to avoid them. Nor is this all; the master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance, and inexperience of the servant as to make him fully aware of the danger to him and to place him, with reference to it, in substantially the same state as if he were an adult." This being a duty devolving upon the defendant, the burden was upon it to show that such caution

was given and its nature. But nothing of the kind was even attempted to be shown. It follows that the presumption that such caution was not given is not removed.

In *Ward v. Odell,* 126 N. C., 948, a child eleven years old, employed in a factory, in passing from one part of the mill to another stopped for a moment at a bench where a wire was being cut, when a piece of wire flew off and put out his eye. It was held that the injury was conclusive that the work was dangerous, and that in such case "These little creatures exposed to such dangers against their will cannot be held guilty of contributory negligence." Nor was it a defense that the child was hired to the company by the father. "It was the child's eye which was put out, not the father's. The father could not sell his child nor give the company the right to expose him to danger. The superintendent put these children to work, knowing their immaturity of mind and body, and when one of them thus put by him in places requiring constant watchfulness is injured every sentiment of justice forbids that the corporation should rely upon the plea of contributory negli- (135) gence." If that is true as to cutting wires in a factory when the child was not on duty at the time, it is necessarily so as to the danger ten times more deadly of crossing eighteen to twenty tracks with engines and cars constantly moving backwards and forwards and when the child's duties required him to cross the tracks.

On this occasion there was no eye-witness as to how the child was killed, but he was found dead upon one of these tracks with his leg cut off. The inference is irresistible that he was killed by a passing train. *Powell v. R. R.,* 125 N. C., 370. If there could be any possible doubt about it, the evidence was certainly sufficient to be submitted to a jury to draw the inference. The little child being found dead with his leg cut off in such a network of tracks, among constantly shifting trains, creates as strong a presumption that his leg was cut off by one of these trains as when a soldier is found dead on a battlefield with a bullet through his head, that he was killed by the enemy.

It is urged that it is not shown that the little boy in his knickerbockers was on duty, because there is evidence tending to show that he was killed on Sunday morning. The opinion of the Court says: "No one testifies that he was killed on Sunday. We assume it." Yet nothing is better settled than that nothing can be assumed against the plaintiff on a nonsuit. The evidence is that he was employed to carry dispatches across these tracks. The very nature of the work as a necessity in operating trains is conclusive that it was carried on every day. There is no evidence whatever that these messages were not required to be sent on Sunday as well as on other days. It is well known that these through trains, and that also the shifting of cars and engines on these tracks,

are operated on Sunday, as well as on other days. His duty was such as could not cease on Sunday. Reference to the decisions of this Court will show cases in which this defendant was sued for the penalty in sending out its freight trains from this very yard on Sunday, *S. v. R. R.*, 149 N. C., 470, and the defense was upheld that it had a right to send out through freight trains. The statute also permits the dispatching of both local and through passenger trains. It is in evidence in this case that other laborers were present on the yard that morning.

(136) Taking the evidence in the light most favorable to the plaintiff, as the law requires us to do on a nonsuit, it is a reasonable inference that the child was there in the performance of the duty of carrying messages from one office to another across these tracks at the time of his death. It is not shown that he had occasion to go there for any other purpose, nor is it reasonable to suppose that after his arduous labors on these other days he would have revisited this spot on the morning in question as a matter of sport or play. The child was killed where he was required to do his work. If for any reason he was not at work at that spot on that day it was the duty of the defendant to show it, and it could have readily done so, if such was the fact. It did not attempt to make such proof.

It was also suggested that the child might have been killed by jumping upon one of the passing trains. One witness testified that he saw him riding on one of the shifting trains that morning. But there is no evidence that he was killed while doing so, and even if it had been shown that he was killed while so riding this would have been contributory negligence, which this Court held in *Ward v. Odell,* 126 N. C., 946, could not be set up against a child under twelve years of age. Besides, contributory negligence must be proven by the defendant. Rev., 483. The opinion of the Court refers to the statements in the answer as if the answer were evidence.

If we are to observe *Judge Daniel's* wise injunction, quoted by the Court, "that we should not be wiser than the law," we will not reverse the humane decisions of this Court, above quoted, in order to defeat a recovery for the death of the little sufferer who by the avarice of the defendant was sent to his death by exposure to an accumulation of perils greater to him in his unguarded and unwarned innocence than that which met the charging column of brave men on Cemetery Ridge. Many soldiers survived four years of war. This child was slain on the fourth day of his employment.

(137) It may be asked, and it will be asked by future ages as well as by the present, why an innocent child of this immature age should have been subjected to such perils, so far beyond his comprehension. This record gives the answer. His mother had seven other children to

support. He had a stepfather. And in this combination of circumstances, the mother testifying that she did not know the dangerous nature nor the character of the employment, and indeed did not consent to his being employed, the defendant was able to procure this child's services for the munificent sum of $12.50 per month. This was truly "the price of innocent blood." Had the defendant employed a man or a boy of maturer years it would have had to pay a sum for his services more in proportion to the peril. Such a person would have known the dangers and would have charged for the risk.

By employing these little children the defendant is able to cheapen to that extent, by the competition, the price of other labor.

Nor is there any reason shown why the defendant company should not have put telephones across these tracks and thus have transmitted the messages without exposing any one to such dangers. The only answer to this is the one that was ineffectually made in the *Troxler* and *Greenlee cases,* that it would have cost the defendant company some expenditure to put in the automatic couplers, as here it would cost a little something to put in the telephones.

This Court held, without any statute, but upon the principles of right and justice, in the *Troxler* and *Greenlee cases,* that it was negligence *per se* to subject a grown man to the danger of making a coupling without using automatic couplers, even when the man was instructed as to the danger, and that in such cases the railroad company could not set up the defense of assumption of risk or contributory negligence. This decision has been followed in other States and is a well-settled law in our own courts. Our law is humane.

Chief Justice Fuller, not long before his death, in a case of personal injury, in words of burning conviction said: "It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subject to a peril of life and limb as great as that of a soldier in time of war." *Johnson* (138) *v. R. R.,* 196 U. S., 1. A conservative estimate of the number of workmen killed or maimed in this country every year in industrial accidents is about 500,000. It is said that the total number killed and wounded in the Union Army during the Civil War was 385,325. In other words, the whole Confederate Army was unable to kill and cripple as many Union men in four years as are now killed and crippled in industrial employment in a single year.

We cannot expect this condition to improve if the courts can be induced to place the blame upon those killed and wounded, because, in order to make a livelihood and with a purpose of obeying those for whom they labor, they venture in dangerous pursuits, while under such

conditions the same courts relieve the master, who created the condition and gave the orders, of all liability and blame whatsoever.

The courts elsewhere have not all yielded their assent to the validity of the considerations urged by the defendant in this case.

In *Molaske v. Coal Co.,* 86 Wis., 220, it was held: "The presumption is that a boy under fourteen years of age is not competent to perform duties involving personal safety and requiring the exercise of a good degree of judgment and constant care and watchfulness; and in an action for injuries resulting from negligence of a boy so employed the burden is upon his employer to show that he was in fact competent. Further, no usage to employ boys of such tender years to perform such duties can be upheld." Here the boy was under twelve, instead of fourteen; no negligence by him was shown and no usage to employ boys of such age for such duties.

In *Wynne v. Conklin,* 86 Ga., 40, it was held: "Whether a boy of thirteen employed by the defendant to work in a tinshop was of sufficient age and capacity to appreciate his hazard and provide against danger is for the consideration of the jury." In this case the boy was under twelve and the danger to which he was exposed was fully an hundredfold greater than that in a tinshop, and a North Carolina jury in all justice should have considered and determined the question whether he was "of sufficient age and capacity to appreciate his
(139) hazard and provide against the danger" to which he was exposed.

In *Goff v. R. R.,* 36 Fed., 299 (Va.), it was held an act of negligence on the part of a railroad company to take into its employment as a brakeman a minor of such tender years as not to know the risk of the service.

The rule established by *Bare v. Coal Co.,* 61 W. Va., 28, that "It is actionable negligence for an employer to engage and place at a dangerous employment a minor who lacks sufficient age and capacity to comprehend and avoid the dangers of such employment, even though the employer instructs him as to the dangers incident to the work," is a well-established rule, being laid down in Labatt on Master and Servant, sec. 251; Sh. and Redf. Neg. (5 Ed.), sec. 219; 4 Thomp. Neg., secs. 3826, 4093, 4689; Bailey Pers. Inj., secs. 2758-2777; Dresser Employers' Liability, 466; Buswell Pers. Inj., sec. 203; 2 Cooley Torts (3 Ed.), 1130, 1131; 20 A. & E. Enc. (2 Ed.), 299.

It is a question for the jury to say whether or not the deceased could appreciate the dangers and knew how to avoid them. *Turner v. R. R.,* 40 W. Va., 675; 4 Thomp. Neg., sec. 4098.

The place where the child was put to work being a dangerous one, the question was open for the jury to pass upon the negligence of the

defendant. *Cahill v. Stone Co.*, 19 L. R. A. (N. S.), 1094; *Lynch v. Nardin*, 1 Q. B., 29; *Pressly v. Yarn Mills*, 138 N. C., 410.

In this case a child under twelve years of age, undergrown, and therefore known to be immature, was set to work by the defendant in a most dangerous place, exposed to be run over by the constantly passing trains and shifting engines crossing eighteen or more tracks, to carry messages which might have been sent by telephone. He was found dead on the track in the yard with his leg cut off. Under our decisions the company could not show contributory negligence, and neither pleaded nor offered to show any. It was the duty of the company to show that they had instructed any employee, much more a child, placed in such employment, of its dangers. The defendant did not show this. The work was of a nature which required employment on Sunday as on (140) other days. The child being found dead where he would be passing in carrying his messages, if he was not at work that day the burden was upon the defendant to show it. The defendant did not offer to do so. Upon all the evidence, taken in the light most favorable to the plaintiff, it would seem impossible to conclude that there was not more than a scintilla of evidence tending to show negligence on the part of the defendant.

HOKE, J., concurs in dissenting opinion of CLARK, C. J.

S. C. BLOW v. E. H. JOYNER.

(Filed 4 October, 1911.)

1. Judgment—Default and Inquiry—Nominal Damages.

When a complaint has been properly filed showing a right of action for unliquidated damages, a judgment by default and inquiry establishes plaintiff's right of action, and that he is at least entitled to nominal damages.

2. Same—Actual Damages—Instructions—Appeal and Error.

After judgment by default and inquiry on the question of unliquidated damages has been entered and a trial upon the inquiry is being had, it is for the plaintiff to show by his evidence the amount of damages he has sustained, in order to recover more than nominal damages; and a charge by the court that the plaintiff is entitled, at least, to recover some actual damages in any view of the case, is erroneous when the evidence is conflicting on this point.

3. Forcible Trespass — Assault — Abusive Language — Punitive Damages — Jury's Discretion—Instructions.

In an action to recover damages for an alleged forcible trespass and assault on the person, where judgment by default and inquiry had been

entered at a subsequent term, there was allegation and proof that the defendant did "unlawfully and wrongfully and with a strong hand enter and forcibly trespass" on the lot and yard of the plaintiff's residence, and in the presence of plaintiff and his wife "threatened, cursed, abused, and assaulted the plaintiff, and refused to leave" after he had been commanded to do so, but remained and continued to use vulgar and profane language, etc.: *Held*, upon the facts and circumstances of this case, (1) it was permissible for the jury to award punitive damages; (2) the question of punitive damages was properly submitted to the jury as one within their discretion, under a proper charge of the law applicable, and was not a matter of law for the court.

(141) APPEAL from *Carter, J.*, at April Term, 1911, of HERTFORD.

Action to recover damages for alleged forcible trespass accompanied by assault on the person. It appeared that summons in the action returnable to Superior Court of Hertford County was served on defendant 1 October, 1909. On verified complaint duly filed at April Term of said court, 1910, judgment by default and inquiry was entered at October Term, 1910, and the cause having been placed on the calendar for the purpose, the same came on for hearing on the issue as to damages before *Carter, J.*, and a jury, at April Term, 1911, of said court. Verdict was rendered and damages assessed in plaintiff's favor for $300. Judgment on the verdict, and defendant excepted and appealed, assigning errors on several exceptions taken and duly entered.

Winborne & Winborne for plaintiff.
D. C. Barnes for defendant.

HOKE, J. The gravamen of plaintiff's cause of action is stated in the complaint, as follows: "That while plaintiff and his family were in such occupancy of said buildings and premises, the defendant on Friday, 27 August, 1909, unlawfully and wrongfully and with a strong hand entered and forcibly trespassed on said premises and in the lot and yard on said premises where the plaintiff and his family were living, armed with a pistol, and in the presence of the plaintiff and his wife, and threatened, cursed, abused, and assaulted plaintiff, and refused to leave said premises and said yard, after he was commanded by plaintiff and his wife to leave said yard and premises, and remained thereon, using profane and vulgar language, to the great annoyance of plaintiff and his wife and to the great damage of plaintiff"; and there was evidence on part of plaintiff tending to support the allegations as made,
(142) except there seems to be no reference to a pistol in the statement of the witnesses, a difference in no way affecting the questions presented. It was objected to the validity of the trial that his Honor charged the jury that the "Judgment by default and inquiry established the fact that the defendant was a trespasser, and by reason of that fact

defendant was estopped from denying that he was a trespasser upon the possessions of the plaintiff;" but the objection, in our opinion, is not well taken. The authorities are very generally to the effect that where a complaint has been properly filed showing a right of action for unliquidated damages, a judgment by default and inquiry establishes plaintiff's right of action and that he is entitled at least to nominal damages. *Osborne v. Leach,* 133 N. C., 428; 2 Black on Judgments, sec. 698; 23 Cyc., 752; 6 Enc. Pl. & Pr., 127. And in this State it is further held that such a judgment concludes on all issuable facts properly pleaded and that evidence in bar of plaintiff's right of action is not admissible on the inquiry as to damages. *McLeod v. Nimocks,* 122 N. C., 438; *Tel. Co. v. Knapp,* 90 N. C., 171; *Parker v. House,* 66 N. C., 374; *Parker v. Smith,* 64 N. C., 291; *Garrard v. Dollar,* 49 N. C., 175. In *McLeod v. Nimocks* it is said: "The judgment by default and inquiry, the defendant having said nothing in answer to plaintiff's complaint, was conclusive that the plaintiff had a cause for action against the defendant of the nature declared in the complaint, and would be entitled to nominal damages without any proof." The statement sometimes made that a judgment of this kind "merely admits a cause of action, while the precise character of the cause of action and the extent of defendant's liability remains to be determined," simply means, as stated, that a judgment by default and inquiry establishes a right of action in plaintiff of the kind stated in the complaint and entitling plaintiff to nominal damages, but that the facts and attendant circumstances giving character to the transaction and relevant as tending to fix the quantum of damages, must be shown, and in this sense only is the statement in question approved in *Osborne v. Leach, supra.* His Honor therefore properly held that the judgment by default operated as an estoppel to the extent stated. Defendant excepted further that, (143) under the charge and on the evidence, the jury were allowed to consider the question of punitive damages and award the same in their discretion.

The objection being (1) that no such damages are permissible in this character of action; (2) that if otherwise, the allowance of such damages on a given state of facts was a question of law for the court, and should not be submitted to the discretion of the jury. But authority with us is against defendant on both positions. In *Ammons v. R. R.,* 140 N. C., 200, on this question of punitive damages, it was said: "Exemplary or punitive damages are not given with a view to compensation, but are under certain circumstances awarded in addition to compensation as a punishment to defendant and as a warning to other wrongdoers. They are not allowed as a matter of course, but only when there are some features of aggravation, as when the wrong is done willfully

and maliciously or under circumstances of rudeness or oppression or in a manner which evinces a reckless and wanton disregard of plaintiff's rights." In *Brame v. Clark,* 148 N. C., 364, and *Duncan v. Stalcup,* 18 N. C., 440, it has been expressly held that if a trespass has been committed under the circumstances stated punitive damages may be allowed. And in *Billings v. Observer Co.,* 150 N. C., 540, it was held that "When on the facts a question of punitive damages is presented, the award of such damages and the amount thereof, under a proper charge, is for the jury." In such case the court will state the law applicable and the jury in their discretion will determine whether punitive damages shall be allowed, and, if so, fix the amount of same.

While we uphold the rulings of his Honor in reference to exceptions thus far noted, we are of opinion that defendant is entitled to a new trial by reason of his charge, duly excepted to, that plaintiff is entitled to some actual damages "in any view of the case." Recurring to the authorities heretofore cited, it will appear that a judgment by default and inquiry only concludes as to the existence of plaintiff's cause of action and his right to recover nominal damages. Any damages
(144) beyond that sum is left an open question to be determined from the facts and attendant circumstances of the occurrence. While the evidence of plaintiff tended to show an injury under circumstances of insult, rudeness, and oppression, there was testimony on the part of defendant in full denial of plaintiff's position, and tending to show that as a matter of fact plaintiff himself was in great measure to blame. In this conflict of evidence it was not within the province of the court to tell the jury that they should in any event allow the plaintiff some actual damages, which by correct interpretation must be taken to mean substantial as distinguished from nominal damages. *Ammons v. R. R.,* 140 N. C., 199; *Chaffin v. Manufacturing Co.,* 135 N. C., 102; Sutherland on Damages, 9; Black's Law Dictionary, 29.

The expression found in some of the opinions, that, on judgment by default the plaintiff is entitled to *some* damages, as in *Dougherty v. Stepp,* 18 N. C., 371, and *Parker v. House, supra,* was used in reference to a claim set up that no right of action had been established because no tortious entry had been shown and no actual damages proven, and was not made in reference to the quantum of damages nor intended to displace or impair the position that a judgment by default and inquiry only concludes as to plaintiff's cause of action and the right to recover nominal damages.

For the error indicated there must be a new trial, and it is so ordered.

New trial.

Cited: *Saunders v. Gilbert, post,* 479; *Graves v. Cameron,* 161 N. C., 550, 552; *Patrick v. Dunn,* 162 N. C., 21; *Plumbing Co. v. Hotel Co.,* 168 N. C., 578; *Armstrong v. Ashbrook,* 170 N. C., 162; *Hollifield v. Telephone Co.,* 172 N. C., 722.

W. L. SHERROD, SURVIVING PARTNER OF J. W. SHERROD & BROTHER, v. N. J. MAYO, ADMR. OF J. W. SHERROD, AND JOHN M. SHERROD.

(Filed 4 October, 1911.)

1. Partnership—Death of Partner—Dissolution—Debts—Real Estate—Heirs at Law.

When lands are purchased by a partnership with partnership funds, upon the death of one of the partners, in the absence of any agreement in the articles of partnership to the contrary, his share therein descends to his heir at law as real estate, if the personal property of the partnership is sufficient to pay all the partnership debts and demands.

2. Same—Deed and Conveyances.

When the rule applies that lands purchased by partnership funds descend to the heir at law, it is immaterial whether the heir of the deceased partner claims his interest by deed from him or by inheritance.

3. Same—Surviving Partner.

The heir at law to whom a deceased partner had conveyed by deed his share of lands purchased with partnership funds is entitled to the lands against the rights of the surviving partner, in an action by the latter for possession for the purpose of winding up the partnership affairs, when it appears that the partnership personalty is sufficient for the purpose of paying the partnership debts and satisfying any claim the surviving partner may have, and there is no provision in the articles of the partnership agreement of a contrary purpose.

4. Partnership—Dissolution—Personalty—Surviving Partner—Debts.

The surviving copartner has the closing up of partnership affairs, the reduction of personal property to cash and the settlement of partnership affairs, and the title to this class of personal property vests at once in the surviving partner and not in the personal representative of the deceased partner. Revisal, sec. 1579.

5. Partnership—Personalty—Sale by Partner—Vendee—Interest Acquired.

A sale by a partner of his interest in a partnership vests in the purchaser only the vendor's share of the surplus which remains after payment of the partnership debts and the settlement of accounts between the partners, and not a share of the partnership personal effects.

(145) APPEAL from *Ward, J.*, at April Term, 1911, of EDGECOMBE.

Action by the plaintiff as surviving partner against the administrator and the heir at law and son of John W. Sherrod for a settlement of the copartnership estate, which consisted of a large number of tracts of land and a large quantity of personal property, used principally in farming operations.

The plaintiff asked to be put in possession of all the lands and
(146) personal property belonging to the copartnership, some of which was in the possession of defendants, claiming the right to sell both lands and personal property as surviving partner, for the purpose of settling up the partnership.

It is admitted that there are no copartnership debts outstanding due third parties. The cause was heard by his Honor upon the pleadings and affidavits. Upon the pleadings, affidavits, and admitted facts, plaintiff asked:

1. That the plaintiff be decreed entitled to the possession of the entire partnership property, both real and personal.

2. That the defendants be restrained from interfering in any way with the plaintiff in custody, control, or management of the partnership property.

3. If the plaintiff is not entitled to a decree adjudging him the owner and entitled to the entire property of the partnership, for the purpose of winding up and settling the same, then that a receiver be appointed to take charge of the entire partnership property and wind up and settle the partnership affairs under the order of this court.

4. For reference and statement of account between the parties.

His Honor ordered a reference to state the copartnership account since the last settlement, admitted to have been made between the partners in 1904; decreed that plaintiff as surviving partner is entitled to possession of the personal property for the purpose of selling it and administering the same; and the court further decreed:

"The motion of the plaintiff that he be placed in possession of that part of the real estate which is above described as being in Edgecombe and Nash counties, as surviving partner, is denied.

"The facts with respect to the real estate are not in dispute, and are as follows:

"1. The lands described in the complaint, however, conveyed in the deeds, were bought by J. W. Sherrod & Brother, with partnership funds.

"2. It is also not in dispute, but is really admitted, and the
(147) court so finds, that there is sufficient personal property on hand, when sold and the proceeds collected, to pay every debt owing by J. W. Sherrod & Brother, including the debt owing each member of

the firm by the firm. The court further finds that the only debts there are owing by the firm of J. W. Sherrod & Brother are the debts owing to the members of said firm.

"3. That on 12 December, 1904, J. W. Sherrod, deceased partner of J. W. Sherrod & Brother, executed and delivered deed for all of his right, title, and interest in the farms in Edgecombe County, known as Pittman place, Cutchin place, Pippen place, and Watkins place, and all his interest in the personal property on each of said farms, to defendant, John M. Sherrod. That said deed was registered in Edgecombe County on — April, 1910. That the plaintiff in this case had no knowledge or information as to the execution or delivery of said deed until the institution of this suit, and shortly prior to the April Term, 1911, of Edgecombe Court.

"4. It thus being a fact that it will take none of the real estate, under any circumstances, to settle any of the indebtedness or expenses incurred in winding up the estate, but that it would go entirely to the partners and their heirs as tenants in common, the court is of opinion that it ought not to go into the hands of the surviving partner as such, and that he is not entitled to the possession of same as such surviving partner, nor ought he be permitted to sell the real estate as such surviving partner for partition, but that the said surviving partner and heirs at law of the deceased partner are tenants in common, and either has a right to insist upon partition of the land in kind. Whereupon it is ordered that the motion of the plaintiff that he be put in possession of said lands as surviving partner is denied."

To so much of the order as denied the right of the plaintiff to take possession and sell the real estate of the copartnership the plaintiff excepts and appeals.

W. J. Sherrod, H. A. Gilliam, and Justice & Broadhurst for plaintiff.
G. M. T. Fountain & Son, Bunn & Spruill for defendant.

BROWN, J. It is the doctrine of the English courts that, as (148) between partners and their heirs and representatives for the purposes of the copartnership, real estate will be treated as personalty if the partners have by the articles of copartnership so treated it and impressed upon it the character of personalty.

There is no doubt that in this country copartners may by articles of copartnership provide that the firm's real estate may be treated as personalty and sold by the surviving partner for the settlement of the copartnership.

In the absence of any such stipulation it was a vexed question for a long time whether, after the dissolution of the firm by the death of one

of the members, the debts being paid, the share of the deceased partner should be treated as personalty and pass to the surviving partner for the settlement of the copartnership, or descend to his heirs at law as real estate.

Judge Story refers to the great diversity of judicial opinion upon this subject. The question was considered by this Court in *Summey v. Patton,* 60 N. C., 601, and it was then decided that "Where land is purchased by partnership, with partnership funds, and used for partnership purposes, upon dissolution of the firm by the death of one of the partners, his share of the land descends to his heir at law as real estate, and does not pass to his representative as personalty, in the absence of any agreement in the articles of copartnership."

This case was approved and followed in *Stroud v. Stroud,* 61 N. C., 525, where it is held that real estate belonging to a copartnership is subject to dower of the widow of a deceased partner, subject, of course, to the payment of the partnership debts, in the absence of any provision to the contrary in the articles of copartnership. *Patton v. Patton,* 60 N. C., 572. These cases are all cited and approved in *Mendenhall v. Benbow,* 84 N. C., 650.

These decisions have settled the question in this State, and they are in accord with the great weight of authority in this country.

In *Shearer v. Shearer,* 98 Mass., 107, the subject is elaborately discussed and what is regarded as the American rule is embodied in the opinion, the substance of which is that the change of character of real to personal estate is worked, if at all, only for the purpose of (149) adjusting and settling the affairs of the partnership, and when the debts are paid the interest of the deceased partner will descend to his heirs.

The following authorities support the decisions of this Court: George on Partnership, pp. 126-127; Story on Partnership, sec. 92, p. 146; *Way v. Stebbins,* 47 Mich., 297, in which it is said: "Partnership lands are to be equally divided among survivors and the heirs of a deceased partner when there are no partnership debts to be satisfied." *Foster's Appeal,* 74 Pa. St., 392; *Yeatman v. Woods,* 27 Am. Dec., 452, and note, 454; notes to 86 Am. Dec., p. 454.

So it has been held that upon the dissolution of a firm real estate may be divided by *compulsory* partition, when it is shown that it is not required to satisfy the liability of the partnership. *Pepper v. Pepper,* 24 Ill. App., 316; *Strong v. Lord,* 107 Ill., 25; *Long v. Waring,* 25 Ala., 525; 60 Am. Dec., 533; *Shearer v. Shearer,* 98 Mass., 107; *Scruggs v. Blair,* 48 Miss., 406; note to 27 L. R. A., 353.

The fact that the son and heir of the deceased partner claims his father's interest in a portion of the lands by deed instead of inheritance

makes no difference. He is entitled to the deceased partner's share of the land after the debts are paid, whether he takes by purchase or by descent. *Wells v. Mitchell*, 23 N. C., 489.

The judgment is

Affirmed.

No. 143—DEFENDANT'S APPEAL, SAME CASE.

THE defendants excepted to so much of the judgment of the Superior Court as required the surrender by them to plaintiff, as surviving partner, of the personal property in their possession belonging to the copartnership.

It is well settled that the surviving copartner has the closing up of the partnership affairs, the reduction of its personal property to cash and the settlement of the partnership affairs. George on Partnership, p. 135.

The reasons which in this country are regarded as sufficient to (150) forbid the sale of real estate, except when necessary to pay the debts of the copartnership, or for its proper settlement, do not apply to personalty. The title to that vests at once in the survivor and not in the personal representative of the deceased partner, and he is entitled to its possession. Revisal, sec. 1579; *Walker v. Miller*, 139 N. C., 448; *Weisel v. Cobb*, 114 N. C., 22; *Hodgin v. Bank*, 128 N. C., 110.

Purchasers of the share of an individual partner can only take his interest. That interest and not a share of the partnership personal effects is sold, and it consists of the vendor's share of the surplus which remains after payment of the partnership debts and the settlement of accounts between the partners; and if, upon the winding up of the firm, the transferring partner's interest has no pecuniary value, the transferee takes nothing by his transfer. Cyc., vol. 30, p. 458; *Daniel v. Crowell*, 125 N. C., 519; *Ross v. Henderson*, 77 N. C., 170. The judgment is

Affirmed.

F. U. BARNES v. POSTAL TELEGRAPH-CABLE COMPANY.

(Filed 27 September, 1911.)

1. Telegraphs—Negligence—Delivery—Reasonable Diligence.

The defendant telegraph company received for transmission and for delivery over an independent telephone company, from its terminal at a nearby point, a message announcing the sickness of addressee's father

and asking the addressee to come at once. The addressee, at the time in question, was four and one-half miles in the country from his home, and the defendant's agent immediately put in a continuous long-distance call and communicated the message to him upon his return. In the addressee's action to recover damages for mental anguish: *Held*, a delay of twenty minutes in the delivery under the circumstances was no evidence of negligence on the part of defendant.

2. Telegraphs—Delivery by Telephone—Person Addressed—Messages—Contents Disclosed.

When the sender of a message delivers it to a telegraph company with the understanding that the company has no office at the place of delivery, and will have to deliver it by the telephone line of an independent company to its destination at a nearby point, the agent of the defendant is only required to telephone the message to the person addressed, for the telegraph company is not allowed to disclose the contents of the message to any one else, except with the consent of the sender and the sendee, or at least the sender or the sendee, depending upon the nature of the message or the terms of the contract.

3. Same—Principal and Agent—Agency of Wife.

A telegraph company has not the right to deliver a message, especially by telephone, in a manner which necessarily discloses its contents, to one not the agent of the addressee to receive telegrams, or to one who is not expressly or impliedly authorized to receive them; and there is no implied authority from the relationship of wife. Cases in which the manual delivery of the message itself is involved, distinguished.

4. Telegraphs—Stipulations—Damages—Demand—Sixty Days—Delivery by Telephone.

When a telegram is written by the sender on the company's regular form, containing the stipulation that a claim or demand for damages must be presented to the company in writing within sixty days after the message has been filed with it, and is received for transmission with the understanding that it is to be delivered to a nearby town by telephoning it over the lines of an independent company, it is a valid defense, under this stipulation, that the addressee received the message by telephone more than sixty days before the institution of the action and no written demand had been made within sixty days after notice to him of the delay.

(151) APPEAL by plaintiff from *Ward, J.*, at June Term, 1911, of MARTIN.

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

H. W. Stubbs and S. A. Newell for plaintiff.
R. C. Strong for defendant.

WALKER, J. This action was brought to recover damages for mental anguish, alleged to have been caused by the negligent delay of the defendant in transmitting and delivering a telegram. The message,

dated 26 November, 1909, was addressed by Mrs. Frank Barnes to Francis U. Barnes at Williamson, N. C., and read as follows: "Come at once. Your father very sick." It was transmitted from the initial point to Greenville, with due promptness, and reached (152) the office in that place at 8 o'clock A. M. The defendant had no office at Williamston, and the agent at Princess Anne so notified the sender. He also told her that it would have to be sent by telephone, owned by another company, from Greenville to Williamston, for which a charge or toll of twenty-five cents would be made by that company. When the message was received by the operator at Greenville, "he put in a long-distance call for Mr. Barnes at Williamston, and he was informed that Mr. Barnes was not there, but in the woods four or five miles away, he being a lumberman." The operator of the defendant at once instructed the telephone operator "to keep in the call for Williamston"—that is, to get Mr. Barnes as soon as it could be done; but he did not return until about 5:30 o'clock P. M., when the message was communicated to him by telephone. The plaintiff alleges that had the message been delivered to him at 8 o'clock A. M., on 26 November, the day it was sent, he could have left by the 8:28 A. M. A. C. L. Railroad Company train, and reached his father's bedside seventeen hours before his death, which occurred about 5 o'clock P. M., 27 November, 1909. We do not well see how he could have done any such thing. It would seem to be a physical impossibility. By his own calculation, there would be only twenty-eight minutes of time for the relay of the message at Greenville, and the delivery of it to him at Williamston, he being at the time, according to his own statement, four and a half miles from his home. Some time must be consumed in making the necessary connection between telegraph and telephone lines, and in making the call on the "long-distance phone" for him. He had to travel four and a half miles to Williamston to catch the train. To charge the defendant with negligence under such circumstances would be anything but justice. Plaintiff says he could have taken the 4:30 P. M. train out of Williamston on 26 November, 1909, and arrived at Princess Anne at 2:23 P. M. on 27 November, 1909, a few hours before his father's death. But the crucial fact in the case is that plaintiff was not at home, but some distance therefrom, and this is what prevented an (153) earlier delivery of the message. It was his misfortune and not the defendant's fault, and plaintiffs fail so often to distinguish between the two. The service rendered to the plaintiff in the effort to reach him with the message was far more prompt and efficient than was the service in *Marquette v. Telegraph Co.*, 153 N. C., 156, which we so recently held to be sufficient in law. We will hold these companies to a strict accountability in the performance of their duties and obliga-

tions to the public and their patrons, but we are impelled by our sense of justice to apply the law fairly and reasonably and not to rule harshly and oppressively in regard to the measure of diligence required of them in the delivery of messages.

It is not mental anguish alone that entitles a plaintiff to recover, however much he may have suffered, but it must be coupled with the negligence of the company, and, too, that negligence must be the proximate cause of the injury as in other cases, and there must also be the absence of negligence on the part of the plaintiff directly or "in continuous sequence" contributing to his alleged injury, as in other cases. *Brewster v. Elizabeth City,* 137 N. C., 392, and especially *Hauser v. Telegraph Co.,* 150 N. C., 557, and *Hocutt v. Telegraph Co.,* 147 N. C., 186; 2 Joyce Elec. Law, sec. 816a.

Telegraph companies are only bound to the exercise of that degree of diligence which a man of ordinary prudence would use under like or similar circumstances. They must be prompt and diligent, it is true, but to demand more of them would be to apply a rule which would result sometimes, if not in the large majority of cases, in oppression and gross injustice. We will require of them their full duty, but no more. "If the plaintiff has lost, he has not been injured, as it is expressed in one of the maxims of the law." *Gainey v. Telegraph Co.,* 136 N. C., 261.

There was some question as to the right of the telephone company to disclose the contents of the message to a person other than the addressee. This could not be done without the consent of the sender and the sendee, or at least the sender or the sendee, depending upon the nature of the message or the terms of the contract. The telegraph
(154) company, under its ordinary contract, is not required to telephone a message, as it would impair the confidential relations assumed, but it can agree to deliver a message in this manner. 37 Cyc., 1683; *Hellams v. Telegraph Co.,* 70 S. C., 83; *Lyles v. Telegraph Co.,* 77 S. C., 174. It is a part of the undertaking of the telegraph company, with respect to the transmission and subsequent handling of the message, that its contents shall not be disclosed to any person whomsoever, without the consent of either the sender or addressee, and if it does divulge the contents without being released from the obligation of secrecy, it acts at its peril. 37 Cyc., 1684; *Cocke v. Telegraph Co.,* 84 Miss., 380. Nor has the company the right to deliver the message, especially by telephone, which necessarily discloses its contents, to one not the agent of the addressee to receive telegrams, unless he is otherwise expressly or impliedly authorized to receive it. *W. U. Tel. Co. v. Mitchell,* 91 Texas, 454 (*s. c.,* 40 L. R. A., 209). We should carefully distinguish between the mode of delivery in respect to telegrams which

are to be transmitted by telephone beyond the telegraph company's line and a delivery of the telegraphic message itself by the messenger of the transmitting company. Observing the distinction will reconcile some apparently conflicting decisions. In this case the telegraph company performed its full duty and is not liable to the plaintiff.

There is a stipulation in the contract of the defendant with its patrons, that a claim or demand in writing must be presented to the telegraph company within sixty days after the message is filed for transmission. We have held this provision to be reasonable and valid. *Sherrill v. Telegraph Co.*, 109 N. C., 532; *Lewis v. Telegraph Co.*, 117 N. C., 436. In *Sykes v. Telegraph Co.*, 150 N. C., 431, we said that "the validity of a stipulation as to presenting the plaintiff's claim (in writing) within sixty days after knowledge of the nondelivery of the message has been received by him, is too well settled now to be longer questioned," citing Jones on Telegraph and Telephone Companies, p. 380, sec. 395, and quoting therefrom a passage of the text (155) giving the reason for the validity of this term of the contract.

The judge was right in nonsuiting the plaintiff, and we affirm the judgment.

No error.

Cited: Lytle v. Tel. Co., 165 N. C., 505; *Betts v. Tel. Co.*, 167 N. C., 80.

T. E. HOOKER v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 4 October, 1911.)

1. Water and Water-courses—Wrongful Diversion—Natural Water-course—Overflow—Drainage.

One who diverts water from its natural course so as to damage another, whether it be a corporation or an individual, or who cuts ditches through a watershed to conduct water to a water-course, which is thereby rendered inefficient to carry it off and thereby damages the land of another, is liable for the damages thus caused.

2. Same—Railroads.

A railroad company, in making its roadbed, cut lateral ditches to convey water from its natural course and watershed into a stream, branch, or run, a natural water-course, flowing through plaintiff's land, and thereby overcharged the stream, causing it to overflow and pond back upon the lands of plaintiff, to his damage: *Held*, the plaintiff is entitled to recover the damages thus caused.

3. Same—Lateral Ditches—Adjoining Owner.

When it appears that the lands of plaintiff were damaged by reason of defendant's wrongful diversion of water into a natural water-course by the use of lateral ditches dug by defendant, the fact that the water had to flow through these ditches upon the lands of another before reaching the *locus in quo* does not affect the plaintiff's right of recovery.

4. Water and Water-courses—Wrongful Diversion—Natural Water-course—Overflow—Proximate Cause—Questions for Jury.

Upon conflicting evidence as to whether damage to plaintiff's lands was caused by the wrongful diversion from the watershed of water into a natural water-course, causing it to overflow and pond water upon the *locus in quo*, or was caused by a failure to properly clear the water-course upon and below the land of plaintiff, the question is for the jury upon proper instructions from the court.

5. Water and Water-courses—Wrongful Diversion—Natural Water-course—Overflow—Proximate Cause—Intervening Cause.

When it appears that the defendant had had lateral ditches on the land of an upper owner dug for the purpose of carrying the water from its natural course into a natural water-course so as to cause it to overflow, to the damage of plaintiff's lands, the diversion by means of these ditches is the proximate cause; and the defendant's position cannot be advantaged, on the ground of intervening negligence, by the fact that the upper owner had, at the instance and expense of the defendant, enlarged the ditches in order to provide for the increased flow of the water as diverted.

6. Instructions—Requests—Substantially Given.

An instruction need not be in the express language of a correct request, if it is sufficiently responsive and gives a correct statement of the law applicable to the questions presented.

7. Water and Water-courses—Permanent Damages—Husband and Wife—Necessary Parties—Easements.

The action of the trial judge in permitting the wife of the plaintiff to be made a party plaintiff after the jury had been impaneled in his action for permanent damages to his land alleged to have been caused by the defendant's wrongful diversion of the flow of water thereon, is not reversible error, the land being held under a deed to the husband and the wife. The wife was a desirable and perhaps a necessary party in order that on payment of permanent damages an easement might pass to defendant.

(156) APPEAL from *Ward, J.*, at December Term, 1910, of PITT.

There was allegation, with evidence, on the part of plaintiff, tending to show that defendant company, in the construction of its roadbed, had wrongfully diverted surface waters from their natural watershed, "caused same to flow into Patrick's Branch or Hardee's Run," rendering same "insufficient and incapable of discharging said waters by reason of the increased servitude put upon them by said wrongful act, thereby causing said branch or run to overflow and pond

back its waters upon plaintiff's land, to his great damage, etc." The allegations were denied and evidence offered by defendant to support such denial, and tending further to show that the in- (157) juries complained of were in great part caused by a failure to clear out the run below said land, and were not properly attributable to any wrongful diversion of water by defendant. On issues submitted, the jury rendered the following verdict:

"1. Did the defendant, in digging its lateral ditches in the construction of its railroad, wrongfully cause water to be diverted in and down Patrick's Run and thereby injure and damage the lands of plaintiff, as alleged in the complaint? Answer: Yes.

"2. What permanent damages has plaintiff sustained thereby? Answer: $600."

Judgment on the verdict, and defendant excepted and appealed.

F. G. James & Son for plaintiff.
Moore & Long for defendant.

HOKE, J., after stating the case: It is now well established with us that "Water cannot be diverted, but may be increased and accelerated." The principle obtains in respect to both corporations and individual owners of property, and has been applied and illustrated in many well-considered decisions of the Court. *Roberts v. Baldwin,* 151 N. C., 407; *Mizell v. McGowan,* 129 N. C., 93; *Hocutt v. R. R.,* 124 N. C., 214; *Parker v. R. R.,* 123 N. C, 71. Stated in a way more directly relevant, it was held in *Hocutt's case, supra,* that, "Neither a corporation nor an individual can divert water from its natural course, so as to damage another; neither can they cut ditches through a watershed and conduct water to a water-course, insufficient to carry it off, whereby the water is flooded upon the lands of another."

There was testimony on the part of plaintiff tending to show that the defendant company in making its roadbed had, by lateral ditches, conveyed water from its natural course and watershed into a stream called Patrick's Branch or Hardee's Run, a natural water-course, flowing through plaintiff's lands, and had thereby overcharged said stream, causing same to overflow and pond back upon said lands, to plaintiff's great damage. There was much testimony on part of (158) defendant in denial and rebuttal of plaintiff's evidence, and tending to show that there had been no diversion of water into said run, and that the injury complained of was caused, in fact and in truth, by a failure to properly clear said run of obstructions therein, upon and below the lands of plaintiff. Under a clear and comprehensive charge, in

which the principles applicable were correctly stated by the court, the jury have accepted the plaintiff's version of the case, and we find no error that gives defendant any just ground of complaint.

We cannot approve the position that recovery should be denied because the diverted water, before reaching plaintiff's lands, where the damage occurred, first passed through the ditches of an adjoining proprietor. Under the charge, the jury have found that the injury was caused by reason of the water being diverted, and on the facts in evidence we do not see that the existence of these ditches could prevent the said diversion from being the proximate cause of the injury. The position, however, is not open to defendant, on this testimony, for it appeared that the ditches in question were enlarged by the neighbor at the instance of defendant and the work was paid for by the company in order to provide for the increased flow of water. The court also laid down the correct rule as to the admeasurement of damages, and the charge was fully responsive to defendant's prayer for instruction on that question. It is well recognized that a prayer for instructions need not be given in its exact language if the general charge is sufficiently responsive and gives a correct statement of the law applicable to the question presented. *Patterson v. McIver,* 90 N. C., 493; *Edwards v. Phifer,* 121 N. C., 391. Nor is the objection well founded that the wife of the original plaintiff, T. E. Hooker, was joined as coplaintiff after the jury was impaneled. True, it has been held in this State, "That a court has no power to convert a pending action that cannot be maintained into a new one by admitting a new party plaintiff, who is solely interested." *Merrill v. Merrill,* 92 N. C., 657. But no such case is presented
(159) here. The land alleged to be damaged was held under a deed to T. E. Hooker and his wife, and while it seems the husband might have proceeded alone if the same had been prosecuted for a simple trespass (*West v. R. R.,* 140 N. C., 620), inasmuch as the question was submitted and determined on an issue as to premanent damages, the wife was a desirable and perhaps a necessary party, in order that on payment of permanent damages an easement might pass to the defendant. *Porter v. R. R.,* 148 N. C, 563. There was no suggestion, certainly no indication, of any surprise by reason of this change of parties. So far as appears, the witnesses on the issues were the same in the one case as in the other and the entire matter seems to have been fully presented to the jury. We find no reason for disturbing the conclusion they have reached, and the judgment on the verdict must be affirmed.

No error.

CARTERET LODGE v. JOHN T. IJAMES ET AL.

(Filed 4 October, 1911.)

1. Injunction—Cutting Timber—Insolvency—Allegations—Good Faith—Practice.

A restraining order to prevent the defendant from cutting timber should be continued to the hearing of the cause when the plaintiff shows an apparent title to the lands and satisfies the court that his claim is made in good faith; and an allegation of insolvency is not now required. Revisal, secs. 806, 807, 808, 809.

2. Same—Evidence.

The plaintiff seeks in its action to enjoin the defendant's cutting timber upon certain lands, claiming title under a certain deed. There was conflicting evidence upon the plaintiff's claim of possession of the land through their tenants, agents, and employees for a long period of time, and as to whether the deed or the possession of plaintiffs covered the *locus in quo: Held*, that as the plaintiff's claim clearly appeared to have been made in good faith and an apparent title was established, the restraining order should be continued to the hearing.

APPEAL from an order of *Ferguson, J.*, made at New Bern, in (160) May, 1911, continuing a restraining order to the hearing, on motion to dissolve a restraining order, issued to prevent the cutting of timber by defendant, on lands alleged to belong to plaintiff. There was judgment continuing the restraining order to the hearing, and defendant excepted and appealed.

F. L. Fuller and Guion & Guion for plaintiff.

W. D. McIver, E. H. Gorham, C. R. Wheatley, and Abernethy & Davis for defendants.

HOKE, J. The statutes of the State, in reference to cases of this character, Revisal, secs. 806, 807, 808, 809, as construed and interpreted by the Court, are to the effect that when a litigant shows an apparent title and satisfies the court that his claim is made in good faith, the restraining order will be continued to the hearing; and there is special provision made that an allegation of insolvency on the part of the defendant, to that time usually regarded as essential, is no longer required. The purpose and policy of this legislation are well stated by *Associate Justice Brown* in *Moore v. Fowle*, 139 N. C., 52, as follows: "The rapidly increasing value of timber trees doubtless prompted the Legislature of 1885 to enact chapter 401, but the efficacy of this act was diminished by the general practice of permitting the defendant to give bond and to cut the timber *pendente lite*, or otherwise to appoint a re-

ceiver and permit the rental value or stumpage to be paid to him. The Legislature of 1901 has thrown greater safeguards around the rights of such litigants, and now, when the plaintiff satisfies the judge that his claim is *bona fide*, and that he can show an apparent title to the timber, the judge should not dissolve the injunction, but continue it until the title can be finally determined."

In same opinion it is further said: "On such hearings the title is not required to be proved with that strictness and certainty as upon the trial"; and there are several decisions of the Court in accord with the position. *Lumber Co. v. Cedar Co.*, 142 N. C., 418; *Alleghany*
(161) *Co. v. Lumber Co.*, 131 N. C., 6. Applying the principle, we are of opinion that his Honor made a correct ruling in continuing the restraining order to the hearing. As the case goes back for trial, we do not consider it desirable to make any detailed statement of the relevant facts in evidence, but speaking generally, a perusal of the testimony will disclose that in August, 1891, one N. M. Jurney and wife executed to plaintiff a deed for a large body of land in Carteret County and purporting to cover the *locus in quo* by metes and bounds, and the evidence on part of plaintiff tended to show that said plaintiff, through its tenants, agents, and employees, had been in the continuous possession and occupation of the property from the date of the deed. There were several affidavits on the part of plaintiff from which it was made to appear further that this deed from Jurney covered the same property that had formerly belonged to David S. Jones and his son, Julius F. Jones, under whom the plaintiff claimed, and that these parties occupied the land since 1851, under deeds describing same, not by course and distance, as in the Jurney deed, but by natural boundaries, stated in the deeds and which would accord with the description in the Jurney deeds and cover the same land. There was much evidence on part of defendant controverting these allegations and tending to show that plaintiff's deeds, prior to the Jurney deed, did not cover the land in controversy, and further that neither before nor since said deed had there been any such occupation and possession by plaintiff or its agents as would serve to mature the title; but it clearly appears, as stated, that the claim of plaintiff is made in good faith and with sufficient evidence, tending to show title, to require that the restraining order be continued to the hearing. The judgment of his Honor to that effect is therefore

Affirmed.

(162)

C. F. BISSETT v. BRYANT LUMBER COMPANY.

(Filed 4 October, 1911.)

Evidence, Corroborative—Tally-Book of Lumber—Computation by Witness.

In an action to recover the price of nine car-loads of lumber sold and delivered, the defendant contended that eight of the cars did not contain the quantity of lumber contended for by the plaintiff, and introduced, by the witness making it, a tally of the lumber as the cars were unloaded, this witness testifying that he tallied the lumber to a certain other witness, who was introduced: *Held* competent for the latter witness to figure up each piece and tell how much was in each car according to the tally made by B. (the former witness) and read over to him, and to say from the tally in the books how it corresponded with the testimony of B.; for the jury would not be permitted to take the books in the jury-room, and it would be impossible for them to carry the figures in their minds; and to make the computation on trial would unduly delay it.

APPEAL from *Peebles, J.*, at November Term, 1910, of WILSON.

This is an action to recover $164.66, alleged to be due for nine cars of lumber sold by the plaintiff to the defendant.

Eight cars of the lumber were shipped by rail to the mill of the defendant, and one car was shipped elsewhere.

The principal controversy between the parties was as to the quantity of lumber in the shipment of eight cars, the defendant claiming it was 10,669 feet less than the quantity claimed by the plaintiff.

The plaintiff offered evidence tending to prove that the lumber was measured and counted as it was placed on the cars, and that the full amount claimed by him was delivered.

In rebuttal the defendant introduced J. W. Burnette, who testified that he was employed by the defendant at the time the lumber was received from plaintiff, and that it was his duty to tally and measure the lumber received by the defendant; that he measured and tallied each car of lumber received from plaintiff as the lumber was taken from the car, except the one car sold at $11, which was not unloaded at the mill of the defendant; that the aggregate amount of lumber taken from the eight cars measured and tallied by him was 85,638 (163) feet; that each piece of lumber taken from the car was measured and tallied on the books produced by the witness and put in evidence by the defendant. Witness stated that he called off from the tally of said lumber made off said books the amount of each piece of lumber so measured and tallied by him to W. W. Briggs, and that he and Mr. Briggs worked up the amount of lumber taken from the tally made by witness, and that the amount aggregated 85,638 feet; that the tallies on the books offered in evidence showed all the lumber received from plaintiff by defendant (not taking into account the car which was not

counted at the mill, but was shipped elsewhere without being unloaded), save and except less than 1,000 feet which was less than four inches wide (the contract calling for more than four inches), or that had so much bark on it that it was not merchantable.

The defendant offered W. W. Briggs as a witness. He testified that he had been over the figures in the tally-book with Burnette, and had worked out the amount of lumber according to the tally, but that he had no recollection of the amount, independent of the book, which was in the handwriting of Burnette and was in evidence. He was then asked to state how the figures, as he worked them out, compared with the figures testified to by Burnette. Upon objection, the court would not permit the witness to answer.

The tally-book was handed to the witness with the request "to figure up each piece and tell how much was in each car according to the tally made by Burnette, and read over to him, and say from the tally in the books how it corresponded with the testimony of Burnette." His Honor excluded this evidence, and the defendant excepted.

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

Pou & Finch for plaintiff.
Daniels & Swindell for defendant.

(164) ALLEN, J., after stating the case: In our opinion, the evidence excluded by the court was important and material.

The evidence of the quantity of lumber on the cars at the mill was not conclusive as to the quantity shipped by the plaintiff, but it was a fact which, if established according to the defendant's contention, would have been entitled to consideration by the jury.

The witness Burnette had testified that he counted and measured the lumber on the cars, and that it aggregated 85,638 feet.

There were eight cars of the lumber, necessarily of various sizes and dimensions, and the plaintiff was contesting the correctness of the count. When the quantity of lumber is considered, it is apparent that it was impossible for the jurors to remember the tallies of lumber as they were read from the book, and to make their own calculations from memory, and it has been held by us in *Nicholson v. Lumber Co., ante,* 59, that his Honor, who presided at the trial, did not have the right to permit the jury to take the book to their room.

If, therefore, the defendant could not introduce a competent witness and let him make the calculations and give the result to the jury, it would have to rely entirely on the evidence of Burnette.

The evidence throws light upon the question in issue, and tends to corroborate the statement of the defendant's witness as to the correctness of his calculations.

A similar question was considered by the Supreme Court of Maryland in *Lyon v. Cumberland,* 77 Md., 459, and the Court there says: "It would have been impossible for the jury to carry these figures in their minds if they had been merely read off by the witness to them; and had the jurors undertaken to transcribe them for the purpose of adding them up themselves, the trial would have been greatly and needlessly protracted."

Also, in *Chicago v. Sheer,* 8 Ill. App., 370: "It is further objected that the court erred in allowing a witness to make a computation and testify as to the amount of interest due. This objection is without any force. The evidence is admitted merely to aid the jury in making a more speedy computation, and thereby to facilitate the dispatch of business. The jury are not bound by the computation thus (165) made by the witness, as it seems they were not in the present instance, but are themselves to ultimately determine what is the true amount of the plaintiff's damages."

There are other exceptions in the record, which we need not consider, as they are not likely to arise on another trial.

There must be a

New trial.

MORSE & RODGERS, INC. v. LOUIS SCHULTZ.

(Filed 4 October, 1911.)

Principal and Agent—Husband and Wife—Goods Sold and Delivered—Feme Covert—Sign—False Representations—Questions for Jury.

In an action to recover from the husband the purchase price of goods sold and delivered, there was evidence tending to show that plaintiff's salesman made the sale in the store of the wife, with her name properly displayed by sign reading "M. Schultz," in accordance with the provisions of Revisal, sec. 218; the transaction was conducted personally with the husband, L. Schultz; and the evidence was conflicting as to whether the plaintiff's salesman thought the husband's name was Max and was led to believe that he was the M. Schultz to whom the goods were sold, and not to his wife, Mamie; that the salesman made the order to Max S., and was corrected so as to make it read to M. Schultz; that the impression was caused by the representations of defendant, as an inducement to the trade, reasonably relied upon by the plaintiff, that the sale was being made to the husband; that the husband appeared to have full control or management of the store: *Held,* an instruction was erroneous that fixed the liability upon the husband, unless the jury found that he informed the salesman at the time that he was the agent of his wife, or unless the salesman ascertained that fact from the sign displayed; (1) the burden

of proof was on the plaintiff to show that the husband, by false representations reasonably relied on, had imposed himself upon the company or its agent as M. Schultz, and assumed that essential portions of plaintiff's evidence should be accepted as true; (2) it ignored defendant's evidence, that about five months previous he had informed the managers of plaintiff corporation, at its home office, that he was acting merely as agent for his wife.

(166) APPEAL from *Ward, J.*, at Second March Term, 1911, of NASH.

Action to recover $341, with interest from 4 October, 1909, as the contract price of goods sold and delivered.

The jury rendered verdict as follows: "Is defendant indebted to plaintiff, as alleged in the complaint, and, if so, in what amount? Answer: Yes, $341, with interest from 4 October, 1909."

Judgment on the verdict, and defendant excepted and appealed.

E. B. Grantham for plaintiff.
T. T. Thorne for defendant.

HOKE, J. On the trial, and after the jury was impaneled, admissions were made as follows: "It was admitted, for the purposes of the trial, that on 4 September, 1909, the time when the goods were sold for the purchase price for which the suit was brought, that the goods were billed out to and shipped to M. Schultz, the wife of the defendant, who at that time was conducting business in her own name, and who had conspicuously displayed at her place of business a sign in conformity with section 218, Revisal, 1905. It was further admitted that the goods shipped, and amounting to $341.50, had not been paid for."

Evidence was then offered on the part of plaintiff tending to show that in April, 1909, at Rocky Mount, N. C., the place of business of M. Schultz, plaintiff sold the goods to defendant, for delivery in September following. That the sale was made, and credit given to defendant, personally, under the impression that defendant himself was the M. Schultz to whom the goods were afterwards shipped, and that this impression was caused by representations of the defendant, as inducements to the trade, reasonably relied upon by plaintiff company. C. C. Alcorn,

(167) a witness for plaintiff, testified that he was the agent who effected the sale; that he dealt with defendant and sold the goods under the impression that he was the proprietor of the business and that his name was M. Schultz. That he did not observe the sign referred to in the admission, but defendant alone was there, in apparent charge and control of the store, and negotiated the trade. That plaintiff thought defendant's name was Max, called him Max and billed the

goods to Max, but stated further that defendant rubbed the name out and substituted M. Schultz. This witness further stated that he knew defendant's wife was named Mamie. The deposition of Arthur Pattison, vice president and one of the managers of plaintiff company, was then offered in evidence, in which it was stated, among other things, that in November, 1908, defendant was in plaintiff's place of business in New York and represented that he was named M. Schultz and the proprietor of this business, and bought a bill of goods in that name, which were paid for, and that the present bill was sold under the impression so caused, that the sale was being made to defendant, etc.

Defendant, a witness in his own behalf, denied that he had represented himself to be M. Schultz; said that the salesman, Alcorn knew that defendant's name was Louis, and was fully aware of the fact that the business belonged to his wife and was conducted in her name of M. Schultz. He denied further that he had represented himself, in New York, to be M. Schultz, the proprietor of the business, but that he had then told plaintiff's officers that he was only a buyer for the firm.

On this and other relevant testimony the court charged the jury, "that unless the defendant, at the time of making the bill for which the suit was brought, told the witness, Alcorn, that he was the agent of M. Schultz, or unless the witness ascertained such fact from the sign displayed in accordance with section 2118 of the Revisal, at M. Schultz's place of business, or by some other reasonable means such fact was made known to Alcorn at or before the time of making the sale, then the defendant would be personally liable for the plaintiff's account, and the jury should so answer the issue"; and we are of opinion that this was not a correct rule to guide the jury in their determination of the issue.

The plaintiff, at the beginning of the trial, had admitted that (168) the goods had been billed out and shipped to M. Schultz, the wife of defendant, who was there conducting the business in her own name, and in the presence of this admission, and on general principles, if plaintiff sought to charge defendant personally, whose name was Louis Schultz, the burden was on the company to show that the present defendant, by false representations, reasonably relied upon by them, had imposed himself upon the company or its agent as being M. Schultz, and that he, and not M. Schultz, was the real debtor; and the charge in question, duly excepted to, erroneously places on defendant the burden of excusing himself, thereby assuming that essential portions of plaintiff's evidence should be accepted as true, and is further objectionable in restricting the jury to what took place between the defendant and the salesman, Alcorn, thereby ignoring the testimony of defendant to

the effect that, on the November previous, not more than five months before this order was taken, he had personally informed the owners and managers of plaintiff company that he was only a buyer for M. Schultz, to whom the goods were billed and shipped. This objection is emphasized by the fact that the witness, Alcorn, in his testimony, further stated that after negotiating the sale, when he went back to New York he advised the house not to ship the goods, showing that, in completing the sale, the management acted to some extent on their own knowledge of conditions and were not influenced altogether by the account this witness may have given them.

There is error which entitles defendant to have the cause tried before another jury.

New trial.

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(169)

J. H. MORGAN v. W. C. MORGAN.

(Filed 4 October, 1911.)

1. Executors and Administrators—Removal of Administrator—Adverse Interests.

In proceedings by the heir at law to remove the administrator of the estate of the intestate, duly appointed, on the ground of an adverse interest, it appeared that intestate's estate consisted largely of lands, with but little personal property, and the adverse interest insisted upon was the claim of plaintiff that the administrator owned jointly with the estate certain mules, hogs, farming implements, etc., to which he was claiming the whole. There was no evidence of bad faith or fraudulent concealment, and the defendant had permitted an inspection and appraisement of the property by the plaintiff, had since held it intact, and had given a solvent and sufficient bond for plaintiff's protection: *Held*, there was no evidence of an adverse interest which would warrant the removal of the administrator Revisal, sec. 38. (*Simpson v. Jones*, 82 N. C., 323, cited and distinguished.)

2. Same—Judgment—Questions of Law—Appeal and Error.

When the lower court rests its judgment as to the removal of an administrator for an interest adverse to the intestate's estate solely upon a question of law, it is reviewable on appeal.

APPEAL from NASH from judgment rendered by *Carter, J.*, at chambers, in Wilson, 15 May, 1911.

This is a proceeding under section 38, Revisal 1905, for the removal of defendant administrator, commenced by J. H. Morgan, a brother of the defendant and a distributee of the intestate. The Clerk of the Superior Court of Nash County denied the motion. Petitioner appealed.

His Honor, *Judge Carter,* made this ruling: "It is therefore found as a fact by the court from the evidence that in respect of the ownership of said property the administrator has and asserts a personal interest adverse to that of the estate of his intestate, and the court is therefore of opinion, as matter of law, that the said W. G. Morgan is not a proper party to administer said estate, on account of his adverse personal interest as aforesaid." The defendant appealed.

Finch & Vaughan and Jacob Battle for plaintiff. (170)
E. B. Grantham for defendant.

BROWN, J. As his Honor rests his judgment solely upon a matter of law, it is not denied that it is reviewable upon appeal.

The petitioner and the defendant are the only heirs at law and distributees of Patsy Morgan, deceased. The record discloses that Patsy M. Morgan owned a one-half undivided interest in a tract of land of about one hundred (100) acres and, as the defendant contends, only a very small amount of personal property.

The defendant is a man fifty years old who has never married. He and his sister, intestate, resided together after the death of their parents upon the old homestead, and their younger brother, J. H. Morgan, married when a young man any moved away.

Some weeks after this defendant qualified as administrator, and after the defendant had filed his inventory in the course of his said administration, the plaintiff raised the contention that certain personal property in the possession of this defendant belonged jointly to the late Patsy M. Morgan and to the defendant, W. G. Morgan.

The defendant denied that Patsy M. Morgan had any interest in the personal property in controversy, consisting of mules, hogs, farming implements, etc. The record shows that when this claim was made by the petitioner the defendant allowed the plaintiff to have an inspection and appraisal of all the property which the plaintiff contended belonged jointly to the said late Patsy M. Morgan and the defendant. The appraisal committee inspected, valued and took an itemized statement of all the property, and every portion of same has been held intact by the defendant and is still held by him.

It is admitted that the defendant has given a solvent bond amply sufficient to cover the full value of his intestate's estate, including the value of the property in dispute.

There are no findings of bad faith upon the part of the defendant, and we are of opinion that his Honor erred in his conclusion that he was incompetent to act as administrator simply because a distributee claimed that the intestate owned a half interest in certain per- (171) sonal property in possession of the defendant.

The items and value of that property have been carefully ascertained and the evidence of it preserved. There is good and sufficient bond to protect the petitioner, and upon a final settlement he will have opportunity to make good his claim, and charge the administrator with the intestate's share of the property in dispute, if he succeeds.

The defendant was properly appointed by the clerk as administrator in obedience to a statute which in many respects is mandatory and provides who is entitled to letters of administration in case of intestacy. The administrator cannot be removed solely because he has personal property in his possession in which it is claimed his intestate had a half interest, in the absence of any findings of bad faith and fraudulent concealment.

We think the learned judge below mistook the true purport of the case upon which he relied. *Simpson v. Jones,* 82 N. C., 323. In that case the administrator was removed because his fidelity and good faith were successfully challenged. He failed to make a defense to a suit brought against his intestate's estate, because he had a personal interest in the recovery, and the administrator alone could make such defense. The Court said: "The distributees are entitled to have an efficient defense to the action made in both answer and proofs, and it is apparent the defendant has not come up to his measure of official obligation." Page 325.

In the case at bar the distributee is at no disadvantage. He may contest the title to this property in dispute in a proceeding by himself against the defendant and his bond for a final accounting and settlement of the estate.

In re Dixon, ante, 26, we directed the removal of a guardian because he set up an unwarranted claim to his ward's real property and gave no account of its rents and profits. His ward is his own child, and helpless to assert her claim to the present income of her property against him.

(172) It was manifest she needed some disinterested person to assert her rights for her. The judgment of the judge of the Superior Court is reversed, and the judgment of the clerk affirmed.

Reversed.

IN RE MARTHA SAVILLE.

(Filed 4 October, 1911.)

Executors and Administrators—Clerk's Appointment—Next of Kin Illiterate —Discretion of Clerk.

Two brothers and two sisters, as next of kin of deceased, filed their renunciation of administration on the estate with the clerk of court, the elder brother requesting the appointment of a certain designated person as administrator and the younger brother requesting only that an administrator be appointed, without designating any particular person. The clerk appointed the person designated by the elder brother, and the younger brother applied subsequently for his removal, without designating any grounds therefor otherwise than may appear under the above stated facts: *Held*, (1) there was no legal ground shown for the removal of the administrator thus appointed; (2) if no renunciation or recommendation had been made, it was within the discretion of the clerk to appoint any one of the next of kin; (3) as none of the next of kin in this case could read or write, it would have been proper for the clerk to refuse to appoint either one of them.

APPEAL by Weldon Bridgers from *Cooke, J.*, at August Term, 1911, of FRANKLIN.

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

B. T. Holden for appellee.
N. Y. Gulley for appellant.

CLARK, C. J. Martha Saville died intestate 11 July, 1911, leaving her surviving two brothers and two sisters, as her next of kin. On 18 July, 1911, the younger brother applied in writing to the clerk to appoint some one administrator. On the next day the elder brother filed his renunciation with the clerk and asked that W. H. (173) Hudson be appointed administrator, which was done. On 26 July the younger brother asked that Hudson be removed on the ground that his appointment was illegal. Hudson was cited to appear before the clerk on 11 August, 1911, to answer the motion for removal. On 2 August the younger brother and the two sisters had filed their renunciation and asked that one Perry be appointed administrator. At the hearing no evidence was offered to show why Hudson should be removed, the motion being entirely based upon the above facts.

Revisal, 3 (2), provides that when there is no husband or widow the clerk shall appoint the next of kin according to their degree, and, if of equal degree, shall appoint one or more of them, at his discretion. It was competent, therefore, for the clerk to have appointed the elder

brother. All four of the brothers and sisters having renounced, it was equally in the discretion of the clerk to appoint the person recommended by the elder brother instead of the nominee of the others. Certainly, the younger brother and the two sisters, having renounced, could not demand the removal of the administrator who had been appointed by the clerk at a time when Hudson was the only person recommended and when the younger brother had asked the appointment of an administrator without naming any one. There being no cause shown for the removal of Hudson, the clerk was within his powers in refusing to do so.

Even if Hudson had been set aside and the appointment had come up *de novo,* Hudson being recommended by one of the next of kin was fully as eligible as Perry, who had been recommended by the others. Upon such state of facts it would be in the discretion of the clerk to choose between them.

All four of the next of kin renounced. But if they had not done so, it would have been proper for the clerk to refuse to appoint either one of them, as they were all unable to read and write. *Stephenson v. Stephenson,* 49 N. C., 472.

His Honor properly affirmed the judgment of the clerk in refusing to remove the administrator.

Affirmed.

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(174)

JOSEPHINE F. ADAMS v. KINSTON AND CAROLINA RAILROAD AND LUMBER COMPANY.

(Filed 4 October, 1911.)

1. Railroads—Collision—Evidence—Presumptions.

Evidence that plaintiff's intestate, an employee of defendant railroad company, was killed in a collision between two of defendant's trains, is sufficient upon the question of defendant's negligence to take the case to the jury, the fact of the collision raising a presumption of negligence.

2. Same—Trains Without Light or Guard.

Evidence that plaintiff's intestate, an employee on defendant's train, was killed in a collision with another of defendant's trains, which occurred before daylight while the train was running backward, with no man or light on the rear car, is evidence of defendant's negligence beyond the presumption of negligence raised by the mere fact that he was killed in a collision.

3. Railroads — Master and Servant — Disobedience of Orders — Evidence — Questions for Jury.

It being material to the issue upon defendant's negligence in an action for damages for the wrongful killing of plaintiff's intestate, as to whether

the intestate, an employee of defendant, at the time complained of, was acting in disobedience to defendant's orders, or whether he was acting under the orders of one who had no authority from defendant to give them, the questions are for the jury under conflicting evidence.

APPEAL from *Peebles, J.*, at March Term, 1911, of LENOIR.

The action is to recover damages on account of the death of the plaintiff's intestate, which it is alleged was caused by the negligence of the defendant.

The defendant denies negligence, and alleges that the intestate was guilty of contributory negligence.

The intestate was killed on 24 January, 1910, which was on Monday, while on the train of the defendant, by a collision between the train and two box cars, which had been left on the track of the defendant, on the preceding Saturday evening.

There was evidence that the intestate was foreman of the track of the defendant, and that he was going out on the train to work on the track.

The plaintiff contended that he was on the train by direction (175) of one Weeks, a representative of the defendant, and that he knew nothing of the two cars on the track.

The defendant contended that Weeks had no authority to act for it; that the intestate had been ordered by one Hayes to go out Monday morning with the regular engineer, Sanderson; that he disobeyed this order and went with the fireman, one Davis; that the intestate was in charge of the train on Monday and on the Saturday preceding, and that he knew the cars were on the track.

At the conclusion of the evidence the defendant moved for judgment of nonsuit, which was denied, and the defendant excepted.

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

E. R. Wooten, McLean, Varser & McLean, and Loftin & Dawson for plaintiff.

G. V. Cowper and Rouse & Land for defendant.

ALLEN, J. There is ample evidence of negligence on the part of the defendant. The collision raises a presumption of negligence. *Kinney v. R. R.*, 122 N. C., 961; *Marcom v. R. R.*, 126 N. C., 200; *Wright v. R. R.*, 127 N. C., 229; *Stewart v. R. R.*, 137 N. C., 689.

In addition to this presumption, there is evidence that the train was running backward, before daylight, with no man or light on the rear car, which is evidence of negligence.

The defendant says, however, that these principles do not militate against its contention, and that, upon the whole evidence, a judgment of nonsuit ought to have been entered.

Its counsel says in his brief:

"The vital questions, therefore, arising in this appeal, are:

"1. Did Weeks assume authority to act as conductor on the morning in question?

"2. If so, did the defendant authorize him to so act or knowingly acquiesce in his assumption of authority to such an extent as to ratify what he did and become responsible for his conduct?

(176) "3. Even granting, for the sake of argument, that the first and second propositions could be answered affirmatively, then as a matter of law could Adams, knowing that Hayes was superintendent and was the representative of the defendant who had employed him, disobey the express and specific orders of Hayes, a superior officer, in order to carry out the orders of Weeks, admittedly an inferior to Hayes (even if it could be said that he had any connection with the defendant)?

"4. It appearing in the plaintiff's own testimony that Adams knew Weeks was not conductor on the morning of the injury, the testimony of the plaintiff showing that one Singleton had been employed the Friday before and that Weeks was no longer assuming to hold the position, could said Adams proceed to obey Week's orders except at his own peril?"

If we understood the evidence as the defendant's counsel construes it, we might agree with his conclusion; but we do not.

In our opinion, there is evidence that Weeks had authority to control the movement of the train, and that the intestate was not acting in violation of directions given him by Hayes.

There is also evidence that the intestate did not know that the cars were on the track.

A witness for the plaintiff, C. C. Bell, testifies that Weeks was acting as assistant conductor and manager of the defendant; that he gave instructions to Davis, who was the acting engineer, as to the movements of the train; that Davis acted on his orders; that Weeks had been acting as conductor of the train; that the train was running backward at the time of the collision, with no light or man on the rear; and that he was on the train with the intestate on Saturday, and that the intestate was at that time making up his pay-rolls, and did not know the cars were left on the track. He also testifies to being present on Sunday and hearing the conversation between the superintendent, Hayes, and the intestate, as follows:

Q. Where was it Mr. Hayes gave you instructions on Sunday? A. At the office.

Q. Who else? A. Mr. Adams and myself.

Q. You say Mr. Hayes told Mr. Adams to take Davis as engineer? A. No, sir; I didn't say so.

Q. Did he tell you to put the hand car on top of the flat car? (177) A. Yes.

Q. What time was this? A. Somewhere between 11 and 12 o'clock.

Q. Why did you go there on Sunday? A. It was the usual thing. Mr. Adams would go down on Sunday between 11 and 12 o'clock to get orders for Monday; that was Mr. Hayes' order, to go down on Sunday and get orders for Monday.

The regular engineer was sick, and for this reason did not run the train on Monday, and Weeks knew this.

Another witness testified he had heard Weeks give orders as to the running of the trains, in the presence of Hayes, without objection or protest. There was evidence on the part of the defendant directly contradicting the evidence of the plaintiff, but we cannot pass on this conflict of evidence, and for the purpose of the motion for nonsuit must accept the evidence of the plaintiff to be true.

Upon a review of the record, we find

No error.

CHARLES C. BURLINGHAM ET AL. V. H. C. CANADY ET AL.

(Filed 4 October, 1911.)

1. Appeal and Error—Case—Counter-case—Settlement—Failure to Request Judge.

Upon the service of a counter-case on appeal it is the duty of the appellant to immediately request the judge to appoint a time and place to settle the case under Revisal, sec. 591, and upon his failure to do so the case of the appellee becomes the case on appeal.

2. Same—Sheriff's Returns—Evidence, Prima Facie—Printing Record.

The appellee, having disagreed to the appellant's statement of the case, had his counter-case served, as appears by the return made by the sheriff thereon. Both cases were then filed in the clerk's office, but by an error which the clerk explained, only the appellee's case was certified to the Supreme Court. Upon an affidavit of appellant's counsel it was contended that no counter-case had been served: *Held*, (1) the return of the sheriff upon the counter-case is *prima facie* evidence that the counter-case had been served as therein stated, and it cannot be contradicted by a single affidavit; (2) as the appellant had failed to request the judge to settle the case under the statute, the counter-case is the case on appeal, which not having been certified and printed, under the rule, the judgment below is affirmed, on motion of appellee.

(178) APPEAL from *Peebles, J.*, at May Term, 1911, of ONSLOW.

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

E. K. Bryan and Frank Thompson for plaintiff.
T. C. Wooten for defendant.

WALKER, J. The defendants in this case appealed to this Court from a verdict and judgment rendered against them in the court below, and served their case on appeal upon the plaintiffs. The plaintiffs, disagreeing to this case, prepared a counter-case and caused the same to be duly served upon the defendant's counsel by the sheriff, who made a return to that effect. Both cases were then filed in the clerk's office. Plaintiff's counsel moved in this Court to affirm the judgment, as no case on appeal had been sent to this Court, though the record proper is here, the motion being based upon the ground that counsel disagreed to the case, and the judge was not requested, as required by Revisal, sec. 591, to settle the case, and that no case on appeal has actually been settled. Defendant's counsel filed an affidavit, in which he denied positively that any counter-case or exceptions had been served upon him or the defendants, and that he inquired of the clerk, who told him that no such case or exceptions had been filed in his office. This is the only affidavit introduced in behalf of the defendants. Plaintiffs filed the affidavits of Mr. Frank Thompson, one of their attorneys, and the sheriff, E. W. Summerville, who state that the counter-case was served upon the defendant's counsel on 14 June, 1911, and the sheriff's return also shows that such service was made by him. M. M. Capps, the clerk, testifies that
(179) the counter-case was filed in his office, and he thought that it was sent up with the record to this Court, and that the statement to the contrary in his certificate is an error which he inadvertently committed, as the record for this Court was prepared by the defendant's attorneys, at their request, and was presented to him for his signature to the certificate, and he supposed, of course, that the record was in proper form and contained the counter-case on appeal, and he so stated to Mr. Frank Thompson, defendant's attorney, afterwards.

The record here does not contain the counter-case, but only the case as tendered by the defendants to the plaintiffs. Under the circumstances, we must grant the plaintiff's motion and affirm, as we discover no error in the record proper.

The sheriff's return imports truth. It is made under oath and cannot be overthrown or shown to be false by the affidavit, merely, of the person upon whom the service is alleged to have been made. It has often been held that the return of a ministerial officer, as to what he has done out of

court, is *prima facie* true, and cannot be contradicted by a single affidavit. *Hunter v. Kirk,* 11 N. C., 277; *Mason v. Miles,* 63 N. C., 564. It would be oath against oath, and we could not well say with whom was the truth. Besides, the service of process or other papers, and the return thereof, are very serious matters, and should not be lightly set aside. In this case, though, the sheriff's return is strongly corroborated by the affidavits of Mr. Thompson, the clerk, and the officer himself, and if no technical force or weight is to be given to the return, we would be bound by the decided weight of the evidence to find against the defendants as to the fact of service. As the countercase was properly served, it was the duty of the defendants to immediately request the judge to appoint a time and place to settle the case under Revisal, sec. 591, and upon his failure to comply with this requirement of the statute the case of the appellee became the case on appeal. As that case has not been certified to this Court, as part of the transcript, and therefore has not been printed, we affirm the judgment.

Affirmed.

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(180)

RUTH HOWIE v. HENRY SPITTLE BY HIS GUARDIAN AD LITEM.

(Filed 4 October, 1911.)

Appeal and Error — Injury to Person — Execution on Person — Insolvent Debtor's Oath — Habeas Corpus — Valid Discharge — Final Judgment — Bond to Stay Execution—Bail.

Judgment being rendered by a court of competent jurisdiction against the defendant in a certain sum for an injury committed to person of the plaintiff—a tort—who appealed without giving bond to stay execution: *Held,* (1) upon the return of execution against defendant's property unsatisfied, an execution upon the person may issue (Revisal, 625, 727); (2) filing an inventory of his property, etc. (Revisal, sec 1905), will not exempt the defendant from arrest; (3) the execution can only be stayed by giving a bond securing the judgment (Revisal, 598); (4) the writ of *habeas corpus* cannot be successfully sued out (Revisal, 1822, subsec. 2); (5) to obtain the benefits of the provisions of Revisal, 1930 to 1933, the defendant must show a valid discharge from imprisonment; (6) bail cannot be given to release the defendant pending his appeal in lieu of the bond to stay execution.

APPEAL from *Ferguson, J.,* at the August Term, 1911, of UNION.

In the matter of *habeas corpus* sued out by the defendant, Henry Spittle, heard by his Honor, *Judge Ferguson,* who denied the writ and

remanded the petitioner to jail. The prisoner applied for a writ of *certiorari* to review the action of the judge. In obedience to the writ the record is docketed in the Supreme Court.

The following is the order sought to be reviewed:

"The above guardian *ad litem* having filed his petition that his ward be discharged from the custody of the sheriff of Union County, and upon said petition being heard, and it appearing to the court that the action was for tort, and that final judgment was rendered at the August Term of Union Superior Court, in which judgment it was provided for execution to issue against the property of said Henry Spittle, and if the judgment could not be collected by execution against his property, that execution should issue against the person of the said Henry Spittle, the execution against the property having been (181) returned, showing that no property of the said Henry Spittle could be found subject to such execution, execution issued against the person, by reason of which and the said final judgment the Sheriff of Union County has the said Henry Spittle in custody in the common jail of Union County. The court is of the opinion that it has not the power under the law to grant the writ of *habeas corpus*, whether prayed for by the guardian *ad litem* or the said Henry Spittle. The petitioner excepts and appeals to the Supreme Court. The petitioner prays the court to grant bail pending the appeal to the Supreme Court. The court is of the opinion that under the law it has not the power to grant bail, to which the petitioner excepts and appeals to the Supreme Court."

Williams, Lemmond & Love for petitioner.
Stack & Parker contra.

BROWN, J. The petitioner is the defendant in a civil action brought against him by Ruth Howie for an injury to her person, a tort, according to the complaint. Upon issue joined, she obtained a verdict and judgment for $250. The petitioner appealed to the Supreme Court, which appeal has not yet been heard. He gave no bond to stay execution, so an execution was issued against his property, which was returned unsatisfied. An execution was issued against his person under which he was taken into custody and confined in the jail of Union County. Before he was arrested he filed an inventory of his property and a list of his creditors as provided by section 1930, Revisal 1905, and attached his affidavit thereto and asked to be exempt from arrest.

We will not review the correctness of the judgment rendered, nor consider the exceptions taken on the trial. They will be passed upon and the assignments of error considered when the appeal is heard.

The only question we can now consider is as to the jurisdiction of the court to render the judgment and issue the final process under which the petitioner has been arrested.

The cause of action, as set out, is an injury to the person of the plaintiff in the execution, which is a tort, and under Revisal, secs. 625 and 727, when an execution against property is returned unsatisfied an execution against the person may issue upon such judg- (182) ment.

When the appeal was taken the law provides but one method of staying execution, and that is by giving a bond securing the judgment. This the petitioner has failed to do. Revisal, sec. 598, and cases cited. The Superior Court had complete jurisdiction to render the judgment, and therefore the petitioner is imprisoned under the final process of a court of competent jurisdiction. Under such conditions the writ of *habeas corpus* may not successfully be sued out. The statute forbids it. Revisal, sec. 1822, subsec. 2; *Ledford v. Emerson,* 143 N. C., 536.

The petitioner contends that he is entitled to his discharge under the insolvent debtor's law.

There are two methods provided in the Revisal for the discharge of insolvent debtors. One relates to those under arrest. Section 1920 *et seq.* The other relates to defendants in civil actions not under arrest. Section 1930 *et seq.*

The petitioner was not under arrest when he filed his petition, and there is nothing in the record to show that he has complied with the provisions of sections 1930 to 1933. To avail himself of that act he must show a valid order of discharge from imprisonment under sections 1932 and 1933. It is not claimed that he has complied with sections 1920 to 1929. We agree with the judge below, that the petitioner is not entitled to give bail pending his appeal to this Court in the civil action, but he may give bond to stay execution. There is no provision of law authorizing bail in lieu of such bond, although there is a provision for his giving bail before the Clerk of the Superior Court of Union County during the pendency of and until the final determination of the proceedings under the insolvent debtor's act. Revisal, sec. 1936.

The judgment is

Affirmed.

Cited: *S. v. Dunn,* 159 N. C., 472.

(183)

H. C. CARTER ET AL. V. BOARD OF DRAINAGE COMMISSIONERS.

(Filed 11 October, 1911.)

1. Drainage Districts—Owners of Lands—Bond Issue—Limited Liability.

In proceedings for the drainage of Mattamuskeet Lake under chapter 442, Laws of 1909, wherein an issue of bonds for the purpose was authorized, each tract of land was assessed its pro rata part for the payment of the bonds and interest thereon: *Held*, upon the payment of the assessment upon the land the owner would be discharged from liability and not responsible for the failure of other owners to pay, except through the method of assessment provided by the statute.

2. Drainage Districts—Bond Issues — Maintenance — Interest — Implied Authority—Necessary Incidents—Injunction—Excessive Issues—Exceptions —Public Interests.

In proceedings to drain Mattamuskeet Lake under chapter 442, Laws of 1909, it was decreed by final judgment, not appealed from, that a bond issue of $400,000 was required. This act authorized the issuance of the bonds for construction, "together with interest thereon, costs of collection or other incidental expenses." By virtue of chapter 67, Laws of 1911, the Drainage Commission prepared to issue an additional $100,000 of bonds, part of which was to be used in expenditures for maintenance of the system until its final completion, and part to provide for the payment of the interest on the original issue: *Held*, (1) the additional issue of the bonds was necessary and an incident to the original issue, and valid; (2) if the issuance of the additional bonds was in an amount excessive for the purpose, any interested persons, owners of land in the drainage area, could except on that ground; (3) work of such a public nature would not be interfered with by injunction against the issuance of the additional bonds.

3. Drainage Districts—Bond Issues—Limited Liability—Protection of State's Guarantee—Conveyance of Interest—Waiver—Interpretation of Statutes.

The limitation of liability on the bonds issued under chapter 509, Laws of 1909, was to protect the State and the State Board of Education because of the power in the said act enabling the State to guarantee three-fourths of said bonds, to be repaid out of the sales of land, which was waived by the Southern Land Reclamation Company by proper resolutions, to whom the State Board of Education has conveyed its interest; and by chapter 67, Laws of 1911, any defect in the machinery of the tax levy was cured, so that the interest on the original issue of $400,000 of bonds could be taken care of and thus enable the sale of the bonds by the drainage commissioners.

HOKE, J., concurs in result.

(184) APPEAL from HYDE, from order of *O. H. Allen, J.*, denying plaintiff's motion for restraining order, heard at chambers in Washington, June, 1911.

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

Ward & Grimes, H. C. Carter, Jr., and J. C. B. Ehringhaus for plaintiffs.

Mann & Jones and John H. Small for defendant.

CLARK, C. J. Under chapter 442, Laws 1909, the plaintiffs and other landowners filed a petition for the drainage of Mattamuskeet Lake and adjacent lands. The State Board of Education, by virtue of its ownership of the lake bottom, was made a party and was chargeable with three-fourths of the expense of the drainage under chapter 509, Laws 1909. Said proceeding was prosecuted to a final decree. Exceptions were filed by plaintiffs and others, which were sustained and the final judgment rendered, to which there were no exceptions or appeal. Under the judgment in that proceeding $400,000 in bonds were directed to be issued for construction. Each tract of land was assessed its pro rata part for the payment of said bonds and interest thereon, upon payment of which its owner would be discharged from liability. No owner is responsible for other owners by reason of their failure to pay, except through the method of assessment provided by the statute.

By virtue of Laws 1911, ch. 67, the drainage commissioners purpose to issue $100,000 in additional bonds, $40,000 of which is to be expended in the maintenance of the system during the three years till its final completion, and $60,000 to provide interest on the other bonds during the two years, thus making a total bond issue of $500,000. Of this sum, the Southern Land Reclamation Company is charged with three-fourths by reason of its purchase from the State Board of Education, besides the charge upon the other lands to the extent of many thousands of dollars which said Reclamation Company has (185) purchased from other landowners within the drainage district.

This injunction is sought by the plaintiffs to restrain the issue of the additional $100,000 bonds. His Honor properly held that the plaintiffs had not shown sufficient grounds to entitle them to such restraining order. The additional $100,000 in bonds is not an addition to the debt for the purposes of improvement, but to provide for those expenses which are the necessary and natural result. Sixty thousand dollars is to provide interest on the $500,000 bonds during two years. This interest must be provided for either out of the pockets of the landowners or by issuing bonds. It is the legal incident of the $400,000 in bonds which are to be issued under a decree to which the plaintiffs were parties and from which they did not appeal. Any one of them, or any other landowner, can pay his pro rata part of such interest, and thereupon the amount of bonds will be diminished accordingly.

The same is true as to the $40,000 which are to be issued to maintain and keep the work in condition for the three years which will be required for its completion. The $400,000 being required as adjudged by the final decree for the construction of the work, money must be provided for the maintenance and good condition of the work as it is done from time to time until its final completion. This money must be raised by the property which is chargeable with the $400,000 of bonds, else there will be serious loss by impairment of the work while being constructed.

It is open to the plaintiff and any others to file exceptions as to these amounts, and show, if they can, that a lesser sum will maintain the work during the progress of construction. They can also file exceptions in like manner and show, if they can, that a less sum than $60,000 will discharge the interest accruing during the two years. But these are not matters which entitle the plaintiff to an injunction to restrain the issue of the bonds.

(186) The original act, chapter 442, Laws 1909, sec. 34, authorized the commissioners to issue bonds for the full amount of the assessment for construction, "together with interest thereon, costs of collection or other incidental expenses." This section has been repealed by section 34, chapter 67, Laws 1911, but it shows that the original act authorized the issuing of bonds for "interest and other incidental expenses." Indeed, the power to issue bonds for interest arises by implication, even if there is no express delegation of this power in the statute. "The limitation of indebtedness does not, however, relate to interest coupons attached to the bonds, and although they may swell the indebtedness beyond the limitation, the bonds are nevertheless valid." 21 A. & E. Enc. (2 Ed.), 43, and note 2.

The limitation in Laws 1909, ch. 509, was to protect the State and the State Board of Education because of the power in said act enabling the State to guarantee three-fourths of said bonds, to be repaid out of the sales of land. This limitation has been waived by the Southern Land Reclamation Company by proper resolutions of the stockholders and directors, which as successor to the State Board of Education it had power to do. Chapter 67, Laws 1911, was intended to cure any defect in the machinery of the tax levy to take care of the bonds and empower the defendant to issue bonds for interest. Unless there is a provision to take care of the interest for the two years and to provide for maintaining the work, as it progresses, up to its completion, the board will doubtless be unable to dispose of the $400,000 bond issue. It will require that entire amount, according to the decree itself, to provide for the construction of the work. Hence, the interest and the maintenance of the work during the progress of construction cannot be paid out of the $400,000. The decree adjudging $400,000 to be necessary for

the construction of the work and directing the issue of bonds for that amount, not being appealed from, the plaintiff cannot now be heard to contest it.

As already said, if there is any question as to the full amount of $100,000 being necessary to pay off the interest and for maintenance, during construction, the plaintiffs can pay their assessment under protest and bring suit to recover any amount in excess, as pro- (187) vided by the statute. But they should not be allowed to stay a work of great public improvement, affecting many hundreds of other people, upon the allegations made in this complaint. The power to issue the $100,000 additional bonds is clearly conferred upon the drainage commissioners by the statute, Laws 1911, ch. 67, sec. 15, and the execution of their powers will not be interfered with unless their action is influenced or procured by fraud. *Sanderlin v. Lukin,* 152 N. C., 744. If there should be any misconduct on the part of the commissioners, they can be held responsible in an action against them, but the work itself will not be stayed nor the issuance of the bonds for construction, interest, and maintenance which is necessary for that end.

The Legislature was not restricted to the amount of bonds, or the assessment made, under the first act passed in 1909. *Durrett v. Davison* (Ky.), 8 L. R. A. (N. S.), 546, and cases cited in the notes thereto.

Affirmed.

HOKE, J., concurs in the result.

Cited: *Caravan v. Comrs.*, 161 N. C., 101; *In re Drainage District,* 162 N. C., 128; *Shelton v. White,* 163 N. C., 93.

W. E. LIVERMAN v. F. L. W. CAHOON.

(Filed 11 October, 1911.)

Notes—Joint Makers—Payment by One—Indorsement to Maker—Cancellation—Implied Promise to Pay—Limitations of Actions.

The payment of a note by one of two of the makers, with indorsement thereof without recourse to himself, cancels the note, and entitles him to recover one-half the amount thereof upon an implied promise to pay by the other obligor; and when there is no promise made not to plead the statute of limitations, action should be brought within three years or recovery will be barred.

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

(188) APPEAL by plaintiff from *O. H. Allen, J.*, at Spring Term, 1911, of TYRRELL.

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

E. F. Aydlett and T. H. Woodley for plaintiff.
J. M. Meekins and M. H. Tillett for defendant.

CLARK, C. J. On 21 June, 1904, the plaintiff and the defendant Cahoon executed a joint note under seal at sixty days to John W. Sykes for $600, with interest from date. This bond was secured by chattel mortgage on certain logs. It fell due 21 August, 1904, and was paid by the plaintiff by check for $606.90, dated 27 September, 1904. This action for contribution was begun 25 October, 1910, and the defendant pleaded the statute of limitations.

The plaintiff testified that when the bond fell due the defendant said he was not prepared to pay it, and asked the plaintiff "to take up the note and hold the same until he could pay his part of it, which would be in a short time; that this was all that was said to him by Cahoon about paying the note." That he paid the note and that it was then indorsed by the obligee as follows:

"Pay the within note to W. E. Liverman, without recourse on me. 27 September, 1904. J. W. SYKES."

The judge instructed the jury that if they believed all the evidence to answer the issue as to the statute of limitations "Yes." Plaintiff excepted. Verdict and judgment accordingly. Plaintiff appealed. This presents the only point in the case. The chattel-mortgage security cuts no figure, as the logs were the joint property of the obligors and have doubtless long since been used.

In *Sherwood v. Collier*, 14 N. C., 381, *Ruffin, C. J.*, said: A payment by any one of two or more jointly, or jointly and severally, bound for the same debt, is payment by all. It is true that if payment be not intended by the purchaser, there is a difference, but that can only be by a stranger, or by using the name of a stranger, to whom an assignment can be made when jointly liable. This is upon the score of the (189) intention, and because the plea of payment by a stranger is bad upon demurrer. If the assignment of a joint security be taken to the surety himself, *there is an extinguishment, notwithstanding the intention; because an assignment to one of his own debt is an absurdity.*" This case has been often cited and approved. See Anno. Ed.

Here the payment was made by one of the principals, and not even by a surety, and there is no security to be assigned. The evidence makes out simply a payment by one of the joint obligors and a request by the other to hold up the note "until he could pay his part of it, which would be in a short time." This request implies no more than a promise by the defendant to pay his half which the law raised from the fact of payment without any express promise. There was no promise not to plead the statute if delay was given, as is held necessary, *Hill v. Hilliard,* 103 N. C., 34; nor, indeed, was there any promise to delay given by plaintiff.

The indorsement of the note to the plaintiff, one of the obligors, by the creditor, in no wise altered the fact that it was a payment and that the note was canceled thereby. The plaintiff could not hold the note and sue upon his own obligation which he had already paid. He was entitled to recover of the defendant one-half of the sum he had paid. Such action should have been brought within three years. The plaintiff not having done so, is barred by the statute of limitations, which has been pleaded by the defendant. The instruction of his Honor was correct.

No error.

WALKER, J., dissenting: The bond in this case was executed by Liverman and Cahoon, as joint obligors, on 21 June, 1904, and they promised to pay the sum of $600 to John W. Sykes on 21 August, 1904. When Liverman gave his check to Sykes the latter indorsed the note to Liverman *without recourse.*

The plaintiff, W. E. Liverman, testified as follows: When the note fell due the said Cahoon came to me and said that the note was due, and wanted to know if I would not arrange to take it up and pay it; said he was not prepared then to pay it, and asked me to take (190) it up and hold the same until he could pay his part of it, which would be in a short time; this was all that was said to him by Cahoon about paying the note; he, the plaintiff, told J. W. Sykes, after the conversation with Cahoon, he would pay it if he, the said Sykes, would indorse the note to him; Cahoon knew he was going to pay the note and take it up; he got him to take it up and hold it until he could pay his part. All of this was known to Sykes. Witness paid the note by check to Sykes, on 27 September, 1904, in the sum of $606.90, which covered the face value of the note and interest accrued; the defendant Cahoon has not paid any part of the note.

The court instructed the jury that, if they believed the evidence, they should answer the issue as to the statute of limitations, "Yes," which was done, and plaintiff appealed from the judgment upon the verdict.

So that if, in any view of the evidence, the plaintiff was entitled to recover, notwithstanding the plea of the statute, there was error, and the judgment should be reversed. I do not deny that, under the old system of pleading, practice and procedure, this Court held that in order for a surety or person secondarily or equally and jointly liable with another to pay a debt to recover, at law, against the principal, cosurety or coöbligor, for the latter's ratable part of any sum paid by him to the creditor in satisfaction of the debt, he must have had the note or evidence of the debt assigned to a third party for his use and benefit; and I am aware that it was said in *Sherwood v. Collier,* 14 N. C., 381, that this was put on the ground that a plea of payment by a stranger was bad on demurrer. This is a fiction, pure and simple—a refinement of the ancient law—for the fact remained that the person secondarily or jointly liable paid the whole of the debt to the creditor, and the latter was, therefore, fully paid and satisfied, and assignment to a "dummy" or "man of straw" did not alter the fact. It is almost retrogressive, and certainly not progressive, to apply such a rule at this late day, when even the doctrine as to the unity of husband and wife, which takes from her the right to contract, is about to disappear. Is (191) this not one of the fossilized doctrines of the common law which is not suited to this age and our present enlightened ideas?

I regret to say that ours was among the very few courts in this country, or in England, that required such an assignment, under any circumstances, and those courts elsewhere that did require it gave quite a different reason from that stated by *Judge Ruffin* for so doing. It was said by them to be necessary because, by paying the debt, the surety or joint obligor did not acquire the legal title to the note, and, therefore, could not sue upon it *at law,* and either of two courses was open to him: he might have the note assigned, that is, the legal title, by the payee to a stranger, and then sue at law upon the note, or he could proceed in equity, when, if necessary, that court would require the payee to properly assign the note so as to enable the surety or joint obligor to recover at law. But most of the courts held that a court of equity did not consider an assignment as necessary, and, therefore, would proceed to administer justice according to the right of the matter, as in equity the plaintiff could sue upon an equitable title, or, at least, as equity considers that as done which should be done, it would treat the note as assigned without any formal transfer thereof. It was also held that if it had been necessary to sue in equity upon the legal title and to have a formal assignment for that purpose, or to make the payee a party, the court would compel the payee of the note to permit the use of his name in the suit, or to execute an assignment, with proper indemnity to him against costs.

But whatever the procedure under the system prevailing prior to 1868, it is very certain that in that year, by Constitution and statute, a fundamental change was effected in common-law methods, and all forms and useless fictions were abolished and a new and more enlightened procedure was installed in its place. Many of the quaint, queer, and impractical notions of ancient times which were found to be unsuited to our civilization, and which often defeated the right and sustained the wrong, perished with the demise of John Doe and Richard Roe, and the sometimes perplexing fiction of lease, entry, and ouster ceased to complicate the action of ejectment and confound (192) the pleader, so that a good title can now be vindicated by a simple statement and proof of the facts. Those forms and fictions are even now of historical value as evidence of the growth and development of the law, and as such deserve the greatest respect and reverence, but they no longer have any place in our present and more rational system of jurisprudence, which has simplified all methods of pleading, practice, and procedure. The spirit of reform, which was aroused in the early part of the last century and which brought to the leadership of the movement for a radical change in the technical and artificial system of the law and of special pleading some of the greatest statesmen, publicists, and lawyers of England and this country, has at last wrought such a reversal of those methods of procedure as to do away with the necessity of having both a judge and chancellor to try and decide one case separately and in sections, and a person aggrieved, or one seeking subrogation, may now assert his rights in one action, without regard to forms or fictions, and may recover upon a simple statement of the facts and the merits of his claim (*Calvert v. Peebles,* 82 N. C., 334), if he is the real party in interest—that is, the party having the beneficial right. Even a court of equity, as formerly constituted, would not send a plaintiff to a court of law to prosecute his case there, after giving him the legal title, but would proceed itself to award full relief. The rule is thus stated by the text-writers and is supported by the authorities: "Equity jurisdiction, having rightfully attached to a controversy, will be made effective for the purpose of complete relief, though it may involve the adjudication of purely legal questions." Fetter on Equity, p. 13 (5); *Simmons v. Hendricks,* 43 N. C., 84. Or, as put in the graphic language of *Lord Nottingham:* "Where this Court can determine the matter, it shall not be a handmaid to other courts, nor beget a suit to be ended elsewhere." The rule rests on the principle that equity prevents multiplicity of suits. *Jesus College v. Bloom,* 3 Atk., 262, 263; *Turner v. Pierce,* 34 Wis., 658; *Eastman v. Savings Bank,* 58 N. H., 421; *McGear v. R. R.,* 133 N. Y., 16. It will give a money judgment, if necessary to full relief. "A court of equity adapts its relief

(193) to the exigencies of the case in hand. It may restrain or compel the defendant; it may appoint a receiver or order an accounting; it may decree specific performance, or order the delivery to the plaintiff of specific real or personal property; or it may order a sum of money to be paid to the plaintiff, and give him a personal judgment therefor." *Murtha v. Curley,* 90 N. Y., 378; *Sprinkle v. Wellborn,* 140 N. C., at p. 177. In the case last cited, at p. 178, it is said: "The administration of this relief is eminently proper under the reformed procedure, where the rights of parties are settled and determined, in one action, the distinction between actions at law and suits in equity having been abolished. 1 Pom. Eq. Jur., sec. 242." This just and beneficent rule, which formerly prevailed in courts of equity, has now become the fundamental principle of our present system of pleading and procedure, so that one judge and one action are now sufficient for the adjudication of all rights, legal and equitable—cases being decided upon their merits and not brought to the ordeal and test of vain and useless technicalities, so ancient as to be hoary with the age of centuries; the resultant rule, and the material one, being that a party may now recover upon an equitable title, as our courts administer both legal and equitable rights. *Farmer v. Daniel,* 82 N. C., 153; *Condry v. Cheshire,* 88 N. C., 375.

Shall we halt in the march of this progressive reform in pleading and procedure and allow a defendant to escape the payment of an honest and meritorious claim upon a flimsy technicality? But let us see what the law of this case was *formerly* and is *now.* I will not consider here the express agreement of Cahoon to pay his share and to permit the plaintiff, when he paid all, to succeed to the rights, of every kind, in the note possessed by the creditor at the very time of the payment; but will show by principle and the overwhelming weight of authority that, under the righteous doctrine of subrogation, Liverman is entitled to recover in this action, and Cahoon cannot take refuge behind the statute of limitations and escape the payment of his just and equitable share of this debt. Sheldon in his work on Subrogation, sec. 1, says that "It is a doctrine primarily of equity jurisprudence, although
(194) its principles are now often applied in courts of common law, especially in those States in which equitable remedies are administered through the forms of law. It is a substitution, ordinarily the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. More broadly, it is the substitution of one person in the place of another, whether as a creditor or as the possessor of any other rightful claim. The substitute is put *in all respects* in the place of the party to whose rights he is subrogated. It has been adopted

from the civil law by courts of equity. In this country, under the initial guidance of Chancellor Kent, its principles have been more widely developed and its doctrines more generally applied than in England. It is treated as the creature of equity, and is so administered as to secure real and essential justice without regard to form, independently of any contractual relations between the parties to be affected by it. It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter."

What more of authority do we need? Bispham says that "the equity of subrogation springs naturally out of the two equities, just considered, of contribution and exoneration, and is, in fact, one of the means by which those equities are enforced. . . . This equity of subrogation is one eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, and is one, therefore, which is much encouraged and protected." Bispham Equity, secs. 335, 336. And again in Sheldon on Subrogation, sec. 2, it is said to be defined "as that process by which another person is put into the place of a creditor, so that the rights and securities of the creditor pass to the person who, by being subrogated to him, enters into his right. It is a legal conception, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, who is thus substituted to the rights, *remedies,* and securities of another. The party who is subro- (195) gated is regarded as entitled to the same rights, and indeed as constituting *one* and *the same* person with the creditor whom he succeeds." This statement of the doctrine closely resembles our case and fully embraces it within its terms. "Whenever, to protect his own rights, one not a volunteer pays or satisfies a debt for which another is primarily responsible, he is substituted in equity in place of the creditor, and may enforce against the person primarily liable all the securities, benefits, and advantages held by the creditor. Like contribution, subrogation rests on principles of equity and justice, and may be decreed, though no contract or privity of any kind exists between the parties." Fetter on Equity, p. 254, sec. 170. It applies as between co-obligors, says Sheldon, as well as between principal and surety and between sureties and others secondarily liable, and where a joint maker or surety of a note has paid the debt which ought, in whole or in part, to have been paid by another, he is entitled not only to the rights, but to all the *remedies,* of the creditor by way of subrogation. Sheldon, sec. 3. "This right of subrogation among parties severally bound as principals has been denied; but the usual rule is that one of several joint debtors will, as against his codebtors, ordinarily be subrogated to

the securities and means of payment of the common creditor whom he has satisfied, so as to enable him to recover from his codebtors, by means thereof, their proportional share of the indebtedness which he has discharged; and this, as in other cases of subrogation, arises rather from natural justice than from contract. Each joint debtor is regarded as the principal debtor for that part of the debt which he ought to pay, and as a surety for his codebtors as to that part of the debt which ought to be discharged by them." Sheldon, sec. 169, and many cases cited in the notes. See especially *Sterling v. Stewart,* 74 Pa. St., 445; *Moore v. State,* 49 Ind., 558; *R. R. v. Walker,* 45 N. C., 575; *Duobin v. Kuney,* 19 Oregon, 71; *Shropshire v. Creditors,* 15 La. Ann., 705; *Boyd v. Boyd,* 3 Grattan, 113; *Martin v. Baldwin,* 7 Ala., 925; *Goodall v. Went-*
(196) *worth,* 20 Me., 322; *Summer v. Rhodes,* 14 Conn., 135; *Chipman v. Morrill,* 20 Cal., 131; *Young v. Vough,* 27 N. J., Eq., 325.

Those cases decide that joint debtors or coprincipals, as between themselves and their creditors, are each liable for the whole debt, but as between themselves, each is liable only for his proportion thereof, and, as to the rest, each is surety for the others, or, to express it a little differently and more exactly, where several parties execute a joint note for a debt owing by them, each is, as to his own proportion, a principal, and as to the share of each of the other makers a cosurety—a concrete example, they say, being this: Where a note is signed by three persons, each is principal for one-third, and a cosurety for the other two-thirds; and all of the said cases agree that if any one of the coprincipals performs the whole duty and pays the entire amount, he is at once subrogated to all the rights and remedies of the principal, and is clothed with the same, without impairment or prejudice, and in the sense that he takes the creditor's place as between himself and the principal who is in default; so that he can sue, just as the creditor could have done, if the debt had not been paid; and this is so whether the obligation arose out of contract or by operation of law. *Dobbins v. Rawley,* 76 Va., 537.

The doctrine is so clearly and strongly stated by *Chief Justice Brickell,* in *Owen v. McGehee,* 61 Ala., 440, that a review of the authorities would not be near complete without the addition of his words: "It is a principle of equity, having its foundation in natural justice, that when one discharges more than his just portion of a common burden, another who received the benefit ought to refund to him a ratable proportion. The principle applies not only to the relation of principal and surety, but to that of original cocontractors, and whenever parties stand in a relation in which equality of burthen is equity between them—when one ought not to bear the burthen in ease of the others, 'as all are equally bound and are equally released'; says *Judge Story,* 'it seems but just that in such a case all should contribute in proportion toward a

benefit obtained by all, upon the maxim *qui sentit commodum* (197) *sentire debet et onus;* and the doctrine has an equal foundation in morals, since no one ought to profit by another's loss when he himself has incurred a like responsibility. Any other rule would put it in the power of the creditor to select his own victim, and, upon motives of mere caprice or favoritism, to make a common burden a most gross and grievous personal oppression.' 1 Story's Eq., sec. 493."

Some of the above-cited cases also hold that a suit in equity to enforce contribution by way of subrogation is far different from the action of *assumpsit* at law, founded upon the implied promise of the defaulting coprincipal to refund what has been paid to his use and for his ease and benefit, and that the two actions are governed by different principles, and that as the one who pays is completely substituted to all the rights and remedies of the creditor, without any assignment, which if necessary at all, is only required at law, the statute does not bar unless the note itself, which has been paid, is barred, or in those States which have a statute similar to ours (Revisal, sec. 399) providing for a special limitation of ten years as to all actions for relief not otherwise provided for in the statute, that the equitable action is governed by the latter section and not by the three-years statute relaing to express or implied contracts. *Chipman v. Webster* and other cases *supra.*

In *Batchellor v. Lawrence,* 99 E. C. L. (C. B., N. S.), 543, *Justice Byles,* who wrote the English treatise on Bills, when commenting upon and construing the mercantile law amendment act (19 and 20 Vict., ch. 97, sec. 5), which gave the creditor paying a debt the right at law to an assignment of the note to himself or a trustee, and the right "to stand in the place of creditor and to use all his remedies and, if need be, his name, upon proper indemnity," in any action or proceeding brought for the purpose of obtaining indemnification from any co-obligor or codebtor, for any advances made by him beyond his share of the liability, said: "It must be remembered that one who is liable jointly with others stands in the position of surety for their proportion of the debt, and, if he pays the whole, is entitled to call upon them for contribution. In all rational systems of law, where a surety (198) pays the debt he is entitled to the benefit of all securities and remedies which the creditor held. Such is the law of France, where law and equity are blended. . . . In England, prior to the passing of this act, a surety or codebtor, who had been compelled to pay the debt for which he was liable, could not obtain the benefit of any securities held by the creditor without having recourse to a court of equity, and not always then. The section in question, I think, meant to afford the party at least the same remedy at law as he would have had in equity. This it does in two modes: first, by enacting that he shall be entitled to have the securities assigned to him; secondly, by taking away

the technical difficulty that before existed to his making the security available *at law,* viz., that the remedy was taken away by payment. As to the first, it is clear that the provision applies not only to persons who stand in the position of sureties, but also to joint debtors. . . . I think a 'codebtor' who pays the entire debt is a surety in the sense in which that word is used here."

But the doctrine for which I contend as having existed in courts of equity before the change in our system, and even extended by many illustrious courts to cases at law, to avoid circuity of action, is most admirably stated by *Judge Johnson,* for the Court, in *Lidderdale v. Robinson,* 12 Wheaton (25 U. S.), 594: "That a surety who discharges the debt of the principal shall, in general, succeed to the rights of the creditor, as well direct as incidental, is strongly exemplified in those cases in which the surety is permitted to succeed to those rights, even against bail, who are themselves in many respects regarded as sureties. 2 Vern., 603; 11 Vesey, 22. That such would be the effect of an actual assignment made by the creditor to the surety, or to some third person for his benefit, no one can doubt. But, in the cases last cited, we find the court of equity lending its aid to compel the creditor to assign the cause of action, and thus to make an actual substitution of the sureties, so as to perfect their claim at law. This fully affirms the right to succeed to the legal standing of their principal; and after establishing that (199) principle, it is going but one step further to consider *that as done which the surety has a right to have done in his favor, and thus to sustain the substitution without an actual assignment.* And accordingly we find the *dictum* expressed in *Robinson v. Wilson,* 2 Madd., 434, in pretty general terms, 'that a surety who pays off a specialty debt shall be considered as a creditor by specialty of his principal.' If the parties in this cause be considered as claiming under assignment from the holder of the bill, and each as assignee of the claim against his coindorsee, according to the actual state of their respective interests, there can be no doubt of the priority here claimed. This subject has undergone a very serious examination in the courts of the United States, and in cases in which, as in this, satisfaction had been made by the surety without taking an actual assignment of the debt." Is this not conclusive as authority?

The same rule is declared and supported by irresistible logic and unanswerable argument in *Tyrrell v. Ward,* 102 Ill., 29. *Justice Walker,* for the Court, said: "There is not the slightest question, under the evidence in the case, that at the time Worthington recovered his judgment the property in controversy was incumbered by legal, valid, and just liens, to nearly, if not quite, the sum of $40,000, and it is fully as clear that they were discharged and satisfied by Smith with the money

of Bayard advanced for the purpose, and as a part of the loan of $50,500 which Hayes had effected for this very purpose. It is equally certain that it was the intention of Bayard, Smith, and Hayes to pay and discharge these liens, to render the trust deeds to Smith effective, and to make them a prior lien to all others in favor of Bayard. This was their clear and unmistakable purpose. All pretense that it was done for any other purpose is excluded by the testimony. Then, what effect did such a payment thus made have on the rights of the parties? Manifestly it subrogated Bayard to all rights of the prior lien-holders, precisely as they were held by them. When paid by Smith for Bayard, they were transferred to him, and equity must treat the transaction as an assignment to Bayard, as fully so as had a formal assignment been made and indorsed on the papers evidencing these debts (200) and liens. *This, every consideration of justice and good conscience demands.* It would be highly inequitable and unjust to defeat the intention of the parties, and visit so heavy a loss on Bayard, when he advanced the money expressly to remove these prior liens and perfect his own. Justice and authority not only sanction, but demand, that Bayard should be subrogated to all their rights."

In *Parsons v. Briddock,* 2 Vernon, 608, cited with approval in *Lidderdale v. Robinson, supra,* the chancellor thus stated the law: "The principal in a bond, being arrested, gave bail, and judgment is had against the bail. On a bill by the sureties, who had been sued on the original bond and paid the money, the court decreed the judgment against the bail to be assigned to them, in order to reimburse them what they had paid, with interest and costs." And in *Cottrell's case,* 25 Pa. St., 294, it was held that "subrogation being founded in principles of equity, may be enforced where there is no contract for a transfer of the security," and the Court, in its opinion, states this equitable principle with great force and conciseness: "Subrogation is founded on principles of equity and benevolence, and may be decreed where no contract or privity of any kind exists between the parties. Wherever one not a mere volunteer discharges the debt of another, he is entitled to all the remedies which the creditor possessed against the debtor. Actual payment discharges a judgment or other encumbrance *at law,* but, where justice requires it, we keep it afoot in equity for the safety of the paying surety. These principles, settled in numerous cases, which will be found collected in 2 Wharton's Digest, 612, are decisive against this appellant."

This covers our case in every aspect of it and shows conclusively that a court of equity, in such matters, disregards forms and seeks to enforce the rights of the parties according to their substance and real merits, which is but a foreshadowing, many years ago, of the spirit and purpose of our present liberal system of pleading and procedure. *Robinson v.*

Wilson, 2 Maddock's Ch., 569 (approved in *Lidderdale's case*),
(201) was decided without regard to any statute, but upon a well-recognized doctrine of equity, that a surety who pays off a *specialty* debt of the principal shall be considered as a *specialty* creditor of the principal. It was also held in *Wright v. Morley,* 11 Vesey Ch. 42, that the surety, or coprincipal who has the same right, as we have seen, may proceed in equity against his codebtor, when he has paid the whole debt, for the payment of his share or part of the liability, without any assignment from the creditor or as if an assignment had been made, and he will have precisely all of the rights and remedies of the creditor that he would have had if the formal assignment had been made. If the specialty is not barred, he is not barred.

I will now refer to two cases, which are much alike, one decided in an English court, *Parsons v. Biddick,* which has already been cited, but which is more fully reported in 11 Vesey Ch., at p. 22, and the other decided by this Court (*Carter v. Jones,* 40 N. C., 196), which is a very strong instance of the application of this equity. It is said that, "The principal had given bail in an action. Judgment was recovered against the bail. Afterwards the surety was called upon and paid, and it was held that he was entitled to an assignment of the judgment against the bail; so that, though the bail were themselves but sureties, as between them and the principal debtor, yet, coming in the room of the principal debtor as to the creditor, it was held that they likewise came into the room of the principal debtor as to the surety. Consequently, that decision established that the surety had precisely the same right that the creditor had, and was to stand in his place. The surety had no direct contract or engagement by which the bail were bound to him, but only a claim against them through the medium of the creditor, and was entitled only to all his rights. There are other cases establishing the same principle."

In *Carter v. Jones, supra,* it was held that where a guarantor had paid the entire debt, he was fully subrogated in equity to the rights and remedies of the creditor to whom he had paid it, as against the debtor *and his sureties,* and that a court of equity, if not a court of law, would
regard the transaction as a sale and assignment of the note to the
(202) paying guarantor. This is a strong and irresistible statement of the law in favor of the paying debtor. He is considered as a purchaser of the note, and entitled to sue upon it, for equity, as it is said, disregards forms and seeks to do justice, according to the very right of the matter.

It is suggested in *Sherwood v. Collier,* 14 N. C., 381, the sheet anchor of the majority, because *Judge Ruffin* said it involved an absurdity for the debtor to sue himself, that the debt was paid and he could only

sue on the promise, implied from his payment, that he should be reimbursed. But the plaintiff does not sue himself, at least under our present system. He simply sues his debtor, who has failed to comply with his promise to pay his ratable part, the plaintiff having already paid his, and having satisfied the debt, as between debtor and creditor, all left due being that which, in equity and good conscience, comes to him by the default of his coöbligor. The obligation of the paying debtor has been satisfied and there is nothing due save what his defaulting fellow owes to him, and for this he must sue the latter, being under no obligation, as between them, to pay any part of it; but his codebtor being under the duty, in law and equity, to pay to his faithful coprincipal that part of the debt he promised to pay. Equity then steps in and compels the defaulter to do justise without regard to the mere forms of law or the legal title.

It is not to be denied that courts generally have held, at common law and under the statute, that a surety, or coöbligor—which is the same thing—who pays off a specialty debt is to be considered, in equity at least, and in all respects, as a specialty creditor of his principal. This was so held in *Robinson v. Wilson,* 2 Maddock Ch., 569. There is an implied contract between the principal and the surety, or between coprincipals, that if one of them shall pay more than his share, the other shall be entitled to an assignment of the bond or other security, or shall have, in law and equity, precisely the same remedies as the creditor would have if the debt had been paid to him. *Robinson v. Wilson, supra; Barrows v. McWhann,* 1 Dess Eq. (S. C.), 409. In the last cited case, which is very much in point, the Court held that, in order to preserve and protect the right, legal and equitable, of the paying coöbligor, an (203) assignment would be decreed, or the court would proceed as if it had been made, and that the limitation of seven years as to the implied promise did not apply, but that in regard to equitable actions; and it was further held that in order to enforce this clear equity the court would order any payment or satisfaction of the debt entered upon the record to be canceled, and would decree that the obligor, who has paid his part and also the share of his coöbligor, should stand literally in the shoes of the creditor, as to his legal and equitable rights, and with the priority and full privilege of a specialty creditor in every regard, if the debt which he paid was evidenced by an instrument under seal. *Drake v. Coltrane,* 44 N. C., 300. This was more distinctly and sharply decided in *Stokes v. Hodges,* 29 S. C. (11 Rich. Eq.), 135, it having been ruled that the paying debtor would be considered as a specialty creditor, as to rights and remedies, in all respects; and is this not in accordance with a just and perfectly fair consideration of the rights of him who has borne, not only his own share, but the share of others equally liable?

Howell v. Reams, 73 N. C., at marg. p. 393, *Judge Bynum* says: "The cosurety who pays the bond debt for which the other is equally bound shall be deemed a bond creditor in the administration of the estate of the deceased cosurety. The same bond which makes them the bond debtors of the obligee, by force of the statute binds them mutually to contribution. In carrying out the beneficial purposes of the statute there can be no reason why they should not occupy the same relation to each other that they do to the principal, instead of becoming by the same act of payment the bond creditors of the principal and only the simple contract creditors of each other."

But however the law may have been before the adoption of our Code system, it cannot be successfully contended that now there is any reason for adding to or upholding the old and technical rule prevailing in courts of common-law jurisdiction. We have jurisdiction both in law and equity and can decree according to the equitable merits of the (204) case, without resorting to two courts. This doctrine is well settled in *Dunlop v. James,* 174 N. Y., 411, as follows: "In modern times courts of law have dealt with subrogation as they would with assignments, and, when the right of action to which the plaintiff asks to be subrogated is a legal right of action, a court of law may treat a plaintiff who is entitled in equity to subrogation as an assignee, and allow him to maintain an action of a legal nature upon the right to which he claims to be subrogated." In *Bledsoe v. Nixon,* 68 N. C., 521 (cited in the opinion of the Court), *Judge Rodman* strongly intimates that the harsh rule by which a surety or coöbligor who pays off a bond must bring his action within three years on the implied promise, is confined solely to *courts of law,* and does not apply to the equitable remedy. This was so held because the right of the obligor, who pays the entire debt, to recover from his coöbligor, equally bound for the debt, depends at law, without an assignment, upon the implied promise, which being a matter arising out of contract, is barred in three years; but not so where the obligor elects to sue in equity, for in that case the ten-years statute applies, as the right is not based upon contract, but arises out of equitable principles, and it has been so expressly held in States having statutes like ours. *Zuellig v. Hemerlie,* 60 Ohio St., 27 (71 Am. St. Rep., 707); *Neal v. Nash,* 23 Ohio St., 483. And so it was held in *McAden v. Palmer,* 140 N. C., 258, that section 399 of the Revisal, providing that actions for equitable relief, or in cases where the cause of action is equitable in its nature, shall be brought within ten years after the cause of action accrues, applies to all actions of an equitable nature; and the very next section of The Code (Revisal, sec. 400) not only per-

mits but requires that all actions shall be brought by the real party in interest, thereby abolishing forever the necessity for suing in the name of a nominal plaintiff to his use.

But the express agreement of the parties in this case is to be considered. Can any one doubt that what they meant was that the plaintiff should pay the whole debt and rely, not upon the defendant's implied promise to reimburse him, but upon the note itself and the latter's obligation thereunder to pay? In other words, that by the express contract the plaintiff should take the place of the creditor in the (205) note as to the defendant's share of the obligation, and be entitled to *all* of the creditor's rights and remedies. In a case exactly similar, it was held that the obligor, who paid all of the debt, was entitled in law and equity to the rights of the creditor in the note, to the extent of the defaulting obligor's part, and with reference to this the Court said: "Whatever may formerly have been held as to the effect of the transaction as above stated, the recent decisions of this Court, paying more regard than formerly to the intention of the parties and to the equities of the case, have determined that the payment, or, as it may rather be called, the advance to the creditor by one of two joint obligors of a sum equal to the entire demand, under such an agreement as is above stated, does not extinguish the entire obligation, but may leave it in force as furnishing a remedy for doing justice to the obligor who has made the advance. In other words, one coöbligor is allowed to purchase the remedy of the obligee against the other obligor, and to enforce it at law in the name of the obligee for procuring contribution or full payment, as he may be entitled, to the one or the other." *Smith v. Latimer,* 54 Ky., 75.

Is not this case directly in point, and is it not in consonance with justice and right? If it has never received the sanction of the law in this State, and I think it has, is it not quite time that we were accepting it as the true and only just doctrine?

I again quote from that case, at p. 79, as it so clearly and strongly states the only true principle, and with direct application to the facts of this case: "As it is an obvious principle of equity long recognized and enforced as such, that the payment of an obligation by one who is a mere surety, whether so originally or made so by subsequent facts, entitles him to subrogation to the rights of the obligee for his own indemnity, though there be no agreement to that effect, we do not see why an express agreement to the same effect, made at the time of payment, and therefore entering into and qualifying that fact, may not be regarded and enforced by a court of law. The case of assignments of choses in action, which though one considered by courts of law as wholly (206) inoperative against the assignor, have under the influence of equitable principles, come to be respected and enforced by those courts

in actions in the name of the obligee, affords an example, and, by analogy, a precedent for the advances towards equity made by this Court in giving effect to agreements between the holder of a note or bond and one of the obligors, with respect to the consequences of a payment made by him."

We must consider that the obligor or surety, who pays the debt, has three remedies against his coöbligor:

1. He may sue in *assumpsit* on the implied promise, or, in this case, on the express promise, when three years inaction will be a bar.

2. He may sue on the specialty, when ten years is the limit.

3. He may sue upon his equitable cause of action, his right being founded solely upon the equity, when ten years will bar under Revisal, sec. 399.

It is true, *Judge Ruffin* says, in *Sherwood v. Collier,* the idea that a man can sue himself or receive assignment of his own debt involves an absurdity, but it does not apply to this case. He is not suing himself, as the cases I have cited clearly show, but is proceeding by action on the specialty, or by the equitable action to recover from the defendant his fair proportion of the joint liability—that which he promised to pay, and which he should be made to pay. It is something this plaintiff does not owe, but which is owing to him by the defendant. We should not be subtle or astute to apply the statute in his case and bar the action, for if there ever was a just claim, this is one, and we cannot deny the relief the plaintiff seeks, even if we should proceed under the hoary principles of the ancient law, which existed in the days of the "learned Mr. Tidd," when a litigant's success depended more upon the comparative wits of the opposing special pleaders than upon the real merits of the case.

It cannot be doubted that the request of the defendant to the plaintiff, that the latter pay the money to the creditor and hold the note until he could pay his share, and the indorsement *without recourse,* meant but one thing, that the plaintiff should be substituted not only to all (207) the rights in, but to all the remedies upon the note which belonged to the creditor—that he should step into his shoes. It was not intended that the note should be satisfied as between the coöbligors, but kept alive for the plaintiff's benefit. Why indorse *without recourse,* if the note was not to be kept afoot?

We must not forget that *Sherwood v. Collier* was an action at law—"debt upon a bond"—and *Judge Ruffin,* a great chancellor, was not deciding what would have been the right of the plaintiff in equity.

It may be said that Sykes was not a party to the express agreement, but this makes no difference. Equity will compel him to assign or to become a party for the purpose of protecting the obligor, who has paid him, giving him, of course, adequate indemnity against costs. How is he

hurt by this course? and, under the former practice it was quite a usual one. But Sykes did know of the arrangement and assented to it, as the testimony of Liverman shows. It must be taken as true, as the judge charged peremptorily, that the claim was barred. In *Davison v. Gregory,* 132 N. C., 389, *Justice Connor,* speaking for the Court, observes the distinction we have made, and says that while, *at law,* the paying obligor must have the legal title to the specialty in order to sue, in equity this rule is very different, for there he is considered as having acceded by subrogation to all the rights of every kind that the creditor had before the payment and to all his securities, "without a formal assignment," citing and approving *Carter v. Jones, supra; York v. Landis,* 65 N. C., 535; *Holden v. Strickland,* 116 N. C., 185; to which may be added *Wilson v. Bank of Lexington,* 72 N. C., 621, and *Neely v. Jones,* 16 W. Va., 640, both citing and approving *Carter v. Jones, supra.* Commenting upon the last named in *Neely v. Jones, supra,* the Court says that the headnote is not justified by the decision actually rendered, and, moreover, is not supported by the authorities (and I fully concur in that criticism); but the Court further says that this Court was right in holding that the surety or coöbligor should, in equity, if not at law, be regarded as a purchaser of the note, or so much thereof as was not his just share of the liability, as against the other and default- (208) ing obligor. The case is a valuable one and decides, after unanswerable reasoning, all that is necessary to support my position. It holds that if there is an express or implied agreement for an assignment of the specialty to be gathered from the nature of the transaction, it would amount to an equitable assignment, though no formal assignment was ever executed. The creditor in the transaction simply retires and the paying obligor steps into his shoes, fully clothed and panoplied with all his rights, remedies, and powers of every kind and description. He becomes himself the creditor *pro tanto* of his defaulting coöbligor. This is the modern, if not the ancient doctrine, backed by an immense weight of authority. *Cuyler v. Ensworth,* 6 Paige, 32; *Ohrem v. Wrightson,* 51 Md., 34; *Lumpkin v. Mills,* 4 Ga., 343; *Townsend v. Whitney,* 75 N. Y., 425; *McDaniels v. Lee,* 37 Mo., 204; *N. B. I. v. Hathaway,* 134 Mass., 69.

In *Mason v. Pierron,* 63 Wis., 239, it was said: "The courts of this country, however, have very generally adhered to the ancient rule, and hold that although the lien or obligation be extinguished at law by the payment of the debt, yet, for the benefit of the surety, it continues in equity in full force. The cases which illustrate the above propositions are very numerous in both countries. A great many of them will be found cited in Story's Equity Jurisprudence, in the notes to sections 492, 493, 495, 496, 499, a, b, c; 3 Pom. Eq. Jur., secs. 1418, 1419, and notes."

The same statement of the law will be found in *Cuyler v. Ensworth, supra:* "According to the modern doctrine on this subject, the surety, by the mere payment of the debt, and without any actual assignment from the creditor, is, in equity, subrogated to all the rights and remedies of the creditor for the recovery of his debt against the principal debtor or his property, or against the cosureties or their property, to the extent of what they are equitably bound to contribute." So in *N. B. I. v. Hathaway, supra,* the Court held that the paying obligor "should be allowed to use the creditor's name, or the security the creditor has obtained, to enforce the right which he has against the cosurety by
(209) reason of the payment which he has made on his account." And, finally, in *McDaniels v. Lee, supra,* the Court said: "It is a well-settled principle in courts of equity that when they once acquire jurisdiction over the subject-matter they will retain it until full justice has been done between the parties. When a party is forced to come to them for relief, they will not grant a part of his remedy, and drive him to a court of law for the balance; but they will retain jurisdiction of the cause until full and ample justice has been done."

We could cite cases almost without number to the same effect, and, when the question is properly considered, there is no discordant note. The case of *Neal v. Nash,* 23 Ohio St., 483, expressly holds that where it is understood that the payment shall not operate as a satisfaction, but the note shall be kept alive for the benefit of the paying debtor, or, if necesssary, that an assignment shall be made of it, the debtor may sue directly upon the note or in equity, and under a Code like ours, though prescribing six instead of three years, on express or implied contracts, as the limitation, it was held that the six-years statute did not apply, but the ten years, the action being for equitable relief.

There is no conflict whatever between the views herein expressed and the case of *Tripp v. Harris,* 154 N. C., 296. The authorities cited in that case related to actions at law, and in *Tripp v. Harris* it was simply held that the paying debtor was subrogated to all rights of the creditor in the mortgage or collateral security, which was sufficient for the decision in the case. If there are any expressions in the cases cited which seem to be the other way, they may be accounted for upon the ground that the distinction between the rights of the paying debtor in a court of law and in a court of equity has not been kept in mind, and, besides, they were mere *dicta.* Every case in which it is said that the law requires a formal assignment to be made was an action at law and not a suit in equity.

The same reason for holding the note to be paid applies equally to the collateral security, for it was given to secure the note, or debt
(210) represented by it, and not the new debt arising out of the implied

promise of the surety or coöbligor to reimburse the party who paid the money for him. The principal debt must be kept on foot in order to save the security for the benefit of him who paid the money, and he must be subrogated to the same rights and the same debt the original creditor had. It is far better and more logical to hold that an equitable right in the note passes to the paying debtor, by virtue of the payment, which the law will make effectual by treating the assignment as having been made, or compelling the creditor to assign to a person designated by the debtor, who paid the money for his use and benefit. Any other doctrine will work great injustice, which the law seeks to avoid.

My conclusion is that the judgment should be set aside and a new trial awarded for the error of the judge in his charge as to the statute of limitations.

JUSTICE BROWN concurs in dissenting opinion of WALKER, J.

Cited: Peele v. Powell, post, 565.

J. R. WILEY v. BROADDUS & IVES LUMBER COMPANY.

(Filed 11 October, 1911.)

1. Standing Timber—Timber Deed—Unilateral Contracts—Time for Cutting—Expiration—Title to Uncut Timber.

One who has purchased and had conveyed to himself growing timber, with the privilege of removing it within a given time, is under no obligation to cut and remove the timber, to that extent the contract being unilateral; and upon his failure to do so within the stated period, his right or estate therein is forfeited, and it inures, as a rule, to the owner of the land.

2. Standing Timber—Timber Deeds—Contracts—Interpretation.

In construing a deed conveying the timber interests in lands, the intent of the parties as embodied in the entire instrument controls, and each and every part must be given effect, if it can be done by any fair and reasonable interpretation.

3. Standing Timber—Timber Deeds—Vendor to Cut and Deliver—Bilateral Contracts—Breach—Damages.

When it appears from a deed conveying timbered interests in land, under the rules of interpretation applicable, that the vendor was to cut and deliver the timber at the log bed of the vendee, and the vendee was to pay therefor a certain price per thousand feet, and also by express provi-

sion that a certain sum first therein referred to as the consideration was only an advancement on the contract price and to be accounted for as the lumber was delivered, the contract is bilateral, and the vendor is entitled to recover such damages as he may have sustained by reason of the vendee's breach thereof.

4. Same—Consideration—Questions for Jury.

In an action for the breach by defendant of a conveyance of all timber standing upon certain described lands, wherein the plaintiff was to cut and haul the timber to defendant's log bed, there was evidence for the plaintiff tending to show that he had sold the pine timber on the land for a less price than it was worth by itself because of gum timber thereon which was included in the sale; and that after receiving the pine, the defendant, in breach of his contract, refused to receive the gum timber, to plaintiff's damage, for that the gum timber was worth less than the contract price, and, by reason of the removal of defendant's tramroad, built for the purposes of the conveyance, was of little value. The evidence of defendant tended to contradict that of plaintiff, and to show the damages to be much less than the amount claimed: *Held*, the amount of damages plaintiff sustained was properly submitted to the jury, under a correct charge of the judge in this case.

5. Standing Timber—Timber Deeds—"All Timber"—Interpretation of Contracts.

Defendant purchased "all timber" on plaintiff's land under a contract wherein plaintiff was to cut and deliver the timber at defendant's log bed: *Held*, under a correct interpretation of the contract in this case, that the words "all timber" did not include such timber as was of no value, but only such as was fit to be used and sawed and put into boards for ordinary purposes for which timber of that character could be used by sawmill men.

(211) APPEAL from *Ferguson, J.*, at February Term, 1911, of CRAVEN.

Action to recover damages for breach of contract concerning the sale of timber and cutting and logging same.

It appeared that on 12 May, 1906, plaintiff and another sold
(212) to defendant "all the pine and gum timber of every description above the size of 12 inches at the base on a certain tract of land; the written contract of conveyance and sale providing that defendant should have full time to have said timber cut and removed from said land, and extending in any event for such purpose to the full term of three years. The instrument also conveyed to defendants, the grantees, the privilege to have a right of way over the grantors' lands and to erect thereon necessary tramroads, etc., for the purpose of carrying out the timber; and there was further provision that the grantors were to cut and deliver said timber at the log bed of defendants' tramroad and to be paid therefor at the rate of $4 per thousand, etc. It was admitted that the present plaintiff was the owner of one-half interest in the

land and timber and the contract concerning same and that defendants had acquired the rights and interests of the other parties.

There was allegation, with evidence on part of plaintiff, tending to show that plaintiff was ready, able, and willing to cut and deliver all the timber as provided for by the contract, and that defendant, after having received the pay for the greater part of the pine timber, wrongfully and in breach of the contract had refused to receive the gum timber and had torn out and removed the tramroad, etc., to plaintiff's damage.

Recovery was resisted on part of defendant on the ground, chiefly, that the contract only conveyed the timber, giving the right to remove the same in three years, and that no breach thereof was committed in leaving part of the timber on the land.

(2) That in any event the damages would be only nominal, as the timber not taken would remain on the land and become property of plaintiff.

On issues submitted, the jury rendered the following verdict:

"1. Were plaintiffs at all times able, ready, and willing during the term of the contract to perform the contract, as alleged? Answer: Yes.

"2. Did defendant fail and refuse to perform the contract on its part, as alleged? Answer: Yes.

"3. If so, what damage is plaintiff entitled to recover there- (213) for? Answer: $300, being for the plaintiffs' half, without interest."

Judgment on the verdict, and defendant excepted and appealed.

Guion & Guion and W. D. McIver for plaintiff.
Moore & Dunn for defendants.

HOKE, J., after stating the case: There is no reversible error shown in the record. Defendant is right in the position that when one has bought and paid for a lot of growing timber, and same has been conveyed him with the privilege of removal within a given time, the contract as to the removal is so far unilateral that the purchaser is not obligated to cut and remove the timber. If he fails to do so within the time, his right or estate therein is forfeited and inures as a rule to the owner of the land. We have so held in two cass at the last term. *Hornthal v. Howcott,* 154 N. C., 228; *Bateman v. Lumber Co.,* 154 N. C., 248.

But the contract in question here is not of that character. Applying to it the accepted rule of construction, "That the intent of the parties as embodied in the entire instrument is the end to be attained, and that each and every part must be given effect, if this can be done by any fair and reasonable interpretation" (*Davis v. Frazier,* 150 N. C., 451), a persual of this entire instrument will disclose that while it begins by

reciting $450 as the consideration, the controlling stipulation of the contract provides that the parties plaintiff were to cut and deliver "said timber" at the log bed, and the parties defendant were to pay for the same the sum of $4 per thousand "feet," and it is also expressly provided that the $450 first referred to as the consideration was only an advancement on the contract price and to be accounted for as the timber was delivered. The contract in this instance was therefore bilateral in its obligations, and the verdict has established that there was a breach of same on part of defendant giving plaintiff a right to recover.

On the issue as to damages there was testimony from plaintiff tending to show that he had bargained the pine timber at a less price than (214) it was worth by itself, because of the fact that he had sold the gum with it, and this last, which was what defendant had failed and refused to receive, was not by itself worth the contract price, and by reason of the removal of defendant's tramroad was of very little value. There was testimony on part of defendant on this issue in contradiction of that of plaintiff, and also tending to show that plaintiff's damage was not near so much as he claimed; but the question was submitted to the jury under a correct charge, and we find no valid reason for disturbing their verdict.

After laying down the general rule of damages and giving special illustration in aid of its application, the court further said: "That will explain what I mean when I say he is to have $4 per thousand, less the value of the timber as it stood upon the ground, whatever you may find that to be, and less whatever you find from the evidence the expense would be to deliver—to cut and deliver it to the tramroad, the place stipulated in the contract. But understand, that as the plaintiff is not the only one interested in the quantity of timber, he would be entitled to only half, because the other half is not his, and he would not be entitled to recover for that.

"Something has been said about the character of the timber. I charge you that such timber as was not of any use, or no value, would not be in the contemplation of the parties to the contract, and would not be included in the description of 'all timber.' And yet it would not mean such timber only as was first quality timber; it would mean such timber as could be used and sawed up and put into boards for ordinary purposes for which gum timber can be used by sawmill men."

We are of opinion, as stated, that the cause has been fairly and correctly tried and that the judgment in plaintiff's favor should be affirmed.

No error.

Cited: Hendricks v. Furniture Co., post, 574; *Byrd v. Sexton,* 161 N. C., 572.

(215)

JOHN A. ROBERTSON v. T. W. HALTON.

(Filed 11 October, 1911.)

1. Fraud—False Warranty—Deceit—Two Transactions—Damages — Special Loss.

The plaintiff exchanged a bay mare with defendant for his mule and $20, the difference in value between the two animals, and finding the mule did not come up to representations made by the defendant, the latter substituted a mare for the mule. In an action for deceit and false warranty, as to both transactions: *Held*, the measure of damages is the difference between the value of the last mare, as she was and as she was represented to be, or as, under the contract or representation, she should have been; and that to permit a recovery upon the false warranty and deceit as to the mule was to mulct defendant twice in damages unless the plaintiff had shown some special loss in addition to the ordinary damages which result in such cases from the deceit or false warranty.

2. Fraud—Evidence—Deceit in One Transaction—Intent—Scienter.

In an action for deceit and false warranty in the exchange of a mule for plaintiff's mare, and likewise in the substitution of a mare for the mule upon demand of plaintiff that defendant make good his representations, the deceit or false warranty in the first transaction, if established, will be evidence of the defendant's intent, or *scienter* in the last, as the two are so closely connected with each other as to render the evidence admissible to show fraud in the second exchange.

3. Fraud—False Warranty—Deceit—Issues—Punitive Damages.

When deceit and false warranty are alleged in the exchange of a mule for a mare and in the subsequent substitution by defendant of a mare for the mule, and there is no element of punitive damages involved, ordinarily two separate issues should be submitted to the jury, one each as to warranty and deceit and another as to damages, the damages for the deceit and for the false warranty being the same.

4. Fraud—False Warranty—Vendor and Vendee—Recommendation of Wares —Evidence—Questions for Jury.

While a statement made by the seller in recommending his goods may not ordinarily amount to a warranty, it may be otherwise when the statement takes the form of an opinion or estimate of quality or value, and it is doubtful whether or not a warranty was intended, for then the jury should decide whether a warranty was, in fact, intended.

5. Same—Questions of Law.

When the words or statements made by the seller as to the value of the wares he is selling, etc., and which induced the purchaser to buy, clearly show a warranty, it becomes a question of law for the court to so declare, without the aid of the jury.

6. Fraud—Deceit, Elements of—Evidence.

To constitute deceit there must be an untrue statement, which is knowingly made, or the person making it must be consciously ignorant whether

it be true or not, with the intent that the other party shall act upon it, or it should be made under circumstances apparently fitted to induce him to do so, in reliance upon it, in the manner contemplated or manifestly probable, so that he thereby suffers damage; and in order to maintain the action it is sufficient to show that the defendant practiced a deception with the design of depriving the plaintiff of some right, profit, or advantage, and to acquire it for himself or avail himself of it in some way. *Whitmire v. Heath*, 155 N. C., 304, cited and approved.

(216) APPEAL by defendant from *Ferguson, J.*, at February Term, 1911, of CRAVEN.

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

Simmons & Ward for plaintiff.
Moore & Dunn for defendant.

WALKER, J. This action was brought to recover damages in the sum of $125 for deceit and false warranty in a horse trade, and was tried upon issues, which, with the answers thereto, are as follows:

1. Did the defendant procure the exchange of his mule for plaintiff's mare by fraud and misrepresentation, as alleged in the complaint? Answer: Yes.

2. If so, what damages is plaintiff entitled to recover by reason thereof? Answer: $50.

3. Did defendant procure the exchange of his mare for the mule swapped him by plaintiff by fraud and misrepresentation, as alleged in the complaint? Answer: Yes.

4. If so, what damages is plaintiff entitled to recover by reason thereof? Answer: $75.

(217) Plaintiff alleged that he was fraudulently induced by the defendant to exchange a bay mare he owned and valued at $200 for a mule owned by the defendant, and $20 as the difference in the value between the two animals, with the understanding that the mule could be returned and another mule substituted, if desired by plaintiff. That in order to induce the plaintiff to trade, the defendant warranted the mule in several respects and made certain false and deceitful representations to him as to the fine qualities of the mule. When the plaintiff discovered that he had been deceived, he told the defendant that he was not satisfied with the trade and that he must make his representations good, whereupon the defendant said that he had a good mare he would substitute for the mule, and at the same time made certain warranties and deceitful representations as to her fine qualities. Judgment was entered upon the verdict, and the defendant appealed.

It will be observed at a glance, by any one reading the evidence sent up, that this case has been tried upon a wrong theory. Why should the defendant be twice mulcted in damage? The trade was, at first, that they should exchange the plaintiff's mare for the mule and $20. If there had been no further exchange or negotiation, and there was a breach of warranty, as to the mule, or a deceit practiced upon the plaintiff, he would be entitled to recover this difference between the value of the mule as he was and as he was represented to be, or as, under the contract or the representation, he should have been. When they again traded, the defendant's mare took the place of the mule, and why is not the measure of damages the difference between the value of the defendant's mare, which he substituted for the mule, as it was and as it should have been? The defendant's mare took the place of the mule, and, in this way, any damages for deceit in the exchange of the mule and $20 "to boot" for the plaintiff's mare were satisfied. If the mare, which was substituted for the mule in the trade, had answered the terms of the warranty or representation, the plaintiff surely could not recover damages for the first deceit, unless he had suffered some special loss in addition to the ordinary damages which result in such cases from the deceit or false warranty, as in *Dushane v. Benedict,* 120 U. S., 630, where the war- (218) ranty or representation was that certain rags, which the plaintiff sold to the defendant, were clean and in sanitary condition, and they turned out to be infected with germs of smallpox, and consequently the disease broke out in the defendant's mill and spread among his employees, causing him great loss and damage, and the Court held that the defendant was entitled to recover damages for the wrong, commensurate with loss, either upon the warranty or the count for deceit; and in this connection, *Justice Gray,* who wrote the opinion, said: "The damages recoverable for a breach of warranty, or for a false representation, include all damages which, in the contemplation of the parties or according to the natural or usual course of things, may result from the wrongful act. For instance, if a man sells hay or grain for the purpose of being fed to cattle, or such as is ordinarily used to feed cattle, and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury. *French v. Vining,* 102 Mass., 132; *Wilson v. Dunville,* 4 L. R. Ir., 249, and 6 L. R. Ir., 210. So, if one sells an animal, warranting or representing it to be sound, which is in fact infected with disease, he is responsible for the damages resulting from a communication of the disease to the buyer's other animals; either in an action for tort for the false representation (*Mullett v. Mason,* L. R. 1 C. P., 559; *Jeffrey v. Bigelow,* 13 Wend., 518; *Faris v. Lewis,* 2 B. Mon., 375; *Sherrod v. Langdon,* 21 Iowa, 518; *Marsh v. Webber,* 16 Minn., 418); or in an action on the warranty, either in tort (*Packard v. Slack,*

32 Vt., 9; *Smith v. Green,* 1 C. P. D., 92), or even in contract (*Black v. Elliott,* 1 Fost. and Fin., 595; See, also, *Randall v. Newson,* 2 Q. B. D., 102)."

There is no evidence, now, in this case of any damage of that kind, and the ordinary rule prevails, which may be thus expressed: The difference in actual value between the article as warranted and the article as delivered is all that can be properly recovered as damages, unless in exceptional cases of special damages. Whatever that difference, in the actual circumstances of the case, is shown to be, is the rule
(219) and measure of damages, where articles delivered are not what the contract calls for. *Marsh v. McPherson,* 105 U. S., 709.

While the court seems to have given the correct instruction in regard to the measure of damages—that is, the difference between the value of the mare as represented by the defendant and its real value—the jury were permitted, under the direction of the court, to assess damages as to both transactions, the first swap and the second or substituted one. This was error. The charge of the court is also very meager, and as to the deceit, it omitted an essential element, the *scienter.* There was abundant proof of a *scienter,* but it was not correctly applied, if considered at all in the charge, and for that reason we have called attention to the law, as stated in former decisions of this Court, and it will be well in such cases to be guided by them.

The deceit in the first transaction, if established, will be evidence of the intent or *scienter* in the last, as the two are so closely connected with each other, and such evidence is admissible to show fraud in the second exchange, under the rule in *Brink v. Black,* 77 N. C., 59, and subsequent cases approving it; *Gilmer v. Hanks,* 84 N. C., 317; *Coble v. Huffines,,* 133 N. C., 422. A case directly in point is *S. v. Weaver,* 104 N. C., 758. But the first transaction is not a separate cause of action, and is only relevant to the controversy as tending to show the deceitful purpose in the last exchange.

We decide, therefore, that there should have been two separate issues, one as to the warranty and the other as to damages, unless the case is so presented at the next trial that the rule of damages for the deceit and the one for the warranty will not be the same, in which case there may be an issue, as to the damages, for each cause of action; but we hardly see how this can be, upon the evidence as it now appears. When there are no punitive damages, one issue as to damages, in cases like this, is generally sufficient, unless there is more than one cause of action so relating to different transactions as to entitle the plaintiff or other party to an assessment of damages upon each of them.

(220) In regard to the nature of the warranty or deceit, much must

depend upon the facts and circumstances of each case as it is presented. We have stated some general rules, though, which will serve as guides to us in such matters.

1. When the statements made by sellers amount to nothing more upon their face than a mere commendation of the goods which is usual in sales—a puffing of wares, as it is sometimes called—there is no warranty or deceit. *Cash Register Co. v. Townsend,* 137 N. C., 652 (70 L. R. A., 349).

2. Where the statement takes the form of an opinion or estimate of value or quality, and it is doubtful whether or not a warranty was intended, the question should be submitted to the jury to say whether one was in fact intended. *Unitype Co. v. Ashcraft,* 155 N. C., 63, citing authorities. In *McKinnon v. McIntosh,* 98 N. C., 89, it was said upon a kindred question, relating to a sale of fertilizers: "The defendant had a right to have the question whether the force and effect of the affirmation of the plaintiff in regard to the quality of the fertilizer did not constitute a warranty of the quality. If the vendor represents an article as possessing a value which upon proof it does not possess, he is liable as on a warranty, express or implied, although he may not have known such an affirmation to be false, if such representation was intended, not as a mere expression of opinion, but the positive assertion of a fact upon which the purchaser acts; and this is a question for the jury. *Thompson v. Tate,* 5 N. C., 97; *Inge v. Bond,* 10 N. C., 101; *Foggart v. Blackweller,* 26 N. C., 230; *Bell v. Jeffreys,* 35 N. C., 356; *Henson v. King,* 48 N. C., 419; *Lewis v. Rountree,* 78 N. C., 323; *Baum v. Stevens,* 24 N. C., 411."

3. Where, though, the words or language clearly show a warranty, it becomes a question of law for the court, without the aid of the jury, to so declare, as in *Unitype Co. v. Ashcraft, supra; Machine Co. v. Feezer,* 152 N. C., 516; *Audit Co. v. Taylor,* 152 N. C., 272.

4. In order to constitute a deceit, several facts must concur and be established by the proof. There must be a statement made by the defendant, (*a*) which is untrue; (*b*) the person making the statement, or the person responsible for it, either must know it to be (221) untrue or be culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not; (*c*) it must be 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 must act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffer damage. 71 S. E. Rep., No. 2, p. 62, second column; Pollock on Torts (7 Ed.), 276; *Whitehurst v. Ins. Co.,* 149 N. C., 273; *Unitype Co. v. Ashcraft, supra.* The gist of the action for deceit is fraudulently producing a false impression upon the mind of the other

party by words or acts, or concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff. *Stewart v. Ranch Co.,* 128 U. S., 383. In order to maintain the action, it is sufficient to show that the defendant practiced a deception with the design of depriving the plaintiff of some right, profit, or advantage, and to acquire it for himself or avail himself of it in some way. *Bank v. Petrie,* 189 U. S., 423-425. In *Whitmire v. Heath,* 155 N. C., 304, the three requisites of an actionable deceit were thus stated: "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," citing numerous cases, and especially *Lunn v. Shermer,* 93 N. C., 164; *Black v. Black,* 110 N. C., 398; *Ashe v. Gray,* 88 N. C., 190 (same case on rehearing, 90 N. C., 137), all actions against horse dealers.

5. A warranty is contractual, but may be joined with a cause of action for deceit, which is a tort. The old and new mode of pleading is clearly stated in *Ashe v. Gray, supra,* and quoting from the opinion of the Court (by *Chief Justice Pearson*) in *Bullinger v. Marshall,* 70 N. C., 520, *Chief Justice Smith* says: "If there be a warranty of soundness in the sale of a horse, the vendee may sue upon the contract of warranty, and the justice of the peace has jurisdiction, or may declare in tort for a false warranty and add a count in deceit, in which case a justice of the peace has not jurisdiction, the plaintiff being per-
(222) mitted to declare collaterally in tort for a false warranty in order to enable him to give in a count for the deceit, which, of course, was in tort." *Ashe v. Gray,* 88 N. C., 192. See, also, *S. c.,* on rehearing, 90 N. C., 137.

For the error noted by us a new trial upon all the issues will be had in the lower court.

New trial.

Cited: Hodges v. Smith, 158 N. C., 263; *Fields v. Brown,* 160 N. C., 299; *Winn v. Finch,* 171 N. C., 276.

HARVEY C. HINES v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 11 October, 1911.)

1. Railroads—Crossings—"Look and Listen"—Injury After Crossing—Negligence—Contributory Negligence—Nonsuit.

When the negligence complained of in an action against a railroad company for injuring plaintiff's horse and wagon after he had crossed the railroad track at a public crossing was that by keeping a proper lookout and in the evercise of reasonable care the defendant's engineer could have avoided the injury, the fact that the plaintiff failed to "look and listen" for the approaching train before attempting to cross has no bearing upon the questions of either negligence or contributory negligence.

2. Railroads—Negligence—Evidence—Contributory Negligence—Nonsuit.

Under conflicting evidence, when there is a motion by defendant to nonsuit, the evidence will be considered in the view most favorable to plaintiff; and when it appears from the evidence of the latter that the injury complained of was caused by the backing of his horse, which had become frightened at the approaching train, and a consequent injury to the horse and the wagon hitched to him, by a collision with the defendant's slowly moving train, and that by keeping a proper lookout and in the exercise of ordinary care the defendant's engineer could have avoided the injury, the question raised is one for the jury, unless it appears that, as a matter of law, the plaintiff by his own negligence contributed to the injury complained of.

3. Railroads—Evidence — Contributory Negligence — Continuing Act — Nonsuit.

When there is evidence that the engineer on defendant's train was negligent in not keeping a proper lookout or in the exercise of ordinary care, in consequence of which the plaintiff's horse backed the wagon to which it was hitched upon defendant's slowly moving train, to plaintiff's damage, it would bar the plaintiff's right to recover if shown that, after the horse began to back, the driver was negligent, and this negligence continued to the time of the injury, under the surrounding circumstances and conditions.

APPEAL by plaintiff from *Peebles, J.*, at March Term, 1911, (223) of LENOIR.

This action is to recover damages for injury to the horse and wagon of the plaintiff.

The plaintiff alleges that the injury occurred on 16 December, 1909, and was caused by the negligence of the defendant, which is denied.

The wagon was loaded with apples, and the injury occurred about 8 o'clock A. M., at the first crossing after leaving the depot at Kinston.

There is evidence that the driver did not look and listen before entering upon the track, and that he saw the train of the defendant as he reached the track.

It is admitted that the horse and wagon crossed the track of the defendant in safety, and had reached a point twenty-five or twenty-eight yards beyond the track, at the time the train of defendant, about seventy-five yards distant, was approaching the crossing. The horse then began backing, and, according to the evidence of the plaintiff, did not stop until the wagon collided with the engine.

There is some evidence of obstructions to the view near the track, but there is also evidence that the horse was in full view of the engine, and the engineer admitted that he saw the horse backing when he was within forty or fifty feet of the crossing. There is also evidence that the train was running about four or five miles an hour, and could have been stopped in eight feet, and that the engineer called to the driver of the wagon and told him to stop backing his horse into the train.

The driver gives the following account of the occurrence:

Q. What took place when you came to the track? A. I done crossed the track; the train bell was ringing and my horse looked up, like he saw it, and stopped, and he commenced to back back; when he com-
(224) menced to back back I commenced tapping him to keep him from backing. I saw he was going to stop, and I jumped off and ran to his head, so as to pull him around the corner. He kept backing. I ran to the end of the dray. When I got to the back the train was very near. I slid out from behind the cart and the train struck the back end of the dray and knocked the horse down. The front part of the bumper struck the cart; the back end of the dray was struck by the cow-catcher.

(It is admitted that the street crossing Gordon is Independence Street.)

Q. When you crossed the track going this way, did you see the train? A. Yes, sir; it was further down, about seventy-five steps—yards—something like that—from the street I was crossing.

Q. When your horse stopped and was looking at the train, can you estimate how fast the train was going? A. About four or five miles an hour.

Q. When the train was coming towards you, did you see anybody looking out of the windows of the train? A. There was a whole lot looking out. The engineer called to me and said stop backing my horse in the train.

Q. Where was he—how far was the engineer when he was talking to you about not backing your horse? A. About fifteen or twenty steps from me.

Q. How long have you been driving a horse? A. I have been tending to him for about a year. I have been accustomed to horses for about fifteen or twenty years.

Q. What damage was done to the wagon after the mix-up? A. The right wheel was torn to pieces, the right wheel and shafts.

Q. What injury did the horse receive? A. The right foot—I think it was the right one—broke in two. They had to kill him. He was smashed up.

Q. What else was done besides breaking his leg? A. Just smashed him right down.

The defendant offered evidence to the contrary, and the en- (225) gineer testified as follows:

Q. Were you the engineer on the train at that time? A. Yes, sir.

Q. How long have you been in the service of the company? A. On this road eleven years.

Q. State what you saw? A. I noticed when I approached this crossing—I was about as far from here to the door, the length of this building—this driver was sitting up in front of his cart when I noticed him; by my noticing him, the horse was backing; the driver jumped off; the horse was backing; that put him in this direction (indicating); the lines were over the hames; the horse kept rearing; I began to slow up; the horse backed up more, less than the width of this stand, and stopped. I ran the engine, and when I was going by, the horse reared up; that brought him by the engine, and the crank-pin on the driver struck the cart and threw the horse under the tender and broke his leg and bruised him up.

Q. You say you were the length of this building when you first saw him? A. I might have been more.

Q. How close were you when you first saw him? A. If he had kept on he would have gone by; the horse stopped about ten feet of the engine. I released her and let her go by.

Q. How far did you run after you struck the cart? A. I judge about eight feet; it didn't make a revolution; the crank-pin came just near enough to slew the horse around; it struck the right wheel of the cart. The driver was on the opposite side of me.

Q. William Hadley said you hollered to him? A. No, sir; I never said a word to him until I stopped. The horse was down. I said, "Why did you want to back the horse in the train?"

Q. When the horse began to back the last time, could you have stopped the train to prevent him from backing the cart into the train? A. No, sir; it was so quick. He stood so a little time. I guess I moved the length of this room before he moved the second time—enough for me to go by him. Instead of the horse going forward, the driver (226) had the reins on him; he backed back.

Q. What part of the engine struck the horse? A. The front driver struck the cart; that is, middle of the engine.

Upon the conclusion of the evidence, his Honor granted the motion of the defendant for judgment of nonsuit, and the plaintiff excepted and appealed.

Loftin & Dawson for plaintiff.
Rouse & Land for defendant.

ALLEN, J. The right of the plaintiff to maintain this action must be determined by the conduct of the parties after the time the horse began to back, and if the evidence presents a phase from which the jury could find that the engineer, by keeping a lookout, could by the exercise of ordinary care have seen that a collision was immiment, in time to stop his train and avoid it, then it was his duty to do so; and if the jury should so find, the plaintiff could recover, notwithstanding the failure of the driver to look and listen at the crossing.

This is clearly stated by *Justice Hoke* in *Snipes v. Mfg. Co.,* 152 N. C., 46.

After discussing the duty of the engineer to keep a lookout, and to stop and avoid injury when he can do so by the exercise of ordinary care, he says: "Ordinarily, cases calling for application of the doctrine indicated arise when the injured person was down on the track, apparently unconscious or helpless, but such extreme conditions are not at all essential, and the ruling should prevail whenever an engineer operating a railroad train does or, in proper performance of his duty, should observe that a collision is not improbable, and that a person is in such a position of peril that ordinary effort on his part will not likely avail to save him from injury; and the authorities are also to the effect that an engineer in such circumstances should resolve doubts in favor of the safer course."

The quotation speaks in terms of persons, but the principle also applies to injury to property.

Under this rule, what is the evidence, and what facts could
(227) the jury find from it, giving it a construction most favorable to the plaintiff, which we must do on a motion for nonsuit?

The evidence of the plaintiff, if believed, shows that the horse was twenty-five or twenty-eight steps beyond the crossing when he began to back; that he was backing towards the track; that he continued to back without stopping until there was a collision between the wagon and the train; that the driver was trying to stop the horse and could not do so; that the horse and wagon and driver were in full view of the engineer; that the engineer called to the driver and told him to stop backing into the train, when about fifteen or twenty yards from him; that at the time the horse began to back the engine was seventy-five yards from the crossing, and that it could have been stopped in eight feet.

If so, there was evidence that the engineer could, by the exercise of ordinary care, have seen that a collision was imminent, in time to stop the engine and avoid the injury.

There was evidence on the part of the defendant, which, if accepted by the jury, would exonerate it.

The engineer testified that he saw the horse backing, and reduced the speed of his engine; that when near the horse and wagon, the horse stopped and appeared to be under control; that he then increased his speed, and as he was passing the crossing the horse suddenly reared and backed into the train.

If the jury should find this evidence to be true, the defendant would not be liable.

Kearns v. R. R., 139 N. C., 471, is not in conflict with these views. In that case the train had passed the crossing, when the horse began to back, and there was no evidence, in the opinion of the Court, of anything the engineer could have done to avoid the injury.

There is some evidence of negligence on the part of the driver, in charge of the horse and wagon, at the time of the injury, but it is not of such character that we can declare, as matter of law, that it amounts to contributory negligence.

It was his duty to look and listen as he approached the crossing, and ordinarily a failure to do so will bar a recovery for an injury on the crossing; but in this case the crossing was passed in safety, (228) and there is no causal connection between this failure of duty and the injury. If after the horse began to back, the driver was negligent and this negligence continued to the time of the injury and contributed to it, the plaintiff could not recover, but in passing upon this question the jury would have the right to consider his surroundings, and the law would require no more of him than to act as a man of ordinary prudence would have done under similar circumstances.

The question is not what a prudent man would do now in the light of subsequent events, but what would a man of ordinary prudence have done in the situation in which the driver was placed.

In our opinion, there was some evidence for the consideration of the jury, and a new trial is ordered.

New trial.

Cited: *Hanford v. R. R.*, 167 N. C., 279; *Hall v. Electric R. R., ib.*, 286; *Smith v. R. R.*, 170 N. C., 185.

HOWARD C. PARK v. W. P. EXUM ET AL.

(Filed 11 October, 1911.)

1. Negotiable Instruments—Holder in Due Course.

In order to establish the position of a holder in due course of a negotiable instrument so as to shut off counterclaims and defense otherwise available, it must be shown that the instrument is complete and regular on its face, and that title thereto was acquired in good faith, for value before maturity, without knowledge or notice of fraud or other impeaching circumstance; and, except when payable to bearer, the indorsement must be proved when it is denied.

2. Same—Indorsement—Pleadings—Burden of Proof.

When, in an action upon a negotiable instrument claimed by the plaintiff as an indorsee for value, in due course, without notice of any infirmity of the instrument, the answer denies the validity of the indorsement, the burden is upon the plaintiff to show that the instrument had been indorsed and that otherwise he was a holder in due course, in order to shut off the defense arising on the testimony, that it was procured from the makers by fraud or deceit.

3. Same—Evidence—Instruction—Expression of Opinion by the Court—Appeal and Error.

When the validity of the indorsement of a negotiable instrument sued on by the indorsee is denied by the answer, and the only evidence is that introduced by the plaintiff, which fully states the necessary matters to show that he is a holder in due course, it is correct for the judge to charge the jury to return a verdict for the plaintiff if they find the facts to be as testified to by him; but reversible error for the trial judge to remark in the presence of the jury that if the verdict was for the defendant he would set it aside, for this is an expression of opinion upon the credibility of the evidence forbidden by statute.

(229) APPEAL from *Justice, J.*, at January Special Term, 1911, of LENOIR.

Plaintiff sued, claiming to be indorsee for value and holder in due course of a negotiable note for $500, given by defendants to McLaughlin Bros., in part obligation for purchase price of a stallion. The deposition of plaintiff was introduced, containing full and direct statement that plaintiff bought the note for full value and same was duly indorsed to him by the payees before maturity and without notice of any fraud or other infirmity affecting its validity. The indorsement was denied in the pleadings, and there were also allegations on the part of defendants to the effect that there was a breach of warranty on the part of McLaughlin Bros. in the sale, and further that the sale was procured by false and fraudulent representations on the part of the said vendors, to defendant's damage. The jury having been impaneled and evidence offered, at the close of the testimony the court intimated that he would charge the jury that if they found the facts to be as testified in the

deposition, the plaintiff could recover, to which defendants then and there excepted. Counsel for defendant then stated to the court, "that they took the position that there was sufficient evidence to be found in the testimony to go to the jury on the question as to whether the jury believed the evidence of the plaintiff in the action. The court stated he would not allow a verdict to stand in favor of the defendants," this statement being made in the hearing of the jury, and defendants excepted.

There was verdict for plaintiff for full amount of the note and interest; judgment according to verdict, and defendant excepted and appealed, alleging errors. (230)

McLean, Varser & McLean and Loftin & Dawson for plaintiff.
G. V. Cowper and T. C. Wooten for defendants.

HOKE, J., after stating the case: Our statute on negotiable instruments, as applied and construed in several recent decisions of the Court, is to the effect that in order to establish the position of holder in due course, when required to shut off counterclaims and defenses otherwise available, it must be shown that the instrument is complete and regular on its face and that title thereto was acquired in good faith and for value before maturity and without knowledge or notice of fraud or other impeaching circumstance, and, except in case of instruments payable to bearer, when the indorsement is denied, the same must be proved. *Myers v. Petty,* 153 N. C., 462; *Mayers v. McRimmon,* 140 N. C., 640; *Tyson v. Joyner,* 139 N. C., 69.

In the present case there was allegation, with evidence on the part of defendant, tending to show that there was a breach of warranty, in the sale, on the part of these vendors.

On a perusal of the entire testimony, we think there was evidence tending to show fraud and deceit on their part, inducing the sale and causing damage, under the principles stated in *Myers v. Petty, supra; Whitehurst v. Ins. Co.,* 149 N. C., 273; *May v. Loomis,* 140 N. C., 350, and cases of like import. The instrument, too, was payable to order and the indorsement was denied in the pleadings, thus putting on plaintiff, in order to shut off the defenses arising on the testimony, the burden of showing that the instrument had been indorsed and that he was otherwise a holder in due course. True, the deposition of plaintiff, introduced on the trial, contains full and direct statement, tending to show that plaintiff was indorsee for value before maturity and in all respects a holder of the note in due course, and it may be that his Honor was right in intimating that he would charge the jury "that if they found the facts to be as testified to in the deposition there should be a verdict in plaintiff's favor; but in this and every other case, (231)

when proof is required to establish a determinative issue, the credibility of the evidence is for the jury, and they must be allowed to consider and pass upon it themselves. We have so held in a case on this very subject, *Bank v. Fountain,* 148 N. C., 590, and a new trial was granted in that case because the court erroneously invaded the province of the jury by telling them that "the *prima facie* case of plaintiff had been restored by the uncontradicted evidence of the president of the bank, etc." The opinion in question quotes with approval from *Bank v. Iron Works,* 159 Mass., 158, as follows: "In an action on a promissory note, which was defended on the ground that the note had been fraudulently put into circulation by the P. L. Co., a Massachusetts corporation, organized for the purpose of 'doing a brokerage business in commercial paper, stocks, bonds, and other property,' from whom the plaintiff company acquired it, the plaintiff's officers testified that the note was taken by them in good faith and for value, before maturity, and the defendant introduced no testimony to contradict these officers: *Held,* that the defendant was entitled, nevertheless, to go to the jury on the question whether the plaintiff took the note for value and without notice of fraud."

Under the conditions stated, therefore, with the controlling issue to be determined, and involving the credibility of plaintiff's testimony, tending to establish it, his Honor had no right to say in the hearing of the jury, "that he would not allow a verdict to stand in favor of defendants." The Court has been always swift to enforce obedience to our law which forbids a presiding judge to express an opinion on the disputed facts of a trial, and under numerous decisions construing the statute, we must hold this remark of his Honor, in the presence of the jury and before verdict, to be reversible error. *S. v. R. R.,* 149 N. C., 508; *Withers v. Lane,* 144 N. C., 184; *S. v. Dixon,* 75 N. C., 275; *Nash v. Morton,* 48 N. C., 3. The expression objected to was undoubtedly an inadvertence. From a long, intimate, and much valued association with his Honor, when we were at the bar together and from observa-
(232) tion of his work as a judicial officer, the writer knows of a certainty that there is no man or judge who places higher estimate on the value of the trial by jury or holds deeper conviction that it should now and always be preserved in its fullest integrity. For the error indicated, defendant is entitled to a

New trial.

Cited: S. v. Cook, 162 N. C., 588; *Trust Co. v. Ellen,* 163 N. C., 46; *Bank v. Exum, ib.,* 203; *Bank v. Branson,* 165 N. C., 349; *Speed v. Perry,* 167 N. C., 128; *Medlin v. Board of Education, ib.,* 244; *Bank v. McArthur,* 168 N. C., 53; *Smathers v. Hotel Co., ib.,* 72; *Swain v. Clemmons,* 172 N. C., 279.

ELECTROVA COMPANY AND S. R. RACKLEY v. THE SPRING GARDEN INSURANCE COMPANY.

(Filed 11 October, 1911.)

1. Insurance, Fire—Vendor and Vendee—Public Policy—Action Upon Insurance Policy—Damages.

A manufacturer and vendor of a piano which mechanically plays tunes when a nickel is inserted in a slot, took out a "floating policy" on his stock of such pianos, and his agent, in the hope of effecting a sale, placed one of them with the owner of a house of ill-fame. Under these conditions the house caught fire and the piano was destroyed, it appearing from the examination of the remains of the slot machine that some money had been put in by the guests of the house: *Held*, the title and right of possession remained in the vendor, the vendee was in nowise a party to the insurance contract, and the question of public policy is too remote to be considered on the question of recovery in an action brought by the vendor against the insurer upon the policy contract. *Brown v. Kinsey*, 81 N. C., 245, cited and approved.

2. Insurance, Fire—Policy Contracts—Interest of Parties—Public Policy.

Contracts will not be declared void as against public policy unless the case is clear and free from doubt and the injury to the public is substantial and not theoretical or problematical, and the advantage or interest of either party will not be considered.

3. Insurance, Fire—Policy Contract—Collateral Acts.

A contract will not be set aside as being against public policy if the illegal act complained of is but collateral to it, for if such act has no direct connection with the contract sought to be set aside, the contract is not affected by it.

4. Insurance, Fire—Policy Contract—Independent Action—Public Policy.

If the plaintiff, in his action upon a contract, resisted upon the ground of public policy, does not require the aid of the illegal act to establish his claim, he may recover.

5. Same.

A floating policy of insurance issued to a vendor of pianos is lawful, for a valid purpose and supported by a consideration, and the vendor may recover upon the contract in his action against the insurer for the loss by fire of one of the pianos covered by the policy, independent of any question of public policy arising from the fact that he had placed it in a house of ill-fame with the hope of selling it to the owner, and while there under these conditions the piano was destroyed.

APPEAL from *Peebles, J.*, at March Term, 1911, of LENOIR. (233)

Action to recover on a policy of insurance on a piano. These issues were submitted to the jury:

1. Did the defendant insure the piano of the plaintiffs, as alleged in the complaint? Answer: Yes.

2. If so, what sum, if any, are plaintiffs entitled to recover of the defendant for its destruction by fire, if it was destroyed? Answer: $248.75. Destroyed by fire.

3. Was the piano an electric one, played by putting a nickel or dime in the slot? Answer: Yes.

4. Was said piano at the time it was burned placed by plaintiffs in the house of a woman who kept a house of ill-fame, for trial, with a view of selling the same to the keeper of said house, and with the knowledge that said house was a house of ill-fame? Answer: Yes; the day before the fire.

5. After the fire, did plaintiffs take out of the piano any money put in the slot? Answer: Yes.

6. If so, how much? Answer: $1.25.

Upon the verdict plaintiffs and defendant moved for judgment. The Court rendered judgment for defendant. Plaintiffs excepted and appealed.

G. V. Cowper and J. Paul Frizzell for plaintiffs.

Simmons & Ward, Loftin & Dawson, McLean, Varser & McLean for defendant.

(234) BROWN, J. The Electrova Company is a corporation engaged in the manufacture and sale of a piano which plays tunes by mechanical means when a nickel is inserted in a slot.

On 11 April, 1910, plaintiff's sales agent, Rackley, placed an instrument in a house of ill-fame in Kinston belonging to Mabel Page, for trial, with the view to sell it to her. It was not placed there to be operated for plaintiffs, but only with the purpose to induce the proprietress to buy it eventually. About 6 P. M. on 12 April the house caught fire and the piano was practically destroyed by the flames. The charred body of the piano was opened and the agent Rackley took out $1.25 in nickels, which had been put in the slot by visitors of the house.

On 12 April, 1910, in the town of Greenville, the agent Rackley took out from defendant's agent there a "floating policy" insuring all plaintiff's instruments in Greenville and Kinston, effective after 12 o'clock noon, that day.

The defense is that the contract of insurance between plaintiff and defendant was void because the piano had been placed in a house of ill-fame with a view to selling it to the proprietress. It is urged that such a transaction is against public policy to such an extent that it avoids the policy of insurance on the piano. The defense has the merit of novelty, at least. But we think it must fail, for two reasons: (1) The

theory of the defense in that the piano was insured in aid and furtherance of a contract or agreement entered into between the plaintiffs and Mabel Page which was against public policy.

The defendant fails to establish any contract or agreement of any sort between the plaintiff and Page. There was no contract or agreement to sell the piano. It was placed in her house only in the hope of a sale. The title and right of possession was never out of the plaintiffs. They had the right to remove it at any moment, and by legal process if necessary. The instrument was not placed in the house to earn nickels for plaintiffs, although Rackley found some in its remains. But if it had been placed there, as slot machines frequently are placed in public places, to earn nickels for the owner, the plaintiffs would not have thereby forfeited their title to the property. The insurance policy was not taken out in aid and furtherance of a contract and agreement entered into between plaintiffs and Mabel Page, for there was none entered into, moral or immoral. (235)

The rule of law which the defendant invokes applies only to executory contracts or agreements which are to be performed in the future, and not to transactions which are past and closed. *Brown v. Kinsey*, 81 N. C., 245.

(2) The effect upon the public interest, under the facts of this case, is too remote entirely to justify a court in refusing its aid to plaintiff to enforce the payment of the policy.

The reason that some contracts and agreements are declared void as against public policy is because the enforcement of them by the courts would have a direct tendency to injure the public good. The law does not consider the advantage or interests of either party to the contract, but acts only from considerations of the public good. *Harrell v. Watson*, 63 N. C., 454; *Brown v. Kinsey, supra; Collins v. Blanten*, 1 Smith Leading Cases, 153.

It has been said by learned judges and text-writers that a court should declare a contract void as against public policy only when the case is clear and free from doubt and the injury to the public is substantial and not theoretical or problematical. *Navigation Co. v. Dumas*, 181 Fed., 782; *Cox v. Hughes*, 102 Pac. Rep., 956.

Where the contract or agreement sought to be enforced has no direct connection with the illegal act, but is collateral to it, then the contract is not tainted or affected by the illegal act. The principle of law is thus stated by *Chief Justice Marshall:* "Where a contract grows immediately out of and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it. But if the promise be entirely disconnected with the illegal act, and is founded on a *new*

consideration, it is not affected by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act." Again the *Chief Justice* expresses the same principle in simpler language when he says: "A new contract, founded on a new consideration, although in relation (236) to property respecting which there had been unlawful transactions between the parties, is not itself unlawful." *Armstrong v. Toler,* 24 U. S., 257. Where the connection between the illegal act and the agreement sought to be enforced is not direct, but remote, the latter will be upheld.

The decision of this Court in *McKesson v. Jones,* 66 N. C., 264, is founded in the principles laid down by *Chief Justice Marshall,* and recognized in the English courts by *Mellish, L. J.,* in *Taylor v. Bowen,* 1 Q. B. D., 291. This was an action on a note given for the rent of land leased for the purpose of raising food for laborers in the employ of the Confederate Government. In the opinion *Mr. Justice Rodman* says: "In the present case this aid given the rebellion was much more indirect; it was at best two steps further off. It was not a sale of military materials, nor even a sale of provisions to laborers making material, but a lease of land upon which provisions might be raised, which might be applied to feed laborers engaged in an unlawful occupation."

Again we read from the same case: "It is possible to foresee and calculate the direct consequences of an act. If we attempt to follow it out into its direct and more remote consequences, our reasoning becomes soon uncertain, and after a few steps altogether unsatisfactory. When we confine ourselves to direct consequences, we feel that we are treading on tolerably firm ground; but if we go further, there is no telling into what calculations of remote and merely possible consequences we may not be compelled to plunge."

In *Powell v. Smith,* 66 N. C., 401, this Court held that where a principal and surety gave a note for a consideration against public policy, and the surety paid same at the request of the principal, the principal giving a new note to the surety, the latter note could be collected.

In *Poindexter v. Davis,* 67 N. C., 114, *Reade, J.,* says: "The facts in this case are, that the county had contracted a debt to equip soldiers in the Confederate service, and then contracted this debt to pay that off. The first transaction was clearly in aid of the rebellion, and for that reason illegal. But how did it aid the rebellion to pay that debt (237) off? . . . The argument is a refinement, and the illegality too remote."

The true test of the illegality of a contract is thus stated by this Court in *S. v. Bevers,* 86 N. C., 595: "The principle upon which the courts

refuse their aid in such cases is this: No court will lend assistance to one who founds his cause of action upon an illegal act. . . . But to put this principle into operation in any particular case it must appear that the very party who is seeking aid from the court participated in the unlawful purpose. Indeed, it is said that the very test of its application is whether the plaintiff can establish his case otherwise than through the medium of an illegal transaction, to which he was himself a party."

It has been also held by other jurisdictions that if the plaintiff does not require the aid of an illegal transaction to establish his claim, he may recover. *In re Bunch Co.,* 180 Fed., 519, and cases cited; *Fruit Association v. Snelling,* 141 Cal., 713.

There are cases which hold that if this piano had been sold to Mabel Page to enable her to better carry on and conduct a house of ill-fame, the seller could not recover in an action for the purchase price. *Furniture Co. v. Alstein,* 51 L. R. A., 889; *Reed v. Brewer,* 90 Tex., 148. Those cases are founded upon the principle we have adverted to, that the plaintiff could not make out his case without resorting to and putting in evidence an illegal transaction.

But nowhere can there be found a case, so far as we are advised, which holds that if Mabel Page had purchased the piano she could not have lawfully insured it, and recovered the insurance had it been destroyed by fire.

It is very generally held to be vicious and in some States it is made a crime for the owner of a house to lease it for immoral purposes. Yet it has never been held that if the house, so leased, is insured and destroyed by fire, the owner cannot recover on his policies.

There is no direct connection between the immoral or unlawful act of leasing and the lawful and (so far as the public is concerned) harmless act of insuring. The evil effect upon the public interests is entirely too remote and problematical to avoid the lawful con- (238) tract of insurance.

Fire insurance contracts are recognized by the laws of all civilized nations. They are based upon a cash consideration, and from their very character cannot have an immoral tendency. They are not entered into to promote vice, but solely to secure the owner of property against loss. The contract sued on is based upon a new and cash consideration and not upon an immoral one. Neither do plaintiffs have to resort to an immoral or illegal transaction to make out their cause of action. How the taking out of this floating policy upon all their pianos in Kinston and Greenville could in any way aid and abet the sale of one of the pianos so insured to Mabel Page is difficult to see. She could

derive no benefit from the insurance and it was therefore no inducement for her to purchase. The moment the piano became her property, it lost the protection of the plaintiff's floating policy and was no longer insured.

No public interest is involved, much less injured, by the enforcement of this contract. And we think what is said by the Supreme Court of California in the case cited may well apply to this: "Parties should be careful about making contracts, but when once made the courts will not relieve them for light or trivial reasons. Public policy is better served by leaving the parties and their rights to be measured by the terms of their contract."

Upon the issues as answered by the jury the plaintiff, the Electrova Company, is entitled to judgment for $248.75, interest and costs. Let the cause be remanded with instructions to the Superior Court of Lenoir to enter judgment accordingly.

Reversed.

Cited: Jewelry Co. v. Joyner, 159 N. C., 647; *Owens v. Wright,* 161 N. C., 131; *Pfeifer v. Israel, ib.,* 428.

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(239)

B. H. STEPHENS v. MRS. SALLIE M. S. HICKS AND HUSBAND.

(Filed 11 October, 1911.)

1. Lien—Mechanics and Laborers—Architect's Plans and Specifications—Interpretation of Statutes.

An architect who furnishes plans and specifications for a building is not a mechanic or laborer within the meaning of the Revisal, sec. 2016, and he has no lien thereon for the same.

2. Liens—Mechanics and Laborers—Architect's Supervision—Interpretation of Statutes.

An architect, who has superintended the work upon a building in course of erection, under a contract with the owner to do so, is not entitled to a mechanic's or laborer's lien, as work of this character does not fall within the intent of the statute. Revisal, sec. 2016.

3. Liens—"Material"—Architects—Plans and Specifications—Interpretation of Statutes.

Plans and specifications of the architect are not "material" within the meaning of the statute giving a lien for material furnished, etc. Revisal, sec. 2016.

4. Liens—Mechanics and Laborers—Architect—Married Women—Executory Contracts—Charge Upon Separate Realty.

The claim of an architect for plans and specifications is not within the intent of Revisal, sec. 2016, giving mechanics and laborers a lien upon the building constructed, etc., and a contract with him to make them is of an executory nature, and hence when the contract or agreement to furnish them is made with a married woman, prior to the act of 1911, ch. 109, without the written consent of her husband, and is not of such character as to charge her separate property, before the passage of the said act, the contract or agreement is not enforcible, and her property is not chargeable.

5. Married Women—Property Rights Act—Statutes—Prospective—Interpretation of Statutes.

Chapter 109, Laws of 1911, relating to married women's property rights, provides that a married woman "shall be authorized to contract," meaning thereafter, and that the act "shall be in force from and after its ratification," referring, without express words of retrospection, to future transactions, and is therefore prospective by its express terms. Retrospective legislation which interferes with the rights of parties to make a contract discussed by WALKER, J.

APPEAL by plaintiff from *Peebles, J.*, at May Term, 1911, of (240) NEW HANOVER.

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

Kenan & Stacy for plaintiff.
Rountree & Carr for defendant.

WALKER, J. This action is brought by the plaintiff, an architect, against the defendants, Mrs. Sallie M. S. Hicks and her husband, to recover of the *feme* defendant damages alleged to be due for a breach of contract, by the terms of which the plaintiff agreed to prepare and furnish plans and specifications for an apartment house, to be erected by her, for which he was to receive $700, and was actually paid the sum of $350, and he further agreed to superintend the construction of the building, as her architect, for the sum of $300, which she has prevented him from doing. Plaintiff seeks also to enforce a mechanic's and laborer's lien upon the property. The defendant demurred to the complaint, and plaintiff appealed from the judgment sustaining the demurrer.

Whatever may be law, as declared in other jurisdictions, this Court has thoroughly settled the prniciple that a mechanic or laborer, within the meaning of our lien laws, is one who performs manual labor—one regularly employed at some hard work, or one who does work that requires little skill, as distinguished from an artisan. *Whitaker v. Smith,*

81 N. C., 340. In that case *Justice Ashe,* for the Court, thus explained the lien law of our State by the circumstances which caused its enactment: "A very large proportion of the laboring population of the State had just recently been released from thraldom and thrown upon their own resources, perfectly ignorant of the common business transactions of social life, and this provision of the Constitution, and the acts passed to carry it into effect, were intended to give protection to that class of persons who were totally dependent upon their manual toil for subsistence. The law was designed exclusively for mechanics
(241) and laborers." And it was held that an overseer is not a mechanic or laborer under our lien law, and is not entitled to a lien on the building and premises, where his work is done or labor performed, for the price or value of his services. *Cook v. Ross,* 117 N. C., 193, is quite as much to the point, for there it was held that one who, under a contract, assists the owner of a mill in purchasing machinery and superintends the installation of the same and the repairing of the mill, so as to put it in proper condition for the manufacture of yarns, was in no view justified by our statute, a mechanic or laborer. "He was superintendent of the work which was done," says the Court, "but was in no sense employed as a laborer by the day to do toilsome and manual labor. His business, under the agreement, was not to labor with his hands, but to oversee those who did the work in subjection to his authority." So it has been held that one who acts as bookkeeper in the reconstruction of a building, under a contract with the owner for his services, is not entitled to a lien. *Nash v. Southwick,* 120 N. C., 459. To the same effect is *Moore v. Industrial Co.,* 138 N. C, 304, where it was held that a lien is not given by our Constitution and statute for services rendered, under contract, as superintendent of a milling business, conductor of a commissary or store connected therewith and as bookkeeper in the same concern. This Court, in deciding that case, adopted the definition of the English courts in construing their statute, that a laborer or mechanic is "a servant employed in some manual occupation." It is further said that "the word 'labor,' in legal parlance, has a well-defined, understood and accepted meaning. It implies continued exertion of the more onerous and inferior kind, usually and chiefly consisting in the protracted exertion of muscular force. Labor may be business, but it is not necessarily so, and business is not always labor. In legal significance, labor implies toil, exertion producing weariness; manual exertion of a toilsome nature," citing *Bloom v. Richards,* 2 Ohio State, 387.

It was said in *Cook v. Tramway Co.,* 18 Q. B. Div., 684, in construing the English employer's liability act, that "The expression used
(242) (in that act), it should be noted, is not manual work, but manual

labor. Many occupations involve the former, but not the latter; for instance, telegraph clerks, bookkeepers, and all persons engaged in writing." *Morrison v. Mining Co.*, 143 N. C., 250.

The plaintiff, therefore, is entitled to no lien under his contract to superintend the work, even if he had performed this duty, and certainly he cannot be heard to say that he should have a lien for what he did not do. Nor is he entitled to a lien for the building plans and specifications, either upon principle or well-considered authority. The language of the statute is that the mechanic or laborer shall have a lien on the property, real or personal, for work done *on the same*. It could hardly be said with correctness and a proper appreciation of the meaning of well-defined terms, that an architect, in furnishing plans and specifications for the guidance of the contractor and his mechanics and laborers, is engaged in the act of performing labor upon the building. He uses his brain far more than he does his brawn—his trained mental faculties rather than his physical or muscular powers—and herein, to a large extent, is to be found the distinction between men employed in his kind of work and the laborer, who works mechanically, though under his direction.

We are ably and strongly supported in our view of the law by *Mitchell v. Packard*, 168 Mass., 467, and *Libbey v. Tidden*, 192 Mass., 193. It has been decided also in other jurisdictions that the word "mechanic," as used in the lien laws, does not include an architect or draughtsman. See cases on this question in 5 Words and Phrases, p. 4457, title "Mechanic" and subtitle "Architect or Draughtsman"; a mechanic or laborer (within the meaning of these laws), being a person skilled in the practical use of tools; a workman who shapes and applies material in the building of houses or other structures mentioned in the law; "one actually employed with his own hands in constructive work," or one so engaged in the application of his own labor to such construction as contradistinguished from a superintendent or overseer. 5 Words and Phrases, 4457; *New Orleans v. Lagman*, 43 La. Ann., 244; *R. R. v. Callahan*, 49 Ga., 506; *People v. Aldermen*, 42 N. Y. Supp., (243) 545; *Parkerson v. Wrightmen*, 4 Strob., 363; *Raeder v. Bensberg*, 6 Mo. App., 445; *In re Osborn*, 104 Fed., 780; *Price v. Kirk*, 13 Phila., 497. The authorities are not uniform, but those cited are in line with our decisions.

The learned counsel for the plaintiff did not contend that their client had furnished any material to be used in the construction of the house because he had prepared the plans and specifications, and their position, in this respect, was the correct one. No one would ever think of an architect's building plans and specifications as "material" within the meaning of the statute, Revisal, sec. 2016, and we do not suppose that

architects would classify themselves as "mechanics or laborers." One class is of as high dignity as the other in every way, but they are dissociated in our mental conception of the two, and when we think and speak of them they are naturally differentiated as belonging to separate and distinct callings, or avocations, though held in the same estimation, so far as the worthiness of the pursuit is concerned.

We conclude that the architect was not in the mind of the Legislature when it was providing for the lien of mechanics, laborers, and materialmen, not being considered as in the same category and as requiring the same protection. They can secure themselves in advance against the danger of loss, or at least have a freer hand than the daily laborer, who is often entirely dependent upon his wages for support and maintenance of himself and family, and sometimes at the mercy of an impecunious or dishonest debtor, with whom he is not on equal terms. He occupies more a position of dependence, if not helplessness, than does the architect. Every consideration of fairness and justice favors him, and for this reason were his interests safeguarded by the law, under whose special care and protection he has been taken.

Another question remains for decision. If there is no lien, it follows that we have only an unsecured and executory contract of a married woman which is not enforcible against her, according to our decisions.

Finger v. Hunter, 130 N. C., 529, and *Ball v. Paquin,* 140 N. C., (244) 83, are not in point. In *Finger v. Hunter* we held that the act of 1901, ch. 617 (Revisal, sec. 2016), giving a laborer's lien on the real property of a married woman for work done on her building and for material furnished, was constitutional and valid, and in *Ball v. Paquin* we held that the plaintiff acquired a lien for work done and material furnished for the construction of a dwelling on a married woman's land, under a written contract with her and her husband, which was duly proved, as to both, with her privy examination. In both cases there were liens, while in this case there is none, and it is therefore governed by *Flaum v. Wallace,* 103 N. C., 296; *Weir v. Page,* 109 N. C., 220; *Thompson v. Taylor,* 110 N. C., 70; *Weathers v. Borders,* 124 N. C., 610; *Harvey v. Johnson,* 133 N. C., 353, and the recent case of *Kearney v. Vann,* 154 N. C., 311, in which *Justice Allen* learnedly considers the question.

The contract in this case was made before the passage of the act of 1911, ch. 109, and is, therefore, not governed by it. When it was made, the law declared such contracts to be void, which means, of course, that it is the same as if the contract had never been made at all. That which is void, or a nullity, can have had no legal existence or binding obligation, and if the act of 1911 had professed to be retroactive in its opera-

tion and to emancipate married women as to all past, as well as future, contracts, it would have been an unauthorized exercise of legislative power under the Constitution. It may do many things with reference to contracts, but it cannot make a contract between parties, because a contract implies volition and the agreement of two or more minds to one and the same thing; in other words, consent. The Legislature can no more make a contract for parties without their consent than it can take away a vested right or impair the obligation of a contract already made.

This case is not like *Springs v. Scott,* 132 N. C., 548; *Anderson v. Wilkins,* 142 N. C., 159, and other decisions of a like kind, in which the Legislature was dealing with the remedy and with contingent and not vested interests. Parties are entitled to contract according to their free will. They make contracts for themselves and not by legislative compulsion. The freedom of the right to contract has been uni- (245) versally considered as guaranteed to every citizen. However this may be, we find that the act of 1911 is not retrospective, but prospective, by its very terms; and so the question does not arise as to the power of the Legislature to declare valid a married woman's contract made prior to the act of validation. The language of the act is that a married woman "shall be authorized to contract," which means thereafter, and further, that the act "shall be in force from and after its ratification," which necessarily, and without express words of retrospection, refers to future transactions. Even in a doubtful case, it should be construed as prospective. We would defeat the legislative intent and make the law, should we decide otherwise. This Court said in *S. v. Littlefield,* 93 N. C., 615: "Such a construction would be giving a retrospective operation to the act, which is in violation of the general rule that 'no statute should have a retrospective effect.' Although the words of the statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless a contrary intention is unequivocally expressed therein. Potter's Dwarris, p. 162, note 9, and cases cited. There is nothing in the act tending to show an intention in the Legislature to make it retrospective, but on the other hand, from the use of the term *original jurisdiction,* it would seem that it was intended that the indictments for such offenses as the inferior court *then* had jurisdiction of should thereafter be *originated* in that court, and that was what was meant by the use of the word 'original' in the statute."

The demurrer was properly sustained.

Affirmed.

Cited: Bullock v. Oil Co., 165 N. C., 68.

(246)

KATE M. WELLS v. JULIA F. WELLS ET AL.

(Filed 11 October, 1911.)

1. Descent and Distribution—Personal Property—Mother Next of Kin, When —Brothers and Sisters of Deceased—Interpretation of Statutes.

In the descent and distribution of the personal estate of one who dies intestate, without child or legal representatives of a deceased child, and leaving a widow and mother and brothers and sisters, his mother is the next of kin and entitled to equally share the property with the widow in exclusion of the brothers and sisters (Revisal, sec. 111, 3), and Revisal, sec. 132 (6), has no application.

2. Interpretation of Statutes—Meaning Plain—Power of Courts.

It is the duty of the courts to observe the plain meaning expressed in a statute.

APPEAL by defendants from *George W. Ward, J.*, heard by consent August Term, 1911, of DUPLIN.

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

Aycock & Winston, George R. Ward, and Stevens, Beasley & Weeks for appellant.

D. L. Ward for appellee.

CLARK, C. J. W. D. Wells, deceased, left surviving him a widow, who, it is admitted, is entitled to half of the personal estate, and his mother, who claims to be entitled to the other half of the personal estate; also two sisters and a brother, who claim that they are entitled to share equally with the mother in that half of the estate—that is, they contend that the mother, the brother, and the two sisters are entitled, each, to one-eighth.

The distribution of the personal estate of an intestate is entirely statutory. Revisal, 132 (3), provides: "If there be no child nor legal representative of a deceased child, then half of the estate shall be allotted to the widow, and the residue be distributed to every of the next of kin of the intestate, who are in equal degree, and to those who legally represent them."

This language is so explicit that it should leave no room for (247) doubt. The next of kin of the intestatte in this case is his mother.

His brother and sisters are one degree further removed. It follows, therefore, that the mother is entitled to half of the personalty.

The brother and sisters rely upon Revisal, 132, subsec. 6: "If, after the death of the father and in the lifetime of the mother, any of his children shall die intestate, *without wife* or children, every brother or

sister, and the representatives of them, shall have an equal share with the mother of the deceased child." But this case does not come within that section, for the intestate left a widow. It does come within the state of facts provided in subsection 3 above quoted.

It may be asked why the Legislature gives the mother only a child's share when the intestate leaves no widow, and gives her as next of kin half of the personalty if the intestate leaves a widow. Such is the plain letter of the law, and we do not have to supply reasons for legislative action. But it may be surmised that the difference is due to this, that when the intestate leaves no wife or children, the entire estate is to be divided, and therefore the children share in it; whereas, when the intestate leaves a widow, there is only half the estate left, and the statute gives that to all who are the next of kin "in an equal degree."

Another reason for subsection 6 is that under Revisal, 132, subsection 5, formerly on the death of the intestate without leaving widow or children the entire personalty would have gone to the father as the next of kin, because *ex jure mariti* he would take his wife's share. Subsection 6, carrying out the same idea, provided that in case of the death of the son, leaving neither widow nor children, the personalty should be distributed equally between the children and the mother, just as if the property had gone to the father and was to be distributed as his personalty under Revisal, 132, subsec. 2.

It would be useless to cite cases from other jurisdictions having statutes more or less similar to ours, or reason by analogy from decisions on a somewhat different state of facts. As already said, we cannot surmise as to the reasons for the statute. When, as here, the statute is plain, it is the duty of the Court to observe it as written. *Lex scripta est* is sufficient for us. (248)

In this case we have not the state of facts provided for by Revisal, 132, subsec. 6, and we do have the state of facts provided for by Revisal, 132, subsec. 3. The clerk therefore properly held that the widow is entitled to one-half of the personalty of the intestate and that the mother of the deceased, as "next of kin," is entitled to the other half. The judgment overruling the clerk is

Reversed.

Cited: *S. c.*, 158 N. C., 330; *Floyd v. R. R.*, 167 N. C., 59.

CHARLES F. DUNN ET AL. v. GEORGE PATRICK.

(Filed 11 October, 1911.)

1. Appeal and Error—Appeal from Justice's Court—Ejectment—Superior Court—Rents and Damages—Measure of Damages—New Trial on One Issue.

On appeal to the Superior Court from a judgment of a justice of the peace in a summary proceeding in ejectment wherein it was determined, under the first issue, that the plaintiff was entitled to the possession of the premises, and, under the second issue, to a certain sum, as rents and damages, the plaintiff is entitled to recover in the Superior Court the rents and damages which have accrued to the date of the trial therein, and it is error for the trial judge to limit the recovery to the amount allowed in the justice's court. Error as to the second issue alone having been committed, a new trial upon that issue alone is ordered.

2. Appeal and Error—Appeal from Justice's Court—Ejectment—Superior Court—Rents and Damages—Surety—Stay Bond—Measure of Damages.

The surety on a bond to stay execution on appeal from a judgment of a justice of the peace rendered in summary proceedings in ejectment is liable for such rents and profits to the plaintiff as may accrue to the date of the trial in the Superior Court. Revisal, secs. 2008, 2006.

3. Appeal and Error—Appeal from Justice's Court—Entry of Notice.

In this case the failure of the appellant to enter his appeal from the justice's judgment within the time prescribed by the statute, Revisal, secs. 1491 and 2008, is considered as not material, in view of the special facts of the case.

(249) APPEAL by plaintiffs from *Peebles, J.*, at March Term, 1911, of LENOIR.

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

Charles F. Dunn in propria persona.
No counsel contra.

WALKER, J. This action was brought under Revisal, secs. 2001-2011, and is a summary proceeding in ejectment by the plaintiff, as landlord, against the defendant, as his tenant. It appears from the testimony of the plaintiff, the only witness examined, that he leased the land to the defendant in May, 1909, at 50 cents a week, and that the rent was regularly paid until November of that year, when the defendant, upon demand, refused either to pay rent or to quit the premises. The plaintiff thereupon brought this proceeding against him before a justice of the peace, who, after hearing the case, gave judgment in favor of the plaintiff for $5.25 and costs. The defendant appealed and gave bond to stay

the execution, conditioned that "he would pay any judgment which in this or any other action the plaintiff may recover for rent of the said premises and damages for the detention thereof," which condition is in accordance with the statute in such cases made and provided, Revisal, sec. 2008. W. C. Fields is surety on the bond. The case was tried in the Superior Court upon two issues:

1. Are the plaintiffs entitled to the possession of the property described in the complaint? Answer: Yes.

2. What amount, if any, are the plaintiffs entitled to recover of the defendants? Answer: $5.25.

The court instructed the jury that, if they believed the evidence, they should answer the first issue "Yes" and the second issue "$5.25" (the amount of rents to the time of the justice's trial), which was accordingly done, and from the judgment upon the verdict the plaintiff appealed, being content with the charge as to the first issue, but alleging error as to the second.

We gather from the record, which is not made up in a regular and orderly way, though sufficiently so for our decision upon the merits of the case, that the defendant did not enter his appeal to the justice's judgment within the time prescribed by the statute, Revisal, secs. 1491 and 2008; but in the view we take of the case, this is not a ma- (250) terial or practical question. We are unable to determine upon what ground or for what reason the court denied the plaintiff's right to an assessment of the rents and damages accrued to the date of the trial. Revisal, sec. 2006, expressly provides for such an assessment in this kind of proceeding, and directs that the verdict shall include and the judgment shall be entered for such rents and damages, and this is, in addition, the general rule, regardless of any special statutory provision. This Court said in *Morisey v. Swinson,* 104 N. C., 555, that "under the present method of procedure, rents are recoverable up to the time of the trial," and this is allowed in order to avoid circuity of action or multiplicity of suits, and so that the entire controversy, as far as it may be done, will be settled in one action, this being in accordance with the very spirit and purpose of our Code. See, also, *Whissenhunt v. Jones,* 78 N. C., 361; *Burnett v. Nicholson,* 86 N. C., 99; *Grant v. Edwards,* 88 N. C., 246. The plaintiff duly excepted to the erroneous instruction upon the measure of damages, and his exception must be sustained and the case remanded for a new trial upon the second issue alone. In other respects the verdict will stand until it is completed by a correct finding upon that issue. The judgment upon the verdict will be entered both against the defendant and his surety for the amount assessed. Revisal, sec. 2006.

New trial.

IN THE MATTER OF LEO HINSON, ALIAS MRS. ERNEST ROCHELLE.

(Filed 11 October, 1911.)

Power of Courts—Sentence of Imprisonment—Temporary Withholding of Capias—Conditioned on Prisoner Leaving County—Rearrest—Limitation of Actions.

A verbal order of the trial judge to the clerk not to issue a capias to carry into effect a sentence of eight months imprisonment of defendant in the county jail, until fifteen days after the adjournment of court, and his saying to the prisoner if she would leave the county within the fifteen days and not return she would not be compelled to serve her sentence, is not a decree of banishment, as it is for the prisoner's volition as to whether she would leave and avoid serving a legal imprisonment; and the fact that she did leave within the time allowed and returned after a longer period of time than that of the sentence will not avail her as a defense, as her absence was not equivalent to serving her sentence, and there is no statute of limitations in such cases.

(251) APPEAL by petitioner from *Whedbee, J.*, in *habeas corpus* proceedings, from WAYNE, heard 7 June, 1911, at Goldsboro.

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

W. S. O'B. Robinson, George E. Hood, and R. M. Robinson for petitioner.

Attorney-General contra.

CLARK, C. J. This is a *certiorari,* in lieu of an appeal, to review a judgment denying the discharge of the petitioner on *habeas corpus. In re Holley,* 154 N. C., 163.

At August Term of Wayne, 1910, the petitioner was convicted of retailing spirituous liquor. The entry on the docket is simply, "Judgment of the court that the defendant be imprisoned in the county jail for eight (8) months." The judge below, in this proceeding, finds that the trial judge said to the defendant that if she would leave the county of Wayne and not return, she would not be compelled to serve the sentence of imprisonment, and directed the clerk of the court verbally not to issue capias to carry into effect the judgment pronounced until fifteen days after the adjournment of the court. Within that time the petitioner left the county of Wayne and took up her abode in the adjoining county of Wilson, where she abided until after the expiration of the eight months, when she returned to Wayne. Thereupon she was taken in arrest upon the capias issued by the clerk, as directed by the trial judge, fifteen days after the adjournment of said court, and was imprisoned (252) in the county jail in execution of the judgment above set out.

The petitioner being in jail under a judgment of the court, his Honor properly refused to discharge her. If the judge had suspended judgment and afterwards in accordance with the terms thereof had passed sentence it would have been valid. *S. v. Hilton,* 151 N. C., 687. The judge might in his discretion have passed judgment to begin at some future time (*S. v. Hamby,* 126 N. C., 1066), as, for instance, to begin fifteen days after the adjournment of the court. But he did neither of these things. He did less. He rendered an absolute judgment of imprisonment, and simply directed the clerk not to issue capias thereon for fifteen days. This was in his discretion. This is sometimes done to give the defendant time to go home and arrange his affairs. In this case the kind-hearted judge, doubtless on account of the sex of the defendant, purposely gave her an opportunity to avoid execution of her sentence. In *S. v. Hatley,* 110 N. C., 522, the Court said that "Such course is not infrequent, and though dictated by the best intentions to benefit the public, as well as offenders, is not to be commended," adding, that the court had no power to pass a sentence of banishment, but that the judgment of the court could not be fairly so construed, and that if the defendant returned after the time specified, capias should be issued to execute the judgment.

The judgment of the court herein is unequivocal. The opportunity which the withholding of the capias afforded the defendant to escape was not a decree of banishment. There was nothing requiring her to leave. If she left it was of her own free will and accord, and was legally a flight from justice. The defendant cannot plead her own wrong in leaving the jurisdiction of the court, by her own voluntary act, as a protection against a legal sentence.

The distinguished counsel who represented the defendant attempted to distinguish this case from *S. v. Hatley, supra,* on the ground that in this case the defendant remained in the adjoining county for the full eight months of the sentence. There is no statute of limitation in such case. The position of counsel could be sustained only on the ground that eight months sojourn in another county is the equivalent of eight months imprisonment in the county jail of Wayne. His (253) loyalty to his home is like that of the Argive,

"Who, in dying, remembered sweet Argos."*

His position if submitted as a proposition of fact to a Wayne County jury might possibly not be altogether hopeless, but we cannot sustain it as a proposition of law. The judgment is

Affirmed.

*"Dulce moriens reminiscitur Argos." Verg., 10 En., 783.

F. K. ELLINGTON AND FRANCES WOMACK, EXECUTORS OF THOMAS B. WOMACK, v. CARY K. DURFEY, SURVIVING EXECUTOR OF FLORENCE P. TUCKER.

(Filed 11 October, 1911.)

Executors and Administrators—Wills—Compensation—Fixed Sum and Commissions—Death of Executor—Interpretation of Wills.

A will provided for the compensation of the two executors, etc., therein named by the maker, that they should receive "out of my estate, in full compensation for all services and responsibilities to be by them rendered and incurred, whether as executors or trustees, the single sum of $2,000 each, and in addition thereto" a commission of a certain per cent of the receipts and disbursements. The executors named entered into the discharge of their duties as such, and collected and disbursed certain sums of money. One of the executors died about two months after the testatrix: *Held*, (1) as to the compensation of the deceased executor, his executors could not recover any part of the fixed sum of $2,000, the time for its payment not being fixed by the will and it being impossible for the courts to prorate it; (2) the Superior Court will fix the percentage of commissions to be allowed upon the receipts and disbursements as upon a *quantum meruit*, not exceeding 5 per cent, and allow one-half thereof to plaintiff's intestate.

APPEAL from *Whedbee, J.*, at February Term, 1911, of WAKE.

This is a controversy, submitted without action, to determine the amount due plaintiff's intestate as one of the executors of Florence P. Tucker, who died 15 December, 1909, leaving a last will and (254) testament appointing Thomas B. Womack and Cary K. Durfey executors.

This paragraph in the will is the only part of it pertinent to the controversy: "My said executors shall receive out of my estate, in full compensation for all services and responsibilities to be by them rendered and incurred, whether as executors or trustees, the single sum of $2,000 each, and in addition thereto they shall be allowed a commission of 5 per cent on the receipts of income and 2 per cent upon disbursements thereof, and may employ such reasonable clerical assistance as may be necessary. Owing to the trust and confidence I have in Cary K. Durfey, it is my desire that my executors shall continue him in his present position with the same salary I shall be paying him at the time of my death."

The controversy was heard by his Honor, *Judge Whedbee*, at February Term, 1911, Wake Superior Court, who gave judgment that the plaintiff's testator was entitled to $188.31, being one-half of the commissions on income fixed by the will, but no part of the $2,000. Plaintiffs excepted and appealed.

Aycock & Winston for plaintiffs.
Holding & Snow for defendant.

BROWN, J. The facts set out in the case substantially show that Mrs. Tucker died 15 December, 1909, leaving a will and appointing Thomas B. Womack, her legal adviser, and the defendant as executors. Judge Womack and his coexecutor transacted the business of the estate up to the death of the former, 18 February, 1910.

The question presented is the just compensation due the estate of plaintiff's testator.

It is stated in the record that during the time he acted as executor the receipts of the estate amounted to $46,920.22, not including sales of any real estate, and the disbursements $7,347.66.

The question presented is one of first impression, and we are without precedent or authority to guide us.

We agree with his Honor below, that the plaintiff's intestate is not entitled to the $2,000, and as the time when it was to be (255) paid is not fixed by the will, it is impossible to prorate it.

The plaintiff's intestate was prevented by death from fully discharging the duties as executor, for which the $2,000 was plainly intended as compensation for all services to be performed by the executor in addition to the commissions on income fixed by the will.

We think, however, that plaintiff's intestate failed to perform all the services, not by his own fault, but because of his untimely death. Consequently we are of opinion that his services should be measured by the just and reasonable rule of *quantum meruit,* and that should be gauged by the compensation allowed by law, had the will fixed no compensation.

We are of opinion that plaintiff's intestate is entitled to one-half of the commissions, not exceeding 5 per cent, upon the sum of $46,920.22, the receipts of the estate, and not exceeding 5 per cent upon the sum of $7,347.66 disbursements.

This of course will not apply to the Executor Durfey, who is living and discharging the duties of sole executor. His compensation will be adjusted by the terms of the will.

The Superior Court will fix the percentage of commissions and allow plaintiff's intestate one-half of the whole.

Reversed.

SMITHFIELD IMPROVEMENT COMPANY v. COLEY-BARDIN.

(Filed 11 October, 1911.)

1. Landlord and Tenant—Repairs to Leased Premises—Agreement.

The landlord is not required to keep the leased premises in repair in the absence of any agreement between the parties to that effect.

2. Same—Implied Covenant.

A covenant on the part of the landlord is not implied, from the fact of a lease of a hotel, that he will keep the leased premises in repair or that they shall be fit for the purposes for which they are rented.

3. Landlord and Tenant—Lease—Hotel—Water Pipes—Plumbing—Damage to Lessee—Counterclaim.

A landlord is not liable to the tenant, in the absence of an express agreement, for damages caused by the inefficient working of the water pipes and plumbing system installed in a hotel, the leased premises, and in his action for the rent, etc., such damages may not be successfully set up by the tenant as a counterclaim.

(256) APPEAL from *Whedbee, J.*, at March Term, 1911, of JOHNSTON.

Summary proceeding in ejectment. The question of possession was not at issue, as defendant had surrendered possession.

At the close of the evidence the court instructed the jury to return a verdict for the plaintiff for $163.50, $150 balance due as rent and $13.50 amount due for pillows. It is admitted that is the sum due plaintiff by defendant for rent and towels.

The defendant offered certain evidence tending to establish a counterclaim, which was excluded, and defendant excepted.

F. H. Brooks for plaintiff.
Abell & Ward for defendant.

BROWN, J. Plaintiff leased by contract in writing to defendant its hotel, including the waterworks and connections used exclusively to supply it with water. This proceeding was brought to eject defendant and recover balance of rent due plaintiff. Defendant pleaded a counterclaim, viz., that under the rental contract between the plaintiff and the defendant, the plaintiff rented to the defendant the waterworks and all connections thereto belonging. That it was the duty of the plaintiff to keep said waterworks and connections in proper repair and in good condition, so that a supply of water could be had at all times for necessary use in said hotel. That on account of the carelessness and negligence of the plaintiff in not keeping said waterworks and connections in

proper repair and in good condition, thereby cutting off the water supply necessary for use in the said hotel, and in the failure to furnish water necessary for the same, the defendant has been damaged. The defendant offered evidence tending to prove that the waterworks and pipes got out of order during her tenancy, that plaintiff neglected to repair them and that defendant was damaged thereby. His (257) Honor excluded the evidence upon the ground that it was defendant's duty to repair the waterworks in the house during her tenancy, and not plaintiff's.

We have examined the written lease with care, and are unable to find any covenant in it by which the landlord binds himself to keep the property or the waterworks during the lease in repair. Whether the tenant obligated to do it is immaterial.

Without express stipulations in a lease, the law implies a covenant of quiet enjoyment upon the part of the landlord, and if the tenant be rightfully evicted by another he may recover damages, and this covenant extends to water and sewerage connections existing at date of lease. *Huggins v. Waters,* 154 N. C., 444.

Under the civil law, in case of tenancies for short terms the landlord was under implied obligation, without special agreement, to keep the premises in repair. 4 Kent Com., 110; *Felton v. Cincinnati,* 95 Fed. Rep., 336; *Viterbo v. Friedlander,* 120 U. S., 707. But under the common law it is well settled that, in the absence of any agreement between the parties, the landlord was under no obligation to his tenant to keep the demised premises in repair.

The common law considers such a lease as the one in evidence as the grant of an estate for years, to which the lessee takes title. The lessee is bound to pay the stipulated rent, notwithstanding injury by flood, fire, or other external cause. It required a statute of the State to relieve the lessee where the property is destroyed by fire.

By the common law the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purpose for which they are rented. 3 Kent Com., 465; Brown Leg. Max. (3 Ed.), 213-214; *Fowler v. Batt,* 6 Mass., 63; *Doupe v. Genin,* 45 N. Y., 119; 2 McAdam on Landlord and Tenant, sec. 383; 1 Taylor on Landlord and Tenant, sec. 327; *Viterbo v. Friedlander, supra.*

Chancellor Kent states the distinction between the civil and (258) common law as follows: "The Roman law made some compensation to the lessee for the shortness of his five-year lease, for it gave him a claim upon the lessor for reimbursement for his reasonable improvements. The landlord was bound to repair, and the tenant was discharged from the rent if he was prevented from reaping and enjoying the crops by an extraordinary and unavoidable calamity, as tem-

pests, fire, or enemies. In these respects the Roman lessee had the advantage of the English tenant, for, if there be no agreement or statute applicable to the case, the English landlord is not bound to repair, or to allow the tenant for repairs made without his authority; and the tenant is bound to pay the rent, and to repair at his own expense, to avoid the charge of permissive waste."

"The rule of *caveat emptor* applies to leases," says the Encyclopædia, "and the landlord is not even under an implied obligation to remedy defects in the demised premises existing at the time of the demise. It follows, therefore, in the absence of any agreement on the part of the landlord to repair, a tenant cannot recover from the landlord the cost of repairs made by him, etc." 18 A. & E., 215.

In regard to waterworks, it has been held in New York that when water pipes are arranged for an entire building occupied by different tenants, it is the duty of the landlord to keep the pipes in repair, or the failure to repair may amount to a constructive evictment. *Bank v. Newton,* 76 N. Y., 616.

But the Massachusetts court holds that a landlord is under no implied obligation to keep in repair water pipes used *exclusively* in carrying water to the part of the building demised to the tenant, and therefore is not liable to such tenant for leakage from such pipes. *McKeon v. Cutter,* 156 Mass., 296.

Upon a review of the record we find

No error.

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(259)

SOUTHERN INVESTMENT COMPANY v. POSTAL TELEGRAPH-CABLE COMPANY.

(Filed 18 October, 1911.)

1. Contracts—Breach—Tort Feasor—Damages.

In the absence of specific stipulation, where one has entered into the enjoyment of a right conferred by contract, an interference with such enjoyment on the part of a tort feasor is not imputable to the grantor.

2. Tenants in Common—Leases by One—Acts Prejudicial—Rights of Cotenants.

A tenant in common is not permitted to do acts which are prejudicial to his cotenant's estate, or to carve out his own part of the estate or to convey it in such a manner as to compel his cotenant to take his share in certain parts.

3. Same—Easements—Severalty.

Servitudes and easements upon lands cannot be granted by a tenant in common without the consent of his cotenants, and any one of them may prevent it until the estate is divided into separate parts; and when each holds his own part in severalty, either of them may impose the servitude and grant the easement upon his own share, as he pleases.

4. Same—Damages—Tort Feasor.

When a tenant in common has granted to a stranger for a valuable consideration a license which he has no right to make, whether it is a lease, an easement, or a revocable license, and the delivery and enjoyment of the privilege has been interfered with and prevented by his cotenant, the cotenant having the right thus to interfere is not a tort feasor, and the grantee may recover in his action against his grantor such damages incident to the wrong as were in the reasonable contemplation of the parties and capable of ascertainment with a reasonable degree of certainty.

5. Same—Telegraph—Railroads—Consent—Cotenant.

When a telegraph company and a railroad company are tenants in common in a telegraph line upon and along the right of way of the latter under a contract for a term of years, which was to be used by both companies for their respective businesses, with stipulations as to the number of wires to be strung and used for each and for additional wires to be strung and used for like purposes, imposing mutual burdens on the contracting parties for their maintenance, etc., the telegraph company has no right to grant to another corporation, in furtherance of a disconnected and separate business, the privilege of affixing two telephone wires to these poles and of imposing this additional burden upon the owners, in the absence of an express provision to that effect and without the consent of its cotenant.

6. Measure of Damages—Telegraphs—Railroads—In Contemplation of Lease—Reasonable Contemplation—Ascertainment.

The defendant telegraph company and a railroad company were tenants in common of a line of telegraph along the latter's right of way, and the defendant leased to a separate and independent telephone company the right to the use of the poles for the purpose of stringing and operating two telephone wires for the use of the lessee. In the contract of lease there was a provision that either of the parties thereto may terminate the lease upon giving thirty days previous notice to the other. The railroad company, the cotenant of the defendant, prevented the licensee from stringing the wires before the time agreed upon for the commencement of the lease: *Held*, plaintiff, the licensee, was entitled to recover its reasonable costs and expenses incurred in making proper preparations to carry out the contract, including freight charges paid in delivering the material along the route and the loss incident to purchase and resale where the same could not be used to advantage or otherwise disposed of, under the rule that they must have been within the reasonable contemplation of the parties and reasonably capable of ascertainment.

7. Instructions—Harmless Error—Appeal and Error.

When it would have been proper for the court to have instructed the jury to find for the plaintiff, if they found the facts to be as testified to by the witnesses, the defendant is not prejudiced by an instruction given to the effect that they should so find upon certain phases of the evidence.

(260) APPEAL from *O. H. Allen, J.*, at May Term, 1911, of BEAUFORT.

Action to recover damages for alleged breach of contract on part of defendant. On issues submitted, there was verdict in favor of plaintiff, assessing his damages at $1,000. Judgment on the verdict, and defendant excepted and appealed.

Small, McLean & McMullan for plaintiff.
R. C. Strong and W. B. Rodman for defendant.

HOKE, J. On the trial it appeared that, on or about 1 February, 1909, plaintiff, a corporation "owning and operating a telephone line
(261) and system" into and out of New Bern, Washington, Farmville, and Greenville, N. C., being desirious of extending the same to Wilson and Raleigh, N. C., and intermediate points, entered into negotiations with defendant corporation, with a view of securing a right or license to use, for the purpose indicated, a line of poles to said points, placed along the right of way of the Raleigh and Pamlico Sound Railroad Company, and in which defendant had acquired an interest by contract with the latter company, and, on 1 May, 1909, a written contract, properly executed, was made between plaintiff and defendant by which said defendant, in consideration of $376 per annum, payable semiannually in advance, granted to plaintiff, termed in the contract licensee, the right to attach to said poles along said route two wires, to be used only as telephone wires and for no other purpose, together with necessary brackets, insulators, etc. This agreement contained a further stipulation to the effect that the same could be terminated by either party on giving to the other thirty days written notice of such intent, and, in which case, the licensee should have the privilege of removing said wires, fixtures, etc.

It appeared, further, that the interest of defendant company, a corporation doing a telegraph business, was acquired and set forth in a written contract, duly executed, entered into between said defendant and the Raleigh and Pamlico Sound Railroad Company in August, 1905, by which the two contracting parties were to own said poles as tenants in common for twenty-five years, and on temination of the contract the telegraph company had the right to remove the wires and fixtures placed by that company, and the poles and such wires as the railroad com-

pany had placed to be and remain as the property of the railroad. This latter contract contained express provision for two wires to be used in the telegraph busniess, with the right and privilege of either to place additional wires and fixtures thereon as the said business might require, and also made minute specifications as to user of said wires in doing telegraph work for railroad business and for the general public and as to the different duties and burdens imposed upon the two contracting parties in the operation and maintenance of the line.

It was further made to appear that the rights and interests (262) of the railroad company in the railroad, its franchise, the right of way and the said poles thereon, were subsequently acquired and held by the Norfolk and Southern Railway, which last mentioned road, by proceedings had, was, at the time of the alleged breach of contract between plaintiff and defendant and at the time same was made, in the hands and control of receivers appointed by the Federal Court.

There was evidence on the part of plaintiff tending to show that as soon as the contract between plaintiff and defendant had been duly made and executed, payment of the first installment of rent having been postponed by mutual consent of the parties, the plaintiff proceeded to purchase and distribute along the railroad line the necessary equipment and material to construct the plant and install the telephone system as contemplated and provided by the contract, and made an effort to affix the wires to the poles, when it was interfered with and the work stopped by the receivers, claiming the right to do so, and plaintiff was forced to give over its purpose and dispose of the material purchased at considerable loss.

On this question, H. Susman, a witness for plaintiff, testified that the material and equipment, having been purchased, was fitted for the line to Wilson and Raleigh, could not be used on the portions of line already constructed, and he was forced to sell it at considerable loss, which, with the freight paid for its delivery along the route and preliminary work, reasonable and necessary in preparation, amounted to $1,398. It appeared further, that the receivers were resisting the right of defendant company to any other or further use of the poles, and had filed a petition in the cause, praying that the road be relieved of the stipulations of their contract with defendant, and, further, that when it was disclosed that the action of the receivers would operate to prevent plaintiffs from exercising the rights and privileges granted in the contract between plaintiff and defendant, said defendant, on 9 June, 1909, gave due notice in writing that it elected to terminate its contract in thirty days from said date, etc.

On these, the controlling facts relevant to the inquiry, the defendant assails the validity of plaintiff's recovery, contending: (263)

(1) That no breach of contract has been shown; (2) in any event, the damages should be only nominal. But in our opinion, neither position can be sustained. Undoubtedly, as insisted on by defendant, it is a correct general proposition that, in the absence of specific stipulation when one has entered into the enjoyment of a right conferred by contract, an interference with such enjoyment on the part of a tort feasor is not imputable to the grantor. The authorities cited by defendant are apt in support of that position. *Hurest v. Marx,* 67 Mo. App., 418; *Moore v. Webber,* 71 Pa. St., 429; *Underwood v. Birchard,* 47 Vt., 305. But no such case is presented here. On the contrary, it appears that the receivers of the railroad are contending that the road should no longer be bound in any way by the terms of the contract between the defendant and the railroad, and have filed a petition that the same be set aside. But, without reference to the ultimate determination of the questions involved in that proceeding, and assuming that the defendant's position is sustained and that their contract with the railroad holds, we find nothing in it which confers upon defendant the right to make the contract upon which plaintiff has brought suit. A perusal of that agreement will disclose that, under its provisions, this defendant and the railroad, or its successors and assigns, became tenants in common of these poles for the term of twenty-five years, for the purpose of operating a telegraph system along this route, to serve both the general public and the railroad company. Specific stipulation is made for two wires, in the first instance, and the right and privilege of either of contracting parties to affix additional wires as its business might require, interchangeable duties and burdens are provided for between the contracting parties, in reference to the operation of the system and the maintenance and repair of the line, its wires and fixtures, etc. In such case, and in the absence of specific provision conferring the power and without permission given by its cotenant, the defendant had no right to grant to plaintiffs, in furtherance of a disconnected and separate business, the privilege of affixing two telephone wires to these poles and of imposing this additional burden upon the owners. *Murray*
(264) *v. Haverty,* 70 Ill., 318; *Marshall v. Trumbull,* 28 Conn., 183; *Hutchinson v. Chase,* 39 Me., 509; 4 Kent's Commentaries, pp. 508-513. In *Hutchinson's case, supra, Rice, J.,* delivering the opinion, said: "The general rule seems to be well settled that one tenant in common cannot, as against his cotenant, convey any part of the common property by metes and bounds, or even an undivided portion of such part. *Bartlett v. Harlow,* 12 Mass., 348; *Peabody v. Minot,* 24 Pick., 329; *Griswold v. Johnson,* 5 Conn., 366; *Smith v. Benson,* 9 Vt. The reason is obvious. His title is to an undivided share of the whole, and he is not authorized to carve out his own part, nor to convey in such a

manner as to compel his cotenants to take their shares in several distinct parcels, such as he may please. *Great Falls Co. v. Worcester*, 15 N. H., 412. Even though his deed may bind him by way of estoppel, as against the cotenants, such deed is inoperative and void. 4 Kent's Commentaries, 368. Though tenants in common are, in legal contemplation, all seized of each and every part of the estate, still they are not permitted to do acts which are prejudicial to their cotenants." And further: "As one tenant in common cannot convey the entire estate, or the whole of any portion thereof, or give a valid release for injuries done thereto, so, too, and for the same reasons, he cannot subject the common property to particular servitudes, by which the rights of his cotenants will be affected. These servitudes, or easements, must be created by the owner, and one tenant in common cannot establish them, upon the common property, without the consent of his cotenant. 3 Kent's Com., 436; 2 Hilliard's Abbr., 118. Such, also, is the rule of the civil law. He who has the property of an estate only in common with others, without any division of the several shares, cannot subject any part of it to a service without the consent of all his copartners; and any one of them may hinder it until, the estate being divided into shares, every one may impose a service on his own share if he think fit. And likewise he who possesses in common and undivided a portion of the land or tenement to which the service is so due cannot by himself free the land or tenement which owes the service; but the service remains for the portions of others. For these services are for every (265) part of the land or tenement to which they are due, and every one of the proprietors has an interest in the service for his own portion." This, we think, being the correct principle, whether the right which defendant undertook to grant plaintiff be considered a lease, as argued, an easement, or revocable license—and we think it clear that it was the latter—there has been a breach of contract on the part of defendant.

For valuable consideration, defendant has made a binding agreement, granting to plaintiff a license which he had no right to make; the delivery and the enjoyment of the privilege has been interfered with and prevented, not by a tort feasor, but by one having right, and, on authority, plaintiff should be allowed to recover. *Kerrison v. Smith*, L. R. Q. B. Div. 1897, p. 445; *Smart v. Lewis*, 109 E. C. L.., 282, 717. *Despeaux v. De Lane* 71 N. J. L., 280, and in our own reports the case of *Sloan v. Hart*, 150 N. C., 269, is in recognition of the same general principle. The court, therefore, committed no error to defendant's prejudice in charging the jury on the question of breach of contract as he did, in effect, "that defendant was responsible if plaintiff was interrupted in the enjoyment of the rights bargained, by reason of litigation and difficul-

ties arising between the railroad and defendant and of which defendant had knowledge at the time it made the contract. In our view, he might well have told the jury, if they believed the evidence, there had been a breach of contract. On the question of damages, his Honor, in general terms, charged the jury that if a breach of contract was established the plaintiff was entitled to recover the damages, incident to the wrong, which were in the reasonable contemplation of the parties, and, more specifically, and to the extent they were in such contemplation, they could allow the reasonable costs and expenses incurred by plaintiff in making proper preparation to carry out the contract, including cost of survey, the freight charges paid in delivering the material along the route, and the loss incident to purchase and resale of material where the same could not be used to advantage or otherwise disposed of, etc.

Subject to the well recognized rule, stated by the court, that
(266) damages must be such as were in the reasonable contemplation of the parties and capable of ascertainment with a reasonable degree of certainty, a recovery for breach of contract is allowed as compensation for the loss sustained (*Hassard-Short v. Hardison,* 114 N. C., 485; Hale Damages, pp. 38-39), and plaintiff, having been induced by defendant's wrong to make this outlay, the amount should be made good to him. And we may not approve the position earnestly insisted on by defendant, that plaintiff should be restricted to nominal damages, by reason of notice given that defendant elected to terminate the contract in thirty days, the argument being that, as plaintiff would, in any event, have had to take down and remove the material in that time, he suffered no actual loss. This position rests upon the theory that the contract had been carried out and the notice duly given according to its terms, the resultant damage in such case being necessarily and entirely speculative; whereas, in fact and truth, the contract had been broken when the notice was given, and the damages claimed had been already suffered—certainly so before the notice ever became effective. This, too, is the correct view to take of *Kivett v. McKeithan,* 90 N. C., 106, in its application to the facts, an authority much relied on by defendant. In that case it was held "That a parol license, relating to land, either voluntary or supported by valuable consideration, may be revoked by the owner, without incurring liability in damages, when notice is given and reasonable opportunity afforded to remove the improvements put up thereunder." It will be noted that the decision proceeds upon the theory that no actionable wrong had been committed, and on that ground no damages were allowed. In our case a breach of contract has been established and, under correct rulings, damages therefor have been properly awarded. There is no error, and the judgment for plaintiff is affirmed.

No error.

(267)

CHARLES S. RILEY & CO. v. W. T. SEARS & CO., INC.

(Filed 18 October, 1911.)

1. Appeal and Error—Second Appeal—Matters Concluded.

Questions which were well within the scope of the inquiry of the same case on a former appeal will not be considered on a second appeal, and the parties are concluded by the former decision.

2. Same—Vendor and Vendee—Insolvent Corporation—Purchase Subject to Laborer's Lien—Defenses.

The vendee of the assets of an insolvent corporation sold by the receiver, having purchased them subject to the liens given by the statute, Revisal, 1206, for labor done and services rendered within two months next preceding the institution of the proceedings in insolvency, resisted payment of the claims of these lienors; and on appeal to the Supreme Court it was ascertained that the claims were valid and judgment entered that the receiver pay them with whatever moneys of the corporation were on hand and collect the balance from the vendee and the surety on his bond given for their payment. On a second appeal: *Held*, the vendee was concluded, by the decision rendered on the first appeal, from further resisting payment to the receiver for the lienors, and the further defense that there were certain actions of tort then pending against the insolvent corporation is not available.

APPEAL from *Peebles, J.*, at April Term, 1911, of NEW HANOVER.

Action, heard on motion made in the cause. From judgment entered plaintiff Riley & Co. excepted and appealed.

Herbert McClammy for plaintiff.

Kenan & Stacy and E. K. Bryan for defendant.

HOKE, J. On the hearing it appeared that this was an action by Riley & Co., holding a large claim against Sears Company, Incorporated, secured by mortgage as part of the assets, to dissolve the debtor corporation and distribute the assets according to law. In the progress of the cause sale was had of a large portion of all of the property, and Charles S. Riley & Co., creditor and mortgagee, became the purchaser at the price of $15,000, and after paying $2,000, an amount ascertained to be due under a mechanic's lien, gave bond in the sum of $13,000, conditioned to pay such further claims as might be established and declared as prior liens on the corporation assets. (268) It further appeared that certain persons, claiming to be creditors by reason of wages due for labor performed for said corporation within two months before proceedings instituted, filed their petitions in the cause, asserting such claim, and, the same being resisted by plaintiff, at May Term, 1910, of said Superior Court, an issue was submitted and it was duly established that the petitioners were due from defendant

corporation certain specified amounts as wages for work and labor and within the sixty days, etc. Judgment was therefore formally entered for these amounts, declaring same a prior lien on the property of the corporation. The receiver was directed to pay the full amount of these claims out of any moneys on hand, and if not sufficient amount on hand for the purpose, that he collect same from plaintiff, Charles S. Riley & Co., and on the bond given, as stated. Plaintiff appealed from this order to Supreme Court. The appeal was dismissed at Fall Term, 1910, and this action of the Supreme Court having been certified down, plaintiff made further resistance to the order, claiming that payment of the claims embodied in the former judgment cannot now be properly made by reason chiefly of certain actions of tort now pending against defendant corporation, and which might also be declared liens on the assets. The Court below being of opinion that plaintiff's position was untenable, gave further directions that the receiver proceed to collect the judgment, and plaintiff excepted and again appealed to this Court.

Our statute in reference to these claims, Revisal, sec. 1206, provides that in proceedings of this character the wages due to "laborers and workmen and all persons doing labor or service, of whatever character, in the regular employment of such corporations, shall be a first lien upon the assets for the amount of wages due them, respectively, for their work rendered within two months next preceding the date when proceedings in insolvency shall be instituted." And if this were a question now open to plaintiff, the statute and authoritative interpretations of it would seem to be against plaintiff's position. *Trust and Deposit Co. v. Fisher,* 200 U. S., 58; *Cox v. Lighting and Fuel Co.,* 152 N. C., (269) 164; *R. R. v. Burnett,* 123 N. C., 210; *Dunavant v. R. R.,* 122 N. C., 1001; *Coal Co. v. Electric Co.,* 118 N. C., 232. But the position is not open. At a former term of the court, the question as to the amount of these claims and their priority as liens upon the assets were investigated, and both the amount and the liens and the priority of same were fully established. Judgment to that effect was formally entered and signed by the presiding judge, and plaintiff's appeal from such judgment, as heretofore stated, was regularly and formally dismissed. The questions which plaintiff now seeks to raise, were, no doubt, fully considered and passed upon when the former judgment was entered; certainly they were well within the scope of the inquiry, and in such case we have repeatedly held that a litigant is concluded and cannot raise the same questions upon a second appeal. *Roberts v. Baldwin,* 155 N. C., 276; *Holley v. Smith,* 132 N. C., 36; *Perry v. R. R.,* 129 N. C., 333.

There is no error, certainly, which gives plaintiff any just around of complaint, in entering the second judgment, simply that the receiver

proceed to collect the money required to pay these claims. This will be certified, that appropriate measures be taken to enforce obedience to the judgment of the Court.

Affirmed.

Cited: *Alexander v. Statesville,* 165 N. C., 533; *Foster v. Tryon,* 169 N. C., 183; *Seahorn v. Charlotte,* 171 N. C., 541.

LUCY JOHNSON v. CITY OF RALEIGH.

(Filed 18 October, 1911.)

1. Cities and Towns—Defects in Streets—Injury to Pedestrians—Negligence—Notice, Actual or Implied.

It is the duty of the governing authorities of a town to keep its streets, sidewalks, and drains in a reasonably safe condition so far as this can be accomplished by the exercise of proper and reasonable care and continuing supervision; and, in such cases, upon the issue as to defendant's negligence, under conflicting evidence, the jury are to determine whether the authorities had notice or knowledge of the defect complained of as having caused the injury, in time to have remedied it, or whether it had existed for such length of time and under such circumstances that they should have discovered and repaired it.

2. Cities and Towns—Defect in Streets—Injury to Pedestrians—Lights at Night—Negligence—Evidence.

In an action to recover damages of a city, alleged by plaintiff to have been received by reason of defendant's negligence in permitting a hole to remain in its sidewalk, into which she fell on a dark night, when there was no light or sufficient light, which it was the duty of the defendant to provide, the absence of lights at the place of the injury is not negligence *per se,* but only a relevant fact on the determinative questions whether the streets were kept in a reasonably safe condition and whether the authorities had properly performed their duty concerning them at the time and place of the occurrence of the injury.

APPEAL from *Whedbee, J.,* at February Term, 1911, of WAKE. (270)

Action to recover damages for personal injuries caused by alleged negligence of defendant in failing to keep its streets in proper repair. On the issue as to negligence, there was verdict for defendant. Judgment on verdict, and plaintiff excepted and appealed.

Douglass, Lyon & Douglass for plaintiff.

W. H. Pace for defendant.

HOKE, J. On the trial it appeared that on the night of 5 February, 1910, plaintiff was crossing from her home on Bloodworth Street to

Barber's store, nearly opposite, and while near the sidewalk she fell into a hole, about 1½ to 2 feet in depth, and was injured; that just at the edge of the sidewalk and nearly in front of the store, instead of an open gutter, a long box had been placed "like a rabbit-gum," as one of the witness described it, and covered over with dirt, and the hole had been caused, in all probability, by a wagon, in driving over or along this way, having crushed in the box. There was evidence on part of plaintiff tending to show that it was a dark night, with no light, or not sufficient light, on the street; that she crossed at the place where persons were accustomed to go, and that the authorities had actual notice of the existence of the hole in time to have remedied the defect, (271) and, in any event, the same had been in existence for such a length of time that they should have known it and had same properly repaired.

The evidence on part of defendant tended to show that they had no notice or knowledge of the hole, and that same had not been there long enough to have enabled them to discover it in the exercise of ordinary care, and that there was adequate light at the cross street, a short distance away, etc.

In the conflict of evidence, the court charged the jury, in general terms, that it was the duty of the governing authorities of a town to keep its streets, sidewalks, drains, and culverts in a reasonably safe condition as far as this could be accomplished by the exercise of proper and reasonable care and continuing supervision, and under this rule submitted the issue of defendant's negligence to the jury on the question whether the authorities had notice or knowledge of the existence of the hole in time to have remedied the defect, or whether it had existed for such length of time that they should have discovered and repaired the same. In reference to the lights, the court, in effect, told the jury that the absence of lights at the place of the injury, if such condition existed, was not negligence *per se,* but was only a relevant fact on the determinative questions whether the streets were kept in a reasonably safe condition and whether the authorities had properly performed their duty concerning them at the time and place of its occurrence.

We have carefully examined the record, and are of opinion that the charge is in accord with our decisions on the subject and the case has been fully and fairly submitted to the jury. *Revis v. Raleigh,* 150 N. C., 353; *Kinsey v. Kinston,* 145 N. C., 108; *Fitzgerald v. Concord,* 140 N. C., 110; and on the question of lights, see *White v. New Bern,* 146 N. C., 447. There is no error, and the judgment below must be affirmed.

No error.

Cited: Brady v. Randleman, 159 N. C., 436.

(272)

GEORGE D. BIZZELL ET AL. v. J. B. ROBERTS, JULIA KATE ROBERTS, AND ZILPHIA A. WARREN.

(Filed 18 October, 1911.)

1. Mortgages—Notes—Interest—Maturity on Default—Reasonable Provisions.

Where a deed is payable in installments and is secured by a mortgage containing provision that the entire debt shall mature on failure to pay the interest or specified portions of the principal as it comes due, or any other reasonable stipulation looking to the care and preservation of the property or the maintenance of the lien thereon, such provision or stipulation, in the absence of circumstances tending to show fraud or oppression or "unconscionable" advantage, is enforcible as a valid contract obligation.

2. Same—Waiver—Option of Mortgagee.

Provision in a mortgage that the mortgage notes shall mature and become payable on failure of the maker to pay the interest as it may become due at the stated periods is primarily for the benefit of the mortgagee, and, as a rule, will be waived by him by the acceptance of all arrears, the occasion of the default, and invariably so when the maturing of the debt is expressed to be at the option or election of the mortgagee and he accepts the arrears with the expressed or implied intent to waive the forfeiture.

3. Mortgages—Notes—Debtor and Creditor—Additional Security—Maturity—Original Debt—Pleadings—Demurrer.

When a mortgage creditor has taken a note or other collateral as additional security for his debt, which has matured, he may proceed to collect it according to its tenor, whether the principal debt is due or not, if there is no binding stipulation to the contrary; and in his suit upon the collateral note under these circumstances a demurrer to the complaint will not be sustained.

APPEAL from *Peebles, J.*, at August Term, 1911, of WAYNE.

Action heard on demurrer to complaint. There was judgment overruling the demurrer, and defendants excepted and appealed.

W. T. Dortch and M. T. Dickinson for plaintiff.
Langston & Allen for defendant.

HOKE, J. It appeared in the complaint that on 3 March, 1909, (273) defendants J. B. Roberts and Julia Kate Roberts became indebted to plaintiff in the aggregate sum of $2,750, payable by installments and evidenced by the promissory notes of said defendants under seal.

1. For $600, payable sixty days after date.
2. For $500, payable one year after date.
3. For $500, payable two years after date.

4. For $500, payable three years after date.

5. For $650, payable four years after date.

There was mortgage on real estate securing said indebtedness and containing the stipulation that if default be made on the payment of either of said notes and interest thereon when due, then all of said notes should become "due and payable at once."

That defendant Roberts had made payments on said notes as follows:

"On the first of said notes was paid $141 on 18 March, 1909, and said note was paid in full on 9 November, 1909; and the second of said notes was paid in full on 9 November, 1909; and on the third of said notes $252.62 was paid on 9 November, 1909; and on 17 February, 1911, there was paid on the balance due on said notes the sum of $1,050, which credit is subject to a deduction of $47.23, the amount paid by the plaintiffs for taxes on said land for the years 1909 and 1910; and that no further payment has been made upon said notes, and the remainder of said indebtedness, to wit, $565.21, with interest thereon from 17 February, 1911, is now due and owing to the plaintiffs by the defendants."

The complaint further stated that on 3 June, 1909, defendants J. B. and Julia Kate Roberts and their codefendant, Zilphia A. Warren, in further security of said first-mentioned notes, executed their promissory note under seal for $450, with interest, etc., payable 1 January, 1910, and that no part of this note had been paid; and on these allegations plaintiff demanded judgment on the $565.21 balance due on the principal indebtedness and for $450, with interest, being the amount due on the collateral. The present action was instituted on 16 May,

(274) 1911, and defendant demurred to the complaint, assigning for cause that no part of plaintiff's claim had matured at the time of action commenced.

Authority here and elsewhere is to the effect that where a debt is payable in installments, and same is secured by a mortgage containing provision that the entire debt shall mature on failure to pay the interest or specified portions of the principal as it comes due, or any other reasonable stipulation looking to the care and preservation of the property or the maintenance of the lien thereon, such stipulation, in the absence of circumstances tending to show fraud or oppression or "unconscionable" advantage, is enforcible as a valid contract obligation. *Gore v. Davis,* 124 N. C., 234; *Parker v. Oliver,* 106 Alabama, 549; *Odell v. Hoyt,* 73 N. Y., 343; *Insurance Co. v. Westerhoff,* 58 Neb., 379. And it is also generally held, uniformly so far as examined, that a provision of this character is primarily for the benefit of the mortgagee

(Jones on Mortgages, sec. 1183a); and from this it would seem to follow that the same may be waived by him, and, as a rule, will be by the acceptance of all arrears, the occasion of the default. This is undoubtedly the correct position when the maturing of the debt is expressed to be at the option or election of the mortgagee and he accepts the arrears with the expressed or implied intent to waive the forfeiture. *Vanlessingen v. Lentz,* 171 Ill., 162; *Development Co. v. Post,* 55 N. J. Eq., 559; *Sire v. Wightman,* 25 N. J. Eq., 102; *Smalley v. Renken,* 85 Ia., 612; *Manufacturing Co. v. Robinson,* 56 Fed., 690; Jones on Mortgages, sec. 1186; 27 Cyc., 1532.

It has been said, however, that this waiver will not result from the acceptance of arrears, when on the face of the mortgage or other instrument the stipulation as to the maturing of the debt is absolute and not made to depend on the election of the mortgagee. *Moore v. Sargent,* 112 Ind., 484.

Without final decision on this question, as the mortgage is not set out in *"ipsissimis verbis,"* there seems to be no conflict of authority on the position that where a creditor who takes a note or other collateral as additional security for his debt and the same has matured, he may, in the absence of binding stipulation to the contrary, pro- (275) ceed to collect it according to its tenor, and whether the principal debt is due or not. *Bank v. Doyle,* 9 R. I., 76; *Hunt v. Nevers,* 32 Mass., 500.

The case of *Hilliard v. Newberry,* 153 N. C., 104, is in recognition of the same general principle. From this it follows that whether the maturing of the principal indebtedness has been waived or otherwise, the plaintiff has an apparent right to prosecute the action on the collateral obligation of $450 which is past due, and the demurrer of defendant therefore was properly overruled.

Affirmed.

MRS. BELLE F. WALL ET AL. v. LUTHER F. HOLLOMAN.

(Filed 18 October, 1911.)

Wrongful Conversion—Severance of Logs—Good Faith—Innocent Purchaser—Cost of Hauling—Measure of Damages—Claim and Delivery—Waiver.

In an action for the wrongful conversion of certain sawmill logs which had been purchased in good faith from the supposed owner of the land, but who had in fact but a life estate therein, the measure of damages against an innocent purchaser for value will not be increased by the fact

that the logs had been hauled at a great expense to a public landing, by water, and there sold; for in the absence of evidence of any increase in the value of the logs otherwise, the damages will be the value of the logs at the place from which they were cut; and while it would have been otherwise had the action been one of claim and delivery, the plaintiff, by his action, has waived his right thereto.

ALLEN and WALKER, JJ., dissent.

APPEAL from *Carter, J.*, Spring Term, 1911, of HERTFORD.

Two actions were brought and by consent are consolidated.

The action is brought to recover for the wrongful conversion of certain sawmill logs cut from the Gatlin land, by Tully Gatlin, who transported them to the water at Sumner's Landing and there sold them to the defendant, Luther Holloman, for $84.07, admitted to be the value of the logs at the water.

(276) It is admitted that the logs measured 12,010 feet and were worth in the woods where cut and converted by Tully Gatlin $2 per thousand feet. Defendant before trial tendered judgment for $24 and costs.

It is admitted that the plaintiffs, except Mrs. Wall, are entitled to recover the value of the logs in the woods or at the landing. His Honor instructed the jury to award the latter sum as the measure of damages. Defendant excepted and appealed.

Winborne & Winborne for plaintiffs.
D. C. Barnes for defendant.

BROWN, J. It is admitted that the logs were cut in good faith by Tully Gatlin under an agreement with Mrs. Wall, the life tenant of the Gatlin land, and that they were transported some distance and at considerable expense to the landing by Tully Gatlin and sold in good faith to defendant—a *bona fide* purchase without knowledge of any defect in the title. The only question presented relates to the measure of damages for the conversion of the timber.

If plaintiffs were suing Tully Gatlin for damages for a trespass upon the land it is admitted they could recover no more than the value of the timber at the place of severance, where it was converted into a chattel, together with any actual damage done the land in removing it therefrom. *Gaskins v. Davis,* 115 N. C. 85; *Dorsey v. Moore,* 100 N. C., 44; *Bennett v. Thompson,* 35 N. C., 147.

There can be no doubt that had plaintiffs brought an action in the nature of a claim and delivery for those logs at the landing they would have been entitled to recover them as found, and the defendant would

not have been entitled to any enhanced value by reason of the cost and expense of transporting them to the landing. This arises from the impracticability of giving the defendant the benefit of his labor.

But where, as in this case, the owners of the logs voluntarily waive the right to reclaim them in specie, the difficulty of separating the enhanced value given to them by the labor of the trespasser in transporting them to the water no longer exists.

"It is then," says the Supreme Court of Wisconsin, "entirely (277) practicable to give the owner the entire value that was taken from him, which seems to be all that natural justice requires, without adding to it such value as the property may have afterwards acquired from the labor of the defendant." *Weymouth v. R. R.*, 17 Wis., 550.

It is admitted that there are two rules for the admeasurement of damages in cases like this prevailing in the courts of this country—one the severe rule which allows the defendant, however innocent, nothing for enhanced value imparted to the chattel solely by his labor, and the other, the lenient rule, which depends largely upon the intention or *mala fides* of the defendant, and, according to other authorities, upon the form of the action.

In referring to this, the English author Mayne in his work on Damages, p. 488, says: "In America there is as usual a conflict," quoting from both Kent and Story. In reference to the latter, Mayne says: "On the other hand, *Story, J.*, laid it down that the true rule is the value of the property at the market price at the time of the conversion, and this is the doctrine generally prevailing. Mr. Sedgwick takes same view."

In the notes on same page the annotator to Mayne says: "The general rule in this country is that the measure of recovery is the market value of the property at the time of conversion, with interest to the time of the trial," citing a great many cases in support of his text.

The A. & E. Ency., p. 720, vol. 28, says: "The value of the property converted is to be estimated at the place of conversion." After adverting to the conflict of decisions, the editor says: "The better rule, which is now most generally recognized, is that where the original taking is without wrongful purpose or intent, and under the belief that the taker has a right to the property, the owner can recover only the unimproved value of the property; but where the original taking was willful and without color or claim of right, the owner is entitled to recover the value of the property at the time of demand for its return and in its condition at that time, and in such a case it is not material that the wrongdoer has changed its character or by improvements greatly enhanced its value." Hale on Torts, 406-410, 417; 13 Cyc., 170; (278)

Cushing v. Longfellow, 26 Me., 310; *Morgan v. Powell*, 43 E. C. L., 734; *Moody v. Whitney*, 38 Me., 174; *Forsyth v. Wells*, 41 Pa. St., 291.

The last two cases were actions of trover and hold that in such action where the property was converted in good faith by mistake the rule of damage should be the same as in trespass. The Pennsylvania case arose out of a conversion by mistake because of the uncertainty of boundaries, and the decision is based upon *Baron Parke's* judgment in *Wood v. Morewood*, 43 Eng. Com. Law, 810.

A very interesting and learned discussion of the subject will be found in *Coal Co. v. Cox*, 39 Md., 1, where the cases are reviewed. Also, see *Mining Co. v. Hertin*, 26 Am. Rep., 521, in the notes to which are collated a large number of cases sustaining our view.

We think the rule as laid down by the Supreme Court of Wisconsin in *Weymouth v. R. R., supra*, is not only the better law and founded in principles of natural justice, but that it has received the distinct indorsement of this Court in *Gaskins v. Davis, supra*, wherein the opinion is quoted from at length.

This rule is founded upon the reasonable and just theory that in the absence of willful wrongdoing compensatory damages are intended as a pecuniary equivalent for the property lost by defendant's wrong, and where property is lost, converted, or destroyed, the owner is compensated when he receives its full value in money.

The place where these logs were converted and taken from plaintiffs was in the woods at the time of severance. The enhanced value at the landing was imparted solely by the cost and expense of transporting them there.

If between the time of severance and the date they were found at the landing the logs had increased in value from other causes, not imparted by the innocent trespasser's labor, plaintiffs would be entitled to recover such increased value; but no such claim is made in this case.

It is not denied that the enhanced value arises entirely from the cost and expense of transportation to the water. Therefore we are
(279) of opinion that the plaintiffs are entitled to recover the value of 12,010 feet at $2 per thousand feet, the admitted value of the logs at the place of severance, with interest from that date.

Reversed.

MOTION TO DISMISS APPEAL IN ABOVE CASE.

APPELLEE moves to dismiss the appeal for noncompliance with Rule 19 in regard to assignments of error.

We are of opinion that the rule has not been fully complied with. *Jones v. R. R.*, 153 N. C., 419. But inasmuch as the appellant had the errors properly assigned, printed and attached to the record before the case was called, for reasons given by counsel and in the exercise of a sound discretion we will not dismiss the appeal, as is usually done. Section 2 of Rule 19 provides that "All the exceptions relied on, grouped and numbered, shall be set out immeditely after the statement of the case on appeal." This assignment of errors must be a part of the transcript of appeal, and embodied in it when sent to this Court and printed, so counsel for appellee can know what exceptions are relied upon and intended to be presented to the Court, and prepare accordingly. It is a rule which when properly complied with greatly facilitates the consideration of appeals.

In this case the appellee has not been taken at any disadvantage, as there was only one exception taken on trial, and that was stated in the record, but not properly stated.

Motion denied.

ALLEN, J., dissenting: Tully Gatlin wrongfully cut timber trees on the lands of the plaintiff, and sold them to the defendant. The trees were worth $24.02 on the land after they were severed, and $84.07 at the time of sale to the defendant. The Court is of opinion that the plaintiffs can recover $24.02, while I think they ought to recover $84.07.

The amount involved is small, but the precedent to be established is important and may affect many transactions. It is for this reason I feel justified in stating the grounds of my dissent.

Four propositions are announced in the opinion of the Court: (280)

(1) That in an action for conversion against the original trespasser, who has cut timber on the land of another, the measure of damage is the value of the trees on the land after they have been severed.

(2) That the owner of the land is not compelled to sue in conversion, but may follow the property and may reclaim the trees wherever he finds them, and although in the hands of a purchaser without notice.

(3) That if the owner elects to take the trees, he is not chargeable with any expense of cutting or transporting the trees, nor with any enhancement in value.

(4) That the usual rule for the admeasurement of damages in actions for conversion is the value of the property at the time of the conversion.

These principles seem to be well established, and are sustained by the authorities in this and other States; but, with great respect, I think they have been misapplied to the facts.

No authority is referred to in the opinion of the Court which deals with the rights of the owner as against the purchaser.

The plaintiffs here are not suing the original trespasser, but the purchaser from him, and there is no suggestion in the record that they had elected to sue for damages prior to the purchase by the defendant, or that they had abandoned their property in the trees.

They are demanding damages of the defendant for his conversion, and if we fix the time of the conversion, they are entitled to recover the value of the property as of that time.

Under the opinion of the Court, the plaintiffs were the owners of and entitled to the possession of the trees at the time the defendant bought them. If so, the defendant bought the trees of the plaintiffs, and, by buying, converted them; and if it be conceded that there can be but one conversion, and the plaintiffs had done no act prior to the purchase by the defendants indicating an election to recover damages, and they had the right to recover the trees at the time of the purchase, the (281) conversion then took place, and by the defendant.

The person who sold the trees had committed a trespass, but it was with the plaintiffs to elect whether they would follow the trees or treat them as converted; and until they exercised this right, no conversion had, in law, taken place.

In other words, the theory upon which the law is administered in actions like this, as I understand it, is that the trespasser has wrongfully taken away the property of the owner, and that the owner may follow the property and reclaim it, or he may sue the trespasser for damages. If he sues the trespasser for damages and recovers, the title passes to the trespasser and he may do with it as he pleases.

If, however, the owner does not sue the trespasser, but elects to demand the property in specie, he may do so, and can recover it in the hands of an innocent purchaser.

In both cases, that of the trespasser and the purchaser, there is an act of conversion, but the property has not been converted until the owner waives his right to the property itself by demanding its value in damages.

In the present case the owner had the right to demand of the defendant the trees taken from his land. If he had done so, and there had been a refusal to surrender possession, can there be any doubt of the right of the owner to recover their value at the time of the refusal? If it should be held otherwise, and that he could only recover the value at the time of the severance of the trees on the land, the right of the owner of property would be dependent on the act of a wrongdoer, and not on his own consent.

In the estimation of the law, the rule for which I contend can work no hardship, as the purchaser, if required to pay the value of the property, can recover the same amount from his vendor upon the implied warranty of title, which obtains in sales of personal property.

On the contrary, to what results may the rule adopted by the Court lead?

It may enable a wrongdoer to go upon the land of another and cut timber without the consent of the owner, and sell it for $84, and the purchaser gets a good title upon paying $24. That is the (282) judgment of the Court between the parties to this record.

It may also do a great injustice to the purchaser. Suppose the trespasser cuts timber, worth $100 on the land after it is severed, and it deteriorates in value, and it is taken to market and is sold to a purchaser for its value at that time, $50.

It is an old saying and true, that "It is a poor rule that does not work both ways," and under the rule adopted by the Court the innocent purchaser must pay $100, the value of the trees when severed, for property worth $50.

There is eminent authority for the views I entertain.

In *Woodenware Co. v. United States,* 106 U. S., 432, timber trees were cut on the lands of the Government by a willful trespasser and sold to the Woodenware Company, "which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase." The trees were worth $60.71 on the land after they were severed, and $850 at the time and place they were sold to the Woodenware Company. It was held that the Government was entitled to recover $850, and the Court says: "The timber at all stages of the conversion was the property of the plaintiff. Its purchase by defendant did not divest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer, defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff."

I would not be candid if I did not say that the Court lays much stress on the fact that the original trespass was willful, and suggests that the rule might be different if it were not for this fact; but in

(283) dealing with one who buys in good faith, I cannot see how the undisclosed motive of his vendor can affect him.

Wright v. Skinner, 34 Fla., 453, says: "If the defendants are innocent vendees, without notice, of a willful trespasser, then the measure of damage against them would be the value of the logs at the time and place of their purchase thereof from such willful trespasser."

In *Nesbitt v. Lumber Co.,* 21 Minn., 491, the trees were cut on the land of the plaintiff without his permission, and sold to the defendant. The trees were worth $2.50 per thousand on the land, and $6 per thousand when sold to the defendant at Anoka. It was held that the plaintiff could recover $6 per thousand, the Court saying: "That plaintiff did not lose his property in the logs by the wrongful removal of them is admitted. He was as much the owner of them at Anoka, where they were converted, as on his land, where they were wrongfully taken from him. This being so, his right to recover the logs themselves, or their value at the time and place of conversion, would seem to follow of course."

The same principle is laid down in *Tuttle v. White,* 46 Mich., 487.

For the reasons presented, and upon authority, I think the judgment should be affirmed.

JUSTICE WALKER concurs in this opinion.

PETER McKELLAR ET AL. v. MALCOLM McKAY AND WIFE, ANNABELLA McKAY, ET AL.

(Filed 18 October, 1911.)

1. Appeal and Error—Evidence—Nonsuit, Premature.

It is reversible error for the trial judge to sustain a motion to nonsuit upon plaintiff's evidence before he has rested his case. Revisal, sec. 39.

2. Same.

While it is within the discretion of the trial judge to refuse to allow the plaintiff to amend his complaint, in an action involving title to lands, so as to allege matters upon which to ask for equitable relief, it is error, upon his refusal to do so, to grant defendant's motion of nonsuit before the plaintiff had rested his case, so as to preclude him from showing in proper instances that a deed under which the defendant claimed was obtained under a proceeding void upon its face. Revisal, sec. 39.

3. Executors and Administrators—Deeds and Conveyances — Proceedings Void Upon Their Face—Collateral Attack.

Proceedings by an administrator to sell lands to make assets, which are void upon their face, may be collaterally attacked.

4. Deeds and Conveyances—Executors and Administrators—Special Proceedings to Sell Land—Destroyed Records—Void Deed—Parol Evidence.

In an action involving title to land, defendant claimed under an administrator's sale in an adjoining county, the deed of the administrator being put in evidence by plaintiff for the purpose of attacking it: *Held*, it was competent for the plaintiff to introduce parol evidence of the contents of the records in the adjoining county, which had been destroyed by fire, to show that the special proceeding by the administrator to sell the land was void on its face.

APPEAL from *Cooke, J.*, at May Term, 1911, of CUMBERLAND. (284)

Partition proceedings. From the judgment entered by the judge the plaintiffs appealed.

Q. K. Nimocks and Sinclair & Dye for plaintiffs.

Rose & Rose, J. G. Shaw, J. A. Murchison, and King & Kimball for defendants.

BROWN, J. This proceeding for partition of the land described in the pleadings was commenced in 1882, and appears never to have been brought to a final conclusion. It appears that on 7 May, 1910, a new and amended petition for partition was filed, and other defendants, to wit, J. H. Alexander and the Buckthorn Lodge Association, made parties defendant.

The latter answered, claiming sole seizin of the land under a deed from J. H. Alexander, which the plaintiffs aver in their petition is null and void.

On the trial for the purpose of attacking them, plaintiffs in- (285) troduced the three deeds under which the lodge association claims, A. M. McKay, administrator of Henrietta McKeller, to Annabella McKay, W. T. McKay and wife to J. H. Alexander, and deed from the latter to the lodge association.

Plaintiffs then introduced the clerk of the court, who testified as to loss of original petition in this proceeding, and J. A. Howard, who testified as to condition of the land. The record, referring to Howard's evidence and subsequent proceedings, contains the following: "To all of the foregoing evidence given by the witness Howard the defendants in apt time objected. Objections overruled, and defendants excepted.

"Q. Who sold the property, Mr. Howard? (Objections by the defendants; sustained, and plaintiffs except.)"

At this juncture the plaintiffs moved to amend their complaint. To this the defendants, and each of them, objected, and each moved the court to dismiss the action. The court overruled the motion by plaintiffs, so far as J. H. Alexander and the Buckthorn Lodge were con-

cerned, to amend, and likewise the motion of the defendants Malcolm McN. McKay and wife, V. C. McKay, and sustained the motion of J. H. Alexander and Buckthorn Lodge Association. The plaintiffs excepted.

Judgment, and plaintiffs again excepted and appealed in open court to the Supreme Court.

The error assigned is that his Honor prematurely dismissed the action as to the principal defendants before plaintiffs had rested their case.

In doing so we are of opinion the learned and careful judge inadvertently erred. The principal defendant is the lodge association, which claims to be sole seized in fee of the land under an administration sale made in Harnett County in 1880. This sale and the deed made in pursuance of it are open to attack. It is true his Honor refused to allow an amendment to the petition, asked presumably for the purpose of setting up facts upon which to ask aquitable relief. But it was still open to plaintiffs to offer parol evidence, if they could, of the contents of the records in Harnett County destroyed by fire, with a view to (286) show that the special proceeding by the administrator to sell the land was void on its face. It is well settled that a proceeding absolutely void on its face may be attacked collaterally. *Harrison v. Hargrove,* 109 N. C., 346. Perhaps plaintiff may have had other evidence to offer.

It is true that every presumption is in favor of the jurisdiction of the Harnett court, and also of the regularity of the special proceeding to sell the land, and it may be the plaintiffs could offer no competent evidence to rebut and overturn such presumption; but they were cut off from the opportunity. We have no means of knowing what they could have offered in evidence.

When plaintiff rested, it was the defendant's privilege to move to nonsuit, and not before. The language of the statute is specific: "When on trial of an issue of fact in a civil action or special proceeding the plaintiff shall have produced his evidence and *rested* his case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit." Revisal, sec. 39.

New trial.

MARY P. GROGAN ET AL. v. S. A. ASHE ET AL., EXECUTORS OF HENRIETTA MARTIN.

(Filed 18 October, 1911.)

1. Wills—Legacies—Gifts by Testators—Ademption—Intent.

A prior legacy may be adeemed or satisfied by a payment or transfer of property to the legatee made for that purpose by the testator during his lifetime, and is largely a question of intention, upon which parol evidence is competent.

2. Evidence—Ademption.

A testator having made a will by which he bequeathed a certain sum of money to M. for life, with certain limitations over to the children of M., went on a note of M. to the bank in order to procure a certain sum of money for the sole benefit of M., which was afterwards paid by her executors. In an action by M. to recover the legacy, the executors pleaded that their payment of the note was an ademption and satisfaction *pro tanto*: *Held*, upon the evidence, that there was no presumption of an ademption, or evidence thereof.

3. Wills—Gifts—Expressed Purposes—Ademption—Questions of Law.

When a testator has made a bequest of money to a legatee for a specified purpose, and afterwards, during his lifetime, has admittedly made a gift to the legatee of the same amount of money and for the purpose expressed in the will, nothing else appearing to show the intent, an ademption will be decreed as a matter of law.

4. Wills—Gifts—Ademptions—Declarations—Evidence.

A testatrix who has made a will by which she devised a certain sum of money, expressing the purpose for which it was devised, went on a note at a bank with her devisee for the latter's sole benefit, which note was subsequently paid by her executors. In an action to recover the legacy: *Held*, the testimony of the bank officers who made the loan is competent to show the declarations of the testator made at the time of the transaction when she executed the note, which were substantially in accordance with the purpose expressed in the will.

APPEAL from *Whedbee, J.*, at April Term, 1911, of WAKE. (287)

This action is brought to recover two legacies, one for $3,333.33 and one for $1,000, devised by defendant's testatrix to plaintiffs.

At the conclusion of the testimony it was agreed by the parties that his Honor, acting for and instead of the jury, should answer the issues made by the pleadings, and that his answers should have the force and effect as if they were answered by the jury, and no more, and should be subject to like objection, etc. His Honor, after hearing the evidence, rendered his judgment, to which both parties excepted and appealed.

This is the defendant's appeal.

Aycock & Winston for plaintiffs.
R. H. Battle & Son for defendants.

BROWN, J. It is admitted that in the second codicil of her will the testatrix devised one-third of $10,000 to "Mary Perkins Grogan for her life and after her death to her daughters who shall then be alive,
(288) or if any be dead leaving issue, to her issue, the children taking the share of the parent."

It is admitted that the legacy has not been paid to the plaintiffs, Mrs. Grogan and her daughters.

The defendants, the executors, aver that at the time of the death of the testatrix she, said testatrix, had outstanding against her a note for $2,500 made to the Peoples National Bank of Winston, N. C., the proceeds of which note were obtained for the use of the plaintiff, Mary, and for the benefit of her separate estate, and with the consent of her said husband; and that since the death of said testatrix said note has been paid by defendants at the suit of said bank; and defendants say that it was the intention of said testatrix that said note should be paid out of the legacy made in said codicil. The plaintiffs deny that said legacy was satisfied in the testatrix's lifetime or any part thereof, but aver that said $2,500 was a gift made to the plaintiff Mary P. Grogan to aid her in building a home while her aunt, the testatrix, was on a visit to her at Winston.

The only evidence introduced was by the defendants. They proved by S. A. Ashe the payment of the $2,500 note out of the funds of the estate and introduced the deposition of Mrs. Mary P. Grogan. The substance of her testimony is to the effect that the $2,500 was a gift and so intended by the testatrix.

Upon this evidence his Honor adjudged that the legacy had not been adeemed.

A prior legacy may be adeemed or satisfied by a payment or transfer of property to the legatee made for that purpose by the testator during his lifetime. Gardner on Wills, 567. But whether the testator intended to satisfy a legacy during life by a subsequent gift made to the legatee is largely a question of intention. And parol evidence may be received to establish the plea. 1 Roper, 409; 2 Redfield Wills, 539; *Hopwood v. Hopwood,* 7 House Lords, 741.

In this case there is no evidence whatever that the $2,500 was intended as a satisfaction *pro tanto* of the legacy that had already been given in the will. The gift was to Mrs. Grogan, while the legacy
(289) was to her for life only and then to her daughters. There is no evidence of any declaration of the testatrix that she so intended the gift, nor are the defendants helped by any rule of presumption.

The testatrix did not stand *in loco parentis* to Mrs. Grogan, and consequently no presumption of ademption arises.

It has been held that where a bequest is made by one standing *in loco parentis* to the beneficiary, and subsequent thereto payments are made by the testator to the beneficiary equal to or less than the legacy, such payments are *prima facie* a complete satisfaction or a satisfaction *pro tanto*. But if the testator does not stand *in loco parentis* such payment does not, *prima facie*, have any relation to the prior legacy. Gardner says that, although criticised, this doctrine has never been denied either in English or American jurisdiction. Wills, p. 569.

We are of opinion that there is no evidence that the testatrix intended the $2,500 as a *pro tanto* satisfaction of the legacy theretofore devised in the second codicil of her will to Mrs. Grogan and her daughters.

The judgment on defendant's appeal is

Affirmed.

THE PLAINTIFFS' APPEAL. No. 225.

BROWN, J. In item 8 of her will the testatrix devised $1,000 to Mary Perkins Grogan, for the purpose of "making her home comfortable according to her wishes." This legacy has not been paid, and defendants aver that it has been satisfied in following manner, to wit: That shortly before her death testatrix borrowed from the Mechanics Savings Bank of Raleigh, N. C., for the benefit of the plaintiff, Mary Perkins Grogan, $1,000, and made her note therefor, along with plaintiff, said Mary Grogan, and her husband, J. S. Grogan, and with his written consent, signified by his joining in said note; and that the said $1,000 was received by the husband of said Mary P. Grogan as her agent and for her use and for the benefit of her separate estate, to wit, for the improvement of her home in Winston; and that it was the inten- (290) tion of said testatrix at the time of the transaction in procuring said money for Mrs. Grogan that the note given for the same should be paid out of the legacy to said Mary Perkins Grogan; that said note has been paid by defendants, and that such payment should be taken as a payment of the legacy.

The plaintiffs reply and admit that the testatrix borrowed the $1,000 as alleged by defendants, and that she paid it over to Mrs. Grogan; but they aver it was not intended by Mrs. Martin as an ademption and satisfaction of the $1,000 legacy, and they further aver that Mrs. Grogan and her husband signed the note as sureties for the testatrix.

The following evidence was introduced by defendants:

Walters Durham testifies as follows: "I am cashier in a bank in Raleigh. I knew Mrs. Martin, the deceased."

The $1,000 note is shown to witness, who states further:

"Mrs. Martin applied for a loan, and said Mr. and Mrs. Grogan were engaged in building and needed some money to complete the building; that they had applied to her for this money, and she did not have any money on hand. As they were relatives, she expected to leave them a bequest in her will, but as it appeared that they needed the money at this time she would be glad for the bank to make a loan of $1,000 on the note of Mr. and Mrs. Grogan, with herself as surety, which note if not paid before her death would be taken care of by the bequest she intended making them."

The court admitted this evidence, and plaintiffs excepted.

Mrs. Grogan admitted receiving this $1,000, but testified that it was given to her as a gift; that the testatrix signed the note as principal; that she and her husband signed it as sureties, and that the money was given to her to aid in the building of her home. Neither she nor her husband paid the note.

We are of opinion that the testimony was competent and properly admitted as the declarations of the testatrix characterizing her act at the time and manifesting her intention to satisfy the legacy already devised in her will.

(291) Taking the testimony of Durham as a true statement of the fact, which his Honor, sitting by consent as a trier of the facts as well as of the law, did, it makes out a clear case of the ademption of the $1,000 general legacy to the plaintiff, Mrs. Grogan.

There is quite a difference between the ademption of a specific and a general legacy, depending upon very different principles. A specific legacy is held to be adeemed when the testator has collected the debts (if the legacy consisted of specific notes) or has disposed of the devised chattels or stocks in his lifetime, whatever may have been his purpose in so doing.

But when a general legacy is given of a sum of money, without regard to any special fund set apart to pay it, the intention of the testator is of the very essence of ademption.

Shaw, C. J., in *Richards v. Humphreys,* 32 Mass., 136, says: "The testator, during his life, has the absolute power of disposition or revocation. If he pay a legacy in express terms during his lifetime, although the term payment, satisfaction, release, or discharge be used, it is manifest that it will operate by way of ademption, and can operate in no other way, inasmuch as a legacy, during the life of the testator, creates no obligation upon the testator or interest in the legatee which can be the subject of payment, release, or satisfaction. If, therefore, a testator, after having made his will, containing a general bequest to a child or stranger, makes an advance, or does other acts which can be shown by

express proof or reasonable presumption to have been intended by the testator as a satisfaction, discharge, or substitute for the legacy given, it shall be deemed in law to be an ademption of the legacy."

As we have shown in the opinion upon defendant's appeal in this case, all of the circumstances surrounding the case are to be considered, and parol evidence is admissible to aid in arriving at the testator's intention in making the gift or advancement. *Carmichael v. Lathrop,* 108 Mich., 473; *In re Youngerman's Estate,* 134 Ia., 488.

While declarations of the testator, made generally and at any time and place, are not generally admissible, these declarations of Mrs. Martin were made at the time she procured and advanced the money for Mrs. Grogan, and as such they are held to be competent as against the legatee, because they characterize at the time the act of the testatrix, and are unmistakable evidence of her purpose and intention (292) to give the $1,000 in satisfaction of the legacy. 4 Ency. of Evidence, 486, and cases cited; *Richards v. Humphreys, supra;* 3 Elliott on Ev., sec. 2087.

These declarations made at the time of the advancement are not the only evidence of the purpose and intent of the testatrix. They are corroborated by the similarity in amount as well as purpose between the gift and the legacy as expressed in the will. This evidence, taken together, amply justifies the final judgment of the judge, that "Mary P. Grogan is not entitled to recover the $1,000 given to her in item 8 of the will of Mrs. Henrietta P. Martin."

But assuming that the declarations of the testatrix are incompetent, and excluding them entirely from consideration, as matter of law upon the admitted facts the $1,000 legacy has been satisfied, and Mrs. Grogan, upon her own testimony, is not entitled to recover it.

It is expressly declared in the will that this legacy is given to the legatee for the purpose of making her a comfortable home. Mrs. Grogan testifies that this $1,000 (given to her by the testatrix long after the execution of the will) was given for the specific purpose of assisting her in building her home.

Ademption, as a mode of payment or satisfaction of a legacy, is sometimes decreed as a matter of law upon admitted facts. Thus it is very generally held that, where a testator gives a legacy for a *particular purpose,* and afterwards gives the legatee the same sum for the *same* purpose, this is of itself an ademption of the legacy, nothing else appearing. *Monck v. Monck,* 1 Ball & B., 298; Wigram on Wills, p. 360; 1 Underhill on Wills, secs. 440-449; 2 Williams on Executors, 651-657. "When the legacy is given for a special purpose, the accomplishment thereof by the testator is also an ademption, and in this connection the

rule of *ejusdem generis* is often applied." 1 A. & E., 619, and cases cited; *Tyler v. Tolen,* 38 N. J. Eq., 97; *Pym v. Lockyer,* 5 My. & Cr., 29.

It was held by *Lord Chancellor Eldon,* in a leading case, that (293) where a father, after bequeathing property to a child, gives him in the father's lifetime a portion of the same property, a total satisfaction of the legacy takes place, though the amount of the portion given is less than the legacy. *Ex parte Pye,* 18 Ves., 152. Mr. Underhill says this rule of a total satisfaction by payment of only a part never found favor in this country, and has been repudiated in England. 1 Underhill, sec. 440.

But courts and text-writers all agree that where the gift and the legacy are *ejusdem generis,* the sum given and the purpose named being practically and substantially identical in both gift and legacy, as in this case, the legacy is adeemed and satisfied by the subsequent gift.

The judgment of the Superior Court upon planitiff's appeal is Affirmed.

PER CURIAM. The judgment of the Superior Court directs that the legacy of $3,333.33 be paid to Mrs. Mary P. Grogan, to be held by her for her life, and after her death to her daughters who shall then be living, etc., according to the terms of the will.

When the opinion is certified down, the Superior Court will make such orders and decrees as are necessary for the preservation of the principal of the fund and the payment of the interest to Mrs. Grogan during her life.

E. V. AUTRY, ADMINISTRATRIX OF B. L. AUTRY, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 18 October, 1911.)

1. Railroads—Freight Depot—Dangerous Conditions—Negligence.

A railroad company is required to keep its premises in a reasonably safe condition for persons who come for the purpose of receiving freight from their depots.

2. Same—Notice—Evidence—Questions for Jury—Contributory Negligence.

Plaintiff's intestate went to the defendant's freight depot to receive heavy machinery packed in boxes, and when leaving, with the boxes on his wagon, the wagon wheel fell into a hole, which caused the boxes to fall on him and crush his head, and he died from the injury thus received. There was evidence tending to show that the hole was on the defendant's

premises and in the only available way of ingress and egress, and that the railroad company had been previously notified of the danger of this hole and had promised to remedy it: *Held*, (1) evidence sufficient as to defendant's negligence to sustain a verdict in plaintiff's favor; (2) the proximate cause of the injury was the falling of the wagon wheel into the hole.

APPEAL from *Cooke, J.*, and a jury, February Term, 1911, of (294) CUMBERLAND.

Action for the alleged negligent killing of the plaintiff's intestate near the defendant's freight depot at Hope Mills, N. C., on the first day of July, 1903.

The court submitted these issues:

1. Was the palintiff's intestate, B. L. Autry, killed by the negligence of the defendant? Answer: Yes.

2. Did the said B. L. Autry, by his own negligence, contribute to his death? Answer: No.

3. What amount is the plaintiff entitled to recover as damages? Answer: $2,000.

From the judgment rendered the defendant appealed.

H. L. Cook, Sinclair & Dye for plaintiff.
Rose & Rose for defendant.

BROWN, J. In apt time the defendant moved to nonsuit. His Honor properly denied the motion.

There is abundant evidence in the record tending to prove that plaintiff's intestate, an employee of the Hope Mills Manufacturing Company, was sent with a wagon to defendant's freight depot for certain heavy boxes of mill machinery; that they were safely loaded on the wagon, and that on way out from the depot the wagon wheel ran into a rut or hole 8 inches deep, which caused the boxes to topple over, throwing the intestate out of the wagon, and the box, which he had attempted to hold steady, fell upon and crushed his head. (295)

Plaintiff also introduced evidence tending to prove "that the place or hole where the wagon dropped in was 2½ feet from the corner of depot. No other way to get out from the depot but to go that way; it was on the right of way, and it was not a public road along there." There was also evidence tending to prove that the mayor of the town had notified by letter defendant's general manager of the condition of the right of way, and that he had written that it should be properly attended to.

There was evidence also by defendant that the hole was not on the right of way, as well as other evidence contradicting plaintiff's averments.

We think the jury was warranted by the evidence offered by plaintiff in finding that plaintiff's intestate was rightfully at the station removing the freight; that he took only way out; that on the defendant's premises the wagon wheel ran into the deep rut and caused the boxes to fall on the intestate and kill him.

The negligence consists in evidence of defendant's failure to keep its premises in a reasonably safe condition for persons who come for the purpose of transacting business. *Finch v. R. R.*, 151 N. C., 105, and cases cited; *R. R. v. Wolfe,* 80 Ky., 82.

The disputed question as to whether the hole was on the defendant's premises was properly and fairly put to the jury.

As to what was the proximate cause of the injury, instead of leaving it to the jury, his Honor might well have charged them that upon all the evidence it was the falling of the wagon wheel into the hole.

We have examined the several assignments of error and think that none of them can be sustained. To discuss them *seriatim* is, in our opinion, needless.

No error.

Cited: *Fulghum v. R. R.,* 158 N. C., 562.

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(296)

Z. T. KIVETT ET AL. V. WESTERN UNION TELEGRAPH COMPANY.

(Filed 18 October, 1911.)

1. Telegraphs — Death Message — Mental Anguish — Damages — Arrival for Funeral—Train Schedules—Evidence.

In an action for damages against a telegraph company for negligent delay in the delivery of a telegram announcing the death of a brother and the time and place of burial, with a request that the sendee "wire if you (he) come," for the plaintiff to recover he must show that he could have reached the place in time to attend the funeral, etc., if the telegram had been promptly delivered; and where the distance was great and by rail, it is competent for him to testify that he knew the "connections" and movements of the trains from having been there before and that he could have reached his destination in time had the message been delivered promptly, the use of the word "schedule" being immaterial.

2. Telegraphs—Death Message—Mental Anguish — Relationship — Presumptions—Other Evidence—Measure of Damages.

While in an action against a telegraph company for damages for mental anguish caused by the negligent failure of the company to deliver a message announcing the death of a brother, mental enguish will be presumed

from the relationship of the parties, this presumption does not exclude other evidence tending to prove a close association between them, and in this case it was competent for the plaintiff to testify that his deceased brother had stayed with him, in the West, three years.

3. Telegraphs—Death Message—Mental Anguish—Negligence—Restrictions—Measure of Damages—Instructions—Substantial Compliance.

Defendant's prayers for special instruction limiting recovery in an action for mental anguish caused by the actionable negligence of defendant telegraph company in a delayed delivery of a message announcing a death, to the mental suffering directly caused by the plaintiff's inability to attend the funeral on that account, and to the character or degree of suffering which would amount to mental anguish for which damages could be awarded, were substantially given in this case by the judge in his charge, and, therefore, no error committed of which the defendant can complain.

4. Telegraphs—Death Message—Street Address—Delivery—Reasonable Efforts.

An attempted delivery of a telegram at the street address given in the message will not of itself relieve a telegraph company of negligence, for upon the failure of the company to make delivery there it is its duty to make reasonable efforts to deliver it elsewhere, and especially when informed of the place where the addressee could be found.

5. Telegraphs—Death Message—Delivery—Offer to Deliver—Street Address—Evidence.

When the uncontradicted evidence is that the messenger of a telegraph company carried a telegram for delivery to the boarding-house of the addressee, and refused to leave it there, in his absence, with the keeper of the house, though she offered to pay the charges due thereon, the defense that the messenger "offered" the message at the boarding-house is without evidence to support it, and unavailing.

6. Same—Delivery to Messenger.

Defendant telegraph company having attempted to deliver a telegram announcing a death, by a messenger, at the street address given therein, was informed where the addressee was to be found: *Held*, it was not sufficient for one who was in charge of defendant's office at the point of delivery to testify that she gave it to another messenger boy for delivery, for it was necessary to show the efforts to deliver the telegram by the one to whom it was given for that purpose.

7. Telegraphs—Death Message—Mental Anguish—Negligence—Issues—Contributory Negligence—Instructions.

In an action to recover damages of a telegraph company for damages arising from its actionable negligence in its delay in delivering a telegram announcing a death, it was not error for the trial judge to refuse to give defendant's prayers for special instruction, that no recovery could be had if the plaintiff did not use all available means in having the

funeral postponed, etc., when no issue as to his contributory negligence had either been tendered or submitted to the jury, as the instructions were not proper upon the issue as to defendant's negligence.

8. Telegraphs—Two Messages—Negligence Alleged as to One—Instructions on the Other.

There were two telegrams concerning which negligence is alleged, but damages asked only as to one: *Held*, it was not error, under the circumstances of this case, for the trial judge to refuse to give requested instructions pertaining to the message upon which no damages are sought, though the instructions may, in themselves, state correct principles of law.

9. Issues, Form of—Sufficiency—Telegraphs—Mental Anguish—Issues Approved.

It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy and each party has a fair opportunity to present his version of the facts and his views of the law, so that the case, as to all parties, can be tried on its merits. The issues submitted in this case for damages alleged to have been caused by defendant's failure to deliver a death message approved. *Wilson v. Taylor*, 154 N. C., 216, cited and approved.

10. Telegraphs—Principal and Agent—Declarations—Furtherance of Agent's Duty—Evidence.

In an action for damages for mental anguish for the negligent delay in the delivery of a telegram, there was evidence tending to show that after the delivery of the telegram had been attempted, the plaintiff, addressee, called at defendant's office and asked for it: *Held*, declarations of defendant's agent to the effect that no such message had been received there are competent, as they were made in furtherance of the duty that the agent owed to the defendant.

(298) APPEAL from *Cooke, J.*, at November Term, 1910, of HARNETT.

These were two separate civil actions, each action being for the recovery of damages for mental anguish alleged to have been caused by the delay and nondelivery of telegrams relating to the death of one Herndon H. Kivett. One suit was in the name of Z. T. Kivett, father of the deceased, and the other in the name of H. H. Kivett, twin brother of the deceased. By consent, the two cases were tried together.

There was evidence on the part of the plaintiffs tending to establish the following facts:

That on 23 July, 1909, the plaintiff Z. T. Kivett was living at Buie's Creek, Harnett County, North Carolina, and the plaintiff H. H. Kivett, his son, was living at Detroit, Mich., and was boarding with a Mrs. Pack, at 28 Stimson Place, and was working at the Ford Motor Company shops in that city; that at 7 o'clock A. M. on 23 July a message was delivered to the defendant at Benson, in the following words:

BUIE'S CREEK, N. C., 23 July, 1909.

H. H. KIVETT, *Detroit, Mich., 28 Stimson Place.* (299)

Herndon died this morning. Heart failure. Will bury Sunday evening. Wire if you come. Z. T. KIVETT.

That at 7:35 said message was promptly dispatched by the Benson office and was received at the office of defendant in Detroit at 7:23 A. M. (central time, being about an hour later); that about 8 o'clock the same morning this telegram was carried by a messenger boy of the defendant to 28 Stimson Place, where he was told by the sendee's landlady, Mrs. Edith M. Pack, that the sendee, H. H. Kivett, was not at home; that he was at the Ford Motor Works; that she offered to pay the charges, but was told by the messenger boy that it must be delivered personally; that the said H. H. Kivett was at work at said motor works on said day, and the telegram was not delivered to him there; that on returning to the boarding-place at 6 o'clock P. M. on the same day the telegram arrived, he was informed by his landlady that a telegram had come to the house for him during the day, and he thereupon went to the main office of the defendant company in Detroit, shortly after 6 o'clock P. M., and asked for the telegram, and was told by the defendant's agent in charge that none had come to his address during the day; that after retiring for the night, at about 12:30 the next morning the telegram was delivered to the plaintiff; that he immediately wired to his father that he could not reach home in time for the funeral, paid for both telegrams and delivered this last one to the same messenger boy who had delivered the first; that if the telegram had been delivered at any time during the day up to 10 o'clock P. M., the plaintiff H. H. Kivett could and would have left Detroit in time to have reached his father's home in Buie's Creek before the funeral. There was also evidence tending to show that at the time the telegram was delivered at 12:30 A. M., 24 July, it was impossible for plaintiff to reach Buie's Creek in time for the funeral.

A witness for the defendant, Mary Nolan, testified that on the date of the receipt of the telegram at Detroit she was in charge of a branch office of the defendant in that city; that she handled the message in controversy and sent it to the Ford Motor Works. She did not claim that she carried the message herself, and no witness was (300) introduced who testified that he went to the motor works with the message. The plaintiff H. H. Kivett was examined as a witness, and testified that he had made the railroad connection between Detroit and Dunn once, and knew the movement of the trains. He was then asked:

Q. If the telegram had been delivered to you in the morning at the time Mrs. Pack, your landlady, told you it came there, or at a reasonable time thereafter at the Ford automobile shop, could or would you have gone home to the funeral?

Defendant objects.

A. I could and would have reached home.

Q. If the company had delivered the telegram to you at or about the time they brought it to the landlady the second time, at 10 o'clock, if they had delivered it to you at the Ford automobile shop, could you have gotten home?

Defendant objects; overruled; exception.

A. I could have reached home if they had delivered that telegram at any time before 9 P. M., Friday, 23 July. I could have reached home in time for my brother's funeral. I would have done it. I could have reached home at the time I inquired for it, in time for my brother's funeral.

He was also asked:

Q. When you went out West state whether or not your brother went with you? A. He did.

Q. How long did he stay with you?

Defendant objects.

A. About three years.

The defendant tendered the following issues:

1. Did the defendant negligently delay the delivery of the telegram sent to H. H. Kivett?

2. Did the defendant receive and negligently fail to transmit and deliver a telegram from Detroit, Mich., to Dunn, N. C., as alleged in the complaint of Z. T. Kivett?

3. Were the plaintiffs injured thereby?

4. What damage, if any, is the plaintiff Z. T. Kivett en-
(301) titled to recover as mental anguish caused by such negligence, if any there was?

5. What damage, if any, is the plaintiff H. H. Kivett entitled to recover as mental anguish caused by such negligence, if any there was?

Which his Honor refused to submit, and defendant excepted.

His Honor submitted the following issues:

1. Did the defendant negligently delay to deliver the telegram addressed to H. H. Kivett in Detroit, Mich., as alleged in the complaint?

2. If the telegram had been delivered promptly, could and would plaintiff's son, H. H. Kivett, have attended the funeral of plaintiff's son, Herndon H. Kivett?

3. What damages, if any, is the plaintiff Z. T. Kivett entitled to recover of the defendant?

1. Did the defendant negligently delay the telegram sent to H. H. Kivett in Detroit?

2. If the telegram had been delivered promptly, could and would plaintiff have attended the funeral of his twin brother, Herndon H. Kivett?

3. What damage, if any, is the plaintiff H. H. Kivett entitled to recover of the defendant company?

Defendant objected to the submission of the issues in both cases. Objection overruled, and defendant excepted.

The defendant tendered the following prayers for instructions:

1. That if the jury find from the evidence that the telegram as sent was directed to H. H. Kivett, at 28 Stimson Place, Detroit, Mich., that the same was promptly transmitted to Detroit and within a short time after its receipt there offered the same at the said address, the boarding-place of the plaintiff, but the plaintiff was not there, then any effort made by the defendant to deliver at another place was not called for in the contract under which the message was sent, and you should answer the first issue "No."

Refused, and defendant excepted.

2. If the jury find from the evidence that the message was (302) delivered within a reasonable time, to the Ford Motor Works, in pursuance of information furnished to the messenger boy, then the defendant has fulfilled its contract, and it was not the defendant's duty to locate plaintiff H. H. Kivett among the several employees of that company; and if you so find, you should answer the first issue "No."

Refused, and defendant excepted.

3. The plaintiffs cannot recover damages for any suffering occasioned by the death of Herndon Kivett, but, if at all, only such mental anguish as resulted directly from the inability of H. H. Kivett to get to the funeral; and the jury must be satisfied by the greater weight of the evidence that such inability to reach the funeral was caused directly by the negligence of the defendant.

Refused, and defendant excepted.

4. It was the duty of the plaintiff H. H. Kivett to use all available means to have the funeral postponed and get there if possible, before he is entitled to recover at all; and if you are not satisfied that he used his best efforts, you shouuld answer the second issue "No."

Refused, and defendant excepted.

5. Mere disappointment, sorrow, or regret at not being able to reach the funeral or at not having the son at such funeral would not constitute what the law deems mental anguish; and if there is no more than this, then plaintiff can recover only nominal damages; and there is no

evidence in this case that either of the plaintiffs suffered more than disappointment, sorrow, or regret at the inability of H. H. Kivett to get to the funeral.

Refused, and defendant excepted.

6. The plaintiff H. H. Kivett cannot recover for any alleged nondelivery of the telegram alleged to have been sent from Detroit to Z. T. Kivett at Dunn.

Refused, and defendant excepted.

7. The plaintiff Z. T. Kivett cannot recover anything for an alleged nondelivery of the telegram claimed to have been sent from De-
(303) troit to Dunn, as there is no evidence that the laws of the State of Michigan allow such recovery.

Refused, and defendant excepted.

8. If the plaintiff, by the exercise of reasonable care, could have postponed the funeral and arranged for the attendance of H. H. Kivett at the funeral, then plaintiffs could only recover nominal damages.

Refused, and defendant excepted.

His Honor charged the jury as follows:

"1. It is the duty of a telegraph company to be diligent in transmitting and delivering messages which are received by it, and any failure of this duty on its part would be negligence, and if damage results from such negligence, either to the sender or the sendee of such message, it would be actionable negligence.

2. If the message refers to a case of sickness or death of some member of the immediate family of the sender or sendee, and there be actionable negligence on the part of the defendant company to deliver it, then the law would presume mental anguish, but there would be no presumption as to the amount of damages beyond nominal damages, and it would be upon the defendant to prove by the preponderance of evidence that there was no mental anguish, and the burden would be upon the plaintiff to establish by the greater weight of the evidence the amount of damages beyond nominal damages. Mental anguish, for which a plaintiff would be entitled to recover, is not that which is due to the death, but it must be that which is caused by the negligence of the defendant. Sorrow and grief for the death of a member of the family, however, does not constitute a cause of action unless it is intensified by the negligence of the telegraph company until it becomes mental anguish, and mental anguish is a very intense mental suffering, so much so as to temporarily impart mental pain; and although the fact that the negligence of the defendant made the cause of disappointment and regret attending upon the sorrow and grief because of the act of negligence on the part of the defendant company, still, unless a greater feeling that that was produced, it would not amount to mental anguish.

3. The damages to be allowed for mental anguish are com- (304) pensatory and not exemplary, and should be limited to a satisfactory or reasonable compensation. These are psychological in their nature, and may be difficult of assessment, but still the jury should be careful to allow as damages whatever is a fair and reasonable compensation to the plaintiff for his mental anguish caused by the negligence, and no further.

4. The two cases of Z. T. Kivett against the Western Union Telegraph Company and of H. H. Kivett against the Western Union Telegraph Company are by consent of the parties being tried together. The court further instructs the jury as follows: Now, apply the principles of the law above expressed to the facts of these cases as the jury shall find them.

5. Then upon the first issue submitted in the case of Z. T. Kivett against the Western Union Telegraph Company, if the jury shall find by the greater weight of the evidence that the defendant negligently delayed to deliver the message addressed to H. H. Kivett in Detroit, as alleged in the complaint, the jury should answer the first issue "Yes." If they should not so find they should answer that issue "No"; if they should answer that issue "No," they need not go any further. And this instruction is given as to the first issue in the other case of H. H. Kivett against the Western Union Telegraph Company. But if they should answer the first issue "Yes" as to any of them, then as to both cases if so answered, or as to the one whereof the answer is "Yes," as the case may be, the jury shall proceed to consider the second issue; and upon that issue the court instructs the jury that if they shall find by the greater weight of the evidence that if the message had been delivered with reasonable promptness, H. H. Kivett could and would have reached his father's home in time to, and would have attended his brother's funeral or burial, they should answer that issue "Yes"; if they should not so find, they should answer that issue "No" in both cases; and if they should answer that issue "No," they need not go any further.

6. But if they should answer that issue "Yes," upon the third issue the court instructs the jury that they must allow nominal damages in each case, and, in addition thereto, they should allow in each case a reasonable compensation for the mental anguish which they find the respective plaintiffs suffered because of the negligence of the (305) defendant which the court has heretofore advised, so that the damages allowed for this cause should be reasonable and only in compensation for the anguish caused by the negligence of the defendant. The court charges you that in your deliberations on that subject a spirit of fairness should control.

Baggett & Baggett and J. C. Clifford for plaintiff.
Rose & Rose for defendant.

ALLEN, J., after stating the case. The plaintiffs could not recover substantial damages unless they establish the fact that H. H. Kivett could and would have reached home in time for his brother's funeral, if the telegram had been promptly delivered. His evidence on this point was, therefore, material, and we do not think it is subject to the criticism of the defendant, that the witness was stating an opinion, not a fact, and that he does not show that he was familiar with the schedules of the trains. He does not use the word "schedule," but says he had made the connection between Detroit and Dunn once, and knew the movement of the trains. We think the evidence competent.

It was also competent for him to testify that his deceased brother had stayed with him, in the West, three years, as bearing upon the relationship between them.

While mental anguish will be presumed under conditions presented by this record, when the relationship is that of brothers, this does not exclude other evidence tending to prove a close association between them.

The third and fifth prayers for instructions were substantially given in the charge of the court, and we think there was no error in denying the others.

The first of these prayers, if accepted as law, would relieve the telegraph company from any duty to make inquiry for the sendee of a message when the street addresss is given, further than at the place indicated by the address, and is opposed to the doctrine in *Hendricks v. Tel. Co.*, 126 N. C., 312, where it is held that, although a tele-
(306) gram is sent in care of another person, it is not sufficient to make inquiry at the place of business of such person, if not delivered to him.

The rule contended for, if sustained, might relieve the defendant from liability in this case, but it would result in imposing additional burdens and expense on it, because under such a rule no one would add a street address to a telegram, and the defendant would have to search a city for a sendee.

Again, there is no evidence that the defendant "offered" the message at the boarding-house. On the contrary, the keeper of the house testified that she told the messenger boy she would pay for the message, and he said it must be delivered personally, and she was not contradicted.

The second prayer could not have been given, because there was no evidence of a delivery at the motor works. The only witness on this

question was Mary Nolan, who was in charge of a branch office of defendant in Detroit, and who testifies to no fact except that she gave the message to a messenger boy, who was not a witness.

The fourth and eighth prayers relate to the conduct of the plaintiff, and, if containing correct statements of law, should have been directed to issues on contributory negligence, instead of to the issue of negligence.

The fact that the defendant did not tender an issue on contributory negligence is very strong evidence that it did not arise.

It would seem that if he had attempted to postpone the funeral, it would not have availed him, as he had to communicate with his father by telegraph, and he sent a telegram which was not delivered.

The court could, with propriety, have given the sixth and seventh prayers, but the refusal to do so is not error.

The plaintiffs did not seek to recover damages for failure to deliver the telegram sent from Detroit, and the charge clearly and explicitly confines the jury to the consideration of the telegram sent from Buie's Creek.

The issues submitted by the court are almost identical with (307) those which were approved in *Dobson v. Tel. Co.,* 152 N. C., 766, and enabled the plaintiffs and the defendant to present their contentions before the jury.

"It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy and each party has a fair opportunity to present his version of the facts and his views of the law, so that the case, as to all parties, can be tried on the merits." *Wilson v. Taylor,* 154 N. C., 215..

The record does not disclose that an exception was taken to the conversation with the agent of the defendant, when the plaintiff called at the telegraph office about 6 o'clock and asked if there was a telegram for him; but in any event we think the evidence is competent, because the declarations were made in furtherance of a duty the agent was then performing for the defendant.

There was evidence of negligence, and the motion to nonsuit could not have been allowed.

No error.

Cited: Alexander v. Telegraph Co., 158 N. C., 478; *Penn v. Telegraph Co.,* 159 N. C., 309; *Miller v. Telegraph Co.,* 167 N. C., 316; *Medlin v. Telegraph Co.,* 169 N. C., 505.

W. F. WYATT v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 18 October, 1911.)

1. Pleadings—*Interpretation*—Substantial Justice.

The allegations of a pleading shall be liberally construed with a view to substantial justice between the parties, and every reasonable intendment is made in favor of the pleader.

2. Same—Railroads—Fire Damage—Defective Locomotive—Sparks.

In an action against a railroad company for damages caused by fire from the defendant's locomotive, it was alleged that the defendant negligently and carelessly permitted said engine to emit sparks and coals of fire, which fell upon plaintiff's property, etc.: *Held*, the preceding allegation in the same paragraph, "in operating and running an engine," merely indicated where the engine was at the time, and what was being done with it, and the pleading was sufficient for the introduction of the plaintiff's evidence tending to show, as the cause of his damage, that the locomotive was defective.

3. Same—Off Right of Way—Contributory Negligence—Buildings—Inflammable Conditions.

In an action for damages against a railroad company for the negligence of the defendant in setting fire to plaintiff's buildings, adjoining but not on the right of way, by sparks emitted from a passing locomotive, there being no evidence that the fire was communicated from combustible matter on the right of way, the right of plaintiff's recovery depends upon whether he could show that the fire was caused by a defective engine, or that it was negligently operated, and evidence sought to establish his contributory negligence is incompetent which tends to show that the buildings destroyed were old, neglected, and inflammable, for the plaintiff would have the right to assume that the defendant would not run an engine so defective or in such a negligent manner as to cause the fire.

4. Witnesses—Opinion Evidence—Nonexperts—Experience.

Opinions of witnesses as to the value of lands, houses, etc., when relating to the measure of damages caused thereto in an action concerning them, are competent when the witnesses, by experience and information, are qualified to speak.

5. Evidence—Railroads—Negligent Burning—Time of Injury—Other Times.

While in estimating the value of lands and houses on the issue of damages the jury is restricted to the time of the injury, testimony as to the value at other times is competent when it bears on the value at that time.

6. Railroads—Fire Damage—Measure of Damages—Evidence—Tax Deeds.

Tax deeds are incompetent evidence of value of plaintiff's lands and buildings, in his action to recover damages to his buildings and lands caused by defendant's negligence, or to show a reduction in the damages from the amount that plaintiff's evidence tended to establish.

WYATT *v.* R. R.

APPEAL from *Whedbee, J.*, at April Term, 1911, of WAKE. (308)

This action is to recover damages for the negligent destruction of property of the plaintiff by fire. The allegation of the negligence is as follows:

"That on 11 April, 1910, the employees and agents of the defendant, in operating and running an engine over said railway near the premises of the plaintiff above described, negligently and carelessly permitted said engine to emit sparks and coals of fire therefrom which fell on plaintiff's property above described and set fire thereto and burned up and destroyed the same, to his damage in the sum of $5,000, as (309) he is informed and believes."

The defendant denies negligence, and for a further defense alleges:

"That if the plaintiff's property was destroyed by fire, as alleged in the complaint, which the defendant denies, plaintiff by his own negligence contributed to bring about such injury, in that he permitted his property to become and remain in an inflammable state and in a negligent condition, and failed to provide a watchman therefor, and his contributory negligence is set up by the defendant in bar of plaintiff's right to recover in this action."

The defendant does not contend that there is no evidence that the defendant set out the fire which burned the property of the plaintiff, but insists that the complaint alleges negligence in the operation of the train, and that this allegation is not supported by evidence of a defective spark arrester.

This contention is presented by two prayers for instruction, which were refused:

"There is no evidence of negligence in the operation of this engine by the employees of the defendant, and you will answer the second issue 'No.'"

"In order to answer the second issue 'Yes,' you must find that the defendant's employees negligently operated the engine on the train which set out the fire, if you find that it was set out by an engine."

His Honor instructed the jury to answer the issue of contributory negligence "No," and defendant excepted.

The evidence in support of the plea of contributory negligence is as follows:

Plaintiff testified that he placed one of his buildings as near the railroad line as he could get it; that he had no tenant for the tannery or bark sheds.

J. H. Harrison, witness for the plaintiff, said the roof of the bark house where the fire started was rotten and very dry, and that he might have described it as burning like powder; that the tannery property

(310) was a loafing place for hoboes, and there was one who cooked in the building one or two nights. The buildings were in a dilapidated condition.

For the defendant, A. L. Pritchett testified that the grade is north at the point of the fire. From the outside, buildings were ragged looking, especially the roof. Conditions around the buildings grassy and trashy looking.

J. H. Edgerton said the buildings were in a very dilapidated condition; the shingles were turned up and mossy; grass and weeds around the building.

Charles Creighton testified that the buildings were in a very bad state; they were all decayed and rotten; roof all rotten; doors off, windows off, and in every way in bad state. The property did not appear to ever be looked after, and it was in bad fix. Weeds as high as a man's head were in the yard around the buildings. It was a regular "hold-out for hoboes."

W. T. Smith said the property was in pretty bad shape, mostly rotted down, the roof especially, and the shingles were curled up, and there was moss on the shingles. Sides of building were torn off, the floors up, windows out, the plastering knocked off in the cottage, and part of the flooring torn up.

T. B. Moseley testified that the buildings were dilapidated and run down for want of repairs; they seemed neglected; grown up in weeds; "the condition of an old settlement that has been abandoned."

J. J. Haywood testified that the property was in bad shape; it was all gone down and dilapidated; no windows at all; doors all down and some panels knocked out. The building nearest the railroad was pretty near down; the weatherboarding and roof were rotten; it was used by gamblers, white and colored, and disreputable women; the grounds around the buildings were grown up in dry weeds and grass. The buildings had been used by tramps, and it could be seen that they had built fires in the buildings.

Plaintiff asked the witness J. H. Harrison: "What, in your opinion, was the value of the property that was burned, in the condition the property was in at the time of the fire?" The witness answered, "Not
(311) less than $4,000, if it was mine." The defendant objected to the question and answer.

John Briggs, who qualified as an expert, testified as follows:

Q. Taking the buildings as you saw them, what would you say they were worth? A. I base my calculation on them as of the last time I saw them, and I figured on the sizes from what I was told. I have no personal recollection of the sizes of the buildings or of the size of the part I put up.

Q. Can you give an opinion satisfactory to yourself as to their value? A. I think I can.

Q. Assuming that the jury should find from the evidence that the two tan-bark houses were 25 x 100 feet and 30 x 80 feet, respectively, and taking into consideration your own personal knowledge of the construction of the two houses, what were they worth on the day of the fire? A. One tan-bark house 25 x 100 feet I value at $1,000; one tan-bark house 30 x 80 feet, with 30-foot basement, I value at $1,320. The three-story tannery, 25 x 50 feet, I value at $1,500; the three-room cottage I value at $650, making a total of $4,470. (That part of the answer as to the three-story tannery and cottage was excluded.)

Q. Assuming that the jury should find from the evidence that the tannery was 25 x 50 and three stories high, from your own knowledge of the condition of it the last time you saw it, can you form an opinion satisfactory to yourself as to the value of the tannery? A. Yes.

Q. What would you say the tannery was worth? A. $1,500.

The defendant excepted to the admission of this evidence.

The defendant introduced M. R. Haynes, a tax lister of Wake County, and proposed to prove by him that after the fire the plaintiff, through his agent, asked for a reduction in the valuation of his property, and the amount of the reduction asked for.

The witness testified that he did not know what reduction was asked for; that he only knew how much was made. He was then asked what reduction was made.

This evidence was excluded, and the defendant excepted. (312)

The defendant also offered in evidence the abstracts before and after the fire, to show the difference in valuation. This evidence was excluded, and the defendant excepted.

The jury returned the following verdict:

1. Was plaintiff's property damaged by fire set out by defendant's engine? Answer: Yes.

2. If so, was the fire set out by sparks negligently emitted by the defendant's engine? Answer: Yes.

3. Did the plaintiff by his own negligence contribute to the cause of said fire? Answer: No.

4. What damage has plaintiff suffered by reason of said fire? Answer: $2,500.

There was a judgment in favor of the plaintiff, and the defendant appealed.

Aycock & Winston and D. L. Ward for plaintiff.

Murray Allen for defendant.

ALLEN, J., after stating the case: The uniform rule, prevailing under our present system, is that the allegations of a pleading shall be liberally construed with a view to substantial justice between the parties, and that every reasonable intendment is made in favor of the pleader. *Brewer v. Wynne,* 154 N. C., 472.

The just application of this rule tends to the trial of cases upon their merits, and we would not be justified in relaxing it in a case like this, where there has been a trial before a jury, and both parties have had full opportunity to present their evidence.

It would require a very strict construction of the allegations of the complaint to give it the meaning contended for by the defendant, to wit, that it only alleges negligence in the operation of the train.

If we give to the pleading every "reasonable intendment in favor of the pleader," and "construe it liberally," as our authorities require, the negligent act alleged in the third paragraph of the complaint is that the defendant "negligently and carelessly permitted said engine to emit sparks and coals of fire therefrom, which fell on plaintiff's (313) property, etc."; and the preceding language, "in operating and running an engine," merely indicates where the engine was, and what was being done with it, at the time of the negligent act.

If so, it was competent for the jury to consider evidence of defects in the engine under the allegations of the complaint.

The defendant's counsel presented his contention as to the contributory negligence of the plaintiff with much force and ability and cited authority from eminent courts in support of his position.

We do not, however, agree with him that the weight of authority sustains his view, and we think his Honor held correctly that there was no evidence to sustain the plea.

The buildings, which were destroyed by fire, were on the land of the plaintiff, adjoining the right of way of the defendant, and the negligence alleged is that the plaintiff failed to repair them, and had permitted the roofs, where the fire began, to become rotten and highly inflammable.

The buildings had been erected about eighteen years, and there is no evidence they were ever ignited prior to the time they were destroyed.

As the buildings were not on the right of way, and there is no evidence that fire caught in combustible matter on the right of way and was communicated to them, the plaintiff could not recover unless he succeeded in proving that the engine of the defendant was defective or that it was negligently operated. *Williams v. R. R.,* 140 N. C., 624.

If so, to hold that a failure to repair is contributory negligence would require the plaintiff to foresee the negligence of the defendant and to provide against it.

We think the contrary is the rule, and that the plaintiff had the right to assume that the defendant would perform its duty, and that it would not operate an engine negligently or one that was defective.

"The general rule is that every person has the right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which can come (314) to him only from violation of law or duty to such other person. Hence failure to anticipate defendant's negligence does not amount to contributory negligence, even though he places his property in an exposed or hazardous position." Cyc., vol. 29, p. 516.

"Since a person is not required to anticipate the negligence of another, he will not be guilty of contributory negligence because the injury results in part from the defective condition of the property, or because its condition is such as to render the danger greater." *Ib.*, 526.

Again it is said in Cyc., vol. 30, p. 1343: "As a general rule, an owner of land has a right to use it in the ordinary and usual way and is not bound to remove dry grass, weeds, leaves, or other combustible material from his land adjoining a railroad right of way, in anticipation of probable negligence on the part of the railroad company, and a failure to perform such acts will not make him guilty of contributory negligence so as to preclude a recovery for damages caused by a fire originating through the railroad company negligence."

The following authorities, among many others, sustain the text: *Salmon v. R. R.*, 38 N. J. L., 12; *R. R. v. Ins. Co.*, 82 Miss., 779; *Hendrick v. Towle*, 60 Mich., 371; *Walker v. R. R.*, 76 Kan., 34; *R. R. v. L. Co.*, 125 Ala., 261; *Matthews v. R. R.*, 121 Mo., 334; *R. R. v. Short*, 110 Tenn., 718; *Kalbfleisch v. R. R.*, 102 N. Y., 521; *R. R. v. Burger*, 124 Ind., 278; *R. R. v. Schultz*, 93 Pa. St., 345; *R. R. v. Jones*, 86 Ind., 500; *R. R. v. Medley*, 75 Va., 506; *Coswell v. R. R.*, 42 Wis., 199; *Snyder v. R. R.*, 11 W. Va., 28.

We quote from only two of them.

In the case from Pennsylvania, the Court says: "Again, complaint is made that the court refused to instruct the jury that if either Schultz or the owner of the strip lying between his land and the railroad allowed the accumulation of dry leaves, brushwood, and other rubbish on his property, which would be readily fired by sparks ordinarily issuing from a properly equipped locomotive, that might be regarded as contributory negligence. This was certainly an extraordinary propo- (315) sition: first, because the learned judge throughout the trial held that if the defendant's locomotive was properly equipped with spark-arresting appliances, the plaintiff could not recover, whether he had been careful or negligent; second, because it is an attempt to impose upon

property owners along the line of a railroad duties unknown and unnecessary before the building of the road; and, third, if this proposition means anything, it means that upon such property owners devolves the duty of guarding against the negligence of railroad companies and their servants; but this is simply absurd."

And in the Michigan case: "The obligation of care to prevent the fire from the defendant's engine from burning the plaintiff's mill rested upon the defendant, and the fact that old, combustible matter accumulated about the mill and in near proximity to the railroad cannot be urged as contributory negligence on the part of the plaintiff. He had a right to use the offal of his mill to fill up the waste and low places with, just as he was accustomed to do before the railroad was built. He was not obliged to guard his premises to relieve the defendant from liability for his negligent acts."

The same principle has been recognized in *Phillips v. R. R.*, 138 N. C., 19: "The owner of premises is not bound to anticipate negligence of a railroad and, by way of prevention, make provision against communication of fire."

Opinions of witnesses as to value of land, houses, etc., have been very generally received when the witnesses, by experience and information, are qualified to speak, and we think there was no error in their admission in this case. 1 Wig. Ev., secs. 714-720; *Whitfield v. Lumber Co.*, 152 N. C., 214.

It is true that in estimating value as an element of damage, the jury is restricted to the time of the injury, as his Honor held, but a witness may speak of value at other times as bearing on the value when the injury occurred.

The evidence as to reduction in the valuation of the property for taxation after the fire was properly excluded. *Ridley v. R. R.*, 124 N. C., 37; *R. R. v. Land Co.*, 137 N. C., 330.

(316) It was the act of the officers of the law, which the plaintiff could not control, and the tax lister testified that he had no recollection of the amount of the reduction asked for by the plaintiff or his agent.

We have examined with care the entire record, and find

No error.

Cited: Jeffress v. R. R., 158 N. C., 222.

R. H. BELL v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 18 October, 1911.)

Master and Servant—Vice Principal — Orders — Negligence — Questions for Jury—Evidence—Nonsuit.

Upon a motion to nonsuit, the plaintiff's evidence being construed in the most favorable light for him, it is reversible error of the trial judge not to submit the question of defendant's negligence to the jury in an action for damages for personal injuries, when there is evidence tending to show that plaintiff and others of defendant's employees were engaged in hoisting a large pole by rope and block to place it upright so as to put one end in a hole prepared for it; that the pole was resting upon a 12-inch wall of a large brick tank, and the defendant's vice principal ordered the plaintiff upon the wall to place the pole in position by using a piece of scantling for a lever, and while the plaintiff was acting accordingly, in full view of the vice principal, the latter ordered the other employees, who had hold of the hoisting rope, to pull on the rope, which caused the pole to swing upon the plaintiff and knock him from the wall to his injury.

APPEAL from *Whedbee, J.*, at April Term, 1911, of WAKE.

This is an action to recover damages for personal injuries.

The plaintiff alleges that he was an employee of the defendant, and that he was injured negligently while performing a duty in obedience to an order of his superior.

The defendant admitted that the plaintiff was in its employment, but denied negligence on its part, and alleged that the plaintiff was injured by his own negligence.

The defendant was engaged in building a large tank, and at the time of the injury was endeavoring to raise a derrick pole, which was to be use in hoisting material for the tank.

The tank was about 42 feet long, 16 feet wide, and 10 feet deep, and was divided into three compartments of equal size, by two (317) walls 12 inches wide, the bottom being of concrete.

The pole was about 58 feet long, and about 16 to 18 inches in diameter at the larger end. It was laying across the tank, the larger end projecting about 6 feet over the end of the tank next to the hole, where it was to be placed, and the smaller end about 15 feet over the other end of the tank.

It was not parallel with the sides of the tank, the larger end being nearer one side of the tank, and the smaller nearer the other side.

The pole was what is known as a derrick pole, and was to be placed in a hole outside of the tank, to be used in hoisting material.

A rope was fastened around the pole about 10 or 12 feet from the larger end, and this rope extended to a snatch block, fastened to a pole, and then about 15 feet, where at the time of the injury it was in the hands of four or five employees of the defendant.

A line dropped from the smaller end of the pole approximately locates the snatch block, and from that point the rope extends in a southeastern direction. The rope was to be used in raising the pole.

The plaintiff offered evidence tending to prove that he was ordered by the foreman of the defendant to go on one of the 12-inch division walls and straighten the pole; that in obedience to the order he took a scantling and went on the wall; that he had the scantling under the pole pushing it straight, in full view of the foreman, when the foreman suddenly and without warning to him directed the other employees to pull on the rope; that this order was obeyed, the pole was raised several feet, turned towards him, and knocked him off the wall; and that he fell on the cement floor and was injured.

At the conclusion of the evidence his Honor, on motion of the defendant, entered a judgment of nonsuit, and the plaintiff excepted and appealed.

Douglass, Lyon & Douglass for plaintiff.
J. H. Pou and R. H. Battle & Son for defendant.

(318) ALLEN, J., after stating the case: In our opinion, there was evidence of the defendant's negligence for the consideration of the injury, and this is the only question before us.

We express no opinion as to its weight, and forbear to discuss it further than is necessary to indicate upon what ground this decision rests, as the case is to be tried before a jury, whose verdict should be rendered uninfluenced by an expression of opinion on the facts by this or any other court.

The evidence on a judgment of nonsuit must be considered in the light most favorable to the plaintiff, and for the purposes of this appeal we must accept as proven the facts which the evidence reasonably sustains.

There is no suggestion in the record that the plaintiff was injured by the negligence of a fellow-servant, and the defendant admits that Stewart was in charge of the hands and the work.

The evidence tends to show that the defendant was handling a heavy pole 58 feet long, resting on the top of walls 10 feet from the ground; that it was the purpose of the defendant to raise the pole by means of a rope and place it in a hole; that the rope was fastened to the pole, and extended to a snatch block, and then extended some distance, where it

was held by employees of the defendant; that the pole was not in the right position; that the foreman ordered the plaintiff to go on top of one of the division walls 12 inches wide, and force the pole into position by using a scantling; that the plaintiff obeyed the order and had the scantling under the pole, pushing it, when the foreman, who was in full view, suddenly and without notice to the plaintiff, gave the signal which caused the employees of the defendant, who had hold of the rope, to pull it, and that this carried the pole towards the plaintiff, knocked him from the wall, and injured him.

If so, there was evidence that a man of ordinary prudence could have foreseen that injury would probably result to the plaintiff by obedience to the signal, and that giving the signal was the cause of the injury, and this would be evidence of negligence.

The place where the rope was fastened to the pole, the direc- (319) tion of the snatch block, and the position of the men who pulled the rope were also circumstances which the jury could consider.

The case falls within the principle declared in *Beal v. Fiber Co.*, 154 N. C., 157.

There was error in ordering a nonsuit, and there must be a New trial.

J. M. HOCKODAY v. C. M. LAWRENCE AND G. T. SIKES, EXECUTORS.

(Filed 18 October, 1911.)

1. Trial by Jury—Waiver—Interpretation of Statute.

The three methods prescribed by statute by which a jury trial may be waived, *i. e.*, by failure to appear at the trial, by written consent filed with the clerk, by oral consent entered in the minutes, are the only ones by which it can be done. Revisal, sec. 540.

2. Appeal and Error—Costs—Discretion of Lower Court.

Items of cost, as they arise in an action, are in no legal sense the subject of litigation, and are only incidental in the progress of the cause; and the parties are not entitled to a trial by jury on questions raised in regard thereto.

3. Same—Issues—Pleadings Insufficient.

A next friend for a grantor in a deed having been appointed on the ground that the grantor was *non compos mentis*, he instituted an action against the grantee to set aside the deed and restrain him from cutting the timber thereunder. A guardian was appointed for the grantor after the institution of the action, who was made a party thereto, but took no active part therein. The restraining order was issued and was con-

tinued to the hearing. After the death of the grantor, his executors were made parties defendant and filed an answer saying "that in their opinion the action was not for the best interest of the parties." The restraining order was dissolved and defendants taxed with costs: *Held*, the defendants' answer did not raise any issue of fact, in the absence of allegation of bad faith or mismanagement of the next friend who had instituted the action.

(320) PETITION to rehear on appeal from *Lyon, J.*, at November Term, 1911, of GRANVILLE.

This case was decided at the last term, and is now before the Court upon a petition to rehear.

The following facts appear in the record: In February, 1907, W. N. Fuller filed an application before the Clerk of the Superior Court of Granville County for the appointment of a next friend for James M. Hockoday, who had been found by a jury to be *non compos mentis*, and on the same day H. C. Hockoday was appointed such next friend, and instituted this action for the purpose of setting aside certain deeds executed by the said James M. Hockoday to the defendant, which purported to convey the timber on certain lands, and also to restrain the defendant from cutting said timber.

A restraining order was issued in the action, and after notice, and upon a full hearing, the same was continued to the hearing. After the institution of the action, a guardian was appointed for the said James M. Hockoday, who was made a party, but who took no active part in the prosecution of the action.

In 1908 or 1909, James M. Hockoday died, leaving a will, and his executor and devisees were made parties to the action by order of court, and they filed answers in which they say "that in their opinion the above-entitled action is not for the best interest of the estate of J. M. Hockoday, and should not be prosecuted further."

A caveat was filed to said will, upon the ground that the testator did not have sufficient mental capacity to make a will, and the will was sustained.

At April Term, 1910, of the Superior Court an order was entered in the action, dissolving the restraining order, and thereupon an arbitration was entered into between the defendant and the sureties on the prosecution bond, and an award was rendered in favor of the defendant for $82, which was paid.

The cause again came on for hearing at November Term, 1910, of said court. Both parties tendered judgment, the principal difference between them being as to costs, the defendant asking that judgment for

costs be rendered against the next friend and the sureties on the prosecution bond, and the sureties asking that it be rendered (321) against the executor of James M. Hockoday.

His Honor found as a fact that the action was instituted for the benefit of the estate of said Hockoday, and taxed the costs against the executor, and the executor excepted and appealed.

A. A. Hicks and T. T. Hicks for plaintiff.
Graham & Devin for defendant.

ALLEN, J. The executor insists that he raised an issue of fact in his answer by alleging "that he is of opinion that this action is not for the best interest of the estate of James M. Hockoday, and should not be prosecuted further, but should be dismissed at the cost of plaintiff and the surety on his prosecution bond," and that as he has not waived the right in the mode prescribed by statute, he is entitled to have this issue passed on by a jury.

It is true, as contended by the defendant, that Revisal, sec. 540, prescribes only three ways in which a trial by jury may be waived: (1) by failing to appear at the trial; (2) by written consent filed with the clerk; (3) by oral consent entered in the minutes; and that there is no such waiver on this record.

The statute was construed to exclude other modes of waiver in *Hahn v. Brinson,* 133 N. C., 8.

If, therefore, an issue of fact is raised by the answer, the defendant is entitled to a reversal of the judgment.

In our opinion, no issue is raised, and the former judgment of this Court should stand.

Items of cost, as they arise in an action, are in no legal sense the subject of the litigation, and arise only incidentally in the progress of the cause. As was said in *Martin v. Sloan,* 69 N. C., 128, if parties, at the beginning of a suit, were to admit that they had no rights involved, but wished to see which could make the other pay the costs, the court would refuse to hear them.

The different sections of The Code in reference to costs clearly (322) contemplate the action of the judge, and recognize his power to pass upon the questions that may arise in determining who is chargeable.

"Costs may be allowed or not, in the discretion of the court." Revisal, sec. 1267. "Costs shall be taxed." Section 1268, etc.

If, however, the rule was otherwise, the defendant has not raised an issue in the answer, because he has failed to allege bad faith or mis-

management on the part of the next friend, who is not in the ordinary sense a party to the action. *Tate v. Mott,* 96 N. C., 19; *Smith v. Smith,* 108 N. C., 369.

In the last case *Justice Clark* uses language appropriate to this case. He says: "It is to be presumed that the order or the court appointing next friends was made regularly, after due inquiry, and in the interest of Larkin Smith. He is the party plaintiff, in fact and in law, and appeared by next friends, who merely represented him, under the authority and appointment of the court. The Code, sec. 180. It is contended, however, that though not strictly parties to the action, the next friends in the case at bar, in resisting the motion to discharge them, were in fact (virtually found by the verdict of the jury) resisting the will of Larkin Smith, a person of full age and competent to appear for himself; that such next friends officiously and unnecessarily caused themselves to be appointed, and that they, and not Larkin Smith, should pay the costs incurred by their false clamor. There is some force in this suggestion. While 'next friends' may not be embraced in the strict letter of The Code, sec. 535, they come within the purview of that section. It was held error to tax trustees of an express trust who are parties to an action with the costs, unless the court had adjudged that they were guilty of 'mismanagement or bad faith in such action.' *Smith v. King,* 107 N. C., 273. *A fortiori* it is error to tax 'next friends' who are not parties, without at least a similar finding. This is not alleged here in the answer or found by the court. Indeed, the presumption, by virtue of their appointment by the court, is that they acted in good faith, and they cannot be liable to costs unless there is an ex-
(323) press finding against them of the facts requisite to tax them with costs."

The allegation in the answer, that in the opinion of the executor it is not for the best interest of the estate to further prosecute the action, falls far short of an allegation of bad faith or mismanagement.

We find no error, and the petition is dismissed.

Petition dismissed.

Cited: Keerl v. Hayes, 166 N. C., 555; *Cozad v. Johnson,* 171 N. C., 642.

N. B. BARGER v. R. H. SMITH AND J. D. SMITH.

(Filed 18 October, 1911.)

1. Cities and Towns—Ordinances — Discrimination — Nuisances — Power of Courts.

The courts will not inquire into the motives of the authorities of a town in passing an ordinance, or as to whose influence caused its passage; but when an ordinance depends upon the power of the town authorities to declare a certain act a nuisance, or whether the ordinance is oppressive or discriminative, it is subject to judicial review.

2. Same—Injunction—Issues of Fact—Questions for Jury—Hearing—Questions of Law.

A town ordinance prohibited the erection of any sawmill or other steam mill within certain boundaries. Within these boundaries the defendant had begun to erect a sawmll before the passage of the ordinance, and was stopped by a restraining order at the suit of plaintiff, who, defendant alleged, was interested in a sawmill operated in the prohibited territory without molestation. The defendant denied that the operation of his sawmill was a nuisance under the conditions and surroundings of its location: *Held*, (1) a permanent injunction should have been refused and the restraining order continued only to the hearing; (2) operating a sawmill is not a nuisance *per se*, and it is a question of law whether it was a nuisance under the circumstances, or whether there was a discrimination, dependent upon what the jury found the facts to be.

APPEAL by defendant from *Whedbee, J.*, at April Term, 1911, of WAYNE.

The facts are sufficiently stated in the opinion of the Court by (324) *Mr. Chief Justice Clark.*

Aycock & Winston and M. T. Dickinson for plaintiff.
Langston & Allen for defendant.

CLARK, C. J. On 18 January, 1911, the Commissioners of the Town of Pikeville passed an ordinance prohibiting the erection or operation of any sawmill or other steam mill within certain boundaries within said town, which are set out in the ordinance. Prior to the adoption of said ordinance the defendants had begun the erection of a sawmill and gin within said territory. Upon the block on which the mill was being erected there were only four residences and three stores, all on the east side of said block, the mill being on the west side, which till then had been used for farming purposes. The town of Pikeville is a village of 310 inhabitants. The defendant alleges that the plaintiff Barger owns a third interest in a rival plant of similar character which was being operated nearer the heart of the village. The defendants continued the erection of their plant until they were enjoined in this proceeding.

"An ordinance must not be oppressive or discriminating, but must be reasonable and lawful." 2 Dill. Mun. Corp. (5 Ed.), sec. 589; 2 Abb. Mun. Corp., sec. 545. When an ordinance is "within the grant of power to the municipality, the presumption is that it is reasonable, unless its unreasonable character appears upon its face. But the courts will declare an ordinance to be void because unreasonable upon a state of facts being shown which makes it unreasonable." *Ib.*, sec. 591, and cases there cited. It is further said that "an ordinance must be impartial, fair, and general. It would be unreasonable and unjust to make under the same circumstances an act done by one person penal and done by another not so. Ordinances which have this effect cannot be sustained. Special and unwarranted discrimination or unjust or oppressive interference in particular cases is not to be allowed." *Ib.*, 593.

Upon the allegations in the answer, if found to be true, the defendant was forbidden by this ordinance to erect and operate his steam mill in the edge of town, while the rival plant in which the plaintiff is (325) interested is being operated much nearer the heart of town without restriction. The answer further alleges that this ordinance was procured to be passed by the influence of the plaintiff. While the courts cannot inquire into the motives in passing an ordinance, it is competent to inquire into allegations as to the ordinance being oppressive or discriminative. Ordinances in regard to a subject peculiarly within the duties of the town authorities, such as the regulation of streets and the like, are usually conclusive. But when an ordinance like this depends upon the power to declare the subject-matter a nuisance, it is a subject of judicial review. In some cases the court will determine whether the subject-matter is a nuisance *per se* as a matter of law from its nature or from the attendant circumstances. Here there are disputed allegations of fact as to discrimination and whether the steam plant is in fact a nuisance. It is not a nuisance *per se,* though its location may make it such. In such case the disputed facts should be submitted to a jury and upon the issues found the court will determine whether, as a matter of law, the ordinance is reasonable or not. In *Small v. Edenton,* 146 N. C., 530, it is said: "The reasonableness of an ordinance is for the court, the jury only being called in to find the facts when in dispute." Citing Abb. Mun. Corp., sec. 545; Smith Mun. Corp., sec. 1133. In that case it is said that the issue of nuisance in many cases must be found by the jury.

We are of opinion that the disputed issues of fact should have been submitted to the jury. The court should not have granted a perpetual injunction, but at the utmost should have granted the restraining order to the hearing.

The judgment below is thus modified. The plaintiff will pay the costs of this appeal.

Modified.

WALKER, J. I concur in the conclusion reached by the Court in this case, but it must not be understood that, in doing so, I am committed to the doctrine that the State, or any one of its municipalities, cannot, in the exercise of its police power, enact a law or pass an ordinance forbidding the erection of a mill within limited and defined territory, and declaring the same to be a nuisance. There are many (326) reasons which can be assigned for holding, in view of the nature of such plants, with their smoke, noise, etc., that the right to legislate by statute or ordinance against them falls within the general police power. But any ordinance may be declared void, if in itself, or because of the peculiar facts and circumstances which gave rise to its adoption, or with reference to which it must be enforced, it will be unreasonable and oppressive in its operation. For this reason I think the Court is right in modifying the order and requiring that the injunction should extend only to the hearing, so that the facts in this particular case may be found by a jury, when we can the more intelligntly pass upon the validity of the ordinance in question.

HOKE, J., concurs in this opinion.

Cited: *S. c.*, 160 N. C., 206.

THEO. A. KOCHS COMPANY v. ANDREW JACKSON, T. C. VANN AND L. LEVIN.

(Filed 18 October, 1911.)

1. Demurrer Ore Tenus—Defect of Parties—Pleadings.

A demurrer *ore tenus* to the complaint upon the ground of defect of parties, or that the plaintiff did not have the legal capacity to sue, will not be sustained, as such defense is deemed waived unless taken by a written answer or demurrer. Revisal, sec. 478.

2. Same—Corporation—Partnership.

A demurrer *ore tenus* will not be sustained on the ground that the plaintiff's name appeared to be either that of an incorporated company or a partnership, and that neither the fact of incorporation nor the names of the partners were alleged. Revisal, sec. 478.

3. Same—Claim and Delivery—Replevy.

The defendant claimed the ownership of personal property under execution sale in proceedings brought against his debtor, to which the plaintiff was not a party; and plaintiff brought his action for the possession of the property under a prior registered mortgage securing a note past due. The defendant gave a replevy bond for the retention of the property, and not having denied in his answer the allegation that plaintiff was the T. A. K. Company, demurred *ore tenus* that the complaint did not allege the fact of incorporation, if the plaintiff were a corporation, or the names of the partners, if a partnership: *Held*, a demurrer *ore tenus* on the ground of defect of parties will not be sustained.

4. Deeds and Conveyances—Registration—Sale Under Execution—Title Acquired—Parties.

A purchaser of personal property at an execution sale cannot acquire any right superior to that of the owners of a prior registered mortgage thereon, who were not parties to the action.

(327) APPEAL from *Cooke, J.*, at February Term, 1911, of CUMBERLAND.

This is an action to recover possession of personal property.

The plaintiff is designated in the summons and complaint as the "Theo. A. Kochs Company," and there is no allegation that the plaintiff is a corporation, and, if a partnership, the names of the partners are not given.

The plaintiff alleges in his complaint the execution of certain notes by one Andrew Jackson, payable to the Theo. A. Kochs Company, and the conveyance by chattel mortgage of the property described in the complaint to secure the same; that there has been a default in the payment of the notes, and that the property, described in the mortgage, is in possession of the defendants, which they have refused to surrender on demand.

The defendants file an answer in which they deny the allegations of the complaint, except the allegation of the execution of the chattel mortgage to secure the payment of the notes, and they allege that they are the owners of the property by virtue of a purchase at a sale under execution against Andrew Jackson. The chattel mortgage was duly registered, and after its registration the said Jackson left the State, and under regular proceedings against him, to which the plaintiff in this action was not a party, said property was attached and sold, and the defendants became the purchasers at the sale.

When the case came on for trial, the defendants demurred to the (328) complaint *ore tenus*, for that it did not allege that Theo. A.

Kochs Company was a corporation, or, if not a corporation, but a partnership, it failed to allege the names of the partners. The motion was overruled, and the defendants excepted.

His Honor also held that the purchase by the defendants at the sale under execution was no defense against the claim of the plaintiff, and the defendants excepted.

There was a judgment in favor of the plaintiff, and the defendants excepted and appealed.

Newton, Herring & Oates for plaintiff.
Rose & Rose and H. L. Cook for defendants.

ALLEN, J., after stating the case: The demurrer *ore tenus* to the complaint was properly overruled. It was an objection to the complaint upon the ground of defect of parties, or that the plaintiff did not have the legal capacity to sue, and such objections are waived, unless taken by a written answer or demurrer, under the provisions of section 478 of the Revisal.

Besides, it does not appear on the face of the complaint that there is a defect of parties, or an incapacity to maintain the action, and the defendants do not deny in their answer the execution of the chattel mortgage to secure the notes, and they have executed a replevy bond, payable to the plaintiff, by means of which they retain the property pending the action.

A similar question was raised in *Stanly v. R. R.*, 89 N. C., 331, in which the Court says: "The appearance and plea to the merits or answer is a concession of the sufficiency of the designation of the person, natural or artificial, and if intended to be disputed it should be, under the present practice, by answer."

The defendants rely on *Heath v. Morgan*, 117 N. C., 505, as an authority in favor of their position, but an examination of the opinion in that case shows that the Court acted upon the assumption that the plaintiff was a partnership, which does not appear in this case, and also that a demurrer was filed, upon the ground that the names of the partners were not stated in the summons or complaint.

The defendants acquired no title as against the plaintiff, by (329) purchase at the execution sale.

The execution was against Jackson, who had executed to the plaintiff a chattel mortgage, which was duly registered.

"The execution is issued by the clerk as a matter of course upon the judgment, and, under it, the property levied upon under the attachment

is sold (if liable to sale), and what title the purchaser gets will be determined after the execution sale, for the purchaser buys only the right of the defendant in the attached property, as in all other sales under execution." *Electric Co. v. Engineering Co.,* 128 N. C., 201. We find No error.

Cited: Daniels v. R. R., 158 N. C., 428; *Brewer v. Abernathy,* 159 N. C., 285.

STATE EX REL. T. H. BATTLE ET AL. v. CITY OF ROCKY MOUNT ET AL.

(Filed 18 October, 1911.)

1. Public Officials—Recorder's Court—Interpretation of Statutes—"Shall" —Legislative Command.

A legislative act declaring that a recorder's court is thereby created for an incorporated town, which *shall* be presided over by a recorder, with certain qualifications, who *shall* be elected by the board of aldermen at a certain meeting, by using the word "*shall*" throughout in connection with the action of the board in appointing a recorder, plainly indicates the will of the Legislature, in imperative terms, that the board must appoint a recorder for the court created.

2. Public Officials—Recorder's Court — Election of Recorder — Legislative Command—Aldermen's Discretion—Interpretation of Statutes.

When the Legislature has created a recorder's court for an incorporated town, the board of aldermen to elect a recorder at a specified meeting, it is not left to the discretion of the board as to whether or not they will elect the recorder, by reason of a provision in the same act that the mayor of the town shall be *ex officio* recorder if the board fail to elect one, the purpose of the proviso being to keep the office full until an election by the board, or until it supplies a vacancy occurring from any other cause, as in case of death or resignation, etc.

3. Interpretation of Statutes—Expressed Intent—Ambiguity.

When the meaning of a statute is clear, or there is no ambiguity, there is no room for construction, and the intention thereof must be gathered from the words employed.

4. Same—Public Officials—Recorder's Court—Election of Recorder by Board of Aldermen—Failure to Elect—Continuous Duty—Power of Courts—Mandamus.

When the Legislature has expressly created a recorder's court for an incorporated town, and in plain terms has required the board of aldermen to elect a recorder therefor at a certain meeting of the board, the board, by failing to act accordingly at the appointed time, may not defeat the

legislative mandate, for the duty imposed is a continuing one, time not being of its essence, and the courts will compel it to act, at any time, and do what it has failed to do at the proper or appointed day.

5. Public Officials—Recorder's Court—Election of Recorder by Aldermen—Failure to Elect—Mandamus.

Mandamus will lie to compel the board of aldermen of an incorporated town to elect a recorder for a recorder's court, in the manner prescribed by statute.

6. Same—Ministerial Duties.

A mandamus issued to compel the board of aldermen to act in obedience to the legislative mandate and elect a recorder for a recorder's court, which the statute has created, cannot direct when they shall appoint or interfere with discretionary powers conferred upon them, but can only require that they shall act in obedience to the law.

7. Same—Indictment—Common-law Offense—Statutory Offense—Interpretation of Statutes.

A willful neglect or omission of the board of aldermen of an incorporated town to elect a recorder, in the manner required of them by statute, for a court which the statute has created, subjects them to an indictment at common law, and if the neglect, omission, or refusal to discharge this duty is willful and corrupt, it is criminal misbehavior, and subjects them to indictment under our statute for a misdemeanor, punishable by fine or imprisonment. Revisal, sec. 3592.

8. Appeal and Error—Public Officials—Mandamus—Public Interest—Procedure—Power of Court.

When it appears on appeal to the Supreme Court from admitted facts that a board of aldermen of an incorporated town are acting in violation of a command of a statute that they elect a recorder in the manner therein stated, judgment will be entered in this Court requiring the writ of mandamus to issue, in view of the public interests involved; but in this case the writ is stayed for a reasonable period, so that, if there has been an election in the meantime, the clerk will not issue the writ, but certify the judgment to the Superior Court in the usual manner and form.

APPEAL from NASH from a decree of *Cooke, J.*, heard 28 (331) February, 1911, at chambers.

This is a suit for a writ of mandamus, brought by certain citizens of the city of Rocky Mount, to compel its board of aldermen to elect a recorder, as required to do by the Laws of 1899, ch. 209, secs. 24, 25, 26, and 27, in order that a recorder's court may be established and organized according to the terms of the said act, which sections provide as follows:

SEC. 24. That a special court for the trial of misdemeanors is hereby established, and said court shall be known as the "Recorder's Court of Rocky Mount."

SEC. 25. That said recorder's court shall be a court of record, and shall be presided over by a recorder, who shall be a *bona fide* resident and a duly qualified voter of said city, and shall be elected by the board of aldermen of said city at the meeting to be held on the Thursday next succeeding the election for mayor and aldermen, to be held on the first Monday in May, one thousand nine hundred and seven, and biennially thereafter; and such recorder shall hold his said office for a term of two years from the date of his said election and until his successor shall be duly elected and qualified. Pending such election and so long thereafter as the board of aldermen shall fail to fill said office by the election of a recorder, the mayor of said city shall be *ex officio* recorder, and as such shall exercise every power conferred upon and perform every duty imposed upon such recorder by this act.

SEC. 26. That whenever the board of aldermen of said city shall, in accordance with the provisions of the preceding section, elect a recorder, said board shall likewise proceed to elect a vice recorder, who shall possess the same qualifications and hold office for the same term as the recorder; and said vice recorder shall enter upon and discharge the duties of the office of recorder whenever the recorder, on account (332) of sickness, absence from the city, or other good and sufficient cause, shall be unable to do so, and he shall for the time be clothed with every power conferred by law upon the recorder: *Provided,* that so long as the mayor of said city shall be *ex officio* recorder the mayor *pro tempore* shall be *ex officio* vice recorder, and as such shall be clothed with every power conferred by law upon such vice recorder.

SEC. 27. That the recorder's court shall hold daily sessions in the courtroom of the municipal building in said city, and shall possess every power in the regulation and ordering thereof usually possessed by other courts of record in like cases.

The defendants have never complied with the requirements of this act nor taken any steps to do so, contending that it was left entirely to their discretion whether to fill the office of recorder or permit the mayor to act as recorder, and the mayor *pro tem,* as vice recorder, and they thought it best for the interests of the community to continue the old régime. The Judge of the Superior Court, Hon. Charles M. Cooke, did not agree with defendant's counsel in this construction of the act, and adjudged that the writ of mandamus be issued. Defendant excepted and appealed.

L. V. Bassett for plaintiff.
F. S. Spruill for defendant.

WALKER, J. We concur with the learned judge in his conclusion of law and in his judgment. The act of 1907 is plainly mandatory. A recorder's court is established by the act, with detailed provisions for the exercise of the jurisdiction conferred upon it. It was clearly intended by the Legislature that the board of aldermen should, at their May meeting next after the passage of the act, elect a recorder. There is not even the scintilla of a discretion given to the board so far. The Legislature had the power to pass the act and it evidently knew precisely what it wanted to do, and expressed itself to that end in unambiguous words, and being composed of fine grammarians, it conveyed its meaning to the board in the imperative mood, which is generally supposed to carry a mandate with it. In every section of the act the (333) word "shall" is used to show that the Legislature intended that the board should execute its will and not its own. As an auxiliary, the word "shall" implies a duty or necessity, whose obligation is derived from the person speaking, and is equivalent to an order or direction to do the particular thing, and excluding all idea of discretion or the exercise of the will of the person addressed, so that he may do it or not as seems to him best. He is simply commanded to do it, and his only duty, which, of course, is obligatory, is to obey. The mandate could not be more imperatively given than it was in this case, and why the intelligent gentlemen should have thought otherwise, we are at a loss to know.

Public duties are imposed to be performed, and not to be neglected. It was not the purpose of the Legislature to decide who should be elected as recorder, for that was left to the choice of the board; but in all other respects they are left without any discretion in the matter. It has even been held that when the word "may" is used in a statute, "it will be construed to mean 'shall' or 'must' when public interests or rights are concerned, and when the public or third persons have a claim *de jure,* that the power shall be exercised. And conversely, the word 'shall' may be understood as equivalent to 'may' when no right or benefit to any one depends upon the imperative use of the term." Black Int. of Laws (1896), p. 338; *Jones v. Comrs.,* 137 N. C., 579; 36 Cyc., 1159; 2 Lewis's Sutherland Stat. Con. (2 Ed.), secs. 637, 638, and 640.

How could there be a recorder's court, under the terms of this act and in view of its evident intent, without a recorder? The provision for the mayor to fill any original vacancy was inserted for the purpose of keeping the office full until there could be an election, or to supply a vacancy occurring from any other cause until a recorder could be elected as in case of death or resignation. It was not the purpose of that provision to enable the defendants to nullify the act of the Legislature, or to set at naught its declared will. The meaning of the statute is

clear, and where there is no ambiguity, there is no room for con-
(334) struction, and the intention must be gathered from the words employed. *U. S. v. Wittsberger,* 5 Wheat., 76; *U. S. v. Harlwill,* 6 Wall., 386; *S. v. Barco,* 150 N. C., 792, 796; *Fortune v. Comrs.,* 140 N. C., 322; *S. v. Eaves,* 106 N. C., 752; *Adams v. Turrentine,* 30 N. C., 147, 150. "The meaning and intention of the Legislature (and its will) must be sought first of all in the language of the statute itself; for it must be presumed that the means employed are adequate to the purpose, and do express that will correctly." Black Int. of Laws (1896), sec. 25; *U. S. v. Goldberg,* 169 U. S., 96; *Hamilton v. Rathbone,* 175 U. S., 421. As a corollary of the foregoing proposition, it follows, that "If the language of the statute is plain and free from ambiguity, and expresses a single definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey. In other words, the statute must be interpreted literally." Black, sec. 26.

The purpose of this Court always has been, as shown by its decisions, and ever will be, not to defeat the intention of the Legislature by a forced interpretation, but to construe its enactments so as to execute its will, with punctilious regard for its sovereign right, delegated by the people, to make the law. We say what it is, but they say what it shall be, and when the will of that body is declared, it becomes the duty of every citizen and every official to obey it.

The defendants cannot escape the discharge of the duty enjoined upon them by the plea that, having failed to act at the day fixed in the act, they are discharged altogether from its performance, and thus, by their own willful wrong and neglect of duty, acquit themselves of responsibility. The duty is a continuing one, time not being of the essence of the obligation imposed upon them, and the courts will compel them to do, at any time, what they have failed to do at the proper or appointed day. Any other doctrine would put it in the power of a delinquent officer to defeat the legislative will and repeal a law, and would be nothing less than monstrous. *Grady v. Comrs.,* 74 N. C., 101; *McCormac v. Comrs.,* 90 N. C., 441; 2 Lewis's Sutherland Stat.
(335) Construct. (2 Ed.), secs. 612-16; Black Int. of Laws (1896), 343; *Julian v. Rathbone,* 39 N. Y., 369.

This much upon the preliminary matters. The other question in the case is whether mandamus will lie to compel obedience to the law. The rule as to the point is that, "Where the duty to be performed is judicial or involves the exercise of discretion upon the part of the tribunal or officer, mandamus will lie to compel such tribunal to take some action in the premises and exercise its judgment or discretion. But the function of the writ is merely to set in motion. It will not direct

how the duty shall be performed or the discretion exercised. To do so would be to substitute the judgment and discretion of the court issuing the mandamus for that of the court or officer to whom it was committed by law. No particular act can be commanded, and if the discretion is to act or not to act at all, mandamus will not lie. After the tribunal or officer has exercised the judgment or discretion vested in him, and has acted, mandamus will not lie for the purpose of reviewing the decision and compelling a change of judgment or any further action in the premises. The writ cannot be used for the correction of error. If, however, such judgment or discretion is abused, and exercised in an arbitrary manner, mandamus will lie to compel a proper exercise thereof. So where the law has limited the discretion of a board or officer, mandamus may be used to keep such board or officer within the limits of such discretion. If by reason of a mistaken view of the law or otherwise, there has been in fact no actual and *bona fide* exercise of judgment and discretion, as, for instance, where the discretion is made to turn upon matters which, under the law, should not be considered, mandamus will lie. So where the discretion is as to the existence of facts entitling the relator to the thing demanded, if the facts are admitted or clearly proved, mandamus will issue to compel action according to law. If the law involved is purely ministerial and not judicial or discretionary, and if the duty itself is imperative, specific, and well defined, mandamus will lie not only to compel performance, but in a particular and specific manner. But the duty must be clearly and unmistakably enjoined by law, so that its performance does (336) not involve the exercise of any judgment or discretion." 19 A. & E. Enc. of Law (2 Ed.), 732-741, and numerous cases cited in the notes. This view of the law was adopted by us in *Barnes v. Comrs.*, 135 N. C., 27, where the subject is fully discussed, with a copious array of the authorities in this and other jurisdictions. We there said: "While it is proper by mandamus to set them (the commissioners) in motion and to require their action upon all matters officially intrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion nor attempt by mandamus to control or dictate the judgment to be given." And again: "If the defendants had neglected or refused to execute the power intrusted to them, we certainly might call upon them to show cause why they had been so negligent, and upon insufficient return might have issued a peremptory mandamus. Here all we could do would be to command them to select the site for the permanent seat of justice for the county, according to law," citing and quoting from *Hill v. Bonner,* 44 N. C., 257.

Advancing a little beyond this proposition, and entering the domain of their discretion, for the purpose of ascertaining and marking the line

beyond which the court will not go in ordering a mandamus, which may incidentally control discretion, we said: "It is sufficient for us now to hold, as we do, that the commissioners still have a discretion, and while this discretion must be exercised in a manner fair, candid, and unprejudiced, and not arbitrary, capricious, or biased, much less warped by resentment or personal dislike, it cannot otherwise be controlled by mandamus. The court can only insist on a conscientious judgment being used in the exercise of the power of choosing or rejecting, but cannot itself exercise the power nor substitute its own conscience for that of the board or its own sense of fitness for the approval or disapproval of that other tribunal, for to do so would be in direct violation of the statute. But this does not mean that they may use this discre-
(337) tion for the purpose of advancing or vindicating their own views or opinions upon the general policy of selling liquor. This policy has been settled by the decision of the Legislature and a vote of the people, to which they must yield a ready obedience, and the discretion must therefore be exercised by them in strict submission to this declared policy, and with scrupulous regard to the right of the applicant to have a fair and impartial hearing and a just decision, whether for him or against him, and, subject to those limitations, they are virtually a law unto themselves."

The rule may be thus briefly stated: Mandamus extends to all cases of neglect to perform an official duty clearly imposed by law, when there is no other adequate remedy. While the court may not control the official discretion of the board, it may compel the reluctant officers to exercise it; and while it cannot direct them in what manner to decide, it may set them in motion and require them to act in obedience to law. *Attorney-General v. Newell,* 85 Me., 246.

So in the case at bar, the duty to proceed to this election, in the manner pointed out, is not a matter of discretion, nor dependent upon the judgment of either branch of the Government or of the members of either branch. If it were so, there could be no remedy by mandamus. The court does not attempt to control the judgment and discretion of the individual members, when assembled, in the choice then to be made. But it may properly, by mandamus, require the two branches to meet in convention, as a required preliminary step to the election of some one to this office. Otherwise, the anomaly would arise of a minority of those who must constitute the convention being able to defeat an election if they are only a majority of either branch. See, also, *Morse, Petitioner,* 18 Pick., 443; *Lamb v. Lynd,* 44 Pa. St., 336; *Strong, Petitioner,* 20 Pick., 484; *King v. Norwich,* 1 Barn. & Ad., 310; *Gibbs v. Hampden,* 19 Pick., 298; *Rex v. Cambridge,* 4 Burr., 2008.

The law will not countenance or condone any attempt to defy its mandates. The private citizen must obey the law, and the public officer is not exempt from this duty by any special privilege appertaining to his office. He is not wiser than the law, nor is he above it. The truth is, that if he willfully neglects or omits to perform a pub- (338) lic duty, he is liable to indictment at common law. *S. v. Comrs.*, 4 N. C., 419; *S. v. Williams,* 34 N. C., 172; *S. v. Comrs.*, 48 N. C., 399; *S. v. Furguson,* 76 N. C., 197. If the neglect, omission, or refusal to discharge any of his official duties is willful and corrupt, it is criminal misbehavior, and subjects him to indictment for a misdemeanor and punishment by fine or imprisonment, and, as a part of the penalty, to removal from office. Pell's Revisal, sec. 3592, and note.

It is usual to issue an order to show cause or an alternative writ, *ex parte,* and in the first instance, in order that the respondent may explain his conduct; but where sufficient facts are admitted and the special matters pleaded in defense are not a bar to the relief, there is no reason why a peremptory writ should not be sent out. There is no issue of fact to be tried, and the court acts at once and finally upon the admissions of the parties, if they entitle the plaintiff to the writ. This board should no longer be permitted to defy the Legislature and obstruct the due and orderly administration of justice. A peremptory writ commanding the recusant defendants to perform an official duty clearly defined by the law, and which should be well understood by them, is demanded by a just regard for the free will of the people and the regular and decorous conduct of the Government, as well as by the dignity and majesty of the law and the peace and tranquility of society. *Attorney-General v. Newell,* 85 Me., 250. If this statute is undesirable or unsuited to the needs of that community, the board of aldermen are not, for that reason, authorized to disregard it, but an appeal to the Legislature is the only remedy. The members of the board must meet and comply with the mandate of the law; that is their plain duty, and if they fail to perform it, the law will punish their disobedience and enforce obedience to the legislative will in some other effectual way. They must act, and we will compel them to do so, though we cannot dictate or control their choice. A peremptory writ of mandamus will issue, commanding the board to meet at once and proceed to (339) comply with the requirements of the law.

As this is a matter in which the public has an interest, and as compliance with the law has been so long delayed, we will follow the well-defined precedents and enter judgment here, requiring the writ to issue from this Court. But we are sure that, upon being informed of this opinion and the conclusion of the Court upon this appeal, the defendants will at once comply with the law and elect a recorder. For this purpose,

the execution of the judgment will be stayed until 1 November, 1911, and if there has been an election in the meantime, the clerk of the Court will not issue the writ, but certify the judgment of this Court with a copy of this opinion, to the court below, as is usual in other appeals. If for any valid and sufficient reason a further stay is desired, or the usual certificate should be issued, without retention of the case here, an order to that effect, modifying this judgment, may be entered, upon application after notice to the opposing party. The practice of retaining the case here and issuing the writ from this Court is well settled. *Corporation Commission v. R. R.*, 137 N. C., 1, is directly in point, and the several cases of like import are cited therein. In *Caldwell v. Wilson*, 121 N. C., 473, the Court said: "The judgment must, therefore, be affirmed; but in view of the public interests involved, we deem it proper not to remand the case, but to enter final judgment in this Court." See, also, *White v. Auditor*, 126 N. C., 584; Revisal, sec. 1542; Rules 49, 50, and 51 of this Court (140 N. C., 499 and 500).

No error.

Cited: School Comrs. v. Aldermen, 158 N. C., 128.

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(340)

IN RE WILL OF J. M. FOWLER.

(Filed 18 October, 1911.)

Wills—Executors—Declarations—Distributees—Several and Independent Interests—Evidence.

The interests of the executor and distributees under a will are several, distinct, and independent, and in an action to set aside the will for fraud and undue influence, his declarations, made against the validity of the instrument, whether before or after the will has been probated or he has qualified thereunder, are incompetent except in so far as they may affect his qualification as executor.

APPEAL by propounders of a will from *Whedbee, J.*, at February Term, 1911, of HARNETT.

E. F. Young and R. L. Godwin for appellee.
Douglass, Lyon & Douglass and J. C. Clifford for appellants.

WALKER, J. The question in this case can be briefly stated, and while it is almost of first impression in this State, its novelty is not of that kind which awakens our surprise, rather than challenges our most

respectful and careful consideration. Is the declaration of an executor, either before or after the will is probated and he has qualified, that he unduly influenced and compelled the testator to make the will, competent as evidence against the legatees and devisees for the purpose of invalidating the will That is the point in the case. The question presented is thus stated in the brief of the propounder's counsel:

"1. The court erred in admitting the declarations of J. P. Jackson (who was named as executor in the will), after the death of the testator, to the effect that he forced the testator to change his will and make it as he wanted it. 2. The court admitted evidence of the declaration of the said J. P. Jackson, which were made prior to the execution of the will, to the effect that he was going to have the said testator change his will, so that it would be like he (the said Jackson) wanted it to be. 3. The court erred in admitting as evidence alleged declarations of the testator, that the said J. P. Jackson (at some time not named) had threatened to turn him out of his home."

We are unable to see how the rejected evidence can be com- (341) petent. There are decisions, in other courts, which seemingly give some color to the contention of the caveators, but when they are examined and considered with reference to their special facts, if they can be said to conflict with our views, the reasons given in favor of this kind of evidence are more apparent than real. In a certain, and sometimes in a qualified sense, an executor may be considered as standing in the place of the testator and his creditors, and he may also be said to represent the devisees and legatees, in some respects; but for the purpose of destroying or even impairing their interest in the estate, the ordinary rule applies, that they are not bound by what he says or does. He then occupies a position of antagonism to them, and his declarations should be no more binding upon them than if he had been an entire stranger. Where a man declares against his own interest, the law admits the declaration as against him, because "self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against himself, and the law, in this instance, substitutes for the sanction of a judicial oath the more powerful one arising out of the sacrifice of a man's own interests. This natural disposition to speak in favor of rather than against interest is so strong that when one has declared anything to his own prejudice, his statement is so stamped with the image and superscription of truth that it is accepted by the law as proof of the correctness and accuracy of what was said, and the fact that it was against interest is taken as a full guaranty of its truthfulness in place, not only of an oath, but of cross-examination as well, they being the usual tests of credibility." *Smith v. Moore,* 142 N. C., 277. The

law must take account of the strength (or frailty, as some may think) of human nature, and decide that "he that sweareth to his own hurt and changeth not" is worthy of trust and confidence, and that, because it is against himself, what he says is entitled to our belief, self-interest and the motive not to swear falsely to his own injury supplying the ordinary tests of the law, by which the reliability of human testimony is assured—the oath and cross-examination and, we add, the de-
(342) meanor of the witness on the stand. *Ivat v. Finch,* 1 Taunton, 141; *Lyon v. Ricker,* 141 N. Y., 225; *Bowen v. Chase,* 98 U. S., 254; and the leading case of *Higham v. Ridgeway,* 10 East, 109 (3 Smith's Lead. Cases, 9 Am. Ed., 1). But the declaration must be against interest and should be free from suspicion.

The executor in this case had no joint interest with the legatees or devisees, his interest consisting solely in his right to manage the estate and to receive the emoluments, that is, the commissions arising therefrom. In all other respects his interest was entirely distinct and separate from that of the legatees, and there is, therefore, no valid reason why he should be permitted to speak for them or to bind their interests by what he may have declared. It seems that he had influence over the testator—a very potent one—and his declarations, if competent, are sufficient to warrant a finding by the jury of undue influence, as he had the power to subdue the will of the testator to his own; but the vital question is, Does the law authorize him to speak for and conclude those who have no joint interest with him? We think not, and the best considered authorities we believe to be against the competency of such evidence. It is undoubtedly true that the declaration of the executor would be competent against him to show that he is unworthy of the trust reposed in him and, therefore, should be removed from his office and deprived of its emoluments; but to permit him to prejudice the rights of others acquired independently of his, and several in their nature, might open the door to fraud, and would shock our sense of justice and right, and this Court has virtually held that such declarations are not admissible to invalidate a will where the interests of the declarent and the beneficiaries under the will are not joint and there is no relation of privity between them. The Court says in *Linebarger v. Linebarger,* 143 N. C., 229, quoting from *Shailer v. Bumstead,* 99 Mass., 112, that, "admitting, for the present, that any interest in a will obtained by undue influence cannot be held by third persons, however innocent of the fraud of the person procuring it, still it by no means follows that the interest of the other innocent legatees should be liable to be di-
(343) vested by the subsequent statements of the parties procuring the will. Such a rule would violate all sense of right, and is not sustained by the decisions. The admissions of a legatee made prior to the

date of the execution of the will are rejected for the reason that, if made before he becomes a legatee, they are not declarations against his interest," citing 1 Underhill on Wills, 163. The very question was raised in *Shailer v. Bumstead, supra,* and the Court held the declarations of the executors, Hayden and Shailer, to be incompetent for unanswerable reasons stated by *Judge Colt* in the opinion, which need not be repeated here. It was said by him that such declarations stand upon the same ground as those made by a legatee, which are surely not admissible against any other innocent legatee or devisee, thereby making our case of *Linebarger v. Linebarger, supra,* a direct authority against the ruling of the lower court in this case by which the declarations were admitted. The case of *In re Will of Mary Ames,* 51 Iowa, 596, is an interesting and instructive one, and, besides, very comprehensive in the scope of the decision actually made, as it embraced both classes of declarations, those of a legatee as well as those of the executor, and they were held to be incompetent, the Court saying: "The general rule of law consonant with reason is that one person is not to be prejudiced by the unauthorized declarations of another. The exceptions to this rule are found in those cases where there is a joint interest or privity of design between several. In such cases each is presumed to speak for the whole; but where there is neither joint interest nor combination, when each claims independently of the other, though under a common instrument, the words of one no more than his acts can bind the other. The interests of these devisees and legatees, under the will, are several and not joint, and hence the three who would impeach it were bound, on principle, to produce evidence that was competent against all the rest. The evidence was not competent as to the three daughters named as legatees, and, therefore, was properly rejected. This conclusion is as clear on authority as on reason." Numerous authorities are cited in support of the ruling by which the declarations were excluded. (344)

Another expression of the Court in that case is very pertinent to this discussion: "The reasoning of the authorities to which we have referred must, we think, work the exclusion of a declaration of an executor who is a legatee and a party to the record, where other legatees may be adversely affected by the declaration. The circumstance of his being executor and a party will not authorize him to manufacture evidence against other devisees, or to affect them by his declaration." In *Blakey v. Blakey,* 33 Ala., 611, it was said: "It is the settled law of this Court that the declarations and acts of a proponent, who is not the sole legatee, are not admissible in evidence to defeat the probate of the will." Underhill in his work on Wills (1 vol., sec. 163) thus states the result, after an examniation of the authorities: "Upon the question whether a declaration of a legatee made after the execution of a will

is admissible to show that it was procured by undue influence, there is a conflict of authority. The majority of the cases reject such evidence, reasoning, on general principles, that no one should be concluded by the unauthorized statements of others with whom he is in no way associated or identified in interest. The admission of a legatee is evidence against the will where he is the sole beneficiary under it. But the interests of legatees under a will are several, not joint. Each claims independently of the others, and his interests should not be affected by the acts or declarations of the other legatees. The same reasoning will be applicable to bring about the rejection of the declarations of an executor offered for the purpose of showing undue influence. No privity of interest or community of purpose exists between him and any legatee which will admit his declarations to impeach the will whence the legatee derives a benefit." The cases holding such declarations to be competent, are not well sustained by the reasons given, and some of them may be explained by restricting the evidence to the declarant himself, or upon the ground that he and the other parties, legatees or devisees, had what was considered to be a joint interest, or had conspired to defeat the will.

(345) Our conclusion is that the court erred in admitting the declarations of J. P. Jackson, the executor, and for this error a new trial is ordered.

New trial.

FANNIE H. THOMPSON v. MARCELLUS SMITH ET AL., ADMINISTRATORS.

(Filed 18 October, 1911.)

Reference—Findings of Facts — Exceptions — Trial Judge — Deliberation — Some Evidence—Appeal and Error.

When exceptions are made to the findings of fact of a referee, it is the duty of the trial judge to deliberate and decide upon each exception and draw his own conclusions from the evidence thereon, using his own faculties in ascertaining the truth of the matter; and when he otherwise acts upon the report, and sustains the referee's findings merely because there is some evidence to support them, it constitutes reversible error. The different rule of the Supreme Court on appeal discussed by WALKER, J.

APPEAL by plaintiff from *Whedbee, J.*, at April Term, 1911, of WAKE.

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

J. H. Fleming for plaintiff.
B. M. Gatling for defendant.

WALKER, J. We have in this case a voluminous record and elaborate briefs upon several very interesting questions, involving the merits of the case, and yet we must remand it to the court below for another hearing because of what the learned and able judge said at the time he heard the case, indicating that he would not, independently as a judge, examine the evidence for the purpose of forming a conclusion as to the facts, where the findings of the referee had been the subject of exceptions, but only for the purpose of ascertaining if there was any evidence to sustain the referee's findings, and if there was, he would adopt those findings as his own. We do not consider this to be the rule in such cases. The party excepts to the finding of the referee, when one of fact, because he impliedly says it is not backed by a pre- (346) ponderance of the evidence; and if his exception is overruled by the referee, he appeals to the judge. What is the use of appealing, if the judge can simply decide that the exception is not well taken, if there is *any* evidence to support the finding? It is for him to say, *of course,* not if there is any evidence, but if all the evidence adduced by the party upon whom rests the burden of proof is, by its greater weight, sufficient to establish the fact which is essential to his success. The learned judge might as well have said that he would sustain the conclusions of law if there was any authority to support them. But the rule adopted by his Honor does not apply to the Superior Court, but only to this Court. We have said that where the evidence has been considered by the referee and by the judge, upon exceptions to the referee's findings, we will not review the judge's conclusions as to them, because the appellant has had two chances, and when two minds—one at least, and perhaps both, professionally trained and accustomed to weigh evidence and to compare and balance probabilities as to its weight—arrive at the same conclusion there is a strong presumption in favor if its correctness, or the same is true, even when the judge differs from the referee as to his findings, and we may safely rely on its correctness. The referee is selected, in such cases, in place of a jury, and the judge so acts when he reviews the referee. If there is any evidence to support the findings and no error has been committed in receiving or rejecting testimony, and no other question of law is raised with respect to the findings, we accept what the judge has found as final, as we do in the case of a jury. *Malloy v. Cotton Mills,* 132 N. C., 432; *Lambertson v. Vann,* 134 N. C., 108; Clark's Code (3 Ed.), p. 564, and cases there collected; *Ramsey v. Browder,* 136 N. C., 251; *Commissioners v. Packing Co.,* 135 N. C., 62.

When exceptions are taken to a referee's findings of fact and law, it is

the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide (347) as in other cases—use his own faculties in ascertaining the truth and form his own judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible errors on his part, but because he cannot *review* the referee's findings in any other way. The point was presented clearly and directly in *Miller v. Groome,* 109 N. C., 148, and it controls this case. His Honor did not review the findings of the referee, as he said if there was any evidence to sustain them, he would affirm his rulings. He might have found some for that purpose, whereas the preponderance may have been heavily the other way. We need not consider the numerous exceptions so ably argued before us by Mr. Gatling and Mr. Fleming.

It will be certified that there was error in the respect indicated, and the cause is remanded with directions that the Judge of the Superior Court review the referee's findings of fact and his rulings as to the law, upon the exceptions thereto, in accordance with the usual practice in such cases.

Error.

Cited: Overman v. Lanier, post, 539; *Thompson v. Smith,* 160 N. C., 257; *Fisher v. Toxaway Co.,* 165 N. C., 668; *Drainage District v. Parks,* 170 N. C., 440.

N. E. EDGERTON ET AL. v. CHARLES F. KIRBY ET AL.

(Filed 18 October, 1911.)

1. Mandamus—Road Commissioners—Vacancy—Issue as to Election—Cause Transferred to Term—Interpretation of Statutes.

In a suit for mandamus brought by two members of a board of road commissioners of a township to compel the other two members to meet with them and elect a fifth member to fill a vacancy caused by the resignation of one of them, the pleadings raised an issue as to whether a certain person had been lawfully elected to fill the vacancy by a majority vote at a previous meeting, the plaintiffs contending that the vote was a tie and that the one claimed to have been elected, and who was acting with the defendant commissioners, was a usurper with merely a colorable title: *Held,* the issues presented a question of fact as to whether the one claiming to have been elected to fill the vacancy caused by the resignation of the

member of the board had received a majority of the votes at the meeting, or whether the vote was a tie, resulting in no election; and an order made by the judge transferring the cause to the Superior Court at term for the trial of the issue joined was correct. Revisal, sec. 824.

2. Mandamus—Public Officer—Legal Duty—Discretionary Powers.

Generally, mandamus will lie to compel a public officer to perform a legal duty as distinguished from a discretionary power, if the legal duty is mandatory.

3. Mandamus—Extraordinary Remedy—Remedy at Law.

Mandamus is an extraordinary remedy, and the writ will not issue except in cases of necessity, where no other adequate remedy is available; and when an issue of fact is raised by the pleadings the determination of which may conclude the matter, the issuance of the writ should in the meanwhile be denied.

4. Mandamus—Power of Courts—Judicial Discretion—No Other Adequate Remedy.

The issuance of the writ of mandamus is within the judicial and not the arbitrary discretion of the court, and where there is a right with no other adequate remedy, this writ should not be denied, if it is the proper remedy.

APPEAL from JOHNSTON from order of *Peebles, J.*, heard at (348) chambers in Goldsboro, 22 July, 1911.

MANDAMUS to require the defendants, except defendant Green, to meet with the plaintiffs and to elect the seventh member of the Board of Road Commissioners of Selma Township. The complaint alleges that after M. C. Winston, the seventh member of said board, resigned, the six remaining members met, and there being a tie vote (three voting for defendant Green and three voting for H. E. Earp), the chairman, N. E. Edgerton, being doubtful as to his power to break the tie, the meeting was adjourned. It is further alleged that the three defendant commissioners, thereafter, met with the defendant W. A. Green and undertook to perform the duties of road commissioners of Selma Township, and that the defendant Green has no right or title to said office, being a usurper thereof in palpable disregarded of the law; that his holding the same is merely colorable, and that he should be removed from the office so unlawfully usurped by him. The complaint further demands that the other defendants shall be required by the court to meet at the call of the chairman and elect and induct the sev- (349) enth commissioner into office, and a prayer accordingly is inserted in the complaint.

The defendants answered the complaint and alleged that the defendant W. A. Green is holding the office of road commissioner of Selma

township; that he was elected at the first meeting of the board, when M. C. Winston resigned, by a vote of three in favor of Green and two in favor of Earp.

The matter came up for hearing before *Hon. R. B. Peebles,* judge, and upon motion of the plaintiffs, under section 824 of the Revisal, to transfer the case to the Superior Court at term for trial of the issues thus joined between the parties, whereupon the following order was entered:

"The court being of the opinion that the whole matter depends upon whether W. A. Green got three votes and his adversary got two votes in the meeting of the Board of Road Commissioners of Selma Township held on 6 May, 1911, the motion of the defendants is denied, and defendants except and appeal to the Supreme Court. Plaintiffs move and request that the issue raised by the pleadings as to the number of votes received by said Green and Earp be submitted to a jury at the next term of the Superior Court of Johnston County, which convenes on 11 September, 1911, upon the pleadings herein filed. This motion is granted, and it is ordered that this action be and the same is hereby transferred to the Superior Court of Johnston County for trial by jury at the September Term, 1911, of said court." Defendant excepted and appealed."

Aycock & Winston for plaintiff.
Abell & Ward for defendant.

WALKER, J. The order of *Judge Peebles* was correct. There was nothing else for him to do, except what he did, in view of the express provision of the statute, Revisal, sec. 824, requiring the judge, when an issue of fact is raised by the pleadings, to continue the action until it can be tried by a jury upon the issue thus joined between the parties.

Such an issue was plainly and directly raised by the pleadings.
(350) Plaintiffs alleged that W. A. Green was never legally elected a member of the board of road commissioners, but is an usurper of that office without the shadow of right or title to it, and they ask that he be so declared and that the three defendant commissioners be required to meet in joint session with plaintiffs and elect the seventh commissioner to fill the vacancy created by the resignation of M. C. Winston, in order that the business of the board may be transacted. Defendant squarely denies the allegation and, on the contrary, avers the truth to be that W. A. Green was duly elected a commissioner by a majority vote and is entitled to hold the office and exercise its functions. This presents a preliminary issue to be determined before we reach the question whether the plaintiffs are entitled to a mandamus for the purpose of

compelling the three defendant commissioners to meet with them to elect the seventh commissioner and complete the personnel of the board. If the jury find that W. A. Green was duly and lawfully elected, then there is no necessity for a mandamus, unless he and his codefendants should refuse to meet with the plaintiffs and discharge the duties imposed upon the board by law. We will discuss and decide that question when we come to it, and not prematurely and perhaps unnecessarily. The case of *Rhodes v. Love,* 153 N. C., 468, so much relied on by the appellant, does not, we think, have any present bearing upon the case. Whether it will or not, if the jury find that W. A. Green was not duly elected a member of the board, is a matter upon which we prefer not to express an opinion at this time, for it may become a moot question.

It may be said, generally, that if a public officer fails to perform his legal duty to the public, mandamus will lie to compel him to do so, if it is a mandatory one, but not to control the exercise of a discretion given to him, for it is the nature of a discretion in certain persons that *they* are to judge for themselves, and, therefore, no court can require them to decide in a particular way or review their judgment by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the persons to whom the discretion is confided by law (351) would not then be their own, but that of the court under whose mandate or compulsion they gave it. *Attorney-General v. Justices,* 27 N. C., 315; *Barnes v. Commissioners,* 135 N. C., 27. If W. A. Green was not elected, the six members of the board must meet and elect a successor to W. A. Green, and in other respects proceed with the business of the board.

"A mandamus lies only for one who has a specific legal right, and who is without any other adequate legal remedy." 1 Chitty Gen. Pr., 790; *S. v. Justices,* 24 N. C., 430. It is an extraordinary remedy, and the court will not grant it unless in a case of necessity. Why should we issue the writ in this case, where the necessity for it may never arise? But how can we determine that the necessity exists, until we hear from the jury and are informed as to the facts? The point, as to when the writ will lie where there is discretion, is sharply accentuated by Tapping in his work on Mandamus, star p. 15, where he says: "The writ does not lie to command the justices to license a victualler to sell ale, notwithstanding it was suggested that the refusal proceeded from a mistaken view of their jurisdiction, and also notwithstanding a very strong case of partiality was made out, for it is a matter entirely within their discretion. The proper course in such a case is to move for a criminal information; nor does it lie to rehear an application for license which they have refused because of a mistaken notion as to the law." As to the

power of a court of general jurisdiction to issue a mandamus for the purpose of controlling the discretion of a public officer, the case of *U. S. v. Seaman,* 17 How. (U. S.), 225, and *Gaines v. Thompson,* 7 Wallace, 347, may well be consulted, for they state the doctrine with clearness and accuracy. They deny the power where there is a discretion left to the officer as to how he will perform the duty, and so we have held. It has been said that, in this country, the writ of mandamus has not been regarded as a prerogative one, as in England, according to Blackstone, their great commentator; and yet, even here, it so far partakes of the nature of a prerogative writ that the court has the power to issue or withhold it, according to the sound judgment; and if the writ, in its consequences, would manifestly be attended with hardship and difficulties, the court may, and even should, refuse it; but this discretion (352) lodged in the court is not an arbitrary one; it is a judicial discretion, and when there is a right, and the law has established no adequate and specific remedy, this writ should not be denied. *Prop. of St. Lukes Church v. Slack,* 7 Cush. (Mass.), 226; Tapping on Mandamus, p. 18. This author says that in no case does the writ lie "to compel a tribunal, judicial or administrative, to render any particular judgment or decision, or to set aside one already rendered, but only to enforce the performance of a ministerial or mandatory duty. This writ is appropriate to compel subordinate courts or bodies (or even individuals, in a restricted class of cases) to proceed and determine matters pending before them and properly within their cognizance or jurisdiction, but it cannot compel them to do that which the law leaves them to decide according to their best judgment and discretion. Tapping, 35, 36. The plaintiff must try other ordinary remedies before he resorts to this unusual writ of compulsion. *Reg. v. R. R.,* 6 Q. B. R., 70 (*Patterson, J.,* one of the greatest judges of the King's Bench, delivering the opinion of the Court, in the absence of the *Chief Justice*). It seems that the duty which is asked to be performed must be mandatory, before the court will send out so drastic a writ. It cannot be said in this case, that every sufficient remedy of the law has been exhausted. In fact, the plaintiff is not even on the threshold of obeying that principle which requires that every other remedy should be tried and that all preliminary questions of fact should be decided before the court will listen to his prayer for this extraordinary writ. It is seldom needed and rarely granted. The citizen must perform his duty to the public, both as a simple member of society and as a public officer, and if he fails in the latter capacity to do what the law requires of him, he cannot only be compelled by mandamus to do his duty, but he is criminally liable for not performing it. Where the law reposes discretion, it excludes the writ of mandamus

as a means of controlling it, and leaves it to be exercised freely and untrammeled, save by the injunction that the officer must perform the duty required of him, honestly and fairly.

No error.

Cited: Key v. Board of Education, 170 N. C., 125; *Johnston v. Board of Elections,* 172 N. C., 167; *Britt v. Board of Canvassess, ib.,* 806.

(353)

M. G. DALRYMPLE v. T. W. COLE.

(Filed 25 October, 1911.)

1. Pleadings — Demurrer — Allegations of Pleading Attacked — Extrinsic Matters.

The pleading to which a demurrer has been filed must itself present the defects against which the demurrer is directed and the latter must stand or fall by the facts alleged in the pleading attacked; and extraneous matters cannot be relied on to show its deficiencies.

2. Same—Findings by Court—Contracts to Convey—Married Women—Liens —Homestead Reserved by Deed.

A demurrer to a pleading which depends upon averments made therein to supply deficiencies in the pleading attacked is a "speaking demurrer," and will be overruled; nor can the demurrer be aided by any findings of fact made by the trial judge to which exception has been taken. The principle when objection is made by demurrer to the complaint, in an action to enforce specific performance of a contract to convey land, because the wife does not join in the conveyance, when there are existing judgment liens and liens by mortgage reserving a homestead, discussed and applied by WALKER, J., citing and distinguishing *Hughes v. Hodges,* 102 N. C., 237, and *Fleming v. Graham,* 110 N. C., 374, and similar cases.

APPEAL from *Cooke, J.,* at April Term, 1911, of MOORE.

This action was brought to compel the specific performance of a contract to convey land, and was heard below upon a demurrer to the complaint, which alleged: "That on 15 October, 1910, the defendant, for a valuable consideration, contracted and agreed in writing with the plaintiff to make, execute, and deliver to the plaintiff, his heirs and assigns, a good and sufficient deed of conveyance to the tract of land described in the complaint, with covenants of warranty, upon the payment to the defendant of the sum of $1,400, the purchase price agreed upon, within ninety days from the date of the contract; that the contract was duly recorded, and within the ninety days fixed in the contract the plaintiff notified the defendant that he elected to take and pur-

chase the land in accordance with the terms of the contract, and would tender the $1,400 within the ninety days, and that he did actually tender said sum within the ninety days and demand that the defendant
(354) make, execute, and deliver a deed in accordance with the terms of the contract, but that the defendant neglected, failed and refused to execute and deliver the deed; and that the plaintiff is still ready, able, and willing to comply with the terms of the contract and pay the purchase money, upon the execution and delivery of the deed. That after the execution of said contract the plaintiff actually paid or assumed the payment of $133.65 for the benefit of the defendant, which sum, it was agreed by the defendant, should be applied, *pro tanto,* to the purchase price of the lands, under the contract." It was further alleged in the complaint, that at the time of the tender of the purchase money and the demand that the defendant execute and deliver the deed, there were mortgages executed by the defendant and his wife to certain parties named in the complaint and duly recorded in Moore County, which were and are liens on the land, and also a judgment docketed against the defendant, which was also a lien on said land, in favor of Mrs. S. D. Cole, the plaintiff in the judgment, and against the defendant for the sum of $100, with interest and costs. The case on appeal states: "The court finds as a fact that the judgment referred to in the complaint was docketed on 6 May, 1910."

The defendant demurred upon the following ground: "That a cause of action is not alleged in the complaint, in that it appears upon the face of the complaint that the defendant is, and was at the time of the execution of the alleged contract referred to in the complaint, a married man, and that defendant's wife did not join in the execution of said alleged contract, and at the time of the execution of said alleged contract there was a docketed judgment as well as recorded mortgages, both liens thereon, and that execution could have been issued upon said docketed judgment, and the alleged contract is, therefore, void and inoperative."

It was admitted upon the argument of the demurrer that the defendant was, at the time of the execution of the contract, and still is, a married man. That admission also appears upon the face of the complaint.

(355) At the hearing, and upon consideration of the demurrer, which was *ore tenus,* the court sustained the same and dismissed the action of the plaintiff, and he appealed.

U. L. Spence and G. W. McNeill for plaintiff.

H. F. Seawell and R. L. Burns for defendant.

WALKER, J., after stating the case: The defendant demurred to the complaint upon the ground that it appeared therefrom that the plaintiff

was a married man at the time the contract was made, that his wife is living, and that at said time there was a judgment against him which was duly docketed in the Superior Court and constituted a lien on his real estate, and that as execution could have been issued on the judgment at any time after it was docketed, the contract was void, for the reason that it was an executory agreement to convey his land, and this could not be done, as he was entitled to a homestead and his wife had not joined in the execution of the contract with privy examination, relying upon the provision of the Constitution (Art. X, sec. 8) forbidding any disposition of the homestead, except by the deed of the homesteader and "the voluntary signature and assent of his wife [thereto, which shall be] signified on her private examination, according to law."

It was said by *Justice Avery* in *Hughes v. Hodges,* 102 N. C., 237: "As between the creditor having a lien on the one side, and the debtor and his family on the other, the Constitution does create *a right* to a home for the benefit of the debtor's family in his lands—a home that may never be marked out by metes and bounds. The debts may be discharged before the homestead is allotted, and then the inchoate right, as applied to the debtor's land, no longer exists. But when the creditor reduces his claim to judgment, the law places him and the debtor at arm's length and frustrates every effort of either to evade the section of the Constitution that gives the wife the veto power, by requiring an allotment of the homestead as antecedent to any sale, and her assent, with privy examination, before the improvident husband can dispose of it; so, if the debtor sell to defraud his credior, when the latter moves in the court to set aside his deed and subject the land to his claim, the Constitution gives first the right to an undefined homestead, and the law, made in pursuance of the Constitution, ascertains its (356) bounds as soon as he seeks to sell." He further says: "Until the owner contracts debts, there can be no undefined homestead right attaching to his land, and, unless his homestead has already been allotted, section 8, Article X of the Constitution, does not restrict his power to convey. If, however, the homestead has once been laid off at the instance of creditors, though the debts may be discharged, the restriction remains, and renders the joinder of the wife essential to a valid conveyance of it. The definition given in *Adrian v. Shaw* must be considered as modified and restricted in its application so as to conform to the views we have expressed in this opinion."

In the defendant's appeal in *Hughes v. Hodges,* at p. 262, *Justice Avery,* for the Court, thus sums up the law: "The presumption of law is in favor of the validity of this and every other deed executed in due form. If the defendant seeks to have it declared void, because it was made in disregard of the requirements of section 8, Article X of the Con-

stitution, the burden is upon him to show that the homestead right attached to the land and vitiated the conveyance, for the want of the joinder of the wife, with privy examination, for one of the three following reasons: (1) That a homestead had been allotted to him in the land described in the mortgage deed, either on his own petition or by an officer in accordance with law. (2) That there was an unsatisfied judgment or judgments that constituted a lien upon the land, when conveyed, and upon which execution might still issue, and make it necessary to have his homestead allotted, or a mortgage reserving an undefined homestead, and constituting a lien on the land that could not be foreclosed without allotting a homestead to the mortgagor in the land. (3) That the mortgage deed was void, because executed with intent to defraud the defendant's creditors, and that the mortgagor did not have a homestead allotted already in other lands. In order to rebut the presumption of validity by bringing the deed under the prohibition contained in section 8, Article X of the Constitution, one of these grounds of objection mentioned must be made to appear by any person (357) who would raise a question as to the effect of the conveyance."

It is this construction of the Constitution upon which the defendant relies to invalidate the contract of sale or option. *Justice Merrimon* dissented from the judgment and opinion of the Court, and held the view that the homestead right, and the protection guaranteed by the Constitution against a transfer thereof without the assent and privy examination of the wife does not depend upon any state of indebtedness, nor is it required that the homestead should have been actually allotted, or that a judgment lien or other conditions indicated in the opinion of the Court should exist before the provision of Article X, section 8, of the Constitution, which forbids a conveyance of the homestead without such assent and privy examination, would become operative. He also thought that the opinion of the Court in *Hughes v. Hodges* was in conflict with prior decisions of this Court in *Jenkins v. Bobbitt*, 77 N. C., 385; *Lambert v. Kinnery*, 74 N. C., 348; *Beavan v. Speed, ibid.*, 544, and *Adrian v. Shaw*, 82 N. C., 474, which he contended had settled the law to be that, without regard to any indebtedness of the husband, the homestead could not be conveyed without the assent and privy examination of the wife, but that the husband's deed was effectual to pass title to the land subject to the homestead. In *Hughes v. Hodges* the mortgage was executed 8 January, 1876, when defendant's first wife, who did not join in the deed, was living. She died in 1881, and he was again married in 1882. There was no reservation of the homestead in the mortgage, and no judgment docketed against the mortgagor, nor was there any question of fraud involved. The suit was to foreclose the mortgage. The court below held that the land should be sold subject to

the homestead, or only the "reversionary interest," as it was termed inaptly, but perhaps for the sake of convenient description, in the absence of a better word. The Court, in an opinion by *Justice Avery* (with a dissenting opinion by *Justice Merrimon,* as already stated), reversed that decision and held that the deed passed the entire interest in the land to the mortgagee, encumbered only by the dower right of the first Mrs. Hodges, which expired at her death, and ordered a sale to be made accordingly. (358)

In *Joyner v. Sugg,* 132 N. C., 580, it appeared that there was no judgment, or other debt than those secured by the deed of trust, and no question of fraud, but the homestead right of Blaney Joyner was reserved in the deed. We held that J. A. E. Joyner, who bought at the sale under the deed of trust, acquired a good title in the land, subject to the homestead right of Blaney Joyner, as that was expressly retained in the deed, and that, as he had died, and the exemption right had ceased, a full and unencumbered title passed to her. It was further said, *in arguendo,* that the *right* to the homestead always exists and is guaranteed by the Constitution, but the homestead itself cannot come into existence until it has been "selected by the owner" of the land and actually allotted, and thereby identified, as decision in *Mayho v. Cotten,* 69 N. C., 293; *Hager v. Nixon, ibid,* 108, and as strongly intimated in *Hughes v. Hodges, supra;* but this expression, of course, must be viewed with due reference to the facts then under consideration, there being no judgment, or other debt, no fraud and no prior conveyance in which the homestead right had been reserved. In such a case the homestead could only be allotted upon application of the party entitled thereto. What is said in that case, therefore, is not at all in conflict with the decision in *Hughes v. Hodges, supra.* It was approved by this Court recently, in *Davenport v. Fleming,* 154 N. C., 291, in which we held (in a concise and clear-cut opinion by *Justice Hoke*) that the constitutional provision against conveying the homestead without the joinder or assent of the wife evidenced as therein presented, applied only and exclusively to the "homestead right," and, quoting from *Joyner v. Suggs,* it was further said: "A deed in trust by the husband, in which the wife does not join, reserving the homestead of the grantor therein, conveys the entire land contained in the deed of trust, subject only to the determinable exemption in $1,000 thereof from the payment of the debts of the grantor during his life," to which the learned justice added: "That case throughout is an apt authority in support of the present ruling."

We have thus reviewed two of the recent cases upon this subject, not for the purpose of testing the relative strength or (359) value of the different and, in some respects, apparently conflicting views to be found in some of the decisions upon the subject, but

rather for the purpose of clearly defining the proposition upon which Mr. Spence relied, in his able argument before us, to sustain the demurrer. He urged that the allegations of the complaint, with the finding of the judge as to the date of the judgment and the admission as to the marriage of the plaintiff at the time of the contract, showed that sufficient facts existed to invalidate the contract, under the decision in *Hughes v. Hodges, supra,* and *Fleming v. Graham,* 110 N. C., 374. But the weakness of this position appears when we consider that the office of a demurrer is to point out defects in the pleading, which is the object of attack, and it must stand or fall by the facts therein alleged, and extraneous matters cannot be called in aid to supply deficiencies, which is necessary to be done in order to show that the cause of action is bad. The doctrine of aider does not apply to such a case. "It is a fundamental rule of pleading that a demurrer will only lie for defects which appear upon the face of the pleading to which it is opposed, and must be decided without evidence *aliunde,* unless by consent of the parties. A speaking demurrer, that is, a demurrer which is founded on matter collateral to the pleading against which it is directed, is bad, and as such will be overruled. It is also a well-settled principle that, when a pleading is demurred to, resort cannot be had to other pleadings for the purpose of supporting or resisting the demurrer, but the demurrer must prevail or fall by the force of the pleading to which it is directed." 6 Enc. Pl. & Pr., 297, 298. If the new or additional facts which are required to point the objection are contained in the demurrer, it is called a "speaking demurrer," and is not good pleading. Nor can the judge find facts to aid the defective pleading. It must be considered by itself and upon its own merits. The recent cases of *Miller v. R. R.,* 154 N. C., 441, and *Brewer v. Wynne, ibid.,* 467, furnish illustrations of the rule. There was no consent given by the plaintiff to the finding as to the date of the judgment, but he distinctly excepted to the judge's ruling, which is sufficient to include the said finding of fact. It (360) does not appear, therefore, by the complaint, whether there was a judgment which was a lien upon the property at the date of the contract, nor that there was a prior mortgage or deed of trust reserving the homestead, nor that the contract was void as to creditors, and no homestead had been allotted in other land, so as to bring the case within one of the categories stated in *Hughes v. Hodges,* the presumption being in favor of the validity of the contract, and the burden being on the defendant to show the contrary. It may also be remarked that the complaint does not allege that a homestead had not already been allotted to the defendant, nor is the value of the land stated. These allegations, which are omitted, may become material in certain phases of the question.

We must not be understood as passing upon the soundness of the objection to the complaint, even if any one or all of said facts had been alleged therein. We merely decide that, in the present state of the pleadings, the demurrer should have been overruled and the defendant allowed to answer. The facts may then be fully disclosed, no injustice will be done the plaintiff by assuming the existence of facts which do not clearly appear, and we may the better and the more safely consider and solve the interesting questions, as to the homestead right, which were argued before us. There was error in the respect indicated

Error.

Cited: *S. c.*, 170 N. C., 103; *Watters v. Hedgpeth*, 172 N. C., 312.

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(361)

O. K. LAROQUE AND WIFE v. W. L. KENNEDY.

(Filed 25 October, 1911.)

1. Witnesses—Ancient Documents—Comparison of Handwriting—Evidence.

On the admissibility of testimony of witnesses as to the genuineness of handwriting of ancient documents by comparison with that of other like documents free from suspicion, when the witness has had full opportunity to observe and note them, and he states that he has thus been enabled to form a satisfactory opinion as to the handwriting of the ancient document in question, *Nicholson v. Lumber Co.*, *ante*, 59, cited and approved as applicable to the facts in this case.

2. Evidence—Deeds and Conveyances—Description—Identity of Lands—Objections and Exceptions—Procedure.

In an action involving the question of title to lands it is competent to offer a certified copy of the deed and identify the handwriting of the officer who made the certificate, and if thereafter the party who thus introduces the deed in evidence fails to locate the land within its boundaries or description, the opposing party should by motion call it to the attention of the court and ask that the deed be withdrawn.

3. Same—Intrinsic Identification—Description of Witnesses.

When a deed to lands concerning which the title is in dispute has been properly introduced in evidence, it is not essential that evidence of location under the description or boundaries of the deed come from defendant or from living witnesses; for the descriptions contained in the deed may indicate where the land is situated without extrinsic proof; and in this case, from the minute description of the witnesses, the land is sufficiently identified by an ancient mill located on "South-West Creek."

4. Damages—Ponding Water—Evidence.

In this action for damages for ponding water back upon plaintiff's land, the testimony of a witness, to the effect that some fifteen years previous he had cut cypress timber up beyond the pond and had floated it to the pond, was properly admitted to show the conditions up beyond the pond bearing on the controversy.

5. Appeal and Error — Contention of Parties — Admissions — Instructions — Procedure.

When made for the first time on appeal, an exception to the charge that it did not correctly state the admissions of the parties will not be considered, as this should have been called to the attention of the judge at the time.

6. Damages—Ponding Water—Adverse User—Prescriptive Right—Easement.

When damages are claimed by plaintiff to his land by reason of defendant's elevating his dam and thus raising the level of the water on the lands of the former, and defendant claims a prescriptive right by adverse user for twenty years or more, testimony tending to show that the water had been maintained at the same or a higher level by a former dam located at the same place as the one complained of at a date more than twenty years previous, and a continuous maintenance at that level, with evidence of water-marks on trees, etc., sustaining defendant's contention, is sufficient to sustain a verdict that an easement had thereby been acquired.

7. Same—Limitation of Actions—Ouster—Adverse Possession.

In defense to an action for damages for ponding water back upon plaintiff's land, the defendant offered evidence tending to show that he and those under whom he claimed had maintained the level of the water as it then was, or at a higher level for more than twenty years, etc.: *Held*, sufficient to show ouster and title by adverse possession. *Green v. Harmon*, 15 N. C., 161, cited and approved.

8. Appeal and Error—Costs—Maps and Surveys—Allowance by Judge—Interpretation of Statutes—Charge Upon Separate Property—Feme Covert.

When a survey has been made of the lands in controversy, the statute requires the trial judge to fix an allowance to be paid the surveyor for his services (Revisal, sec. 1504); and it appearing in this case that the parties had from time to time each paid one-half of the cost of the survey and platting of the land, and that the judge had declared the charges made by the surveyor to be exorbitant and had refused to act thereon, the cause is remanded to the end that the allowance of the surveyor be fixed and taxed against the plaintiffs to the use of the defendant, not exceeding the amount the latter has paid; and, further, a motion to make them a charge against the separate estate of *feme* plaintiff should be denied.

(362) APPEAL by plaintiffs from *Justice, J.*, at January Special Term, 1911, of LENOIR.

The plaintiff brings this action to recover damages for ponding water on her land, located on South-West Creek. She alleges in her complaint, among other things:

"That the defendant is the owner of a mill-site known as 'Kennedy's Mill' in said South-West Township, which said mill is built across South-West Creek below plaintiff's lands, and the defendant makes use of the waters of said South-West Creek to supply power for the operation of said mill.

"That on or about .... day of March, 1906, the defendant wrongfully, unlawfully, and without any rightful authority raised the dam of said mill about 3 feet or more over and above the height which he and the former owners of the said mill had maintained it before, and thereby raised the water in said creek, and caused same to overflow upon the *feme* plaintiff's lands hereinbefore mentioned, to her great (363) damage and injury."

The plaintiff admitted on the trial that the defendant was entitled to maintain his dam at 10 feet 6 inches, and the controversy between them was as to the land between the water-mark with the dam at 10 feet 6 inches and the water-mark with the dam at 12 feet 2 inches.

The defendant contended that he was the owner of the land beyond the water-mark with the dam at 12 feet 2 inches high, and, if not the owner, that he had acquired the right to pond the water by prescription.

The plaintiff offered evidence tending to prove that prior to 1906 the dam was 10 feet 6 inches high, and that in that year it was raised to 12 feet 6 inches, and that water was thereby ponded on the land claimed by the plaintiff.

The plaintiff also offered a chain of title extending to 1869, and evidence that this title covered the land in controversy, and of adverse possession for a length of time sufficient to ripen color of title. It was admitted that the records of Lenoir County, except two old index books, were destroyed by fire in 1880.

The defendant offered in evidence deeds and other evidences of title, which, if admissible, traced his title to 1769.

Among other evidences of title, the defendant introduced a paper purporting to be a deed from Major Croom to Richard Caswell, of date 1772. The following certificate was on this paper:

I certify the above deed, probate, and enrollment to be true copies from the records of Lenoir County, this 12 March, 1851.

STEPHEN WHITE, *Register.*

Plato Collins was examined in reference to this paper, and testified as follows:

Q. How long have you been clerk of the court? A. Eleven years.

Q. Is it in evidence that Stephen White was register of deeds; have you ever seen any of his handwriting in his official capacity of register of deeds? A. I haven't seen the original records; they were de-

(364) stroyed; I have seen papers with Caswell's and White's signatures in a good many instances, certifying to the records when he was register of deeds.

Q. Have you seen that handwriting in his official capacity, purported and accepted as his handwriting? A. Yes, sir.

Q. You mean you accepted it as clerk? A. It has been presented to me as his handwriting and we accepted it as such; I have seen a good many of them.

Q. From what you have seen, can you form an opinion satisfactory to yourself whether these papers are in Stephen White's handwriting? A. Yes, sir; I have seen it frequently; it is the same handwriting.

Q. Will you look at that paper and say whether the certificate is in the handwriting of Stephen White? A. I think it is.

Cross-examined:

Q. Have you seen any of this handwriting that has been questioned before? A. No, sir.

Q. That was seen by people and accepted as his handwriting? A. Yes; they were presented to me by parties who held them, and accepted by me as his handwriting.

Q. In fact, you never saw any public records admitted to be in his handwriting? A. That matter was never brought in question by anybody.

Q. These papers were accepted by you and put on the public records? A. Yes, sir.

Redirect examination:

Q. Look at that paper and see what you think about it. (Hands witness paper.) Is that the same as that? A. Yes, sir; that purports to be Mayor Croom to Richard Caswell,, certified 12 March, 1851.

Q. Will you look at that deed from Richard Caswell to Jesse Cobb, certified April, 1855; look at his signature? A. That doesn't look as much like it as the other; the characteristics of it are the same.

Q. In your opinion, are the handwritings on those papers in his handwriting? A. They have the same characteristics; I say it is the same handwriting that was purported to me to be in his handwriting.

Q. Also Jesse Cobb to John Cobb, certified 16 April, 1855; is (365) that the same handwriting? A. Yes, sir.

Q. You have said you have seen the writing of White when he was register of deeds in 1851; have you seen other writings of his? A. When I was a boy I saw receipts my father got when he used to trade with White, and we had been getting receipts; they got burned up when my father's house was burned up; they were in the same handwriting as these.

Q. From your recollection of the handwriting of Stephen White, are you able to form an opinion satisfactory to yourself that the signatures submitted to you are the handwriting of Stephen White? A. Yes.

Two other papers were admitted on the same evidence.

The plaintiff excepted.

In the chain of title introduced there was a deed from Jesse Cobb to John Cobb, of date 10 March, 1800, and the division of the John Cobb lands, of date 16 December, 1844.

In this division, under which the defendant claims, the land covered by the mill "to the high-water mark of the millpond" is allotted.

The deed to Richard Caswell and others called for land on South-West Creek.

E. P. Loftin, for the defendant, testified, among other things, that he had known the Cobb mill about 65 years; had lived about a mile or a mile and a half from the mill-house; that when he first knew the mill, old man Cobb was in charge, and, after his death, his son, Jesse Cobb; it was known as Cobb's mill; Johnnie Jackson had charge next; then Kennedy and Wooten; then Mr. Kelly; that he had known the boundaries of this land known as the Cobb mill land for fully 65 years; that he knows the present boundary of the high-water mark of the mill property, and that it is lower now than when the Cobbs had it; that he saw trees there above the island when he was a boy, and the water is about the same thing now; that there is a holly and the water does not come up as close as when he used to fish there; also a gum there that has high-water marks on it made with an axe, that are 12 to 14 inches above the present high-water mark; that the holly has marks or bruises on it, and that he had chained his boat to the holly when fishing, at the (366) time Kelly had the mill; that the water now does not quite cover the island in the pond, and that he had seen it covered by water in times past; that the dam was old and worn down in 1851 and 1852, and that he does not think the water is as high now as it was then.

The defendant testified, among other things, as follows:

That he bought the mill from J. J. Jackson and rented it to J. C. Kennedy from year to year for 5 years; at the expiration of the time he sold it to J. P. Kelly and delivered to him in January, 1885. Kelly kept the mill for 18 years; then he bought it from Jackson, commissioner; J. C. Kennedy bought the half interest from J. C. Wooten, and the property was sold under that mortgage to pay that debt; bought it from Jackson; both J. C. Kennedy and J. C. Wooten are dead; J. C. Kennedy died about 16 or 18 years ago; Wooten died about the same time; that he has the deed to him from Mr. Jackson; that he was put in possession of what is known as the Cobb mills, the same property he owns now; that at that time the water of the pond was higher than it is now, and not

as high as he has seen it; at the time the west end of the dam and the road, in his judgment, was about as it was then, the Kinston end; some of the papers refer to it as the north side; it is a little northwest; on that end the road is about like it was then; the dam doesn't extend quite as far as the pond; this road on the Kinston side of the dam stops before it gets to the rim of the pond and the public road, and the natural level of the land for his part of the water of the pond; at that time the pond was about level with the road, but it was not running over it; then further down, where Cheney shows on the maps the little island, there are several projections, hummocks or tussocks; that is the point he has designated as a little island; the top of that shows, but the smaller ones do not show. They all show now. That he commenced to repair in the summer of 1905 and completed about 1 March, 1906. The water is lower than when he took charge; the Strawberry Branch run is in the center of Strawberry Swamp; at this point it turns towards the
(367) island at right angles; when it reaches the upland there is a natural embankment there 14 inches or 2 feet; all along the run of Strawberry Swamp down to where you can see it on the swamp side of the embankment is cypress, gum, and such growth that grows in water on LaRoque's side of the run; on the embankment there is a growth that usually grows on uplands; that he saw only one dead pine, that looked to be dead 10 or 12 years to him; it is rotten; there is one small pine standing in water about 15 or 20 steps from the rim of high-water mark; the high-water mark seems to be along the bank of the stream; there is a slight line that runs along there which would indicate water has been there; and from the observation he made and the growth, the high-water mark used to be at least 12 inches higher; the holly and dogwood are right on the edge of the embankment; they are about 10 or 12 feet from the rim of the water; it slopes there gradually and a boat could not go within 20 or 30 feet of them now; that he noticed the bark of the trees; they looked like they had old bruises on them; observed a gum; it is in the same locality, but 25 feet from them; the gum is farther to the water; the water would have to rise a foot and a half to reach that; on the island they speak about he only saw one small pine that lies almost to the water; it didn't seem to be thrifty.

Jesse Evans, for the defendant, testified as follows:

Q. Where do you live? A. Dover.

Q. Are you acquainted with the Cobb mill? A. Yes, sir; I have known it all my life; when I first knew it, it was Cobb's mill; I am 55 years old.

Q. Will you state whether you have had any business relations there, and if so, what? A. I cut some timber, cypress, up the pond under Mr.

Kelly's instructions; that was 15 years ago; I made arrangements with Kelly on what they call Strawberry Branch and floated it down to the pond and put it at the pond, this end of the pond.

Objected to; objection overruled; exception.

The Court: I am admitting it to show the condition of the water up there.

Q. You say you floated it down on this end of the pond; what (368) is that end of the pond? A. I claim it is right along the road, where the waters come, what you might say is an open place.

There was other evidence on the part of the defendant as to marks on the land and trees, tending to show an old water line beyond the present one, and that the water had been ponded on the land continuously since 1850 or 1860, by the defendant and those under whom he claims, as far or further than at this time; and there was evidence to the contrary by the plaintiff.

His Honor charged the jury fully, to which there was no exception except as follows:

(*a*) "The plaintiff admits that the defendant is entitled to pond water on the land covered by water by a dam of 10 feet 6 inches, but that he is not entitled to pond water on the land coverd by water between that height and the height of the water when maintained at 12 feet 2 inches."

The plaintiffs excepted to the foregoing portion of the court's charge.

(*b*) "The defendant introduces a deed in partition, dated 1844, the calls of which are for the high-water mark of the millpond; but the deed does not state the height of water in the millpond in 1844. The defendant claims title by possession, but does not show a grant from the State, but claims the same character of title that the plaintiff does. The defendant claims that the high-water mark mentioned in those proceedings of the Cobb mill, in partition proceedings, fixes the boundaries under which the defendant and those under whom he claims claim their title. Now, if you find the plaintiff has ripened her title, then you inquire where the defendant has a right and title or where he has been in possession. The defendant claims he has been in possession of the land up to the boundary known as the high-water mark. Now, the burden upon that question would be upon the defendant to show you by the greater weight of the evidence, or at least to your satisfaction, where that high-water mark is, either by the deed of partition or by some other deed, that the boundary is fixed and determined in (369) some way."

The plaintiffs excepted to the foregoing portion of the charge.

(*c*) "So, then, it is a question for you to ascertain, whether the defendant has shown where the high-water mark is, either by showing you the height of the dam at the time the deed was made or where the high-water mark actually was."

The plaintiffs excepted to the foregoing part of the court's charge.

(*d*) "The defendant claims that you should answer the issue No; that the plaintiff is not the owner of any part of the land covered by water at the height of 12 feet 2 inches at the dam, nor any part of it; that he has proven to your satisfaction that he is entitled to the land covered by water at the height of 14 feet."

The plaintiffs excepted to the foregoing portion of the court's charge.

(*e*) "Now, the right of the defendant to pond the water back on this land might arise from two grounds: First, if the defendant owns the land covered by water by a dam up to 12 feet 2 inches, he has the right to pond the water back; and if you find that he owns it, then the question for you is, Has the defendant exercised the right continuously for 20 years to keep the water at 12 feet 2 inches? The defendant claims that he has the right to keep it back to where it is, and even higher, by reason of so keeping it for 20 years continuously, and that if he has that right, he has what is known as a prescriptive right and is entitled to the easement of 12 feet 2 inches. The defendant claims he has the right to maintain a dam at 14 feet, and that the dam has been maintained at 14 feet for more than 20 years, or at least it has been ponded as high as it is now for 20 years continuously."

The plaintiff excepted to the foregoing portion of the court's charge.

(*f*) "The court charges you that if you find by the greater weight of the evidence that the defendant owned the land, then he would have the right to pond the water back as often as he pleased; also the
(270) court charges you if he had the right to pond the water upon the land, and that right was acquired by prescription, then if he did it for 20 years continuously and ponded it back at a point at or above what it is now, and acquired that easement by 20 years' continuous use, he would still be entitled to maintain it."

The plaintiff excepted to the foregoing portion of the court's charge.

The jury returned the following verdict:

"1. Is *feme* plaintiff the owner and in possession of any part of the tract of land described in the complaint not covered by water ponded back by a dam at the height of 12 feet and 2 inches? If so, what part thereof? Answer: Yes, all above water at 12—2.

"2. Is *feme* plaintiff the owner and entitled to possession of any part of the land described in the complaint covered by water ponded back by a dam at the height of 12 feet and 2 inches? If so, what part thereof? Answer: No.

"3. Has defendant wrongfully injured plaintiff's land by unlawfully ponding water on plaintiff's land? Answer: No.

"4. What damages, if any, is plaintiff entitled to recover of defendant? Answer: None."

A judgment was rendered upon the verdict, and the plaintiff appealed.

Loftin & Dawson, G. V. Cowper, and McLean, Varser & McLean for plaintiff.

George Rountree, W. D. Pollock, and Rouse & Land for defendant.

ALLEN, J., after stating the case: The plaintiff objects to the admissibility of the deed to Richard Caswell, on two grounds:

(1) That the evidence of the clerk, Plato Collins, as to the handwriting of Stephen White, who was Register of Deeds of Lenoir County in 1855, is incompetent. This objection is fully met by the interesting and valuable opinion of *Justice Hoke* in *Nicholson v. Lumber Co., ante,* 59. In that case a certificate of survey of a land warrant, (371) dated in 1841, and signed by Ruel Windley, surveyor, was admitted in evidence on the testimony of John B. Respass, Jr., which was as follows:

Q. Do you know Ruel Windley's handwriting? A. I know it in this way: he raised my father and was very devoted to him, and often in looking over his papers, which I have now, my father would show me and say, "This is frandfather's signature."

Q. Have you seen a great deal of that writing? A. Yes, sir. Since I have been surveying I have seen quite a lot of it. By family reputation, my great-frandfather was a surveyor, and my father was a surveyor.

A small map marked "A," was handed to witness, and he was asked:

Q. Whose handwriting is this if you know? A. That is Ruel Windley's, from the source of information I have.

By the Court: Q. Do you mean to say that somebody told you that that identical paper was in Ruel Windley's own handwriting? A. Not this one.

By counsel for defendant: Q. From the writing you have seen purporting to have been written by Ruel Windley, is that, or is it not, his handwriting? A. Yes, sir; that is his handwriting.

And the Court, in speaking of this evidence, says:

"On these facts and accompanying testimony, we are of opinion that the plat with the certificate was properly received in evidence, being admissible as an ancient document, and also by reason of competent testimony tending to show that the certificate just below the plat and giving the corners of same, was signed or subscribed in the handwriting

of Ruel Windley, deceased. . . . The means of acquiring the requisite knowledge to enable one to form and express an opinion as to handwriting has, in case of ancient documents, and of necessity, been extended to include a witness who, in the course of his duty, has had full opportunity and frequent occasion to observe and note the handwriting in other ancient documents, entirely free from suspicion, and states that he has thus been enabled to form a satisfactory opinion as to the
(372) handwriting of the ancient document in question. 3 Taylor Evidence, Ames' Notes, 1229, 21; Chamberlain Best on Evidence, p. 231; Starkie on Evidence, sec. 521."

(2) That no evidence was introduced to locate this and other deeds.

This objection cannot be considered under an exception to the admissibility of the deed. If the defendant offered a certified copy of the deed, and identified the handwriting of the officer who made the certificate, it was competent evidence; and if afterwards he failed to locate the land, the defendant should have called the matter to the attention of the court by a motion to withdraw the deeds or by a request for a special instruction.

It is not, however, essential that evidence of location should come from witnesses for the defendant, or from living witnesses. The deeds may contain descriptions which, without the aid of extrinsic proof, may indicate where the property is situate.

In this case the witness described the locality minutely, and according to all the evidence there was an ancient mill on the land claimed by the defendant and on South-West Creek.

In the deed to Caswell and in the other deeds the land is particularly described, and is said to be on South-West Creek, and to include the grist-mill on said creek.

We think the deeds were properly admitted. We also think the evidence of Jesse Evans was competent, restricted, as it was, by his Honor.

The first exception to the charge cannot be sustained. We must assume that the judge correctly stated the admission of the parties, and if by inadvertence he did not, it ought to have been called to his attention at the time, and cannot be made the subject of exception for the first time in the case on appeal.

The other exceptions to the charge are upon the grounds:

(1) That there is no evidence where high-water mark was in 1844.

(2) That there is no evidence of an adverse possession by the defendant.

(373) (3) That there is no evidence of a user by the defendant that will confer an easement.

In our opinion, there was some evidence as to the location of the high-water mark in 1844, and of a user by the defendant for a sufficient length of time to confer an easement.

A fair interpretation of the evidence of the witness Loftin is that in 1851 the water was maintained higher than now, and that at that time the dam was old and worn down, and there is other evidence of marks on the trees and land, and of the changes in the land, which were properly left to the jury.

If the evidence of the defendant is accepted as true, and we must do so in considering the question whether there is evidence, there can be no doubt of a user under a claim of right for more than 20 years, which would be necessary to confer an easement.

The objection that there is no evidence of an adverse possession is based on the following statement of *Chief Justice Ruffin* in *Green v. Harmon,* 15 N. C., 161:

"The overflowing of land by an act not done on it, but by stopping a water-course below, on one's own land, is not an ouster of the owner from the land overflowed. There is no entry, which is necessary to make a disseizin. The remedy for the injury is not trespass, but an action on the case for the consequential damages. *Howard v. Banks,* 2 Bur., 1113. Hence, however long it may continue, it affords, of itself, only a presumption of a grant of the easement, and not of the conveyance of the land."

The principle declared is not applicable to the facts in this case, as according to all the evidence here the dam was on the land of the defendant and the water does not extend beyond the claim of the defendant.

It is, however, manifest, from an examination of the whole case, that it was not the purpose of the Court to declare that overflowing land, claimed under a deed, is not an act of adverse possession, as is shown by the concluding language of the opinion:

"Although cutting of timber and overflowing the land do not (274) amount, of themselves, to an ouster, yet, being done without the leave of the owner, they give character to the entry into another part, and also furnish evidence of it to the owner. The jury might fairly infer from it, not only that the defendant did claim the land, but that the lessor of the plaintiff knew he claimed it and was not a mere wrong-doer without color of title."

The case involves, almost entirely, questions of fact, and having been fairly tried, we cannot disturb the judgment.

No error.

DEFENDANT'S APPEAL IN SAME CASE.

THE defendant's appeal presents two questions.

Upon the coming in of the verdict, the defendant moved the court for judgment for the entire cost of the action, including the cost of the survey. The court declined to tax the cost of the survey against the plaintiffs, on the ground that one-half had been paid by each party as the survey proceeded, and the court stated that in his opinion the bill was exorbitant, and declined to allow it to be taxed in the bill of costs. Defendant excepted.

The defendant then moved the court to adjudge the cost of the action to be charged upon the separate real and personal estate of the *feme* plaintiff, Nora A. LaRoque. The court declined to grant the motion, and the defendant excepted.

The record discloses that the cost and expense of the survey were advanced equally by the plaintiffs and defendant upon the demand of the surveyor, as the survey progressed, and at the time of the trial one-half of the cost of the survey had been paid by the plaintiffs and one-half by the defendant. The entire cost of the survey was about $750.

It is provided in section 1504 of the Revisal that the court may order a survey when the boundaries of land shall be drawn in question in any pending action, "and for such surveys the court shall make a proper allowance, to be taxed as among the costs of the suit."

(375) The amount of the allowance is within the discretion of the court, after considering the evidence as to the work done, but the judge cannot decline to act because he thinks the charges made by the surveyor are exorbitant.

The statute requires him to fix the allowance, and directs that it shall be taxed as costs.

The payments to the surveyor without an order were made by the parties at their own peril, and cannot control the action of the judge.

The defendant was not entitled to have the judgment for costs made a charge against the separate estate of the *feme* plaintiff. The ordinary judgment for costs was rendered against her, which was proper.

The cause is remanded, to the end that the allowance to the surveyor be fixed, and that it be taxed as costs to the use of the defendant; provided that in no event shall such amount to the use of the defendant exceed the amount he has paid.

Reversed.

Cited: *S. c.*, 161 N. C., 461; *Hardy v. Mitchell, ib.*, 353; *Lupton v. Express Co.*, 169 N. C., 675.

L. HARVEY & SON v. C. A. PETTAWAY.

(Filed 18 October, 1911.)

1. Contracts—Cotton—Future Delivery—Wagering Contracts—Actual Delivery—Intent—Questions for Jury.

A contract for future delivery of cotton, to be a wagering contract upon its face, must necessarily indicate the intention of both parties to have been that the cotton itself should not be delivered and that the contract should be discharged only by the payment of the difference between the contract and the market price.

2. Contracts — Cotton — Future Delivery—Wagering Contracts — Measure of Damages—Place of Delivery.

A contract for the future delivery of cotton, providing that if it is not delivered at the time and place agreed upon the vendee should purchase it in the market and charge against the vendor the difference between the contract and market price, contemplates only such damages as the law would award, and a stipulation in the agreement for a different place of delivery than that the law fixes in awarding such damages will not, of itself, make such a difference in the measure of damages as would stamp the contract as a wagering one.

APPEAL from *Peebles, J.*, at March Term, 1911, of LENOIR. (376)

The defendant demurred to the complaint. The Court rendered judgment sustaining the demurrer. Plaintiff appealed.

Rouse & Land, McLean, Varser & McLean, and Loftin & Dawson for plaintiff.

Duffy & Koonce and G. V. Cowper for defendant.

BROWN, J. The action is brought to recover damages for failure to deliver 25,000 pounds of cotton according to the terms of a written contract.

The plaintiffs allege that for many years they have been and still are dealers in spot cotton. They then set up and make a part of their complaint a contract which contains the usual provisions for the sale of 25,000 pounds of lint cotton to be delivered to plaintiffs at A. C. L. depot, Jacksonville, N. C., on or before 31 December, 1909, at a price therein mentioned. Then follows this clause, upon which arises the vital question in this appeal:

"Should the party of the second part fail to deliver any or all of said 25,000 pounds of cotton, then he hereby agrees to pay said L. Harvey & Son the difference between the price herein agreed upon and the price of middling cotton in Kinston at noon on 31 December, 1909, on the quantity said party of the second part fails to deliver, and that L. Har-

vey & Son may purchase such cotton at said time and place and charge said party with the difference between the herein agreed price and the price so paid."

There are two grounds of demurrer, but only one is relied upon in defendant's brief.

It is contended by the learned counsel for defendants that the clause quoted is conclusive evidence that the contract is a gambling contract on its face, and therefore void. We cannot concur with them. There is nothing on the face of this contract which necessarily indi-
(377) cates that it was the *intention* of both parties that the cotton should not be delivered and that the contract should be discharged only by payment of the difference between the contract and the market price.

The language of the opinion in *Rankin v. Mitchem,* 141 N. C., 277, is applicable to this contract:

"The insertion of the last clause cannot be said to be conclusive evidence of the intention of both parties that the contract should be discharged only by a payment of the difference between the contract price and the market price of the cotton on the day fixed for delivery. That being so, the matter is to be settled by ascertaining the real underlying intention of the parties to the contract. Was it the intention of both parties to the contract that the cotton should not be delivered? Was it their purpose to conceal in the terms of a fair contract a gambling in which the parties contemplated no real transaction as to the article to be delivered? This purpose and underlying intent his Honor properly left to the jury, the contract not being a gambling one on its face."

This case is cited and approved in *Edgerton v. Edgerton,* 153 N. C., 169, where it is said that "The form of the contract is not conclusive in determining its validity, when it is a sale as being founded upon an illegal consideration and as having been made in contravention of public policy." "The true test of the validity of a contract for future delivery is whether it can be settled only in money and in no other way, or whether the party selling can tender and compel acceptance of the particular commodity sold, or the party buying can compel the delivery of the commodity purchased. The essential inquiry in every case is as to the necessary effect of the real contract and the real intention of the parties." *Edgerton v. Edgerton,* 153 N. C., 168; 20 Cyc., 930; *Williams v. Carr,* 80 N. C., 295; *S. v. McGinnis,* 138 N. C., 724; *S. v. Clayton,* 138 N. C., 732; *Bibb v. Allen,* 149 U. S. 481; *Sampson v. Camperdown Mills,* 82 Fed., 836; *Dillaway v. Alden,* 88 Me., 236; *Cleage v. Langley,* 149 Fed., 352; *Berry v. Chase,* 146 Fed., 630; *Thompson v. Williamson,* 67 N. J. Eq., 219; *Kingsbury v. Korwan,* 77 N. Y., 612.

The provision in this contract to pay damages in case of failure (378) to perform it is nothing more than the law would award upon its breach without any specific agreement.

It is true, the legal rule would be the difference between the contract price and the market price at Jacksonville on 31 December, 1909, the date fixed for delivery, while the contract fixes the price at Kinston.

The parties had the right to agree upon Kinston as the place at which the market price is to be fixed, if done in good faith. Certainly this slight difference between the measure of damages allowed by law and that stipulated in the contract is not alone sufficient to stamp it as a gambling contract.

The defendants will be allowed to answer.

Reversed.

Cited: *Rodgers v. Bell, post,* 381, 382; *Rodgers v. Brock, post,* 402; *Holt v. Wellons,* 163 N. C., 129.

RODGERS, McCABE & CO. v. J. H. BELL.

(Filed 9 November, 1911.)

1. Contracts—Future Delivery—Wagering—Interpretation of Contracts.

A contract for the sale and delivery of cotton will not be held void upon its face, as a matter of law, merely because it contains definite provision for an adjustment of damage on failure to deliver the cotton. *Harvey v. Pettaway, ante,* 375, cited.

2. Same—Mutual Intent—Interpretation of Statutes.

Revisal, sec. 1689, declaring unlawful and void certain contracts for future delivery of cotton, etc., by its use of the terms "but it is intended and understood" by the parties "that money or other things of value shall be paid . . . dependent on whether the market price or the value of the things shall be greater or less at the time and place, etc.," shows that the mutual intent of the parties is necessary to bring the contract within the intent of the statute.

3. Same.

An innocent party to a contract for the future delivery of cotton at a certain time and place, valid in its terms, cannot lose his rights thereunder merely because of an unexpressed intent of the other party that the cotton was not to be actually delivered, but that the gain or loss under the contract was to be ascertained from the rise or fall of the price of cotton in the market; for to avoid the contract the vitiating purpose must be shared by both.

4. Statutes—Interpretation as a Whole.

A statute should be so construed as to make it harmonize with the existent body of the law, unless the legislative intent is clearly expressed to the contrary; and each and every clause shall be allowed significance if this can be done by any fair and reasonable interpretation.

5. Statutes—Codification—Interpretation.

Where laws have been codified and in case of ambiguity or doubt, permitting construction, it is proper for the court to examine the original legislation as an aid to a correct interpretation.

6. Same—Futures—Exceptions—Evidence—Burden of Proof.

The words at the end of secton 1689 of the Revisal, qualifying its general provisions declaring that certain contracts known as futures are unlawful, by providing that they "shall not be construed so as to apply to any person, firm, or corporation . . . engaged in the business of manufacturing or wholesale merchandising in the purchase or sale of necessary commodities required in the ordinary course of their business," are meaningless as placed, and by interpretation from a consideration of chapter 328, Laws of 1905, where these qualifications are first used, and with reference to the Laws of 1889, it is plain that the proviso noted applies only to the method or quantum of proof, and hence should properly refer to section 1691 of the Revisal to give them their proper meaning and prevent their repugnancy to sections 1689 and 3823 of the Revisal. Thus construing the various acts *in pari materia*, the ordinary rule prevails in an action against those who come within the meaning of the proviso of section 1689, that one who asserts that an ordinary business contract is unlawful is required to prove it to the satisfaction of the jury by the greater weight of the evidence; and the defendant cannot be heard to complain of a charge which has in part put the burden of proof on him where the whole burden belonged.

7. Contracts—Future Delivery—Breach—Damages—Wagering Contracts.

A contract for the future delivery of cotton provided that upon the failure to deliver the cotton damages should be allowed on the basis of the difference between the contract price and the highest market price between two dates several months apart: *Held*, the plaintiff, suing upon the contract, could only recover the difference between the market and contract price at the time and place of delivery.

BROWN and WALKER, JJ., concurring in result.

(380) APPEAL from *Ward, J.*, at April Term, 1911, of EDGECOMBE.

Civil action to recover damages for breach of contract in failing to deliver a certain amount of cotton. The written contract, on its face, provided for the delivery of 50,000 pounds of cotton at the depot or boat landing in Pollocksville, N. C., on or before 1 January, 1910, and contained a stipulation that in case the party of the second part failed to deliver said cotton or any part thereof, the damages should

be admeasured at the highest price in the above-mentioned market on any day between 10 September, 1909, and 1 December, 1909, with interest, etc.

There was testimony on part of plaintiff tending to show a failure to deliver 29,454 pounds of cotton, causing damage, etc., and further that actual delivery of the cotton was intended. The defendant filed verified answer, admitting execution of the written contract and containing averment that although the contract on its face provided for actual delivery, it was not so intended by the parties, but that same was a gambling contract prohibited by the statute, etc., and offered evidence tending to show that the contract was negotiated by plaintiffs' agents, and it was understood between them at the time that no actual delivery was intended or should be required, etc.

Issues were submitted and responded to by the jury as follows:

1. Did the plaintiff and defendant enter into the contract as alleged in the complaint? Answer: Yes.

2. Was the plaintiff at all times able, ready, and willing to accept and receive and pay for said cotton upon its delivery during the time and at the place mentioned therein? Answer: Yes.

3. Was the said contract illegal and void? Answer: No. (381)

4. If not, what damage is plaintiff entitled to recover? Answer: 29,454 pounds at 4½ cents per pound, with interest at 6 per cent until paid from 1 December, 1909.

Judgment on the verdict, and defendant excepted and appealed, assigning errors, etc.

F. S. Spruill and H. A. Gilliam for plaintiff.

T. D. Warren, Aycock & Winston, and P. M. Pearsall for defendants.

HOKE, J. The defendant moved to nonsuit, contending that the contract on its face is a gambling contract avoided by the statute, and this because it contains definite provision for an adjustment of damages on failure to deliver. But the question has been resolved against defendant in *Harvey v. Pettaway, ante,* page 375, holding that this and other stipulations of similar import, appearing in the contract, are not conclusive as a matter of law. It was also insisted that the court below erred in charging the jury, as he did, on the third issue as follows: "Upon this issue the jury is instructed that whether or not such contract is illegal and void is to be settled from the evidence in the case by ascertaining the real underlying intention of both parties to the contract, and the inquiries are to be directed to the question as to whether it was the intention of both parties to the contract that the cotton described therein should not be delivered, and whether it was the purpose and intent of

both parties to conceal in the terms of the written contract a gambling deal in which the parties to the contract contemplated no real transaction as to the articles to be delivered," the objection being that if either party had the intent and purpose not to deliver, though uncommunicated to the other, the contract was prohibited by the statute. Defendant also tendered an issue presenting this view, which was rejected.

It is true that in order to a valid agreement the minds of the parties must have met on the same thing at one and at the same time; but this is said in reference to the common intent as contained and (382) expressed in the communications had between them. This may be by words, written or unwritten, or by conduct, both or either; but it must be in some way expressed, or it does not bind, and the position may not be allowed that when the parties have made an agreement for valuable consideration, clearly expressing their common intent and purpose in one way, this can be frustrated or altered by the secret and undisclosed intent of one of the parties to the contrary. This is true on general principles (*Williams v. Carr,* 80 N. C., 294; Anson on Contracts, pp. 2, 3, and 4; Clark on Contracts, pp. 2 and 3), and on the facts of this case both the statute in question and authoriative interpretation of this and similar enactments here and elsewhere are against defendant's position.

Section 1689, Revisal, being the law by which contracts in futures are declared to be unlawful, provides in part: "That every contract, whether in writing or otherwise, whereby any person shall agree to sell and deliver cotton, corn. wheat, rye, bacon, salt, etc., at a place and time specified and agreed upon therein," to any other person, etc., when in fact and notwithstanding the terms expressed of such contract, it is *not intended by the parties thereto* that the articles or things so agreed to be sold and delivered shall be actually delivered or the value thereof paid, *"but it is intended* and *understood* by *them* that money or other thing of value shall be paid to the one by the other or to a third party, dependent on whether the market price or value of the thing shall be greater or less at the time and place, etc., . . . shall be utterly null and void." It will be noted that the statute avoids the contract when the vitiating purpose is held by the *"parties thereto,"* and further, "but it is intended and understood by them" that settlement may be had by paying the difference according to the rise or fall of the market or other change in value; and this view has prevailed in the different cases with us construing the law. *Harvey v. Pettaway, supra; Edgerton v. Edgerton,* 153 N. C., 167; *Burns v. Tomlinson,* 147 N. C., 645; *Rankin v. Mitchem,* 141 N. C., 277; *S. v. McGinnis,* 138 N. C., 724; *S. v. Clayton,* 138 N. C., 732; and authoritative decisions elsewhere are to the (383) same effect: *Crawford v. Spencer,* 92 Mo., 498; *Scanlon v.*

Warren, 169 Ill., 142; *Wall v. Schneider,* 59 Wis., 352; Clark on Contracts, p. 331.

In *S. v. Clayton, supra,* it was held: "The test of the validity of a contract for 'futures' which Laws 1889, ch. 221, requires is the 'intention not to actually deliver' the articles bought or sold for future delivery. No matter how explicit the words in any contract which may require a delivery, if in fact there is no intention to deliver, but the real understanding is that on the stipulated date the losing party shall pay to the other the difference between the market price and the contract price, this is a gambling contract, and void at common law and indictable under the statute."

In *Rankin's case, Associate Justice Brown,* for the Court, said: "That being so, the matter is to be settled by ascertaining the real underlying intention of the parties to the contract. Was it the intention of both parties to the contract that the cotton should not be delivered? Was it their purpose to conceal in the terms of a fair contract a gambling deal, in which the parties contemplate no real transaction as to the article to be delivered? This purpose and underlying intent his Honor properly left to the jury, the contract not being a gambling one on its face."

Undoubtedly, if it was understood by both that either party to the contract could be relieved by paying the difference, and that no actual compliance was intended at the time, this would avoid the contract; the language of the statute being that the contract is utterly void if there was no intent "that the thing should be actually delivered or the value thereof paid." It is in this sense that the Court said in *Burns v. Tomlinson,* 147 N. C., 645, "that a lawful contract was one where actual delivery was intended by both parties"—a correct statement of the burden placed on plaintiff by section 1691 of the statute, whenever the same applies. But it was never held in this case, or any other with us, that when an innocent party had made a contract valid in its terms, his rights acquired thereunder should be denied him by (384) reason of an undisclosed purpose or intent of the other. To avoid the contract the vitiating purpose or understanding must be shared in by both.

The cases apparently holding a contrary view, to which we were cited by counsel, *McGrew v. Produce Ex.,* 85 Tenn., 572, and *Connor v. Black,* 119 *Mo.,* 126, were on statutes differing from ours and permitting or requiring perhaps a different interpretation. Thus the Tennessee statute in express terms condemns the contract "if *either* of the contracting parties dealing simply for the margin or on the prospective rise and fall of prices, had no intention or purpose of making actual delivery." And the Missouri statute of similar import received

like construction and seems to have been enacted just after the decision from that State which we have cited in support of our conclusion.

It was further urged for error that the court, after imposing upon the plaintiff the burden of proving the contract a lawful one as required by chapter 36, sec. 1691 of the Revisal, in a subsequent part of the charge changed this ruling by placing the burden on defendant of showing it to be unlawful. On a perusal of the charge of his Honor, we doubt if it is subject to this criticism, but assuming that defendant's position concerning the charge is correct, we are of opinion that there is no error committed to defendant's prejudice, and this by reason of certain qualifying words appearing elsewhere in the chapter, as follows: "This section shall not be construed so as to apply to any person, firm, corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandising in the purchase or sale of necessary commodities required in the ordinary course of their business." These words now have place at the end of section 1689 of the same chapter, that defining and declaring what contracts of this kind shall be considered unlawful, and the Court has already held in *S. v. McGinnis* and *S. v. Clayton, supra,* that in so far as these qualifying words are considered in reference to that section, they are without significance. In answer to the suggestion made in the *McGinnis case,* that this statute gave manufacturers and wholesale merchants the right to "hedge" (385) by purchasing "future contracts" for raw commodities without intending to demand "actual delivery," the *Chief Justice* said in *McGinnis's case* that the words referred to had no such meaning, but were inserted "unnecessarily and out of abundance of caution." And further, that "Section 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants. It does not authorize them to engage in any business prohibited by the act of 1889. It does not authorize them to speculate in cotton or other commodities. It simply provides that the courts shall not construe the act of 1905 to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business." And in *Clayton's case* he further said: "It is this class of *bona fide* contracts, in aid of business and not for gambling purposes, that section 7, chapter 238, Laws of 1905, was intended to authorize. That section did not authorize, nor can it be construed to intend to authorize, manufacturers and wholesale merchants to gamble by buying commodities for future delivery when there was no intention to deliver."

To allow to this proviso the meaning which the words, used ordinarily, import, and as affecting the body of the section where it now has place, would cause a direct conflict with section 3823 of the Revisal, by which contracts, of the very kind described in section 1689, are made criminal, and without qualifying words of any description. Accordingly, in

McGinnis's case, it is suggested that the clause in question should probably be annexed to section 1691 of the chapter, that in reference to the burden of proof, and on full consideration we hold this to be the proper construction. It is a well recognized principle that in construing a statute, "In order to determine the true intent of the Legislature, the particular clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts." Black on Interpretation of Laws, sec. 74, p. 166. A principle especially insistent in case of legislation *"in pari materia"* and directly applied to our Revisal in *S. v. Lewis,* 142 N. C., 626, and other decisions of like import.
Having reference to this general principle, it is also well under- (386) stood that a statute should be so construed as to make it "harmonize with the existent body of the law, unless the legislative intent is clearly expressed to the contrary, and that each and every clause shall be allowed significance if this can be done by fair and reasonable interpretation." Black Interpretation of Laws, p. 60, secs. 32 and 49; Lewis's Sutherland Statutory Construction, sec. 516.

It is also held that where laws have been codified, and in case of ambiguity or doubt, permitting construction, it is allowed that the court may examine the original legislation, as an aid to a correct interpretation. Lewis's Sutherland, sec. 450.

On examination of the original statute, it appears that the act, defining and declaring contracts of the kind in question unlawful, was passed in 1889, chapter 221. In 1905, chapter 538, the Legislature enacted a law to suppress what is known, in popular phrase, as "bucket shops," and, having provided for this in sections 1 and 2, the statute contains several additional sections relating to the statute of 1889 and all of them having reference to the mode or quantum of proof which should be required in enforcement of that act. The Law of 1905 then, in its closing section, provided: "That this act shall not be construed so as to apply to any person, firm, or corporation, etc." This is the first time the words we are considering appear in our legislation on this subject, and, so far as they had reference to the law of 1889, it is clear that the Legislature, in the original statutes, only intended that they should affect the questions of proof.

From these considerations, we are of opinion, as stated, that the proviso at the end of section 1689 of the Revisal, by correct interpretation, should appear, and only affect section 1691, that relating to the burden of proof; and giving the words this effect and placing, there has been no error committed which gives defendant any just ground for complaint.

On the undisputed facts, it appears that plaintiffs are dealers in spot cotton; that they buy from two to three hundred thousand bales of cotton

(387) each year, supplying in the ordinary course of their business other dealers in Baltimore, New York, Boston, and various cotton mills in different sections of the country. Under and by virtue of the words in question, plaintiff's case is therefore withdrawn from the operation of section 1691, and he is entitled to have his cause tried under the rule which generally prevails, "that one who asserts that an ordinary business contract is unlawful is required to prove it to the satisfaction of the jury by the greater weight of evidence."

Defendant objected, further, that his Honor, on the issue as to damages, allowed the jury to award same on the basis of the highest market price of cotton between 10 September and 1 December, as provided by the contract. It is a general trend of court decisions to hold that, when "a contract is for a matter of certain value or value easily ascertainable" (Clark on Contracts, p. 412), or, as stated by another author, "Where damages can be easily and precisely determined by a definite pecuniary standard, as by proof of market values" (Hale on Damages, p. 137), that any sum stipulated for in the contract in excess of that value should be considered as a penalty, and especially is this true when the stipulated sum would necessitate an exorbitant recovery or one greatly disproportioned to the loss. But on perusal of his Honor's charge, we do not find that such an exception is open to defendant. The court seems to have submitted the question of damages under the rule which ordinarily obtains, that is, to be admeasured on the difference between the market contract price at the time and place of delivery. *Hosiery Co. v. Cotton Co.*, 140 N. C., 452. The damages were no doubt awarded on that basis, and the plaintiff does not appeal. The question, therefore, is not presented, and on the facts in evidence we make no decision upon it. There is no reversible error disclosed in the record, and the judgment for plaintiff is affirmed.

No error.

WALKER, J., concurring in result: In *Sprunt v. May, post,* 388, I filed a dissenting opinion, stating my views as to the Laws 1889, ch, 221, and Laws 1905, ch. 538, forbidding dealings in "futures" and the conduct and maintenance of bucket shops. For the (388) reasons therein given, I dissent from so much of the opinion of the Court in this case as is in conflict therewith, and assent to the conclusion that there was no error in the trial below, as the plaintiff is excepted from the operaion of Revisal, sec. 1689.

BROWN, J., concurring: I concur generally in the opinion of the Court, but will state my view as to the effect of the last sentence in section 1689 of the Revisal upon wholesale dealers. I am of opinion that

they are exempted entirely from the effect and operation of the act of the General Assembly embraced in chapter 36, Revisal, sections 1687 to 1691, inclusive. The validity of contracts for futurue delivery entered into with such dealers are to be determined according to the principles of the common law just as if no such legislation had ever been enacted.

Cited: Sprunt v. May, post, 390; *Rodgers v. Brock, post,* 402; *Hardwood Co. v. Waldo,* 161 N. C., 197; *Holt v. Wellons,* 163 N. C., 129; *Wilson v. Scarboro, ib.,* 388; *Mfg. Co. v. Andrews,* 165 N. C., 292, 294.

ALEX. SPRUNT & SONS v. C. C. MAY.

(Filed 9 November, 1911.)

1. Contracts, Wagering—Cotton—Future Delivery—Wholesale Dealer in Cotton—Evidence—Burden of Proof—Interpretation of Statutes.

A *bona fide* wholesale dealer in spot cotton who purchases the same for future delivery in the ordinary course of his business, under a contract valid on its face, is entitled to have his cause of action tried and determined, when resisted upon the ground that the contract is a wagering one and void under the statute, under the rule which generally obtains, that one who asserts that an "ordinary business contract, valid on its face, is unlawful, is required to prove it by the greater weight of the evidence." *Rodgers v. Bell, ante,* 378, cited as controlling this case in the interpretation of Revisal, secs. 1689, 1691.

2. Contracts, Wagering—Cotton—Future Delivery—Principal and Agent—Mutual Intent—Evidence.

A *bona fide* wholesale dealer who sues upon a contract for the future delivery of cotton, which is resisted on the ground that the contract was a wagering one and void under the provisions of Revisal, sec. 1689, is bound by the acts and statements of his agents in negotiating and closing the trade, to the effect that actual delivery was not contemplated or required; and the plaintiff may not recover on the contract merely because he was a *bona fide* wholesale dealer in cotton and only authorized his agent to make a contract for actual delivery, if the agent at the time entered into a contract with the vendor which was condemned by the statute as being a wagering one.

3. Principal and Agent—Acts of Agent—Repudiation in Part.

One who sues on a contract made for his benefit by one assuming to act as his agent may not accept the benefits under the contract made for him and repudiate the agency as to those moving upon the same subject-matter to the other party.

4. Same.

When a recovery upon a contract valid on its face for future delivery of cotton, in an action brought by a *bona fide* wholesale dealer therein, is resisted upon the ground that the contract is a wagering one prohibited by statute, Revisal, sec. 1689, evidence is sufficient upon the question as to whether the actual delivery of the cotton was agreed on, which tends to show that, when the contract was being negotiated, the vendor, a farmer, did not have the cotton; that more cotton had been sold in that locality than could be delivered; that plaintiff's agent, who acted for him in the transaction, had an understanding with defendant that actual delivery of the cotton would not be required, but that the difference between the contract and market prices could be paid in money.

WALKER, J., dissenting.

(389) APPEAL from *Peebles, J.*, at April Term,, 1911, of NEW HANOVER.

Action to recover damages for an alleged breach of a written contract for delivery of cotton.

The evidence on part of plaintiff tended to show that on 9 September, 1909, defendant entered into a written contract with plaintiff, agreeing to deliver 100 bales of cotton at Trenton, N. C., between 15 September, 1909, and November, at the price of 12 cents per pound, and plaintiff agreed to accept same and pay the stipulated price. The defendant had failed to deliver said cotton or any part thereof, to plaintiff's damage $1,000. That the contract was negotiated, on part of plaintiff, by one F. Brock, their agent, and signed by plaintiffs, per F. Brock, agent, and by defendant. That plaintiffs were large dealers and exporters (390) of cotton, supplying other dealers and mills in Europe, etc., and, through their agents, bought spot cotton, required for their business, in different sections of the country to the average amount of 400,000 bales annually. That plaintiffs intended, in good faith, to carry out the terms of the contract, and that no agent had authority from them to make purchases and contracts therefor with any other understanding.

Defendant, having filed a verified answer, alleging that the contract in question was a gaming contract prohibited by the statute, offered evidence tending to show that it was the understanding between defendant and plaintiff's agent, when contract was entered into, and that, on failure to comply, the demand could be satisfied by paying the difference, etc.

The court charged the jury. There was verdict in plaintiff's favor for $1,000 damages. Judgment on the verdict, and defendant excepted and appealed.

Rountree & Carr for plaintiff.

T. D. Warren, J. K. Warren, Aycock & Winston, and P. M. Pearsall for defendant.

HOKE, J., after stating the case: We have held, in *Rodgers v. Bell, ante,* 378, in reference to our statute as to gaming contracts, Revisal, 1905, ch. 36, that the words now appearing at the end of section 1689, to wit: "This section shall not be construed so as to apply to any person, firm, corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandising, in the purchase or sale of the necessary commodities required in the ordinary course of their business," by correct construction, should appear and only affect section 1691 of said chapter—the section relating to the burden of proof—and that, by reason of this clause, so placed, a *bona fide* wholesale dealer in spot cotton, who purchased the same in the ordinary course of his business, is not affected by said section, but is entitled to have his cause tried and determined under the rule, which generally obtains, that one who asserts that an "ordinary business contract, valid on its face, is unlawful, is required to prove it by the greater weight of the evidence." (391)

On the facts in evidence it appears that plaintiffs and their predecessors, under the style of Alex. Sprunt & Sons, from 1866, have been engaged in the cotton business, and since 1880 they have exported cotton in large quantities, supplying mills and dealers abroad, and, in the ordinary course of their business, they buy annually on an average of 400,000 bales of cotton. They are, therefore, if the evidence is accepted by the jury, well within the clause withdrawing their case from the provision of section 1691, and, on another trial, the same will be submitted under the ordinary rules of evidence obtaining in such cases.

Objections were chiefly made to the validity of the trial for alleged error in a portion of his Honor's charge, as follows: "So, therefore, if you find as a fact that Alexander Sprunt & Sons were engaged in the wholesale cotton business here, buying cotton and shipping it to Europe, and that they had not been engaged and were not engaged in gambling contracts or futures with the expectation of taking margins or the difference between the contract price and the price at the time of the delivery, and that they did not authorize Brock to make any such contracts, but simply authorized him to make a contract for the actual delivery of the cotton, then you will find the first issue 'Yes.'"

As we understand it, the charge could only mean, and was intended, by his Honor, to mean that if plaintiffs were *bona fide* wholesale dealers in cotton, and only authorized Brock to make a contract for actual delivery, plaintiffs could recover for breach of a contract made by Brock, although in the negotiations and making of the contract there was an understanding between Brock and the other party that actual delivery was not intended and would not be required—a position that cannot be sustained.

If plaintiffs were seeking to avoid this contract and its effect, they might, under certain conditions and circumstances, be heard to repudiate the representations and conduct of their agent, Brock, who
(392) acted for them in this matter. But the plaintiff here adopts the contract and is seeking recovery on it, and where this is true, he must be held bound by the acts and statements of his agent in negotiating and closing the trade. The position indicated has been often upheld in decisions of our Court and elsewhere. *Beeson v. Smith,* 149 N. C., 145; *Corbett v. Clute,* 137 N. C., 551; *Black v. Baylees,* 86 N. C., 527; *Harris v. Delamar,* 38 N. C., 219; *McIntire v. Pryor,* 173 U. S., 38; *Manufacturing Co. v. Cotton & Long,* 126 Ky., 750; *Haguerin v. Basely,* 14 Vet., 273.

In *Corbett v. Clute, supra,* plaintiff sued to foreclose a mortgage; there was allegation, with evidence, on part of defendant, tending to show that the agent of plaintiff had wrongfully procured the note and mortgage by falsely representing that the son of the mortgagor, an old, feeble, inexperienced woman, had been guilty of a criminal offense, and that unless mortgage was executed her son would be prosecuted and sent to the penitentiary. It was claimed by plaintiffs and this was very well established, that they had not authorized the conduct of their agent; but the position was not allowed to affect the question, the Court saying: "It will not be contended that the plaintiff is not bound by the statements of his agent. He is here, now, asserting his claims under the note and mortgage obtained for him by this transaction, and if he claims the benefits, he must accept the responsibility," citing *Black v. Baylees* and *Harris v. Delamar, supra.* In *Mfg. Co. v. Cotton, supra,* it was held "that when a principal accepts an order for goods, obtained by agent, he is bound by the agent's acts in obtaining it, although he violated the principal's instructions." The principle is very generally recognized, and further citation of authority is not required.

Nor can it be contended, for a moment, that there was no testimony tending to show an understanding and agreement between defendant and plaintiff's agent, Brock, forbidden by the statute. Revisal, sec. 1689. Speaking to this question, the defendant testified as follows:

"Mr. Brock asked me if I wanted to sell some cotton for 12
(393) cents, and I told him there was already more cotton sold around there than could be delivered, even if cotton went down below the contract price. He says, 'We are already in the hole; we have already sold some for 10 and 11.'"

Q. Who had? A. He and I, too, and several others. He says, "If you can sell this for 12 cents, you can take this and pay the difference in that 10-cent cotton."

Q. What was the agreement between you and him in reference to the actual delivery of the cotton. A. He told me it would not be expected, and we could settle on the difference.

Q. Did you intend to deliver any cotton under that contract? A. No, sir.

Q. Did you have any cotton to deliver? A. No, sir.

Q. Did you own any cotton? A. No, sir.

Q. Did Mr. Brock know that you were not farming? A. Yes, sir.

And the agent Brock testified:

You say you told Mr. May that the cotton was not expected to be delivered? A. Yes, sir; I told him I didn't think they would require the delivery of the cotton. I asked Mr. May did he want to sell some cotton for 12 cents; he said he had already sold some cotton, and as far as everything said in the conversation, I don't know about it—I can't remember that; we were talking over what they were intending to do about it—that they could take the difference in one and pay the difference in the other; and that was the way the contract was made.

Q. What was it Mr. May said to you before you signed the contract in reference to having sold some contract cotton? A. He said he had already sold some contract cotton, and in the general discussion of the contract cotton, and if he would sell more, he would take the difference in one way and pay the difference in the other; that's exactly what was said about it.

Q. What did you say to him at the time of the execution of this contract in reference to the delivery of the actual cotton? A. I told him I didn't think the actual delivery of the cotton was expected at all; if I was wrong in it, that was what I told him.

Applying the principle as stated, if, when this contract was (394) negotiated and made, there was an understanding between defendant and plaintiff's agent that actual delivery of the cotton should not be required, but that the difference between the contract and market price could be paid in money, such a contract is condemned by the statute and no recovery can be had thereon. For the error in the charge, the defendant is entitled to a new trial, and it is so ordered.

New trial.

WALKER, J., dissenting: I regret always to differ from my brethren; but when an important and valuable right of the citizen, which, in my opinion, is recognized by the law, is abridged or impaired by a decision of this Court, it is my clear duty to enter my dissent, and, when required, as is the case here, to give my reasons therefor. I cannot agree to the proposition which seems to form the basis of the Court's opinion, that the exception in the statute, Revisal, secs. 1689, 1690, as to pur-

chases or sales by manufacturers and wholesale merchants of the necessary commodities used in their business, is restricted to the burden of proof or to the clause of the statute raising a *prima facie* case of illegality in the transaction upon the proof of certain facts; nor do I think that it was so decided in *S. v. McGinnis,* 138 N. C., 724, or *S. v. Clayton, ibid,* 732. An extract from the opinion of the *Chief Justice* in the former case will show the contrary: "That no other businesses or persons are mentioned as authorized to deal *bona fide* for the purchase of commodities on 'margin' is not an implied restriction upon others to do an act not forbidden by any statute. Sec 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants. It does not authorize them to engage in any business prohibited by the act of 1889. It does not authorize them to speculate in cotton or other commodities. It simply provides that the courts shall not construe the act of 1905 to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business." It is true that the court, in that case, when considering the burden of proof, did say: "There may be good reasons why the purchase of 'necessary commodities required in the ordinary (395) course of their business' for future delivery 'on a margin,' by manufacturers and wholesale merchants, shall not raise a presumption that such dealings are 'wagering' contracts, while purchases by them, not of such commodities or when not 'required in the ordinary course of their business,' or the purchase by others of any commodities, when made on the deposit of a 'margin' and for 'future' delivery, shall raise the presumption of a 'wagering' contract. Whether the reason is good and sound for making the purchase of commodities upon 'margin' *prima facie* evidence of a 'wagering' contract, under a certain state of facts, and providing that upon a different state of facts such purchase upon 'margin' does not constitute *prima facie* evidence of a 'wagering' contract, is a matter for the Legislature." But this but emphasizes the correctness of my position, that no such decision was made in that case, when we connect the two quotations and consider them together. It was evidently in the minds of the *Chief Justice* and the other members of the Court, at the time, that such manufacturers and dealers could buy cotton and other commodities *"on margin,"* if done *bona fide* and not for the mere purpose of speculation, but for the legitimate purpose of preventing losses in their business by sudden and violent fluctuations of prices in the market. It is said in the *McGinnis case,* as we have seen, that they may purchase commodities used and required in the ordinary course of their business, "for future delivery *on a margin.*"

It is thus conceded that the mere fact that such a dealer buys *"on a margin"* does not make the transaction unlawful under the statute, but

is clearly authorized. The statute covers the whole subject and provides a general scheme of legislation to prevent the vicious practice of dealing, for the purpose of speculation, in "futures," which have a well-known and definite meaning, being regarded by the law as a cover for gambling, and therefore denounced by it as illegal. Such purchases and sales by manufacturers and wholesale dealers or merchants, being lawful, the Legislature, by section 1689, which declared "future contracts" unlawful, excepted such manufacturers and dealers as we have described from the operation of that section, which means, of course, that as to them the purchase of commodities used in their business, "on (396) margins," should be lawful, or, expressing it negatively, should not be unlawful. The exception is in section 1689 and not in the two sections 1690 and 1691, which relate to the *prima facie* case and the burden of proof.

I understood, at the time they were decided, that *McGinnis's case* and *Clayton's case* were in accord with this view, and I believe that they were intended to be; but if they are not, or were not so intended to be, I cannot longer give my assent to them.

The defendants in those two cases were indicted for conducting and maintaining bucket shops, which was plainly unlawful. They were not manufacturers or merchants, in the sense of those terms as used in the statute, and the question now presented was not necessarily involved in those decisions, although the Court, I think, recognized the law to be as I now contend it is.

Alex. Sprunt & Sons are engaged in a perfectly legitimate business, that of buying spot cotton for export, and are not dealing in what are known as "futures" for the purpose of speculation. They are wholesale dealers in the cotton itself, and buy it for resale or to fill orders, and in no view are they gambling in the article. When they buy "on a margin," it is merely for the purpose of protecting themselves against losses which may arise from the rise or fall in prices in the cotton market, and only to that extent; and this is precisely what they are authorized to do by the last provision in Revisal, sec. 1689.

But it is said that the exception to be found at the end of that section (1689) should be bodily taken therefrom and transferred to sections 1690 and 1691, which relate to the burden of proof, and the *prima facie* case made against the plaintiff by the plea of the defendant that the contract sued on is illegal, it being a gambling contract, for the purchase or sale of cotton "on margins," to be settled merely by paying the difference in the price of the commodity at a given time, which is determined by the rise or fall of the price in the market, and, therefore, purely speculative.

(397) We are permitted to construe statutes *in pari materia* together and to transfer terms, if necessary, to ascertain the legislative intention; but we are not authorized to take an important exception from one section of the Revisal, withdrawing thereby its qualification of the broad and general provisions of the enactment, and transfer it to another section relating to a different branch of the law. It will be seen at once that this is not ascertaining, but changing, the legislative meaning; besides, the Laws of 1905, ch. 538, sec. 1, not only refers to transactions therein forbidden, such as bucket shops, but is expressly made applicable to the act of 1889, ch. 221, and to *every* section thereof, and by section 7 of the act of 1905 it is explicitly provided that it shall not apply to commodities bought and sold by wholesale dealers in their business. It was unnecessary to enact such a provision unless reference was had to purchases and sales "on margins," for those otherwise made, or in a legitimate manner, were clearly not within the prohibitory terms of the statute. The codifiers inserted the exception at the proper place, not only because the act of 1905 made it applicable to that section by plain and direct words, but also because if a purchase or sale on margins by such a dealer was not unlawful under that section, the sections as to the burden of proof and the *prima facie* case could have no bearing upon the transaction, it being a lawful one. They relate only to gambling contracts. But there is another fact to be taken into account. The Legislature, when it enacted the Revisal of 1905, placed the exception at the end of section 1689, at the very session of that body when the proviso or exception was first adopted, and the Revisal was passed in this form, with a provision repealing all public and general statutes not contained in the Revisal, with certain limitations not pertinent to this question. The Revisal took effect 1 August, 1905, and became the law of the State from that date, in form and substance as adopted. Revisal, secs. 5453, 5463. The last cited section is in these words: "All the provisions, chapters, subchapters, and sections contained in this Revisal shall be in force from and after 1 August, 1905."

It is suggested that, as section 1689 of the Revisal does not apply to the plaintiff, who is a wholesale dealer in cotton, by reason of the exception at the end of that section, the common law is in force as (398) to him, and the burden, instead of being upon the plaintiff to show, apart from the writing, that the contract is a lawful one, where illegality of the contract is pleaded as a defense, is upon the defendant to show, as he was required to do at common law, that it was illegal. But the glaring fallacy of this position is seen in the well-recognized and established rule by which we construe all statutes. It

is conceded by all writers upon the subject, and by all the judges who have considered it, to be a rule of universal application, and it is thus stated by them:

"1. The common law, of course, gives way to the statute which is inconsistent with it. 2. When a statute is designed to be a revision, consolidation, or codification of the whole body of the law, applicable to a given subject, it supersedes and supplants the common law, so far as it applies to the subject, and leaves no part of it in force." Black's Inter. of Law, p. 236; *Hannon v. Madden,* 10 Bush., 664; *Kramer v. Rebman,* 9 Iowa, 114; *Com. v. Cooley,* 10 Pick., 37; *S. v. Witson,* 43 N. H., 415.

The courts whose reports I have cited are of very high repute, and could not well go astray upon such a simple proposition. The theory and practical operation of this rule are so well explained and clearly illustrated by the Supreme Court of Alabama, in *Barker v. Bell,* 46 Ala., 216, that no room is left for doubt that our statute (Revisal, sec. 1689) takes the place of the common law, and is the one and only rule upon the subject with which it deals. That Court, which is held in high esteem by all courts for its juridical learning and ability, said in the case just cited: The Revisal "is intended to contain all the statute laws of the State of a public nature, designed to operate upon all the people of the State, up to the date of its adoption, unless otherwise directed in the Code. This law is not merely cumulative of the common law, and made to perfect the deficiencies of that system, but it is designed to create a new and independent system, applicable to our own institutions and government. In such case, where a statute disposes of the whole subject of legislation, it is the only law. Otherwise, we shall have (399) two systems, where one only was intended to operate, and the statute becomes the law only so far as a party may choose to follow it. Besides, the mere fact that a statute is made shows that, so far as it goes, the Legislature intended to displace the old rule by the new one. On some questions the common law conflicts more or less with our constitutional law, and is necessarily displaced and repealed by it; and in others it has, by the lapse of ages, and by mistakes inevitably attendant on all human affairs, become uncertain and difficult to reconcile with the principles of justice. Hence the Legislature intervenes to remove such difficulties, uncertainties, and mistakes by a new law. This new law, to the extent that it goes, necessarily takes the place of all others. It would be illogical to contend that the old rule must stand, as well as the new one, because this would not remedy the evil sought to be removed and avoided."

Even if the statute introduces a new rule, it repeals immemorial custom and the common law, provided the enactment introduces a new

principle or rule sufficient in itself. Black, p. 236; *Delaplane v. Crenshaw,* 15 Grattan, 457. So we see it is not necessary that a statute should be in direct conflict with the common law in order to repeal it, but it is quite sufficient if the statute introduces into the law a new principle and a new rule sufficient of itself to create or answer for a full provision upon the subject. The Revisal, sec. 1689, is of this character, and it takes the place of the common law as much so as if there had been an express clause of repeal of that law in it. The exception, therefore, applies to the law as declared in that section, and there is no common law upon the subject left to operate, it having been repealed, and the statute furnishes the only rule.

After careful deliberation, my conclusion is that the charge of the court was correct, regardless of what occurred between the defendant, C. C. May, and the plaintiff's agent, F. Brock. His Honor appears to have entertained the same views as those herein expressed, and for that reason instructed the jury as he did.

I concur with the majority of the Court in the construction
(400) placed upon section 1689 of the Revisal, so far as it relates to the real agreement of the parties. If it is agreed or understood by both parties that there need not be an actual delivery of the cotton, but that the contract may be settled by either one of them by paying the difference in the price, and the transaction is not within the exception, it is void by the terms of the statute; but the undisclosed or unexpressed intention of one of the parties is not sufficient to invalidate it, as a contract is the agreement of both parties, and not merely the intention of one. "A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree." *Prince v. McRae,* 84 N. C., 675. See, also, *Brunhild v. Freeman,* 77 N. C., 128; *Pendleton v. Jones,* 82 N. C., 249; *Bailey v. Rutjes,* 86 N. C., 517. Besides, Revisal, sec. 1689, declares that the contract shall be void, notwithstanding the terms stated therein, if it was not intended, *by the parties thereto,* that the articles or thing so in form agreed to be sold and delivered should be actually delivered or the value thereof paid, but that it should be settled by paying the difference in the market price, according as the same may be greater or less at the time and place fixed for the performance of the contract. It will be seen that it is the unlawful intention in the understanding of *both* parties, and not merely the secret purpose of one of them, that renders the contract invalid.

Cited: *Rodgers v. Bell, ante,* 378; *Rodgers v. Brock, post,* 402; *Bank v. Justice,* 157 N. C., 375; *Whitlock v. Alexander,* 160 N. C., 483; *School Trustees v. Board of Education,* 166 N. C., 466; *McCracken v. R. R.,* 168 N. C., 67.

RODGERS, McCABE & CO. v. FURNEY BROCK.

(Filed 9 November, 1911.)

Contracts—Cotton—Future Delivery—Wagering—Evidence—Questions for Jury.

A contract for the delivery of a certain amount of lint cotton at a certain place and before a specified time is sufficiently specific to enforce delivery, and though its breach sounds in damages, and equity may not enforce specific performance, it does not necessarily stamp the contract as a gambling one, nor does it necessarily do so because the damages provided in the instrument for its breach differs somewhat from the rule of law otherwise applicable. *Rodgers v. Bell, ante,* 378; *Sprunt v. May, ante,* 388, cited as applicable and controlling.

APPEAL from *Ward, J.,* at April Term, 1911, of EDGECOMBE. (401)

Action to recover damages for a breach of contract in failing to deliver 75,000 pounds of lint cotton as per written contract, which provided, "That in event party of the second part shall fail to deliver said cotton or any part thereof, according to this contract, then the party of the first part shall be entitled to recover at law, and shall recover damages for such failure from the parties of the second part, his executors or assigns. The measure of damages for such failure, or part thereof, shall be calculated at the highest price in the above-mentioned market on any day between 1 September, 1909, and 1 December, 1909, with interest on such amount from 1 December, at 6 per cent."

The court at the close of the testimony stated it would charge the jury, if they believed all the evidence and should find all the facts to be as testified, there could be no recovery, and they should answer issues in favor of defendant; upon which plaintiff excepted and submitted to nonsuit and appealed.

H. A. Gilliam and F. S. Spruill for plaintiff.

Aycock & Winston, Thomas D. Warren, and P. M. Pearsall for defendant.

BROWN, J. The first contention of the defendant is that the contract is a gambling one on its face, for these reasons:

(1) No cotton is specified so as to enforce delivery.

(402) (2) Delivery cannot be compelled, as contract provides for a settlement on an artificial price of cotton.

(3) Measure of damage provided is arbitrary and not such as the law provides.

The contract calls for delivery of 75,000 pounds lint cotton at Trenton on or before 1 January, 1910. This is sufficiently specific.

It is true that specific performance of a contract to deliver cotton will not generally be enforced by a court of equity, because the failure to deliver the cotton may be compensated in damages. That does not necessarily stamp a contract as a gambling one.

That the measure of damages provided in the instrument for a breach of the contract differs somewhat from the rule of the law does not of itself conclusively indicate that it is a gambling contract on its face. This is decided in *Harvey v. Pettaway, ante,* 375.

While there is evidence in this case tending to prove that the contract sued on is a gambling contract, we think there are phases of the evidence to the contrary.

The principles of law governing cases of this character are fully discussed and settled in the opinions of this Court at this term by *Mr. Justice Hoke* in *Rodgers v. Bell, ante,* 378; *Sprunt v. May, ante,* 388.

The case should be submitted to the jury upon the issues raised by the pleadings under appropriate instructions.

New trial.

TOWN OF MURPHY v. C. A. WEBB & CO.

(Filed 25 October, 1911.)

1. Cities and Towns—Bond Issues—Taxation—Sewerage and Water System—Necessaries.

Bonds issued by a town for the purpose of extending its water and sewerage system and for making certain necessary street improvements are necessary expenses.

2. Cities and Towns—Bond Issues—Taxation—Necessary Expenses—Legislative Restrictions—Constitutional Law.

The Legislature may restrict or limit the power of incorporated towns or cities to tax or contract debts for purposes which fall within the class of necessary expenses, for they are but the State's instrumentalities for the administration of local government; and when this restriction is thus

placed upon them, or it is required of them to submit the question of a bond issue to popular vote, and an issue of bonds is made without compliance therewith, the issue is invalid. Constitution, Art. VII, sec. 4.

3. Interpretation of Statutes—Repealing Acts—Subject-matter—Identification.

A legislative act upon a subject-matter which by express terms repeals a section of a specified chapter of the laws of a certain year, referring to the Public Laws, will be construed as repealing the corresponding section of that numbered chapter of the Private Laws of that year, when the subject-matter is the same and the Public Laws referred to have no bearing upon or relevancy to the subject to which the repealing statute refers.

4. Same—Bond Issue—Taxation—Necessaries—Restrictions Repealed.

Chapter 239 of the Private Laws of 1889 is the charter of the town of Murphy, and section 17 thereof requires that, to levy a tax or issue bonds for certain necessary expenses, the question should first be submitted to a popular vote. Chapter 387, sec. 2, Private Laws of 1911, refers to the same subject-matter and repeals section 17 of the Public Laws of 1889, which has no bearing upon or relevancy to the same subject-matter: *Held*, the reference to the Public Laws was evidently a clerical error, and the Laws of 1911 are construed to repeal section 17 of the Private Laws of 1889, ch. 239, sec. 17, so as to take away the legislative restrictions therein imposed.

5. Municipal Bonds—Laws 1911, Chapter 86.

The Laws of 1911, chapter 86, has no application to cities and towns having special provisions authorizing issuing of bonds for construction of sewerage and waterworks, as is the case with the town of Murphy.

APPEAL from CHEROKEE, heard by *Webb, J.*, upon case agreed, (403) at chambers in Murphy, 16 September, 1911.

This case was brought to test the validity of certain bonds issued by the plaintiff for the purpose of extending or enlarging its water and sewerage system and of making street improvements, and was heard in the court below upon the following case agreed: (404)

1. The plaintiff is a municipal corporation, chartered by the name aforesaid and organized under and by virtue of chapter 239, Private Laws 1889, and the acts amendatory thereof, and especially chapter 387, Private Laws 1911.

2. On 31 August, A. D. 1911, the plaintiff contracted with the defendants to sell to them certain bonds of the town of Murphy, of the par value of $25,000, which are to draw interest at the rate of 6 per cent, and to run for a period of thirty years, the proceeds of which are to be used for extending the water and sewerage system of the town of Murphy and for making certain necessary street improvements.

3. The plaintiff claims that it has the right to issue the bonds under and by virtue of its charter, to wit, chapter 239 of the Private Laws of

1889, as amended by chapter 387, Private Laws 1911, and of a resolution which was adopted by the board of commissioners of said town on 6 September, 1911, and that no vote of the people is required.

4. The defendants have refused to carry out said contract, by receiving and paying for the said bonds, for the reason that section 17 of said chapter 239 of the Private Laws of 1889 does not permit the said town to borrow money or issue bonds unless authorized by the qualified voters of said town.

5. The plaintiff claims that section 2 of said chapter 387 of the Private Laws of 1911 repeals said section 17 and permits and authorizes the town to issue the bonds without submitting the question of their issue to a vote of the qualified voters of the town. The defendants contend that said chapter 387, Private Laws 1911, does not repeal said section 17.

6. It is also agreed that chapter 239, Private Laws 1889, is the charter of the town of Murphy, and that chapter 239, Public Laws 1889, is "An act to incorporate the Fayetteville and Albemarle Railroad Company."

7. It is agreed between the plaintiff and the defendants that the Superior and the Supreme Courts be requested to pass upon the ques-
(405) tion herein raised, and that judgment be entered according to the final decision which may be given, and, if the court is of the opinion that the bonds are valid, that the defendants be required to receive and pay for the bonds; but if the court is of the opinion that the bonds are invalid, then the defendants shall not be required to pay for said bonds.

The court, after hearing argument and upon consideration of the facts, rendered judgment for the plaintiff, and the defendants appealed.

E. B. Norvell for plaintiff.
Charles A. Webb for defendant.

WALKER, J., after stating the case: It is thoroughly well settled by our own decisions that, for the necessary expenses of a county or town, bonds may be issued without a vote of the people authorizing the same, and the purposes for which the bonds in question were issued fall within the class of necessary expenses. *Fawcett v. Mount Airy,* 134 N. C., 125; *Wadsworth v. Concord,* 133 N. C., 587; *Robinson v. Goldsboro,* 135 N. C., 382; *Comrs v. Webb,* 148 N. C., 122; *Bradshaw v. High Point,* 151 N. C., 517; *Ellison v. Williamston,* 152 N. C., 147. But while this power which resides in the mnuicipal body is not restricted by the Constitution, it was provided by that instrument, with reference thereto,

as follows: "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations." Const., Art. VIII, sec. 4. It has, therefore, been held by this Court that the Legislature may require a favorable popular vote, as preliminary to the valid issue of municipal bonds, even for necessary expenses, and may otherwise restrict or limit the power of cities and incorporated villages (or towns) to tax or contract debts, either directly or indirectly; and when the Legislature has exercised the power thus conferred upon it, the local authorities must heed its mandate and proceed accordingly. *Evans v. Comrs.*, 89 N. C., 154, *Wadsworth v. Concord, supra; Robinson v. Goldsboro, supra; Perry v. Comrs.*, 148 N. C., 521; *Burgin v. Smith*, 151 N. C., 566; (406) *Jones v. New Bern*, 152 N. C., 64; *Ellison v. Williamston, supra.* For this reason we held in *Wharton v. Greensboro*, 146 N. C., 356, that Laws 1889, ch. 486 (Revisal, sec. 2977), was a constitutional enactment, and that under it, where other provision had not been made by subsequent legislation, no city or town could contract a debt, pledge its faith, or loan its credit, for the maintenance of internal improvements, or for any special purpose whatsoever, to an extent exceeding in the aggregate 10 per cent of the assessed value of the real and personal property situated therein; and that any levy of taxes above that limit would be null and void.

While in respect to cities and towns it is said that the power of the Legislature to control them, in the exercise of their municipal powers, is somewhat more restricted than in the case of counties, yet both are but instrumentalities of the State, for the administration of local government, and their authority as such may be enlarged, abridged, or withdrawn entirely at the will or pleasure of the Legislature. *Lily v. Taylor*, 88 N. C., 490; *Jones v. Comrs.*, 137 N .C., 592; *Wharton v. Comrs.*, 146 N. C., 356; *Burgin v. Smith*, 151 N. C., 562.

Whether these provisions of law to be found in the Constitution and statutes, and as construed by this Court, are in accordance with a sound and wise public policy, and whether some additional curb should not be placed upon the power vested in municipalities to tax so as to prevent the present tendency towards extravagance and the other evils in the administration of their affairs, is a matter which is assigned, under our form of government, to the good sense and wisdom of the Legislature. We must apply the law as we find it to be, not as we think it should be.

Having stated these general principles, it must be admitted, in consideration thereof, that the plaintiff in this case, the town of Murphy, had

the power to issue the bonds for the purpose of making the improvements described in the resolution of its board of commissioners, without
(407) any vote of the people therein, unless restrained by some act of the Legislature from so doing.

It is conceded that by Private Laws 1889, ch. 239, sec. 17, such a restraint was imposed, and that if that section is still in force the bonds cannot be lawfully issued without the sanction of the people, to be signified at the polls by a majority vote of the qualified registered voters of the town. But it is contended that section 17 of that act was repealed by Private Laws of 1911, ch. 387, sec. 2. The latter section provides for the repeal of section 17 of chapter 239 of the *Public* Laws of 1889, whereas that chapter incorporates the Fayetteville and Albemarle Railroad Company, and makes no reference whatsoever to the town of Murphy or to its corporate affairs. The original charter of the town of Murphy is chapter 239 of the *Private* Laws of 1889, and section 17 thereof is the one which relates to the power of the town to create a public debt, and places a restriction upon that power by requiring the approval of the people at the polls before any such debt is contracted. Section 1, chapter 387, Private Laws of 1911, amends section 1, chapter 239, Private Laws of 1889, the two sections referring to the same subject-matter, viz., the territorial limits of the town, the later act extending the same. A bare statement of the facts is sufficient to convince any reasonable mind that a clerical mistake was committed in referring to section 17, chapter 239, Laws 1889, as being a part of the Public Laws of that year, it being manifest that the Private Laws were intended, as the two acts relate to the town of Murphy, and chapter 239 of the Public Laws 1889 to the incorporation of a railroad company in another part of the State. The very question presented here was discussed and decided in *Fortune v. Comrs.*, 140 N. C., 322, wherein we said: "One difficulty in construing the act, and an insuperable obstacle, as the plaintiff's counsel contend, in the way of enforcing the provision which we have quoted, is that there is no reference therein to any particular chapter of the Laws 1905. It is argued that this is a patent ambiguity which defeats the operation of that clause. 'A mis-description or misnomer in a statute will not vitiate the enact-
(408) ment or render it inoperative, provided the means of identifying the person or thing intended, apart from the erroneous description, are clear, certain, and convincing.' Black Int. of Laws, sec. 58. Under this rule, we may call to our aid anything in the act itself or even in the alleged erroneous description, which sufficiently points to something else as furnishing certain evidence of what was meant, though the reference to the extraneous matter may not in itself be full and accurate. The rule, even when literally or strictly construed, does not

require that the erroneous description shall be altogether rejected in making the search for the true meaning; but it may be used in connection with anything outside of the statute to which it refers and which itself, when examined, makes the meaning clear. The erroneous description may in this way be helped out by extraneous evidence. Black, *supra,* sec. 38. But ours is not so much an erroneous as an inaccurate description, and the question is whether its words are adequate to express with sufficient certainty the intention of the Legislature. It has been held that if a later act expressly refers to a designated section of an earlier one, to which it can have no application, but there is another section of the prior act to which, and to which alone, in view of the subject-matter, the later act can properly refer, it will be read according to the manifest purpose of the Legislature, and the misdescription will not prevent the reasonable construction that the Legislature intended to refer to the latter section. *School Directors v. School Directors,* 73 Ill., 249; *Plank Road Co. v. Reynolds,* 3 Wis., 258; Black, *supra,* sec. 28." That decision clearly covers this case in principle, and it has been approved in the following cases: *Comrs. v. Stedman,* 141 N. C. 448; *McLeod v. Comrs.,* 148 N. C., 77; *Pullen v. Corporation Commission,* 152 N. C., 548. As said in the *Fortune case,* "We have no doubt as to the intention, and conclude that the mere designation of the section was sufficient, under the circumstances, for us to identify with certainty the chapter and section to which the reference was made." We may add thereto, so as to emphasize the striking similarity between the two cases, that the reference in this case by chapter and section, (409) corresponding as it does with the only chapter and section of the Laws of 1889, public or private, that relate to the subject-matter, is fully sufficient to show the purpose of the Legislature, and the word "Public," in reference, may be treated as a misprison of the draftsman or copyist, and the error should not be allowed to defeat the otherwise plainly and accurately expressed will of that body. The case of *Improvement Co. v. Comrs.,* 146 N. C., 353, is also directly in point. There Washington County was inserted in the House Journal for Robeson County, in recording the passage of the bill in that body; but the number of the bill corresponded with the number of a bill to authorize the issue of bonds by Robeson County. This and other "pointers" and "earmarks" were held sufficient to show that Robeson County was intended instead of Washington County in the House record, the reference in the latter to Washington County being manifestly a mere clerical error, which was held insufficient to defeat the plain legislative purpose.

Since this opinion was prepared, our attention has been called to an act of the Legislature entitled "An act to amend ch. 73, sec. 2916, of the

Revisal, concerning towns, so as to confer upon cities, towns, and municipalities power to coustruct and maintain waterworks, sewerage systems, and other public utilities," being chapter 86 of the Public Laws of 1911. This act is not mentioned in the case agreed, nor is there any reference to it in the brief of counsel, and it seems to have been overlooked; but we are now asked to consider it and determine whether it has any application to the facts of this case. This is a most reasonable request of counsel, as it is important that the validity of the bonds in question should be free from all doubt or uncertainty.

We do not think, after a careful reading of the statute, that it was intended to affect bonds issued by the town of Murphy, under its charter and the amendments thereto. If the general act of 1911 applies to any municipality which has special provisions upon the same subject—and this we are not now required to decide—it does not apply to this
(410) case, as we have virtually held at this term, in *Hotel Co. v. Red Springs,* 157 N. C., 137, since the statute was called to our notice. If it did not apply to that case, it certainly does not to this one. There the amendment to the charter of the town was passed at the session of 1911, a few days before the general law was enacted, while in this case the charter was amended, so as to authorize the issue of bonds without a vote of the people, two days after the general act was ratified, showing very clearly that the said act was not intended to apply to the town of Murphy. Besides, the act of 1911 is an amendment of chapter 73 of the Revisal and section 2916 thereof. It is provided by section 2918 as follows: "This chapter shall apply to all incorporated cities and towns where the same shall not be inconsistent with special acts of incorporation or special laws in reference thereto." This section shows that this case is not affected by the act of 1911, for the issuing of the bonds without an election is specially provided for in the amended charter of the town.

We find no error in the case or record, and therefore affirm the judgment.

Affirmed.

Cited: Warsaw v. Malone, 159 N. C., 574; *Ipock v. Gaskins,* 161 N. C., 673; *Bain v. Goldsboro,* 164 N. C., 104; *Burwell v. Lillington,* 171 N. C., 96; *Toomey v. Lumber Co , ib.,* 182; *Bramham v. Durham, ib.,* 182.

WILLIAM JONES, EXECUTOR, v. MRS. FANNIE HUNTLEY ET AL.

(Filed 25 October, 1911.)

1. Wills—Intent—Debts — Order of Payment — Personal Property — Charge Upon Realty—Executors and Administrators.

While, ordinarily, personal property must first be exhausted by the personal representatives of the deceased before resorting to the sale of real property for the payment of the debts of the deceased, it is within the power of a testator to say what property shall be first liable and in what order; and it clearly appearing from the will that it was the intent of the deceased that his interests in realty should be liable for his debts, rather than a specific bequest of personalty, this intent will be carried out.

2. Same—Specific Legacy.

A specific bequest to M. by item 1 of a will, "My insurance policy of $1,000 in" a certain named company, giving its date, with the "will and desire that she shall have all the benefits accruing thereunder in the event" of the testator's death; which by item 2 provides that the burial expenses be paid out of any other property, after which the balance of the personal property and real estate shall be divided among the heirs as the law may direct: *Held*, the intent of the testator was that all his debts be paid from the property embraced in the second item, extending to an ownership of an interest in remainder (Revisal, sec. 3140), in exoneration of the specific bequest contained in item 1.

APPEAL by defendants from *Justice, J.*, at June Term, 1911, (411) of ANSON.

This was a petition to sell land to make assets, filed by the executor of Elijah D. Huntley against his heirs at law. The sole question presented was the construction of the will as set out upon the following facts agreed:

"Elijah D. Huntley died on 13 December, 1902, leaving a will, two of the items of which are as follows:

"First. I hereby give and bequeath to Miss Hattie Hasty, of the said county and State, my insurance policy of one thousand dollars ($1,000) in the Phœnix Mutual Life Insurance Company of Hartford, Conn., bearing date 17 November, 1902; and it is my will and desire that she, the said Miss Hattie Hasty, shall have all the benefits accuring thereunder, in the event of my death.

"Second, I desire that my debts (if any) and burial expenses be paid out of any other property of which I die possessed, after which the balance of my personal property and real estate shall be divided between my legal heirs as the law may direct."

The plaintiff qualified as his executor. The testator did not at his death have sufficient personal property other than the insurance policy

referred to in item 1, to pay the debts and burial expenses. The plaintiff used $400 of the proceeds of the insurance for the payment of debts.

The testator at the time of his death was the owner of an interest in the remainder in some lands in Anson County. The plaintiff (412) brought this action to sell these lands for the purpose of reimbursing the legatee for the amount of the policy which had been used for the payment of debts.

From the judgment the defendants appealed.

Russell & Weatherspoon and McLendon & Thomas for plaintiff.
Lockhart & Dunlap for defendants.

CLARK, C. J. The judgment of his Honor was correct, and so fully states his reasons that we reproduce it as the opinion of this Court.

"The court is of the opinion, and so adjudges, that the said policy of insurance, or proceeds thereof, is and was intended by the testator to be an absolute, specific legacy; and the land mentioned in the second clause not being specifically devised, and the intention of testator appearing in the will that the property so mentioned in item 2 should be subject to the payment of debts in exoneration of the said policy, it is ordered and adjudged that if it shall be found that there is not sufficient personal property, other than the proceeds of the policy, to pay the debts of the testator, that the plaintiff as executor have license to sell the land to pay the debts, and that the policy, or the proceeds of the same, shall not be liable until all the property, real and personal, mentioned or referred to in the second clause of the will be exhausted."

Ordinarily, the personalty must first be exhausted before recourse can be had for the payment of debts to the realty. But the testator can change this order. The prime consideration in the construction of a will is the intent. As to that there can be no doubt upon the face of the will. The testator intended that the property in item 2 of the will should be charged with the payment of debts and burial expenses in exoneration of the property mentioned in item 1. By item 1 the testator bequeathed, not "$1,000," but his "insurance policy of $1,000," using the words one thousand dollars as descriptive of the policy. His intention to make the policy a specific bequest is further manifested by his description of it, giving the name and location of the company, (413) the amount, the date. The further words, that "the said Miss Hattie Hasty shall have all the benefits accruing thereunder in the event of my death," show clearly that he intended it should be specifically exonerated from the payment of debts. This intent he further indicates by providing in section 2 that his debts and burial expenses

should "be paid out of any other property of which I shall die possessed." He further adds to this by saying "after which" the balance of his personal and real property should be divided between his legal heirs as the law may direct.

The words "other property of which I shall die possessed, after which the balance of my personal property and real estate shall be divided, etc.," include the ownership of an interest in remainder of lands. Revisal, 3140.

The intent of the will seems to us so plain that no citation of authorities could throw any additional light upon its construction. The judgment of his Honor is in all respects

Affirmed.

HENRY T. FIELDS v. THOMAS M. BYNUM.

(Filed 25 October, 1911.)

1. Issues Sufficient—Slander—Issues Approved.

When under the issues submitted the defendant has had opportunity to present evidence of any defense he has set up in his answer and has not been otherwise prejudiced, there is no reversible error. The issues in this action for slander approved.

2. Slander—Privileged Utterances — Interest — Justification — Good Faith—Manner.

To justify words alleged to have been slanderously spoken, and to bring himself within the protection which attaches to communications made in the fulfillment of a duty, the defendant must show something more than an honest belief in the truth of his utterances, for he must show that the communication was made in good faith on an occasion which justified his making it; and the manner in which it is uttered may take them out of the privilege.

3. Same—Presence of Others—Accusations.

When in an action for slander the defendant seeks to avoid civil liability upon the ground that the occasion was a privileged one, and it appears that the defendant sought the plaintiff and in the presence of other persons accused him of burning a certain mill in the operation of which the defendant had a certain interest, and charged him with burning another mill on same place previously, also saying to the plaintiff that his neighbors believed that he burned it, the communication cannot be said to have been fairly and impartially made on a proper occasion, in a proper manner, which is necessary for the defendant to establish in order to make his plea available.

4. Slander—Pleadings—General Damages—Measure.

When general damages are sought in an action of slander for words spoken which are actionable *per se*, compensatory damages may be awarded which embrace compensation for those injuries which the law will presume must naturally, proximately, and necessarily result, including injury to the feelings and mental suffering endured in consequence; and it is not incumbent on the plaintiff to introduce evidence that he has suffered special damage in such instances.

5. Same—Malice—Intent—Punitive Damages.

When there is evidence tending to show slander actionable *per se*, as appears from the facts in this case, and general damage is alleged, it is also competent for the jury to award punitive damages in their discretion, if they are satisfied by the greater weight of the evidence that the utterances were made from personal malice, with the design or purpose to injure the plaintiff, in a wanton or reckless disregard of his rights.

(414) APPEAL from *O. H. Allen, J.*, at February Term, 1911, of CHATHAM.

Action for slander. These issues were submitted to the jury:

1. Did the defendant speak to the plaintiff, in the presence and hearing of Willie J. Bright and others, the words set out in paragraph 3 of the complaint, or words of the same substance? Answer: Yes.

2. Did the defendant speak to the plaintiff, in the presence and hearing of Willie J. Bright and others, the words set out in paragraph 4 of the complaint, or words of the same substance and meaning? Answer: Yes.

(415) 3. What damage, if any, is plaintiff entitled to recover? Answer: $500.

From the judgment rendered, the defendant appealed.

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

H. A. London & Son for plaintiff.

W. P. Bynum, Hayes & Bynum, and Robert C. Strudwick for defendant.

BROWN, J. 1. The defendant excepted to the issues and tendered two others. Those submitted have been practically approved by this Court in several cases. *McCurry v. McCurry,* 82 N. C., 296; *Wozelka v. Heltrick,* 93 N. C., 10; *Rice v. McAdams,* 149 N. C., 29.

Under the issues submitted the defendant had opportunity to present evidence of any defense set up in his answer. *Deaver v. Deaver,* 137 N. C., 246.

2. The defendant contends that the occasion when the words were uttered was a privileged one exempting him from civil liability for their

utterance. Defendant tendered certain prayers for instruction presenting that view, which were refused.

We are of opinion that the occasion was not privileged and that the prayers were properly refused.

The contention of the defendant is that he had a direct personal interest in the burning of the mill, although it belonged to Buie, as he was engaged in sawing defendant's timber with it, and another mill had been burned on the same site the June previous; that he sought the plaintiff in good faith to ascertain who burned the mill and in the discharge of a private duty in the prosecution of his own interests.

We do not differ with the learned counsel as to the law, but only in its application to the facts of this case. The plaintiff's version of the facts is that the defendant came to his residence and called him out, saying: "'You burnt the mill up last night.' I told him I did not. Jim Campbell, Norflus Barber, and Willie Bright were present. Defendant said he would blow my brains out if I opened my mouth; said I was the man that burnt it in June, 'and I know you did it.' I did not burn either mill." Several witnesses testified to plain- (416) tiff's good character. There was no evidence that his character was bad.

Defendant testifies: "I then asked him (the plaintiff) about trying to deed the timber to other parties after he had sold it to me; that I believed he had burned the mill, and that his neighbors believed it. I never charged him with burning the mill only as above stated."

In order to bring himself within the protection which attaches to communications made in the fulfillment of a duty, the defendant must show something more than an honest belief in the truth of his utterance. He must show that what he said was a communication made in a sense of duty with the *bona fide* purpose of ascertaining the origin of the fire, and that it was made on an occasion which justified the making of it. *Dawkins v. Lord Paulet,* L. R. 5 Q. B., 102; Newell on Slander, p. 477.

Then, again, where the expressions employed are allowable in all respects, the manner in which they are made public may take them out of the privilege.

In the case of spoken words the defendant must be careful in whose presence he speaks. While the accidental presence of a third person will always take the case out of the privilege, it is otherwise if the defendant purposely selects an occasion where a number of persons are present. Odgers on Libel and Slander, 199.

It is generally held that answers to questions put by the plaintiff himself will in general be priviledged, although made in the presence of

third persons. *Palmer v. Hammerstone,* 1 Cab. and El., 36; *Billings v. Fairbanks,* 139 Mass., 66. But even in reply to plaintiff's questions, the defendant is not protected by privilege if he repeats in presence of third persons charges of a slanderous character which he has previously made. *Griffiths v. Lewis,* 53 E. C. L., 61; *Sanborn v. Fickett,* 91 Me., 346; 18 A. & E., 1032.

Assuming the communication to have been made in manner and form as testified by the plaintiff, it is manifestly not privileged. And
(417) we think, taking the defendant's version of the occurrence, it was not a privileged occasion.

The response was not elicited in reply to questions asked by plaintiff; nor is the inference justified that the defendant sought the plaintiff for the sole purpose of ascertaining the orgin of the fire. Defendant put no questions to the plaintiff and asked for no information. According to defendant's own testimony, he did not ask plaintiff if he burned the mill, but at once charged plaintiff with attempting to sell timber which he had already sold plaintiff, and then substantially charged him with burning the mill. "I believe you burned the mill, and your neighbors believe it." "You know you burned the mill," etc. These are words of accusation and not those which should be used in an inquiry intended only to elicit the truth.

The defendant did not seek the plaintiff in privacy and demand to know what plaintiff had to say concerning the burning of the mill, but made the accusation openly in the presence of three persons.

"Confidential communications," says Mr. Newell, "must not be shouted across the street for all passers-by to hear." "He should choose a time when no one else is by except those to whom it is his duty to make the statement." Page 477.

From all the evidence it cannot be inferred that the communication was fairly and impartially made on a proper occasion, in a proper manner, and without other defamatory matter. These are essentials to a privileged communication, especially where the matter communicated charges, as in this case, a felony. Newell, p. 477.

The cases strongly relied on by the learned counsel for the defendant are *Aycock v. Marsh,* 30 N. C., 360, and *Brown v. Hathaway,* 95 Mass., 239. In the former the communication was in private and was in the strictest sense privileged, made, as held by the Court, in the performance of a high moral duty. In the latter the communication was made in the house of the plaintiff and *in reply to inquiries* put by plaintiff in presence of a police officer who accompanied the defendant for the purpose of searching the house for stolen goods.

The Supreme Court of Massachusetts held that the circum-
(418) stances surrounding it made the communication privileged.

3. Upon the issue of damage the defendant contended that there is no evidence upon which damage can be awarded, and further requested the court to charge: "It is incumbent on the plaintiff to show to the jury evidence that he has suffered damage before he can ask you to award any to him."

His Honor refused to give the instruction, and the defendant excepted. The plaintiff asked for general damages and pleaded no special damages. General damages include actual or compensatory damages, and embrace compensation for those injuries which the law will presume must naturally, proximately, and necessarily result from the utterance of words which are actionable *per se,* such as the charge made in this case. Such damages include injury to the feelings and mental suffering endured in consequence. General damages need not be pleaded or proved. 18 A. & E. 1081, 1082, 1083, and cases cited in notes.

General damages are sometimes called substantial damages, and are based upon the theory that it is competent for the jury to award, where the words are actionable *per se,* a figure which will fairly compensate the plaintiff for the injury sustained. Newell, p. 841. The right to recover compensatory damage is in no way dependent on the existence of malice upon the part of the defendant. 18 A. & E. Enc., p. 1089. General damages also include punitive damages, which a jury in proper cases may exercise their discretion in awarding. His Honor charged the jury: "That if, after considering this view of the evidence, the jury are satisfied by the greater weight of the evidence that the charge was made for personal malice, with the design and purpose to injure the plaintiff, or that the charge was made in such a manner that it showed a wanton and reckless disregard of the plaintiff's rights, the jury may, in addition to compensation, give exemplary or punitive damages, which is allowed as a kind of punishment, with a view of preventing similar wrongs in the future."

His Honor further charged that if the defendant was not (419) actuated by malice the plaintiff can recover only compensatory damage. This is a clear and correct statement of the law. Odgers, p. 291; 18 A. & E. Enc., p. 1091, and cases cited; Newell, p. 842.

The version of the occurrence given by plaintiff is sufficient evidence to be submitted to the jury as a basis for punitive damages.

No error.

Cited: McCall v. Sustair, 157 N. C., 183, 186; *Garrison v. Machine Co.,* 159 N. C., 288; *Barringer v. Deal,* 164 N. C., 47, 248; *Ivey v. King,* 167 N. C., 177.

J. L. CURRIE AND J. R. McQUEEN v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 1 November, 1911.)

1. Railroads—Negligence—Presumptions—Operation of Trains—Damage by Fire — Skillful Employees — Prudent Operation — Questions of Fact — Burden of Proof.

When, in an action to recover damages for the destruction of plaintiff's buildings by fire along or near the right of way of a railroad company, which was alleged to have been caused by the latter's negligence, either in the defective condition of defendant's locomotive or in its operation or running, there are two issues, presenting the questions separately, (1) as to whether the engine set the property on fire, and (2) whether it was properly equipped and competently run in a careful manner, the affirmative answer to the first issue raises a presumption of negligence which the defendant must rebut by showing under the second issue that the locomotive was properly equipped, and with competent employees in charge, who prudently operated it.

2. Same—Intimation of Court—Opinion—Interpretation of Statutes.

In an action to recover damages against defendant railroad company for the alleged negligent burning and destruction of plaintiff's property by fire along the former's right of way, when by their affirmative answer to an issue the jury have found that the fire was caused by defendant's locomotive, a presumption of fact is raised, upon the question presented by the second issue as to whether the engine was properly equipped and run by competent employees, which it is for the jury to decide; and should the trial judge instruct that if the defendant's evidence on the second issue is found to be true as fact by the jury, they should answer the issue for the defendant, it would be an expression of opinion by the judge upon the weight of the evidence prohibited by statute. *Williams v.* R. R., 130 N. C., 116, cited and overruled.

3. Railroads—Damages by Fire—Running of Trains—Defective Locomotive —Negligence—Evidence.

Testimony that the defendant's engine, which caused the destruction of plaintiff's buildings along the right of way of the former, had patches on the wire netting, and that the covering of the manhole had long openings in it, when square ones would have been safer, and the former had been rejected at the master mechanics' convention because the sparks would get hung there, and would choke up the engine, with the effect that flames would come out of the furnace when the door was open, etc., and that the defendant used this netting because it had a stock on hand: *Held*, some evidence that an old and defective spark arrester on the locomotive had caused the damages alleged.

4. Railroads—Operation of Trains—Negligence—Evidence.

When pertinent to the inquiry as to whether plaintiff's damage by fire was caused by the negligence of the defendant's employees on its locomotive, evidence only of the speed of the train, without inquiry as to what

the engineer or his fireman were doing at the time it passed the plaintiff's property, or whether sparks were then escaping, etc., is sufficient to show that the locomotive was carefully or prudently being run and operated, *quære?*

5. Railroads—Negligence—Damage by Fire—Evidence—Nonsuit.

Evidence held sufficient as tending to show negligence of defendant in causing the destruction of plaintiff's lumber plant near the right of way by fire from its passing locomotive, which tends to show that on Sunday, the day of the fire, two of defendant's locomotives passed in twenty minutes of each other; there was no smoke or other evidence of fire in the plant before the locomotives passed; thereafter, within fifteen minutes, the plant was burning; the engineer on the second locomotive did not notice any smoke there as he passed the plant; and sparks, cinders, and heavy smoke were coming from this train.

APPEAL from *O. H. Allen, J.*, at February Term, 1911, of (420) MOORE.

This is an action to recover damages for the destruction by fire of the lumber plant of the plaintiff, on Sunday, 20 May, 1910.

At the conclusion of the evidence the defendant moved for (421) judgment of nonsuit, which was denied, and the defendant excepted.

The defendant requested the court to give the following instructions, which were refused, and the defendant excepted:

"That although from the evidence introduced by the plaintiff, which raises the presumption of negligence, that the defendant did set fire to the property of the plaintiffs, yet the court charges you that, upon all the evidence introduced, you would not be warranted in charging the defendant with actionable negligence; and this is so because the plaintiffs have done nothing more than to introduce evidence tending to show presumptive negligence, which is rebuttable, and the defendant having introduced uncontradicted evidence to rebut that presumption, the plaintiffs cannot recover, because they have failed to go further and show, by additional evidence, that there was actual negligence, as alleged in the complaint."

"If the jury believe the uncontradicted evidence of the defendant's witnesses, the engines from which the damage is alleged to have come was in good condition and had a proper spark arrester and other appliances to prevent the escape of fire, and was skillfully operated and managed by a competent engineer, and the jury should answer the second issue, 'Yes'"

The defendant also excepted for that his Honor charged the jury on the second issue as follows: "Upon this issue the burden of proof is upon defendant to show by the greater weight of the evidence that at the time of the escape of sparks it had a proper spark arrester and other appliances to prevent the escape of sparks, such as are approved and in

general use at the time, and that the engine and appliances were in good condition and operated in a careful way by a skillful and competent engineer."

The following verdict was returned by the jury:

1. Was the property of the plaintiffs, referred to in the complaint, set on fire and burned by sparks from the defendant's engine at the time alleged in the complaint? Answer: Yes.

(422) 2. If so, did said engines of the defendant, at the time of the escape of said sparks, have proper spark arresters and other appliances to prevent the escape of sparks, approved and in general use at said time, and were said engines and appliances in good condition and operated in a careful way by skillful and competent engineers? Answer: No.

3. Were the plaintiffs guilty of contributory negligence, as alleged in the answer? Answer: No.

4. What damage, if any, are the plaintiffs entitled to recover of the defendant? Answer: $10,000.

There was judgment in favor of the plaintiffs, and the defendant excepted and appealed.

D. E. McIver and G. W. McNeill for plaintiffs.

W. H. Neal for defendant.

ALLEN, J. Three questions are presented by this appeal: (1) That there was error in imposing the burden of proof on the defendant on the second issue. (2) That if the burden of proof was on the defendant, it was by reason of the presumption arising from proof that the defendant destroyed the property of the plaintiffs by fire, and that this was a presumption of law and not of fact; and that when evidence was offered rebutting the presumption, it was error to leave the question to the jury, in the absence of other evidence of negligence, and that it ought to have been decided as matter of law by the court. (3) That it was error to refuse to nonsuit the plaintiffs on all the evidence.

(1) The learned counsel for the defendant urges with much force on the consideration of the Court several cases in our own reports holding that the burden of proof is on the plaintiff as to negligence, and that while the duty of proceeding with the evidence may shift from one party to the other, the burden of the issue does not shift; and he insists, on the authority of these cases, that there was error in holding that the burden on the second issue was on the defendant.

An examination of these decisions will show that in all of them one issue was submitted to the jury to determine the liability of the

(423) defendant, and that this issue embraced two facts: the origin of the fire, and the negligence of the defendant.

In the case before us these facts were to be settled by separate issues, and in this is to be found the distinction between the cases relied on and the one under consideration.

The first issue establishes the fact that the defendant destroyed the property of the plaintiff by fire, and from this fact alone the presumption arises that the defendant was negligent. *Ellis v. R. R.*, 24 N. C., 138; *Lawton v. Giles*, 90 N. C., 380; *Manufacturing Co. v. R. R.*, 122 N. C., 881; *Hosiery Mills v. R. R.*, 131 N. C., 238; *Lumber Co. v. R. R.*, 143 N. C., 324; *Deppe v. R. R.*, 152 N. C., 82; *Kornegay v. R. R.*, 154 N. C., 392.

These authorities place the burden on the defendant to rebut the presumption of negligence arising from proof connecting it with the origin of the fire, by evidence which will satisfy the jury that the engine was properly equipped, that competent men were in charge of it, and that it was prudently operated; and, necessarily, the burden of the issue embracing these facts alone is on the defendant.

(2) The prayers for instruction tendered by the defendant require a consideration of the nature of the presumption in cases like this, because if this presumption is evidence in behalf of the plaintiff, the evidence of the defendant is not uncontradicted, as the instruction required the judge to charge.

It may be well to analyze the instructions before discussing them. They require the judge to decide that the evidence of the defendant is uncontradicted, and that, if believed by the jury, it is sufficient to establish the fact that the engine was properly equipped and was prudently operated by competent employees.

In many jurisdictions it is held that the presumption of negligence arising from proof that the defendant set out the fire is one of law; and generally, where this conclusion is reached, the courts approve the view contended for by the defendant, that it is the duty of the court to pass on the sufficiency of the rebutting evidence as matter of law.

This position is also supported by *Williams v. R. R.*, 130 N. C., (424) 116, in which it was held to be error to refuse to give an instruction like those requested by the defendant.

On the other hand, when the presumption is treated as one of fact, the rule usually obtains that the evidence must be submitted to the jury, who must pass on its sufficiency; and with the exception of *Williams v. R. R., supra,* our Court has held the presumption to be one of fact.

In *Cox v. R. R.*, 149 N. C., 118, *Justice Walker,* speaking for the Court, says: "The presumption is one of fact and not law. Evidence that the sparks were emitted from the engine and that they set fire to the timber made a *prima facie* case for the plaintiff, but only to the extent of being evidence sufficient to carry the case to the jury and to

warrant a verdict in favor of the plaintiff, if the jury should find the ultimate or crucial fact that the fire was caused by the defendant's negligence."

In *Deppe v. R. R.*, 152 N. C., 82, *Justice Manning*, after stating the duty imposed on the defendant, says: "If the defendant can show at the trial that it 'had used all those precautions for confining sparks or cinders' which are approved and in general use, and the jury shall so find the fact, the trial judge will instruct them to answer the issue of negligence 'No,' provided the precautions were used by a competent and skilled engineer, in a careful way. Rule 1, in *Williams v. R. R.*, 140 N. C., 623; *Knott v. R. R.*, 142 N. C., 238."

Note that after the rebutting evidence is introduced by the defendant, it is for the jury to find the fact.

These cases and others to the same effect are cited with approval in *Kornegay v. R. R.*, 154 N. C., 392, where the principle is stated as follows: "When it is shown that the fire originated from sparks which came from the defendant's engine, the plaintiff made out a *prima facie* case, entitling him to have the issue as to negligence submitted to the jury, and they were justified in finding negligence, unless they were satisfied, upon all the evidence in the case, that, in fact, there was no negligence, but that the defendant's engine was equipped with (425) a proper spark arrester and had been operated in a careful or prudent manner. *Williams v. R. R.*, 140 N. C., 623; *Cox v. R. R.*, 149 N. C., 117."

The reasons for the rule, and its justice, are nowhere better stated than by *Chief Justice Smith*, in *Aycock v. R. R.*, 89 N. C., 329: "A numerous array of cases are cited in the note in support of each side of the question as to the party upon whom rests the burden of proof of the presence or absence of negligence, where only the injury is shown, in case of fire from emitted sparks. While the author favors the class of cases which impose the burden upon the plaintiff, we prefer to abide by the rule so long understood and acted on in this State, not alone because of its intrinsic merit, but because it is so much easier for those who do the damage to show the exculpating circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence. The servants of the company must know and be able to explain the transaction, while the complaining party may not; and it is but just that he should be allowed to say to the company, 'You have burned my property, and if you are not in default, show it and escape responsibility.'" The note referred to is one to *R. R. v. Schurty*, 2 A. & E. R. R. Cases, 271.

The presumption is one of fact, and is itself evidence of negligence, and the evidence of the defendant in rebuttal of the presumption is as to facts upon which the decision of the issue depends, and there would

seem to be no reason for excepting evidence of this character from the statute which forbids the judge from expressing an opinion on the facts or as to the weight of the evidence. If it should be held that the defendant was entitled to the instructions prayed for, the duty would be imposed on the judge to decide that there were no contradictions in the evidence of the defendant, that the witnesses were worthy of belief, and that the evidence was sufficient and satisfactory, which are matters committed by the law to the jury and not to the judge.

We conclude, therefore, that, assuming there were no contradictions in the evidence of the defendant, and that, *if believed,* it established the facts that the engine was properly equipped and was (426) in charge of competent employees, and was prudently operated, this evidence cannot be said to be uncontradicted, and it was for the jury to pass on its weight. The evidence was contradicted by the presumption, which was some evidence of negligence.

We do not think *Williams v. R. R., supra,* is in line with the other decisions of this Court, and we must decline to follow it.

There are, however, other valid reasons for sustaining the ruling of his Honor.

There was some evidence of defects in the spark arrester, coming from the witnesses for the defendant. J. R. Bissett, master mechanic of the defendant, testified that there were patches on the wire netting, and that the covering of the manhole had long openings in it instead of square ones. He also said: "The covering of the manhole was in general use before they had adopted this wire netting, and we discarded that—the master mechanics' convention did—because the sparks would get hung in there and make a solid mass of it and the engine would get choked and the flame would come out the furnace door when it was opened and they would have to go in there and knock it, so they adopted this same netting to cover the manhole with. The reason those manholes with the long openings, instead of the square, were used, was that the S. A. L. had in stock a quantity of them, and we used them on the manholes to fill the bill, because there is enough opening, with what is in there, to give the engine draught enough to steam with."

It was permissible to argue from this evidence that the spark arrester in use was old and dilapidated, and that it had been condemned by the convention of the master mechanics.

It is also doubtful if any evidence was introduced that the engine was properly operated.

Two engines of the defendant passed the place of the fire within a short time of each other, one being No. 746 and the other 752.

J. M. Stoker, engineer, was the only witness examined as to the operation of No. 746, and he says nothing as to how the engine was being managed, except that he was running about thirty miles (427)

an hour when he passed the place of the fire; and the only evidence on this point as to engine No. 752 was that of N. R. Vaughan, engineer, who said he was sitting on the right-hand side of the engine, and was running at from thirty to thirty-five miles an hour. No inquiry was made of either as to what he or his fireman was doing, or whether or not sparks escaped from the engine he was in charge of, as it passed the property of the plaintiff. In the absence of such evidence from witnesses who knew the facts, the jury might well infer that they were silent because a disclosure would be hurtful.

(3) If we are correct in our conclusion that the burden was on the defendant on the second issue, it follows that there was no error in denying the motion to nonsuit, if there was evidence to support a finding in favor of the plaintiff on the first issue as to the origin of the fire.

In our opinion, there was sufficient evidence to support the verdict.

The lumber plant which was burned was situated near the right of way of the defendant. Engine No. 746 passed the lumber plant about 3:10 P. M., and engine No. 752 about 3:30 P. M. The fire occurred on Sunday, and several witnesses, who had the opportunity to see, testified that they saw no smoke or other evidence of fire before the engines passed, and that the plant was burning within fifteen or twenty minutes after the passing of the last engine. The engineer on engine No. 752 testified that he did not notice any smoke as he passed the plant, and one of the plaintiffs testified that he was at the plant about 1 o'clock P. M. on Sunday, and saw no evidence of fire, and that he was in the boiler-room the night before at 11 o'clock, and there were then only a few sparks in the back end of the boiler well.

Another witness for the plaintiffs, Mrs. Vick, testified that she noticed sparks, cinders, and heavy smoke coming from the train.

If this evidence is true, there was no fire about the premises before the engines passed; sparks escaped from the engine, and within
(428) fifteen minutes thereafter the property of the plaintiffs was on fire; and it was not unreasonable to conclude from these facts that the property of the plaintiffs was set on fire and burned by sparks from the defendant's engine.

We have examined all of the exceptions appearing in the record, and find

No error.

Cited: Hardy v. Lumber Co., 160 N. C., 117; *Aman v. Lumber Co., lb.*, 373; *Armfield v. R. R.*, 162 N. C., 28; *Kemp v. R. R.*, 169 N. C., 732; *In re Allred's Will*, 170 N. C., 160; *Worth v. Feed Co.*, 172 N. C., 342.

JANE R. WILKES v. R. M. MILLER, ADMINISTRATOR OF J. W. MILLER, J. C. SIKES, ADMINISTRATOR OF W. F. RHEA, ET AL.

(Filed 1 November, 1911.)

1. Judgments—Dockets—Cross-indexed—Liens.

Judgments which have been docketed, but not cross-indexed, do not constitute a lien upon land or take precedence over mortgages subsequently registered.

2. Mortgages—Notes—Substitution—Subsequent Judgment—Liens—Priorities.

The substitution of one note and mortgage for another will not discharge the original note and mortgage unless the latter is surrendered to the mortgagor, or canceled of record; for it is only a renewal or acknowledgment of the same debt, and will constitute a prior lien on the lands to that of a judgment obtained after the registration of the original mortgage, but before the one taken in substitution of it.

APPEAL from UNION from judgment by *W. R. Allen, J.*, rendered in chambers, by consent, in 1910.

Action instituted in Superior Court of UNION for the purpose of obtaining judgment to apply the proceeds of certain lands described in the complaint to the payment of a judgment in favor of the plaintiff against W. F. Rhea, deceased. This case was with an action, instituted prior to the bringing of this action, for the purpose of foreclosing a mortgage made by W. F. Rhea and wife to J. W. Miller, the mortgagor and mortgagee both being dead at the time of the institution of these actions.

By consent of the parties, his Honor, *W. R. Allen, J.*, found the facts and conclusions of law, and rendered judgment in favor of (429) the defendant R. M. Miller, administrator of J. W. Miller, as follows:

This cause came on for hearing upon exceptions to the report of a referee, and upon consideration of said report and the exceptions thereto and the evidence and exhibits, I find the following facts:

1. That prior to 1886, W. F. Rhea was the owner of the tract of land referred to in the complaint; that he is now dead, and J. C. Sikes is his adminsitrator; that the said Rhea left surviving him a widow, who is still living, and no children.

2. That J. W. Miller is dead, and R. M. Miller, Jr., is his administrator.

3. That on 1 March, 1886, the said W. F. Rhea and wife conveyed said tract of land to Joseph McLaughlin by mortgage deed to secure

the payment of a balance due on a note for $550 executed by the said Rhea 15 March, 1881, which mortgage deed was registered in Union County in Book W, page 480, on 1 March, 1886.

4. That on 2 February, 1887, the said Rhea and wife conveyed said land to Joseph McLaughlin by mortgage deed to secure a note of even date for $313.20, which mortgage deed was registered in Union County on 5 February, 1887.

5. That on 1 January, 1889, the said Rhea and wife conveyed said land to J. B. Ross by mortgage deed to secure a note of even date for $313.20, which mortgage deed was registered in Union County on 1 February, 1889.

6. That the notes and mortgages referred to in findings 3 and 4 were duly assigned to J. W. Miller on 11 January, 1893, and the note and mortgage referred to in finding 5 were duly assigned to said Miller on 27 February, 1889.

7. That on 11 January, 1893, there was due on the notes referred to in findings 3, 4, and 5, the sum of $830, and on said day the said Rhea and wife executed to the said Miller a note for said sum, and conveyed said land to said Miller to secure payment of the same by mortgage deed, which was registered in Union County on 4 May, 1896.

8. That at the time of the execution of the note and mortgage referred to in the preceding paragraph the said Miller retained
(430) the notes and mortgages referred to in the 3d, 4th, and 5th findings, and the same have never been surrendered nor canceled of record.

9. That thereafter an action was instituted in the Superior Court of Union County against the administrator and heirs at law and widow of W. F. Rhea to foreclose the mortgage referred to in the 7th finding, and at February Term, 1905, a judgment was rendered therein in favor of the plaintiff, administrator of Miller, for the sum of $1,230.48, with interest on $830, and condemning said land to be sold to pay the same; that said land was sold thereunder for the sum of $350, and said sale was duly confirmed. There was no reference in the complaint in said action to the notes and mortgages referred to in findings 3, 4, and 5.

10. That on 2 December, 1884, said Liddell & Co. obtained two judgments in Mecklenburg County against the said W. F. Rhea: one for $201.33, with 8 per cent interest from date of judgment, and the other for $217.33, with 8 per cent interest from date of judgment and $3.20 costs. Transcripts of said judgments were sent to Union County, and the same appear on the judgment docket of said county as of 4 December, 1884, but said judgments were never cross-indexed.

11. That on 5 November, 1895, Jane R. Wilkes, trading as the Mecklenburg Iron Works, obtained a judgment against the said W. F. Rhea before a justice of the peace of Mecklenburg County for the sum of $239.60, with interest on $181.50 from 5 November, 1895, at 8 per cent and $3.80 costs, which judgment was duly docketed in Union County 15 November, 1895.

12. That the findings and conclusions of the referee as to the attempted allotment of a homestead to the said W. F. Rhea are adopted.

13. That this present action was instituted on 20 December, 1905, for the purpose of subjecting the proceeds of the sale of land referred to in the 9th finding to the payment of the judgment referred to in the 11th finding.

14. That Liddell & Co. has been made a party to this action (431) and claims proceeds.

And it is thereupon considered and adjudged that neither Jane R. Wilkes, trading as the Mecklenburg Iron Works, nor the Liddell Company is entitled to any part of the proceeds of sale.

It is further considered and adjudged that the said Jane R. Wilkes pay the costs accrued since this action was commenced, except so much as is incident to the determination of the claim of Liddell & Co., which said company shall pay.

From the judgment and the conclusions of law reached by his Honor the plaintiff excepted and appealed.

R. B. Redwine for plaintiff.
Adams, Armfield & Adams for defendant.

BROWN, J. 1. The judgments of Liddell & Co. referred to in finding 10 were docketed prior to the registration of the mortgages referred to in the findings, but the judgments were never cross-indexed. Therefore they never constituted a lien upon the land. *Dewey v. Sugg,* 109 N. C., 329.

2. The Wilkes judgment was docketed 5 November, 1895, after the registration of the original mortgages referred to in findings 3, 4, and 5.

On 11 January, 1893, there was due on the mortgages (all on same land) $830. On that date Miller, the owner of the debt, took from the debtor another note and mortgage securing the same debt. The original notes and mortgages were never canceled or surrendered, but were retained by Miller.

Upon these facts the original notes and mortgages were not discharged, and their lien continued.

The substitution of one note and mortgage for another will not discharge the lien of the original note and mortgage unless the latter is surrendered to the mortgagor, or canceled of record. It is only a renewal or acknowledgment of the same debt. *Collins v. Davis,* 132 N. C., 106; *Hyman v. Devereux,* 63 N. C., 626.

The conclusion of his Honor that the Wilkes and Liddell (432) judgments are not entitled to any portion of the proceeds of the sale of the land, and that the same should be applied to the judgment in favor of Miller in the foreclosure suit, is correct.

Affirmed.

ALLEN, J., did not sit on the hearing of this case.

N. A. CURRIE v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 1 November, 1911.)

1. Carriers of Goods—Penalty Statutes—Damages—Claim—Requirements—Interpretation of Statutes.

Revisal, sec. 2634, imposing a penalty on common carriers for failure to settle claims for loss or damages to property while in their possession as such, within certain different periods of time for shipments wholly within the State and for interstate shipments, requires that, in order to recover the penalty, the claim must be filed with the company within the time specified and applicable.

2. Same—Form Sufficient.

In a suit against a carrier to recover a penalty for failure to settle a claim relating to a shipment of molasses, under Revisal, sec. 2634, the following written demand, "Seaboard Air Line. Bought of N. A. Currie, merchant and cotton buyer, 1 puncheon of molasses, 118 gallons, at 40 cents a gallon. Shipped from Wilmington": *Held,* sufficient.

3. Carriers of Goods—Insurers—Negligence—Character of Shipment.

Common carriers, in the absence of a valid stipulation to the contrary, are held to be insurers of goods intrusted to them for shipment; but this principle does not extend or apply to loss or damage arising from the negligence of the shipper or from vices or defects inherent in the nature of the goods.

4. Same—Defense—Evidence.

In an action to recover of a carrier the penalty prescribed by Revisal, sec. 2634, for failure to settle a claim relating to the shipment of a puncheon of molasses, the defense was available to the carrier that the punch-

eon had burst by reason of the fermentation of the molasses, for which the defendant was not responsible, and this caused the damage sought by the plaintiff.

APPEAL from *O. H. Allen, J.*, at October Term, 1911, of (433) BLADEN.

Action to recover damages done to a puncheon of molasses shipped over defendant's line, and for penalty in failing to settle the claim within the time required by law, heard on appeal from a justice's court.

The jury rendered the following verdict:

1. In what sum, if any, is defendant indebted to the plaintiff by reason of the loss of a puncheon of molasses? Answer: $47.20.

2. In what sum, if any, is defendant indebted to plaintiff by way of penalty? Answer: $50.

Judgment on the verdict, and defendant excepted and appealed.

Plaintiff not represented in this Court.
W. H. Neal for defendant.

HOKE, J. The Court has held that section 2634 of Revisal, imposing a penalty on common carriers for failure to settle claims for loss or damage to property while in their possession as such, within sixty days after filing same in case of shipments wholly within the State, and ninety days when the shipments were without the State, by correct interpretation, requires that, in order to a recovery of the penalty, the claim should be filed with the company within the time specified. *Thompson v. Express Co.*, 147 N. C., 343.

The testimony tended to show that the molasses was lost by reason of the bursting of the puncheon, and defendant objected to the recovery: (1) That there had been no proper filing of the claim. The written statement of plaintiff's demand within the time was left with the proper officials of defendant company in terms as follows:

"CLARKTON, N. C., 3 September, 1909.

Seaboard Air Line. Bought of N. A. Currie, merchant and cotton buyer, 1 puncheon of molasses, 118 gallons, at 40 cents a gallon, $47.20. Shipped from Wilmington"; and plaintiff was allowed to testify over defendant's objection that he told the agent (434) on presenting the claim that "it was for the puncheon of molasses that burst." While the form of the demand is not one to be approved or generally followed, we think it sufficiently definite to notify defendant of the amount and the nature of the claim, affording as it did sufficient information to enable the company to make investi-

gation and secure the evidence relevant to the inquiry, and we concur with his Honor in holding the notice to be a sufficient filing within the meaning of the statute. *Stonestreet v. Frost*, 123 N. C., 640.

Defendant further objected that the court declined to submit or entertain the view arising on the testimony, that the puncheon burst by reason of fermentation of the molasses, and for which defendant was in no way responsible.

While common carriers, in the absence of valid stipulation to the contrary, are held in this State to be insurers of goods intrusted to them for shipment, it is generally understood that the principle does not extend or apply to loss or damage arising from the negligence of the shipper or from vices or defects inherent in the nature of the goods. This limitation on the liability of common carrers of goods was referred to as accepted law by *Allen, J.*, in his concurring opinion in *Peanut Co. v. R. R.*, 155 N. C., 148, and the statement is in full accord with the authorities. Moore on Carriers, secs. 4 and 5; Hutchinson on Carriers (3 Ed.), secs. 333 and 334. In this last citation the author says: "So, obviously, the carrier, if not himself at fault, cannot be held liable for losses which have been caused by the inherent nature, vice, defect, or infirmity of the goods themselves, as in the case of decay, waste or deterioration of perishable fruits, the evaporation of liquids, the bursting of vessels, owing to the fermentation of their contents, etc." There was evidence on part of the defendant, tending to establish the conditions referred to, and we are of opinion that defendant was entitled to have the same considered by the jury, under a proper charge. For the error indicated, defendant is entitled to a

New trial.

Cited: *McConnell v. R. R.*, 163 N. C., 506, 508.

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(435)

HENRY P. STARR v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

(Filed 1 November, 1911.)

1. Telegraphs—Telephones—Electricity—Dangerous Instrumentality—Wires—Care Required—Negligence—Electric Storms.

A telephone company having taken its instrument from a house of a subscriber, left the loose ends of the wire fastened together hanging from the porch plate, without "grounding" and without a lightning arrester.

During an electric storm plaintiff was standing near these ends of the wire and was struck with and injured by electricity: *Held*, evidence sufficient for the jury to find that the negligence of the telephone company caused the injury, without testimony of an eye-witness to the effect that he saw the discharge of the lightning leap from the wires and strike the plaintiff.

2. Electricity—Storms—Metal Wires—Conductivity—Effect—Courts—Judicial Knowledge.

The courts may take judicial knowledge of well known and established facts, and it was not error for the judge to instruct the jury, upon the evidence introduced, that metal is a good conductor and that it will attract lightning which forms in electrical storms, and carry it to the earth; that the human body is a better conductor than the air, and when sufficiently near to the ends of wires strongly enough charged with electricity, the current will leap through the body to the ground, etc.

APPEAL by defendant from *O. H. Allen, J.*, at August Term 1911, of GUILFORD.

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

R. C. Strudwick and W. P. Bynum for plaintiff.

H. E. W. Palmer, Brutus J. Clay, and Wilson & Ferguson for defendant.

CLARK, C. J. The defendant removed a telephone from the plaintiff's house, but for its own convenience left the wires leading into plaintiff's porch still connected with its general system of wires and with the loose ends twisted together and hanging down 6 or 8 inches from the plate of the porch. At the same time the defendant removed the lighning arrester and severed the ground connection of the said wires. There was evidence that the wires left in this condition were dangerous on account of the means thus afforded of their (436) conducting lightning which might strike any part of the defendant's general system of wires, into the house, and that the plaintiff was unaware of this danger, but relied upon the defendant to leave the wires in a safe condition.

One afternoon in June, 1909, the plaintiff was sitting on his porch under said wires when a storm, accompanied by thunder and lightning, came up. The plaintiff arose to go into his house, and as he stood up, the ends of said wires being about 18 inches from and to the left of his head, there came a violent clap of thunder and a ball or bolt of lightning struck him on the left and back of his head, which the plaintiff claims came from the ends of said wires, rendering him unconscious and seriously injuring him. The jury found that said injuries were caused in this mode and by the negligence of the defendant.

The defendant's chief contention is that the court erred in not granting the motion to nonsuit the plaintiff. But we think not. The matter was peculiarly one of fact, and was for the jury to determine. It is true, no one saw the discharge of the lightning leap from the wires and strike the plaintiff on the left and back of his head. But the evidence justified the jury in finding such to be the fact. When one fires a pistol at another no one sees the ball strike the body, but the *pointing* the pistol within proper distance, its discharge and the wound are evidence from which the jury can infer the cause of the wound.

In dealing with this dangerous agency of electricity, if the defendant left its wires for its own convenience hanging in the plaintiff's porch, it was negligence for which it was liable if the injury of the plaintiff was caused, as the jury finds, by lightning striking on its wires and being discharged against the plaintiff thereby. Especially is this so, when the defendant was guilty of the further negligence of taking off the lightning arrester and severing the ground connections.

(437) In a case almost identical in the facts with the present, *Telephone Co., v. McTyer,* 137 Ala., 601, the Court said: "The only justification for the wires being carried into a building and maintained there is the telephone service thus supplied by means of them. If they are put there not for that purpose, but for the mere convenience of the telephone company, and allowed to be in such condition as that persons and property in the building are liable to be injured by lightning gathered and brought into the building by them and there discharged, their mere presence is a wrong. So, when they were originally carried into the building, and equipped and maintained to supply the service to the owner, but at his instance the service has been discontinued and the instruments removed, and the company, instead of then removing the wires, merely cuts them loose from the instrument, twists their ends together, and leaves them thus dangling in the building, so that atmospheric electricity striking them anywhere along their course on the outside will be inducted into the building, and there discharged to the peril of persons and property, *this is an unpalliated wrong* on the part of the company. It is the creation and maintenance of a dangerous situation without that warranting occasion for it which may exist when the wires are in use—without any occasion whatever, in fact; and the company is liable in damages for whatever injuries may result to persons and property on the premises."

And further the Court said: "In view of the known capacity of these wires to collect and carry dangerous currents of atmospheric

electricity into the store and there discharge them, to the deadly peril of persons in there at the time, and in view of the total absence of any occasion for the wires to be left there at all, there can, in our opinion, be no doubt that the company owed a plain duty not only to Thomas, but also to his customers, to remove the wires, and thereby to obviate this peril to him and to them. Nor was there any excuse for its failure to perform this duty. Its remission of it was a positive wrong, committed by defendant's servant who removed the telephone and twisted up and left the wires. No man of ordinary care and prudence would have so acted. There is not room for two reasonable con- (438) clusions as to the character of the act in respect of negligence *vel non.* It was negligence *per se,* and to be so declared as matter of law."

The defendant also excepts because the judge charged the jury: "Then, as I said, there are some well-known facts that may be considered in the same way as if they had been testified to. It is a well-known fact, for instance, that lightning in times of storms is frequently discharged from the clouds and passes to the earth, and that metal wires in the air are good conductors of electricity, much better than the air, and that electricity discharging from the clouds near such wires is liable and apt to pass on them and along them to the earth, and that if a human body, which is also a good conductor, is in contact with a wire charged with electricity, it will pass through it to the ground; or if near it, if the charge is strong enough, it is likely to seek it and pass to the ground, the human body being a better conductor than air. Therefore, it is the duty of one engaged in a business which requires the dealing with metal wires to use every reasonable precaution to protect any one likely to come in contact with or near to the same; and so when the defendant was ordered to remove this telephone, and when it did remove it from the house of the plaintiff, it was its duty to remove the same and leave it in a reasonably safe condition, if it left any part of the wires attached to the house. So an important inquiry is whether the wire was left in a reasonably safe condition, or did the defendant leave it in a dangerous condition."

This was not an expression of opinion, but the statement of facts generally known. What is a matter of common knowledge to every one else should certainly be matter within the knowledge of a court and of which it can take judicial notice.

No error.

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

(439)

V. M. DORSETT v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 1 November, 1911.)

1. Carriers of Passengers—Mileage Book—Exchange for Tickets—Wrongful Refusal—Ejection from Train—Damages.

When the owner of a mileage book has properly requested the carrier's agent for a ticket in exchange for his mileage, to which he was entitled under the rules of the company, and has been refused by the agent, it is incumbent upon the conductor of the carrier to take the mileage on the train for his transportation; and the ejection of the passenger by the conductor because the former did not have the ticket and, after explanation, had insisted on his taking the mileage to destination, subjects the carrier to the payment of the damages sustained in consequence.

2. Carriers of Passengers—Mileage Exchanged—Wrongful Refusal—Intermediate Point—Consent—Evidence.

When the owner of the carrier's mileage book has requested under the rules of the company a ticket to his destination in exchange for his mileage, and has been refused by the agent an exchange except to an intermediate point, and then requested, with the same result, a ticket to a further point towards his destination, it is competent to show that he had not consented to the agent's giving him the ticket to the intermediate point as evidence that he had not withdrawn his request for the ticket to the point beyond.

3. Evidence—Rebuttal—Examination on Matters Already Testified—Appeal and Error.

Examination of a witness in rebuttal upon evidence he has already gone over in his original examination, while irregular, does not constitute reversible error on appeal.

4. Carriers of Passengers—Mileage Exchanged—Refusal—Ejection of Passenger—Punitive Damages.

The wrongful ejection of the plaintiff, a passenger on defendant's train, by the conductor, porter, and baggagemaster, in a very rough manner, with anger and violence, because he insisted upon the conductor's taking his mileage for his transportation, as under the circumstances he had a right to do, justifies a charge to the jury that in their discretion they might, if they saw fit, award punitive as well as compensatory damages.

CLARK, C. J., concurring.

(440) APPEAL from *O. H. Allen, J.*, at June Term, 1911, of LEE.

The action was brought to recover damages for unlawful ejection from defendant's train. Appropriate issues were submitted to which there is no exception.

There was a verdict and judgment for plaintiff, from which defendant appealed.

A. A. F. Seawell and D. E. McIver for plaintiff.
Rose & Rose for defendant.

BROWN, J. The evidence of the plaintiff tends to prove that on 30 October, 1909, he presented his mileage book issued by defendant to its agent at Red Springs in due time before arrival of its train for Fayetteville and demanded a ticket for Siler City, N. C. This being refused, he demanded ticket to Sanford, N. C., which was likewise refused. The agent stated he had no time, and gave plaintiff a ticket to Fayetteville. It is necessary to change cars at Fayetteville for Sanford and Siler City.

While plaintiff was alighting from train at Fayetteville he saw Conductor McCulloch of the train from Fayetteville to Sanford, and asked him if he, plaintiff, had time to get a ticket; he was told by the conductor that he did not have time, and the train left immediately. Train was in motion by the time plaintiff could get to his seat. Conductor McCulloch demanded a ticket of plaintiff. Plaintiff tendered his mileage coupons, explaining the circumstances stated above, which the conductor refused. The conductor, aided by his porter and baggagemaster, by force, in a very rough manner and with anger and violence, ejected plaintiff from defendant's train.

There was evidence offered by defendant contradicting, qualifying, and explaining the plaintiff's evidence which it is unnecessary to set out.

The three assignments of error relating to the evidence cannot be sustained.

It was permissible to ask plaintiff whether he consented to the agent giving him a ticket to Fayetteville in order to show that plaintiff had not voluntarily withdrawn his application for a ticket to Sanford.

Allowing the plaintiff to be examined in rebuttal upon evi-
dence already gone over in his original examination, while ir- (441)
regular, does not constitute reversible error.

The remaining assignments of error relate to the charge and to refusal to give certain instructions, which it is unnecessary to set out here.

The propositions of law chiefly urged by the learned counsel for defendant are settled in *Harvey v. R. R.*, 153 N. C., 568.

It is decided in that case that a mileage book is a contract for carriage, subject to certain restrictive regulations; that the owner is compelled under the terms of the contract to present it at the ticket office in reasonable time, and, when he does so, that he is entitled to receive a ticket in exchange for his mileage strip.

If the traveler fails to do this, he has no right to have the book accepted for transportation on the train. When he complies with the

contract on his part and the carrier fails to give him the requisite ticket in exchange, the carrier is at fault and may not lawfully refuse to honor the mileage contract on the train, and cannot rightfully eject him. The plaintiff, according to all the evidence, complied with the contract on his part. He waived his right to a ticket to Siler City, but not to Sanford. It was defendant's duty to furnish plaintiff a ticket to Sanford in exchange for his mileage, which he had bought and paid for. The plaintiff, according to the evidence, had no time to present his book at Fayetteville, even if that was necessary, which we do not admit, as plaintiff had already presented it at Red Springs.

If the railway companies insist upon the traveler presenting his book at the ticket window, they must be prepared to honor it there. If they fail to do so, they should instruct their conductors to honor it on the train. This will prevent much friction and will doubtless save the railway companies from much litigation and expense.

(442) In the *Harvey case* it was admitted that there was no foundation for punitive damages, and two members of the Court thought the verdict rendered grossly excessive and that it should have been set aside for that reason. But in this case the plaintiff offers evidence which fully justified the court in instructing the jury that in their discretion they might, if they saw fit, award punitive as well as compensatory damages.

We think the charge of the court is a full presentation of the contentions of both parties and is free from error.

No error.

CLARK, C. J., concurring: In *Harvey v. R. R.*, 153 N. C., 567, the Court did not find it necessary to pass upon the validity of the requirement that the holder of a mileage book shall present it and obtain a ticket thereon, but, passing by that question, as in this case, held that the plaintiff was entitled to recover. 153 N. C., at p. 577.

I am of opinion that in any aspect the plaintiff is entitled to recover, for that such requirement is an unreasonable regulation and therefore void, for at least four reasons:

1. Down to the enactment of the statute by which the General Assembly of 1908 prescribed 2½ cents per mile as a maximum legal rate for transportation over the railroads of this State, such requirement had never been heard of in North Carolina. It is therefore not necessary, and hence unreasonable.

2. Throughout the Union, except practically in this and two or three other adjoining States, such requirement is still unheard of, and mileage is still pulled on the trains as was the case here prior to 1908. See table, 153 N. C., at p. 580. Therefore it cannot be necessary in this

State where the volume of travel is much smaller than in many others, and hence it is unreasonable to vex the public by an unnecessary requirement.

3. By chapter 216, Laws 1907, the General Assembly prescribed 2¼ cents per mile as a maximum legal rate for transportation over the railroads in this State. The railroad companies proposed to the Executive of this State that "if the rate were changed to 2½ cents per mile they would issue mileage books, good on their lines within and without the State and good on all railroads within the State, at the rate of 2 cents per mile." Thereupon, the Special Session of 1908 was called, which enacted the 2½ cents per mile rate. This session was held at considerable expense to the taxpayers of the State. No (443) one in this State had ever heard of a requirement that mileage books be exchanged for a ticket. Every one understood, of course, that the mileage books issued would be such as the public had always been accustomed to. That mileage had saved the public the annoyance which it now daily suffers of being compelled to purchase tickets. The requirement to buy tickets with mileage was adopted after the General Assembly had adjourned. It was a breach of faith and hence unnecessary and void. It is vexatious and annoying to the traveling public.

4. This hitherto unheard-of requirement that mileage should be used, not as mileage, but to buy tickets with, was doubtless adopted to deter the public from the purchase of mileage books by making their use less of a convenience. For that reason, also, it should be held void, for travel should be made as convenient as possible for the traveling public. The great "Pennsylvania System" as well as some other roads finds it an economy and a convenience to themselves as well as to the public to allow mileage books to be used on the train, not only by the holder, but for any one else who may be with him. It is certainly less expensive to the railroad company to have an agent, other than the conductor, to take up mileage on the train than to have extra agents at the stations to exchange tickets for mileage. In this State the Raleigh and Southport, and possibly some other roads, still accept mileage on their trains. This is another evidence that the innovation of requiring the public to buy tickets with mileage is unnecessary and a vexatious imposition upon the public.

Cited: Mason v. R. R., 159 N. C., 187; *Norman v. R. R.*, 161 N. C., 339; *Hallman v. R. R.*, 169 N. C., 131.

(444)

LULA RUSS v. J. T. HARPER.

(Filed 1 November, 1911.)

1. Master and Servant—Safe Place to Work—Safe Appliances—Duty of Master—Special Care—Negligence—Proximate Cause—Damages.

In the course of plaintiff's employment at defendant's laundry she was required to take a heavy basket of wet clothes on the third floor of the building, hoisted there through a shaft. The handle of the basket was a short rope with iron hooks at the end, caught in loops at either side of the basket, the middle of which was caught in a large hook at the end of the hoisting rope. The evidence of plaintiff tended to show that the hook on the end of the hoisting rope, by means of which the basket was suspended, was inefficient and insecure, and for this cause an end of the rope handle to the basket became unfastened and the hook thereat caught in her arm, cutting through the flesh; that the other end of the rope remained fastened to the basket and the weight of the basket pulled her against a post, where she remained until she was rescued by others: *Held*, the condition of the appliances was not such as required of the defendant no special care, preparation, or prevision, where the element of proximate cause is ordinarily lacking; and the evidence tended to show actionable negligence on defendant's part in respect to it.

2. Master and Servant—Assumption of Risks—Contributory Negligence—Rule of Prudent Man.

When the doctrine of assumption of risks is relied on in defense to an action for damages arising from injuries received through defendant's negligence, for that the servant continued to work at the unsafe place and with the improper appliances furnished by the master, which had resulted in the injury complained of, the questions relating to it are determined on the principles applicable to the doctrine of contributory negligence, under the "rule of the prudent man."

3. Master and Servant—Negligence—Conditional Release—Sealed Instrument—Questions for Jury.

A paper-writing, not under seal, set up in defense to an action by the master wherein damages for personal injuries arising from his negligence is sought by the servant, which contained certain conditions to be performed by the master before it is effective as a "release or discharge," raises the question as to the master's performance of those conditions, which is to be determined by the jury when the evidence relating to it is conflicting; and in the absence of a seal the instrument could not be treated as a technical release.

4. Master and Servant—Safe Place to Work—Safe Appliances—Former Conditions—Evidence.

When the injury complained of was alleged to have been caused by the master's not furnishing for the use of the servant in performing his duties a proper appliance in fastening a basket to a hoisting rope, or that the hook on the rope was at the time wrapped around with a small string

insufficient for the purpose, it is competent for a witness to testify that at this same place a year or two before the basket fell with her on two occasions, under the same conditions which in this case caused the injury.

BROWN, J., dissents; WALKER, J., concurs in the dissenting opinion.

APPEAL from *Peebles, J.*, at April Term, 1911, of NEW HAN- (445) OVER.

Action to recover damages for physical injury caused by alleged negligence of defendant. There was evidence on the part of plaintiff tending to show that on 2 February, 1909, plaintiff, an employee of defendant, doing business as the Wilmington Steam Laundry, was injured by the negligence of defendant in failing to provide a safe place or appliance for doing her work and in failing to give same proper supervision. There was also testimony for plaintiff tending to show that the conditions contained in the paper-writing set up by defendant in lieu of her recovery had not been complied with, etc.

The defendant offered evidence tending to show there had been no negligence of defendant causing the injury, and resisted recovery further on the grounds that plaintiff had assumed the risk, was guilty of contributory negligence, and that any and all recovery was barred in the case by reason of an adjustment had between the parties, evidenced and contained in a paper-writing executed by the plaintiff in terms as follows:

WILMINGTON, N. C.

In consideration of the fact that the Wilmington Steam Laundry will pay my doctor's and medicine bills and keep me on the pay-roll at my regular salary until I am pronounced able to resume (446) work, by the doctor, I do hereby forever release and discharge said Wilmington Steam Laundry from any and all claims, demands, actions, which I now have or may hereafter have claim against for any injuries that I received on 2 February, 1909. LULA RUSS.

LIZZIE RUSS,
CHARLES T. HARPER,
Witnesses.

Defendant claimed that said paper-writing was and should have the effect of a release of plaintiff's demand; and offered evidence tending to show that all conditions and stipulations appearing in the agreement had been fully complied with.

The jury rendered the following verdict:

1. Was the plaintiff injured by the negligence of the defendant in his (defendant's) failure to furnish safe elevator arrangement? Answer: Yes.

2. Was the plaintiff guilty of contributory negligence, as alleged? Answer: No.

3. Did the plaintiff assume the risk of the injury by her accepting employment and using the arrangement furnished her, as alleged by defendant? Answer: No.

4. Did the plaintiff execute the agreement or paper-writing offered in evidence by defendant, and did she receive her weekly pay and doctor's services under said agreement until the doctor determined her well and ready to return to work, in satisfaction of her claim for damages? Answer: No.

5. What damages, if any, is the plaintiff entitled to recover? Answer: $600 in addition to anything paid on account.

Judgment on the verdict, and defendant excepted and appealed.

W. P. M. Turner, Rountree & Carr, and Herbert McClammy for plaintiff.

E. K. Bryan for defendant.

HOKE, J., after stating the case: There was evidence tending to show that defendant was proprietor of a steam laundry, and in the ordinary progress of the work the wet clothes were placed in a large heavy basket, "large enough to lay a man's shirt in full," and raised by a hoisting rope and pulley on the third floor, where it became (447) plaintiff's duty as an employee to pull the basket from the elevator shaft to the floor, remove the clothes and give them to another employee to be placed in the drier. That the handle of the basket was a short rope with iron hooks at the ends. These hooks were caught in loops at either side of the basket and this short rope, at or about the middle, was hitched to a large hook at the end of the hoisting rope, where it was or should have held in place by some kind of proper and secure fastening so placed as to hold the basket steady and in its proper position. That on this occasion the basket was very heavy, having from 50 to 75 wet shirts in it, and as plaintiff in the usual way was endeavoring to pull the same to its landing place, from the absence of the fastening or because same was insufficient or insecure, the short rope slipped, tilting the basket, with the effect that one of the hooks at the side of the basket slipped from its hold, causing the basket to drop, and as it went down the shaft the hook at the loose end of the short rope caught in plaintiff's "right arm between the elbow and wrist, cutting through the flesh for a distance of about three inches and lodged in the bone and muscles of the wrist. That when the basket jerked forward and the hook fastened in plaintiff's arm, she fell with one shoulder against a post at the side of the shaft and in this way was kept from being jerked into the shaft; the basket filled with wet

clothes hanging down the shaft, suspended by the rope, one large iron hook being caught in plaintiff's wrist and the other fastened to one end of the basket." That plaintiff remained in this position for a time, till relieved by the superintendent and another employee standing near.

The negligence alleged against defendant on the facts in evidence was in not having any proper fastening to hold the short rope in or on the large hook at the end of the hoisting rope; that the hook did not have sufficient curvature and in having an insufficient and insecure fastening to keep the short rope from slipping, rendering the basket liable to tilt, as it did in this instance, and thereby making plaintiff's work less secure.

Speaking to this question, the plaintiff, on being shown the appliance as at present operated, stated that it was not like it was at the time plaintiff received her injury. At that time, "The hook on the rope from the drum did not have any wire wrapped (448) across the top of the hook when I worked at the laundry, and, in fact, had nothing on the hook to prevent the rope from flying off. Where the rope came together and wound upon the top hook, there was wrapped around it a small cotton string which kept the rope from slipping, and therefore held the basket in place. The rope you have here has a large twine string wrapped just under the hook, and this is interwoven in the two small ropes. This is entirely different from the way it was arranged when I was injured. When I was injured, the two large hooks which caught in the handles of the basket were sharp at the points, but since then they have been cut off. When the accident happened, I had caught hold of the basket by the side of it, as I had always done, to pull it from the shaft to the floor, and when I pulled it in, the small cotton cord around the center hook that held the rope in position, broke, which caused one end of the basket to fly up, and in doing so one hook was released, and that end of the rope jerked loose from the top hook."

There was evidence on part of defendant contradicting the portion of this above statement which tends to establish negligence on defendant's part; but on the testimony as quoted, the question of defendant's negligence under a proper charge was for the jury. It was not a case presenting ordinary conditions requiring no special care, preparation, or prevision, where the element of proximate cause is not infrequently lacking, as in *House v. R. R.*, 152 N. C., 397, and *Dunn v. R. R.*, 151 N. C., 313; but comes under that class of cases illustrated in *Hipp v. Fiber Co.*, 152 N. C., 745, and *Wade v. Contracting Co.*, 149 N. C., 177, etc.

The court was right, therefore, in submitting to the jury the issue as to defendant's negligence. We find no testimony tending to show contributory negligence by plaintiff, other than that which might arise by reason of her working on under the circumstances as they (449) existed, and this was not improperly submitted to the jury, under an issue as to assumption of risk. Whatever may be the ruling in other jurisdictions, it is now very well established in this State that this doctrine of assumption of risk, in its proper acceptation, does not apply to conditions caused or created by the employee's negligence, or, in such case, if it exists in name, it is to be determined on the principles applicable to contributory negligence. On this question, in *Bissell v. Lumber Co.,* 152 N. C., 124, the Court quotes with approval from Shearman and Redfield on Negligence, sec. 211, as follows: "The true rule, as nearly as it can be stated, is that a servant can recover for an injury suffered from defects due to the master's fault, of which he had notice, if under all the circumstances a servant of ordinary prudence, if acting with such prudence, would, under similar conditions, have continued the same work under the same risk"; and this statement has been approved in numerous decisions of the Court, as in *Norris v. Holt-Morgan Mills,* 154 N. C., 474; *Turner v. Lumber Co.,* 140 N. C., 475; *Pressly v. Yarn Mills,* 138 N. C, 410.

In *Turner's case, Associate Justice Brown* states the doctrine we are considering, as follows: "His Honor instructed the jury that when the plaintiff went on the log car for the purpose of riding, he assumed the risk of all the dangers incident to riding on a log train. As a general statement of the law, this proposition is correct; but it does not go far enough, and was liable to mislead the jury. The judge should have further stated that the plaintiff assumed no risk which was incurred by reason of a defective car. There was evidence tending to prove that one of the standards used to hold the logs securely in place was gone, and there was no evidence that the plaintiff was apprised of the danger liable to result when he mounted the loaded car. Inasmuch as it was the master's duty (he having undertaken it according to the plaintiff's contention) to furnish his laborers transportation on his log train to and from the 'quarters,' it was his further duty to see that such transportation was rendered as reasonably safe as the character of it would admit. While the plaintiff assumed the risks incident to riding on loaded log cars, he did not assume any risk resulting from a (450) defective car. *Hicks v. Mfg. Co.,* 138 N. C., 319; *Pressly v. Yarn Mills, ibid.,* 410. If the plaintiff knew that the standard was gone when he mounted the loaded log car, and if in consequence thereof the danger to himself was so obvious that no man of ordinary prudence would have ridden on it, then the plaintiff did assume the

risk and would be guilty of such contributory negligence as would bar a recovery." This being the doctrine as it obtains with us, on the facts in evidence, the court committed no error to defendant's prejudice in submitting the question of assumption of risk to the jury. See *Hamilton v. Lumber Co., post,* 519.

On the 4th issue the paper-writing relied on by defendant could not be treated as a technical release, for lack of a seal. *Redmond v. Coffin,* 17 N. C., 441; *Smithwick v. Ward,* 52 N. C., 64; Clark on Contracts, p. 491. But whether termed a release, a compromise, or accord and satisfaction, it purports on its face to be an adjustment on mutually dependent conditions, and a breach on the part of defendant having been established by the verdict, the plaintiff is remitted to his original rights. *Wacksmuth v. Relief Dept.,* 157 N. C., 34*; *Wildes v. Nelson,* 154 N. C., 590; *Memphis v. Brown,* 20 Wall., 289; *Noe v. Christian,* 51 N. Y., 270; 1 A. & E. Enc. (2 Ed.), 422 *et seq.*

There was also objection that Minnie Pickett, a witness for plaintiff, was allowed to testify that when she worked at this same place a year or two before, the basket fell with her on two occasions; that the small string, wrapped around the short rope just where the same was fastened to the hook on the long rope, broke, causing the basket to drop to the bottom floor. The conditions appear to be the same and the evidence, tending, as it did, to show that this was a dangerous contrivance, would seem to be a relevant circumstance, under *Blevins v. Cotton Mills,* 150 N. C., 493, and cases of like kind.

There is no reversible error, and the judgment in plaintiff's favor is affirmed.

No error.

BROWN, J., dissenting: I am of opinion that upon all the (451) evidence the giving way of the fastening which held one side of the basket was an accident to which no reasonable care or human foresight can guard against, and that the defendant should not justly be held liable for the consequences.

MR. JUSTICE WALKER concurred in this opinion.

*The Relief Department cases will be found together in 157 N. C.

H. G. KIME v. SOUTHERN RAILWAY COMPANY.

(Filed 1 November, 1911.)

1. Carrier of Goods—Live Stock—Damages—Stipulated Notice—Knowledge of Agent—Liability of Carriers.

When by reason of the negligence of the carrier a shipment of horses is injured in transportation under its live-stock bill of lading, the carrier is liable in damages, notwithstandng the notice required by its bill of lading has not been given in accordance with its terms, *i. e.*, "the claim for such loss or damage shall be made in writing, verified by the affidavit of the shipper or his agent, and delivered to an authorized officer or agent of the carrier within five days from the time said stock is removed from the car, etc.," if the proper agent of the defendant knew of the injury to the live stock at the time they were being unloaded from the car.

2. Same—Evidence—Questions for Jury.

It is some evidence of notice to a carrier of the damaged condition of horses it had transported under its usual live-stock bill of lading, that its depot agent was standing in such position near the car that the horses would pass before him while being unloaded, and that they were covered with perspiration, were in a suffocated condition, very weak, and that instead of leading them in the usual manner, they had to be taken by the tail and hip and steadied down the gangway to keep them from falling.

APPEAL from *Daniels, J.*, at May Term, 1911, of ALAMANCE.

This is an action to recover damages for injury to stock transported by the defendant railroad.

The plaintiff offered evidence tending to prove that twenty-one horses and three mules were received by the defendant from a connecting common carrier, and that they were carried in an old stock (452) car which had been worked over; that the ventilating windows and doors were closed up tightly with slats and the car rendered almost air-tight, being without ventilation and unsuitable and unfit for the transportation of live stock; and that they were injured thereby while in possession of the defendant.

The bill of lading covering the shipment was introduced in evidence, and, among other things, it contained the following stipulations:

(1) No claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to an authorized officer or agent of the said carrier within five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a

claim is made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs.

(2) The said shipper or the consignee is to pay the freight charges thereon to the said carrier at the rate of $45 per carload, which is the lower published tariff rate, based upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers, or their employees or otherwise: "If horses or mules, not exceeding $100 each."

It was admitted that the plaintiff did not give to the defendant (453) written notice of his claim for damages; but he contended that this was unnecessary, as the agent of the defendant was present when the horses and mules were unloaded, and saw them and knew of the injury to them.

The following verdict was rendered by the jury:

1. Was plaintiff's stock injured by the negligence of the defendant company, as alleged in the complaint? Answer: Yes.

2. If so, what amount of damages has the plaintiff sustained on account of said negligence and injury? Answer: $475.

3. Did the plaintiff comply with the contract of shipment as to the giving of notice to defendant as to his claim for damages? Answer: No.

Judgment was entered upon the verdict in favor of the defendant, and the plaintiff excepted and appealed.

W. H. Carroll for plaintiff.
Parker & Paker for defendant.

ALLEN, J. The ruling of the learned judge, before whom this case was tried, granting the motion of the defendant for judgment upon the verdict, is based upon the answer to the third issue, he being of opinion that the failure of the plaintiff to give notice to defendant of the injury to the stock is fatal to his right of action.

He correctly held, in accordance with our authorities, that the provision in the bill of lading requiring notice was valid, and that the failure to give written notice would not prevent a recovery by the plaintiff, if the agent of the defendant knew of the injury to the horses and mules at the time they were being unloaded. *Selby v. R. R.*, 113 N. C., 588; *Jones v. R. R.*, 148 N. C., 586; *Austin v. R. R.*, 151 N. C., 137; *Kime v. R. R.*, 153 N. C., 400.

He was, however, further of opinion, and so charged the jury, that there was no evidence "that the agent of the defendant saw or knew that it (the stock) was injured," and directed the jury to answer the third issue "No," if the evidence of the witness for the plaintiff was believed; and in this, we think, there was error.

The plaintiff was a witness in his own behalf, and testified that he was present when the stock was unloaded at Burlington, and that Mr. Ray, the depot agent, was also present; that the horses and (454) mules were in a suffocated condition, and that the perspiration was on them like they had come out of a river; that they were out of breath and very weak, and that the boys who were helping to unload had to take them by the tails and hips and steady them; that they did not lead them as was usually done, but had to steady them and lead them down the gangway to keep them from falling; that Mr. Ray, the agent, was standing on the platform when they were moved away.

He was then asked the following questions:

Q. Was he in a position to see the horses? A. Yes, sir; good as I could.

Q. How close were the horses to Mr. Ray? A. They had to come right by the side of him.

Q. How many feet? A. Something like six or eight feet.

Q. That was when they came out? A. Yes, sir.

If this evidence is believed, the condition of the stock was such that it would necessarily attract attention, and the agent was so situated that he could scarcely fail to observe them.

In our opinion, this is some evidence that he saw the horses and mules, and knew they were injured.

The question is also raised on the record as to the effect of the valuation clause in the bill of lading, but as this is considered in another case at this term, and the facts bearing on this controversy may be more fully developed on another trial, we refrain from discussing it. For the error pointed out,

New trial.

Cited: Wilkins v. R. R., 160 N. C., 59; *Kime v. R .R., ib.*, 457; *Baldwin v. R. R.*, 170 N. C., 13; *Hemphill v. R. R., ib.*, 456; *Mewborn v. R. R., ib.*, 210; *Schloss v. R. R.*, 171 N. C., 352.

(455)

ACME CEMENT AND PLASTER COMPANY v. GREENSBORO WOOD FIBER PLASTER COMPANY.

(Filed 1 November, 1911.)

1. Statute of Frauds—Third Persons.

The statute of frauds is not available as to third parties, and strangers to the transaction cannot avail themselves of this plea.

2. Statute of Frauds—Contracts, Written—Lessor and Lessee—Registration—Lease—Evidence.

A written contract of lease of lands is good between the parties without registration, and a creditor of the lessee, who had thought he was selling the goods to the lessor, cannot avail himself of the want of registration of the lease, in his action against the lessor; and it is therein competent to prove the existence of the lease as a substantive fact.

3. Lessor and Lessee — Lease — Fraud and Mistake — Notice to Vendor — Inquiry.

One dealing with a lessee of a business concern who, in the transaction, describes himself as lessee, has notice of such facts as will put him on reasonable inquiry that he is not dealing with the lessor, and the lessor cannot be held liable for goods sold and delivered to the lessee by mistake and without his authority, when he had not induced or misled the seller into making the transaction.

4. Same—Partnership.

The principle which requires notice to be given of the retiring of a partner to those dealing with a partnership, to relieve him of liability from debts created thereafter by the firm, has no application to instances of a lease so as to require like notice to protect the lessor from debts thereafter made by his lessee.

APPEAL by plaintiff from *Daniels, J.*, at February Term, 1911, of GUILFORD.

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

Taylor & Scales for plaintiff.
Stern & Stern for defendant.

CLARK, C. J. In 1906 the plaintiff sold the defendant two car-loads of cement, for which the latter paid. On 1 January, 1907, the defendant leased its property to one W. E. Cochran, and went out of business. Thereafter said Cochran ordered four car-loads of cement (456) from the plaintiff. The correspondence on Cochran's part was on letterheads bearing at the top the words "Greensboro Wood Fiber

Plaster Company," and at the bottom the letters were signed "Greensboro Wood Fiber Plaster Company, W. E. Cochran, lessee." This signature was stamped with a rubber stamp, except the words "W. E. Cochran," which was written in pen and ink. The correspondence which the defendant company had had with the plaintiff was on letterheads which bore the words "Greensboro Wood Fiber Plaster Company," and in addition bore at the head the words "W. C. Bain, president; J. R. McClamroch, vice president; E. G. West, secretary, treasurer, and general manager," and was signed "Greensboro Wood Fiber Plaster Company, per E. G. West, secretary and treasurer." The letterheads of the defendant also described its business as "manufacturers of wall plaster," while that used by Cochran used the words "manufacturers of Blue Bell Wood Fiber Plaster."

This action is brought to recover of the defendant company the price of the four car-loads of cement shipped on the order of W. E. Cochran, lessee, in 1907.

The plaintiff excepted because the defendant was allowed to show by the witness West that it had leased its plant to Cochran on 1 January, 1907, and for this purpose offered in evidence the written lease. The plaintiff objected on the ground that it was a lease of the defendant's entire plant for a period of five years, consisting among other things of real estate, and, not having been recorded, it was void under the statute of frauds. The exception is not well taken. The statute of frauds is not available as to third parties, and strangers to the transaction cannot avail themselves of the statute. *Cowell v. Ins. Co.*, 126 N. C., 684; *Davis v. Ins. Co.*, 84 N. C., 396; *Green v. R. R.*, 77 N. C., 95. As to the plaintiff, the lease was a substantive fact which could be proven by the witness West. Besides, the lease was in writing. Revisal, 976. The registration required by Revisal, 980, has no application when, as here, the issue to be determined is whether the plaintiff is a creditor or not.

(457) There are numerous other exceptions, but they practically depend upon the propositions that the defendant company should have granted the plaintiff's prayer for instruction, that it was incumbent upon the defendant company to notify the plaintiff that it had leased its plant to Cochran, and that not having done so, the defendant is liable for the goods bought by said Cochran.

The plaintiff contended that when a partner retires from a partnership, in order to relieve himself from liability on account of debts created thereafter by the firm, he must give actual notice of such retirement to such persons as have been accustomed to deal with the firm or must show that they had knowledge of such facts as would put the creditor on notice. And as to those not theretofore dealing with the firm,

he must show public notice given of his retirement and that the same is true when the purchaser of a partnership business conducts it in the same name and style.

The defendant does not contest these propositions of law. It offered evidence that it did not authorize the defendant to use its name in the business and had no knowledge of the fact, and contended that the change in the former letterheads by omitting the names of the officers, and the change in the description of the business and that the signature "W. E. Cochran, lessee," instead of "per E. G. West, secretary and treasurer," were sufficient and full notice to the plaintiff that it was dealing with Cochran, and not with the defendant company.

The case is not analogous to that of a partnership where the business goes on in the same name. Here there was a lease of the entire business, and the defendant had no control or knowledge of the conduct of the lessee. It was not called upon to notify the plaintiff that it had gone out of business. It would only be responsible to the plaintiff if its conduct had been such as to induce the plaintiff to believe that Cochran was acting on its behalf or by its authority, notwithstanding he described himself as lessee or had misled the plaintiff to so believe.

The court properly charged the jury that the burden was upon the plaintiff to show that defendant by its conduct induced plaintiff to believe that the person making the order for the four car-loads of cement had authority to make this contract, or by its conduct (458) misled the plaintiff so that it believed that the defendant was responsible for the order. The court could not instruct the jury, as requested by the plaintiff, to find the issue in favor of the plaintiff. The signature of the orders, "W. E. Cochran, lessee," was sufficient notice to the plaintiff that it was not dealing with his lessor, the defendant company. It was certainly sufficient to put the plaintiff on inquiry, and it and not the defendant company must suffer for the plaintiff's negligence. It would be otherwise if the defendant had by its conduct induced or misled the plaintiff into believing that it was liable for purchases made by its lessee or had authorized him to make such purchases. This view of the evidence was submitted to the jury by the court.

The lessor of a business does not stand in the same situation as a retiring partner, or the seller of a partnership business, who permits the business to be carried on in the same name and style as before. There former dealers with the firm must be shown to have actual notice. But when a business is carried on by a lessee, who describes himself as lessee, there is notice to all dealing with him that they are not dealing with the lessor.

The charge of his Honor is very full and explicit, the evidence is voluminous, and was doubtless fully argued to the jury. There seems to be very slight contradiction as to the facts. We find

No error.

A. D. SINCLAIR v. E. P. TEAL ET AL.

(Filed 1 November, 1911.)

Deeds and Conveyances—Limitation of Actions—Fraud or Mistake—Executors and Administrators.

In an action involving title to lands, the defendant claimed by successive conveyances from a devisee to whom the lands had been devised by her father as 100 acres to be cut off in a certain manner from given lines; and plaintiff, who was executor of the devisor, claims 8 acres thereof adjoining his own land as being in excess of the 100 acres devised and which had been surveyed and conveyed under metes and bounds in his absence. The defendant pleaded the twenty, ten, seven, and three years statutes of limitations, which the plaintiff resisted on the ground of mistake (Revisal, 395, 6): *Held*, (1) if the plaintiff's defenses were available against the devisee, it were not so against the subsequent grantees; (2) the statute runs from the discovery of the fraud, "or when it should have been discovered in the exercise of ordinary care"; and as it was the duty of plaintiff, as executor, to have laid off the land to the devisee and put her in possession, and as he could, by a simple calculation from the deed, have discovered that the description embraced 108 acres, and as for twenty years the various owners of the land had cultivated up to the boundaries, the statute had become a bar to the action.

(459) APPEAL by plaintiff from *Justice, J.*, at April Term, 1911, of ANSON.

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

Fred J. Coxe for plaintiff.
Robinson & Caudle for defendant.

CLARK, C. J. Llewellyn Sinclair by his will, probated 2 July, 1889, devised to his daughter, Mary Jarman, 100 acres of land "commencing in the old line at a corner of a 25 acres, my corner and Lewis Rickett's land, where it joins my old land, and runs near north, so as to make 100 acres west of said line." The 100 acres were surveyed off for her soon after the probate of the will, said survey being made by the county surveyor at the instance of Mary Jarman, without the plaintiff, the

executor of the will, A. D. Sinclair, being present. The said executor, who was devisee of the land adjoining, found out soon thereafter that said survey had been made, and he and the said Mary Jarman each treated said survey as containing only 100 acres, as devised in the will, and from said date said Mary Jarman, and those claiming under her, and the said A. D. Sinclair, were each in possession of their respective land on each side of said line, under said survey, under known and visible lines and boundaries, each cultivating up to said line.

On 2 March, 1893, Mary Jarman and husband mortgaged the (460) land to one Covington, describing the same by metes and bounds as had been fully set out in the survey made by the county surveyor. The land was sold under the mortgage and the purchaser received the deed containing said description bearing date 11 October, 1894. The purchaser went into possession under said deed, under known and visible lines and boundaries, and remained in posession of the same till 18 November, 1905, when he for value conveyed the same to the defendant E. P. Teal, describing the said metes and bounds, who has remained in possession under known and visible lines and boundaries up to this date. Another survey was made in the latter part of the year 1907, when it was discovered that the tract contained 108 acres, and this action was commenced 27 October, 1909, being less than three years prior to the beginning of this action, to cut off and recover 8 acres.

The defendant pleads the twenty-year statute, the ten-year statute, the seven-year statute, and the three-year statute. It would seem that he was protected by each one of them; but the plaintiff claims that under Revisal, 395 (6), he could maintain his action on the ground of mistake, it having been brought within three years after the actual discovery of the mistake in the acreage. If this had been true as between the plaintiff and Mary Jarman, it would not have deprived the defendant of the protection of the other statutes of limitations that are pleaded.

But even between the original parties the three-year statute runs from the time the fraud or mistake was discovered, "or should have been discovered in the exercise of ordinary care." *Peacock v. Barnes,* 142 N. C., 219, and cases there cited. It was the duty of the plaintiff as executor to lay off said land to Mary Jarman, the devisee. He did not do so, but permitted her to have it surveyed and enter into possession. It was therefore his duty to ascertain if the quantity was correct. Indeed, he could have ascertained that fact by the simple process of taking the metes and bounds as reported by the county surveyor and making a calculation therefrom. He says those metes and bounds were repeated in the description of the property, in the mortgage, and in the successive conveyances down to the defendant. He recognized (461) the line between himself and his sister and her successors in title

and in possession by cultivating up to that line and permitting them to do so for more than twenty years. In *Peacock v. Barnes, supra,* the Court quotes with approval Pomeroy Eq. Jur. (3 Ed.), sec. 917, note 2, "This can only mean that the plaintiff's ignorance is not negligent; that he remains ignorant without any fault of his own; that he had not discovered the fraud or mistake and could not by any reasonable diligence have discovered it."

Upon the agreed statement of facts as above, the court properly held that the plaintiff was not entitled to recover.

Affirmed.

Cited: Eubank v. Lyman, 170 N. C., 508; *Garland v. Arrowood,* 172 N. C., 593.

W. D. AUSTIN v. J. W. LEWIS & CO. AND HASTY & THOMAS.

(Filed 1 November, 1911.)

1. Courts, Justices'— Action on Contract — Nonresident Defendants — Bona Fide Residents—Motion to Dismiss—Procedure.

For a justice of the peace to acquire jurisdiction in an action upon contract against a nonresident of that county there must be other *bona fide* resident defendants; and when it appears that a nonresident of the county has been thus sued with other defendants, who are residents, but not *bona fide* parties, he may subsequently move to dismiss the action in the justice's court and again on appeal in the Superior Court.

2. Same—Pleadings.

In an action upon contract for the sale of lumber at a certain sum, brought before a justice of the peace, it was alleged and claimed that it was delivered to H. & T. for one L., a nonresident, to whom it was duly shipped; that L. had received it and plaintiff had been paid through H. & T., excepting a certain balance, the amount in controversy: *Held,* the action should have been dismissed upon the motion of L., he being a nonresident of the county, and it appearing that H. & T. were not *bona fide* defendants. Revisal, secs. 1449, 1450.

ALLEN, J., dissenting.

(462) APPEAL by defendants from *Ferguson, J.,* at August Term, 1911, of UNION.

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

Williams, Lemmond & Love for plaintiff.

Stack & Parker for defendant.

CLARK, C. J. This action was begun before a justice of the peace in Union County to recover $80. The defendants as recited in the warrant are J. W. Thomas and J. W. Hasty, both of Union County, and J. W. Lewis of Mecklenburg County.

The plaintiff filed a complaint before the justice reciting that he had sold to the defendant Lewis two car-loads of lumber at the sum of $12.50 per thousand, and delivered the same to said Hasty and Thomas for the said Lewis, to whom it was duly shipped; that the said Lewis had received the same and had paid the plaintiff through said Hasty and Thomas $224.01, leaving a balance due of $82.39. The defendant Lewis entered a special appearance and filed a motion to dismiss because it appeared upon the summons that he was a resident of Mecklenburg; that the sum demanded under alleged contract was under $200, and that it appeared upon the face of the complaint that no cause of action was stated against Hasty or Thomas nor any allegation connecting them with Lewis or alleging any liability on their part, and that joining them in the action was a fraud upon the jurisdiction of the court. The motion to dismiss the action was overruled, and was renewed.

The motion to dismiss should have been granted. Lewis being a nonresident of Union, could not be sued in that county unless there were other *bona fide* defendants residing in said county. Revisal, 1447. The complaint states no cause of action against either Hasty or Thomas.

Originally, a justice of the peace had no authority to issue any process to any other county but his own. He was authorized to do so in certain instances by chapter 60, Laws 1870, now Revisal, 1449, 1450. *Fertilizer Co. v. Marshburn,* 122 N. C., 414. This authority became much abused. Claims and notes were assigned to a resident of a dis- (463) tant county and thereupon action would be brought before a justice of the peace against nonresident defendants, who would submit to judgment by default rather than attend. Indeed, it was not necessary that the plaintiff should reside in such county. *Sossamer v. Hinson,* 72 N. C., 578. Thereupon the act of 1876-7, ch. 287, now Revisal, 1447, was passed, which requires that one or more *bona fide* defendants shall reside in the county. *Lilly v. Purcell,* 78 N. C., 82. Neither Hasty nor Thomas are *bona fide* defendants, and the justice did not have jurisdiction.

Action dismissed.

Cited: Dixon v. Haar, 158 N. C., 343.

W. O. SAUNDERS AND WIFE v. OLIVER F. GILBERT.

(Filed 9 November, 1911.)

1. Assault—Forcible Trespass—Threats—Res Gestae—Evidence.

Whatever is said or done by a mob or unlawful assembly in the nature or character of threats tending to show its purpose or *quo animo*, is competent as a part of the *res gestæ* in an action for assault or forcible trespass.

2. Assault—Forcible Trespass—Unlawful Assembly—Mob—Evidence.

In this case, *Held*, a crowd of armed people who had followed the plaintiff to his home and remained on the street there in a threatening manner, using abusive language, constituted an unlawful assembly.

3. Assault—Forcible Trespass—Mental Shock—Physician—Common Knowledge—Evidence.

In an action of assault and forcible trespass, which had caused the *feme* plaintiff to suffer from nervousness and mental shock, the court, from common knowledge, may assume that her attending physician will give her an opiate or sedative, and the testimony of her attending physician that he told her he was giving her morphine will not constitute reversible error.

4. Instructions—Specific Matters—Objections and Exceptions—Procedure.

If the charge of the judge is not specific, there must be a request for special instructions to make them so; otherwise, an exception to the charge for that reason will not be considered on appeal when the charge sets forth in a correct manner principles of law applicable to the case, and with sufficient clearness.

5. Forcible Trespass—Assault—Unlawful Assembly—Mob—Evidence—Firing—Aggravation of Damages.

An action of forcible trespass or assault is shown when it appears that an unlawful assembly of people followed the plaintiff to his home and there remained in such a threatening attitude and using such violent and abusive language as to make him reasonably apprehensive of his safety; and the asserted justification of defendant in firing upon the plaintiff under these circumstances, after plaintiff had fired with the hope of scaring the mob away, is not material, except upon the question of damages.

6. Forcible Trespass—Unlawful Assembly—Unlawful Use of Streets—Actual Entry—Evidence.

It is not necessary for a threatening and armed assembly to commit a forcible trespass or assault that they should actually enter on the premises of the one assaulted, for if an entry can readily be made and by their conduct on the street in front of his house they cause him to reasonably apprehend violence from them, their use of the street is unlawful, and as much calculated to produce a breach of the peace as if actual entry had been made.

7. Forcible Trespass — Unlawful Assembly—Firing—Justification — Reasonable Apprehension—Instructions—Questions for Jury.

When pertinent, in an action for forcible entry and assault against one of an armed and threatening multitude, upon an inquiry whether the defendant was justified in firing upon the plaintiff after the latter had fired, it is proper for the court to instruct the jury, in substance, under conflicting evidence, that it was for them to find whether the defendant fired through a reasonable apprehension of receiving bodily harm from the plaintiff, or because a felony was about to be committed; or whether the shots fired by the plaintiff were for the protection of himself and home from injury and to frighten the crowd away, and that the defendant's shots were fired in a reckless manner without having any reasonable apprehension that he or any one else was about to suffer from plaintiff's acts.

8. Forcible Trespass—Assault—Unlawful Assembly—Mob—Firing—Aggravation of Offense—Intentional and Willful Acts—Punitive Damages.

Punitive damages may be awarded, in addition to actual or compensatory damages, in an action of assault or forcible trespass where the defendant has acted wantonly or with criminal indifference to his civil obligations, or has been guilty of intentional and willful violation of the plaintiff's rights; and the defense that a criminal prosecution lies or may be presented will not avail the defendant, though when already convicted the fine imposed may be considered in diminution of the verdict in the civil action when awarding punitive damages to the injured party.

9. Forcible Trespass—Assault—Punitive Damages—Foundation.

An action cannot be maintained solely for the purpose of recovering punitive damages for forcible trespass; but if a right of action exists, though the damages are nominal, the jury may, in a proper case, award punitive damages.

10. Same—Evidence.

The defendant, accompanied by a large multitude of people, had followed plaintiff from church in a threatening manner, and was standing on the street in front of plaintiff's house. In the hope of scaring them away, the plaintiff fired in the air, whereupon the defendant fired several times at plaintiff, without reasonable apprehension of his own safety or that of others, nearly hitting the wife, the other plaintiff, who was at that time on the porch with her husband: *Held*, sufficient for awarding punitive damages, and the defendant in thus taking the law into his own hands cannot justify his act, whatever moral provocation he may have had.

APPEAL from *Justice, J.*, at Spring Term, 1911, of PASQUO- (465) TANK.

These are actions, one by the plaintiff, W. O. Saunders, and the other by his wife, Columbia Saunders, against the defendant for trespass and assault. They were consolidated and tried together, resulting in a ver-

dict and judgment for the plaintiffs, from which the defendant appealed. As the parties differ materially as to the nature of the evidence, it becomes necessary to state it at some length, all of it having been introduced by the plaintiffs.

The plaintiff, Columbia Sanders, testified: "I live on Cypress Street, and have lived in this town since I was a child; am the daughter of John Ballance and wife of W. O. Saunders; have known the defendant twelve or thirteen years; was once a clerk in his store about three years, and for Mitchell, his brother-in-law, in which the defendant was a (466) clerk for about five years. On 31 July, 1910, I was at home alone in my house until about 9 P. M., and was on the porch when my husband came, a large crowd of people following him, from church; some in front and some behind him. My husband came in the gate and closed it; heard Gilbert's voice. He said to Mr. Saunders, 'Will give you twenty-four hours to leave town.'"

Plaintiff was then asked, "What did the crowd do?" Defendant objected. Objection overruled, and defendant excepted. Answer: "The people leaned up against the fence and I heard other threats; my husband told them to leave, and the first man who came in the yard he would shoot. I was in the light and had on a white dress; saw a large crowd—two or three hundred people—and heard some one in the crowd say, 'Get him now.' My husband fired upwards from the doorstep towards tree tops. I then pulled him on the porch and some firing began on the street. A bullet struck the wall; just did miss me. I saw the flash. Another bullet struck the piazza post immediately in front of me and between me and the person firing. If the bullet had not struck the post it would have hit me."

"What did any one say?"

"Just as Mr. Saunders got inside the gate, some one said, 'That was all that saved you.'"

To this question and answer defendant objected; objection overruled, and defendant excepted.

"Two bullets struck the house and one struck the fence. The crowd seemed angry; saw no arms except flash of pistol. It made me nervous, and I was nearly wild; did not sleep that night; have not gotten over it yet; sent for Dr. McMullan, and he came."

Q. What did Dr. McMullan say he gave you? (Defendant objected; objection overruled; defendant excepted.) A. He said it was morphine.

Q. How did he administer it? A. He put it in my arm. It did not put me to sleep. There were several others who saw me, among them Mr. and Mrs. Simons and Mr. and Mrs. White. I was screaming and crying and could not eat or sleep any scarcely for about a week. I had a

baby about five months old and two other children, three and (467) five yeras old, in the house with me. I am still afraid to sleep without doors and blinds closed. On Monday I sent for Dr. Fearing.

Cross-examined, she testified: "This was on Sunday night immediately after service. Some people always passed my house going from church, but no large crowd like this. Mr. Saunders' father was with him, and went in the yard when he did. No one else came in the yard. The gate was ten or fifteen feet from the porch. Mr. Saunders came to about the bottom of the step and fired two or three times; nobody else had fired before he shot. He fired twice. I don't know whether he fired the third shot then or a little after. Then the firing was from the street. I pulled Mr. Saunders in just after he had fired. I closed the door when he went in; don't know whether it was before the third shot or not. He went upstairs and left me on the piazza. Mr. Saunders had been to Blackwell Memorial Church. Nobody attempted to go into the the gate, but pushed against the fence in a threatening manner. Mr. Saunders had not been in the house, since he left to go to church, until after the firing began."

Edward Brinson testified: "I have lived in Elizabeth City seventeen years; know defendant. On 31 July, 1910, was at Blackwell Memorial Church; saw W. O. Saunders there; did not see Gilbert at church. I came out on sidewalk and saw it was full of people, and I got into the street in front of Saunders' house; heard some one say 'Stop' or 'Halt'; some one in the yard fired; it was Saunders who shot; held the pistol and fired up above the crowd. I saw Gilbert fire towards the house. I dodged around Gilbert and heard several shots from where Gilbert was standing near the oak. Gilbert kind of leaned forward when he fired. I ran. I heard no threats. The street and the sidewalks were full of people, some walking leisurely, some fast, and some running."

J. M. Ballance testified: "I met O. F. Gilbert on the street Monday, 25 July, 1910, a week before the occurrence, and had a talk with him. He said: 'I understand you have stock in the *Independent.*' I said: 'No, I have not; all I have done is to sign Saunders' bond (468) to keep him out of jail,' He said: 'I want to tell you that I want to withdraw from you, if you have any stock in it.' He said: 'Why don't you help to stop this man (referring to Saunders) from talking about your pastor?' I said: 'I have nothing to do with that.' I said something and he said, 'Don't you think, if I am going to kill a man, it is my place to warn him beforehand of it?' Saunders was editor of the *Independent.* On the 31st, at night, I was at Blackwell Memorial Church. I went towards home along Cypress Street. When I got about eighty feet of Saunders' home, some one fired two shots upward from Saunders' doorsteps; then there were four shots fired from the

street towards Saunders' house in quick succession from near the oak. I went home and then back to Saunders' home. Mrs. Saunders was very nervous. I stayed there that night with the chief of police and a guard. I am half-brother to Mrs. Saunders. I saw three bullet holes, but saw no bullets; saw the glancing dents in the wood. I was eighty feet away; no one between me and the party firing on the sidewalk. I heard Saunders say he fired three times before any one else shot. When Saunders drew his pistol the people on the sidewalk and on the street began to run. I am on Saunders' prosecution bond."

Mr. Matthews testified: "I live six or eight hundred feet from Saunders' house. Was in front of my gate and heard two shots and four to six more. I went to Saunders' house. The street was full of people in groups; considerable excitement; saw Mrs. Saunders. She was greatly distressed—on the porch wringing her hands and appealing for help."

Dr. Zenas Fearing testified: "I know plaintiffs. As mayor of Elizabeth City, I was phoned to come to Saunders' house Sunday night, and went as Mayor and not as physician. Mrs. Saunders was very nervous and on the verge of collapse. This was on Sunday night. Dr. McMullan was there Sunday night. She was nervous. On the 2d of August saw Mrs. Saunders professionally and treated her for nervuosness."

(469) Charles Reid, sheriff of the county, testified: "Was at church and was going home; heard the shots—three shots, then four or five; went to the house of Saunders. Mrs. Saunders was nervous and asked me to protect her; stayed there until the crowd dispersed. I left guard around the house."

Plaintiff rests, and defendant introduced no evidence.

The court, after reading the evidence to the jury, stating the contention of the parties respectively, among other things, charged the jury as follows:

"1. If you find that Gilbert fired the shots towards the house through a reasonable apprehension that he was in danger of serious bodily harm from Saunders, or if he fired the shots believing that a felony was about to be committed, then Gilbert would not be guilty of committing a trespass as charged in the complaint, and it would be the duty of the jury to answer the issue as to trespass, 'No.'" Defendant excepted.

"2. If you find that Gilbert fired the shots towards the house under a reasonable apprehension that he was about to suffer serious bodily harm himself or that a felony was about to be committed, then he would have had a right to so fire the shots, and he would not be guilty of assault or trespass, as charged in the complaint, and it would be the duty of the jury to answer the issue as to assault and trespess, 'No.'" Defendant excepted.

"3. If you find that the plaintiff, W. O. Saunders, fired the shots in the air above the heads of the crowd for the purpose of protecting his home and frightening the crowd away and protecting himself from serious danger, and the said defendant fired the shots in the direction of the plaintiffs in a reckless manner without having any reasonable apprehension that he or anybody else was about to suffer from Saunders, then you should answer the issue as to unlawful assault, 'Yes.'" Defendant excepted.

"4. If you shall find that the plaintiff, W. O. Saunders, fired the shots in the air above the heads of the crowd for the purpose of protecting his home and frightening the crowd away and protecting himself from serious danger, and defendant fired the shots in the direc- (470) tion of the plaintiffs, in a reckless manner, without having any reasonable apprehension that he or anybody else was about to suffer from W. O. Saunders, then you should answer the issue as to unlawful trespass, 'Yes.'" Defendant excepted.

Upon the subject of damages, the court charged the jury: "That if they should answer the issues as to the assaults and trespasses which appear in the record, 'No,' they need go no further, for the plaintiffs would have suffered no damages. But if they answer those issues 'Yes,' then they would go further and consider the question of damages and give to the plaintiffs such actual damages as they may have sustained because of the alleged wrongful conduct of the defendant Gilbert, and in reaching their conclusion as to such actual damage, they might consider any mental and physical pain which they find that the plaintiffs suffered by reason of the said alleged wrongful conduct on the part of the defendant, and in addition might add such amount as in their judgment and discretion they deemed right as punitive or exemplary damages, provided you find that there was an assault committed on plaintiffs, maliciously or wantonly." Defendant excepted.

Brown Shepherd, Pruden & Pruden, and Meekins & Tillett for plaintiffs.

J. C. B. Ehringhaus, J. B. Leigh, W. M. Bond, and E. F. Adylett for defendant.

WALKER, J., after stating the case: The testimony as to what was said in the road and in front of the plaintiff's home was clearly competent. The *res gestæ* includes what was said as well as what was done. The acts and outcries of this unlawful assembly—for that is, in plain speech and in law, what it was—is held to be competent as *pars rei gestæ*, and also as tending to show their purpose or *quo animo*. Nothing is better settled than this rule of evidence. *S. v. Rawls*, 65 N. C., 334;

S. v. Worthington, 64 N. C., 594. We find it stated in 4 Elliott on Evidence, sec. 3128, that "What is said and done by persons dur-
(471) ing the time they are engaged in a roit (or unlawful assembly) constitutes the *res gestæ,* and it is, of course, competent, as a rule, to prove all that is said and done"—the acts and words of the mob or any members of it, as in *Rex v. Gordon,* 21 State Trials, 485 (563), wherein evidence of the cries of the mob "No Popery," as it was proceeding towards Parliament House, were held competent and admissible as a part of the *res gestæ.*

What Dr. McMullan said to the *feme* plaintiff, Mrs. Saunders, when he was administering morphine hypodermically, is not of sufficient importance to warrant the granting of a new trial, if it was incompetent as evidence. Proof of her highly excited and nervous condition was overwhelmingly established by the testimony, and there was none to the contrary. We are permitted to use our common sense sometimes in deciding legal questions, and every one must know that the good doctor was administering something medicinally for the alleviation of her sufferings and to quiet her excited nerves. Whether it was morphine, or any other opiate, narcotic, anodyne, or sedative, can make no essential difference. It was evidently given, whether internally or by hypodermic, to calm and soothe her disturbed feelings. We do not mean to imply that it was not competent as a statement accompanying an act and explanatory of it, but waiving, for the present, the question of its admissibility under the strict rule of evidence, it was harmless, if incompetent.

Having passed the skirmish line, we will now address ourselves to the remaining point in the case, the validity of the judge's charge upon the subject of forcible trespass and the right of self-defense. The charge was clear and sufficiently full, in the absence of requests for more specific instructions. If the defendant thought himself entitled to an instruction that "A person exercising the right of self-defense may safely act upon appearances, or the facts and circumstances as they appeared to him at the time, if he entertained an honest belief in their existence," he should have asked the judge to make his charge more definite in that respect; and having failed to do so, he cannot, after the verdict, complain. *Simmons v. Davenport,* 140 N. C., 407. He
(472) appeared, by his silence, to be content with the instructions, and we will not hear him speak now. The judge laid down a correct rule, that the defendant must have had a reasonable apprehension that his own life or limb was in jeopardy, and the jury are to judge of the reasonableness of his fear, nothwithstanding the other principle asserted. *S. v. Nash,* 88 N. C., 618. Would a man of ordinary firmness and similarly situated have reasonably acted upon the assumption that

he was about to receive serious bodily harm, and defended himself, giving him the benefit of his view of the circumstances at the time? In *Nash's case, Judge Ashe* said: "The Court did not give the prisoner, in *Scott's case* (4 Ired., 409), the benefit of the principle, for the reason that no such instruction had been asked in the court below, the judge concluding that the prisoner would have requested the instruction if he had acted upon such belief." This is a sufficient answer to defendant's exception for failure to give the instruction, the omission of which in the charge is now assigned as error. A defendant must not sleep upon his rights, but be vigilant; otherwise, the court may be betrayed into assuming that he had none, because he did not assert them. But on other grounds, should the failure to insert the instruction in the charge, even if it is correct in itself, be reversible error? We think not. The defendant's liability for a trespass or an assault depended, not upon his right of self-defense. He was the aggressor and, with his associates, had pursued the plaintiff, W. O. Saunders, even into his own yard—it may, with strict regard for the facts, be said, had forced him there by his fear of superior numbers, until he took refuge in his own house and escaped from threatened violence to his person. The offense of forcible trespass or assault was complete at that very moment, and what occurred afterwards—when, in the apprehension that he was about to be attacked on his own premises, Saunders fired his pistol "to scare them off," and defendant returned the fire—has nothing to do with the unlawfulness of the defendant's acts, and does not excuse what they did. He had already committed a forcible trespass and assault, as we will see, and Saunders' conduct, defensible, in law, as it is (473) (*S. v. Nash, supra*), did not excuse him or condone the offense he had already committed. Who will say that Saunders did not have reasonable ground to apprehend that they were about to attack him, and even his wife, whom he had the right to defend, in his own house?

It would seem unnecessary to discuss the character of the defendant's acts in order to show that they were unlawful and violative of the plaintiff's rights of person and property. They were, at least, sufficient to constitute a civil trespass. "If three persons commit a trespass upon property, in the presence of the person in possession, their number makes it indictable, although actual force is not used." *S. v. Simpson,* 12 N. C., 504. In that case the learned and just judge who presided over this Court at the time (*Chief Justice Taylor*) said: "The inquiry therefore is, whether the facts proved, according to the case sent up, amount to an indictable trespass. In *Regina v. Soley* it is said by *Lord Holt* that 'As to what act will make a riot or trespass, such act as will make a trespass will also make a riot'; by which he must be understood to mean, if committed by three or more persons. 11 Mod., 116. The con-

verse of the proposition must be true, that a trespass committed by three or more persons will make a riot. In every trespass, as well as riot, there must be some circumstances, either of an actual force or violence, or at least of an apparent tendency thereto, as are apt to strike a terror into the people; but it is not necessary that personal violence should have been committed. *Clifford v. Brandon,* 2 Campbell, 369. Any resistance on the part of the prosecutrix must have led to an actual breach of the peace; but the resistance of two women to the four persons who came to take the corn must have been unavailing." So in *S. v. Rawls,* 65 N. C., 334, it was held that when even four persons, with a gun and hoe, pursue another who is at a place where he has a right to be, and by threatening and insulting language put him in fear or by what is calculated to do so, and thereby induce him to go home sooner that he would have gone, or in a different way or course, and compel him by their numbers to do what he would not otherwise have done, they were guilty of a forcible trespass, although they did not approach nearer to him than seventy-five yards, and did not attempt to use their weapons. It is further said: "When a number of
(474) persons meet together, and there is evidence tending to show a common design to commit an assault upon another, they may all be properly found guilty, though only one of them used threatening and insulting language to him." And again, said *Judge Settle*: "The prosecutor was where he had a right to be, and had just been engaged in repairing his fences, which some one had knocked down, and no one had the right by numbers, manner, language, weapons, or otherwise to drive him home by a different path or at a different pace than that which he chose to take. What was the prosecutor to do? Was he to stand still and submit to a battery? Can the defendants stand in a more favorable light before a court of justice merely because their violence was not fully consummated in consequence of the flight of the prosecutor? Some stress seems to be laid upon the fact that the gun and other weapons were not taken from the shoulders of those carrying them. As is said in *S. v. Church,* 63 N. C., 16, that makes no difference, for 'that would have been but the work of a moment, and was not needed to put the prosecutor in fear and to interfere with his personal liberty.' " But the subject was fully discussed in *S. v. Davenport, post,* 596, and the authorities cited, and it covers the questions now raised by the defendant. There can be no question that defendant is civilly liable for the trespass and assault.

It can make no difference that this large multitude of people did not actually enter upon the premises of the plaintiffs or go within their curtilage. We have held that the gathering of a large number of persons on the public road in front of a man's house, or the use of violent,

abusive, or insulting language in a public or private road, or in the street of a city, in the presence and hearing of the owner of adjoining property, constitutes a forcible trespass. *S. v. Lloyd,* 85 N. C., 573; *S. v. Hinson,* 83 N. C., 640. In *S. v. Widenhouse,* 71 N. C., 279, (475) it is said that "The only privilege which the public have in a public road is that of passing over it, and those who abuse that privilege become trespassers *ab initio,*" citing *S. v. Buckner,* 61 N. C., 558, where *Judge Reade* says: "All misbehavior is aggravated by being in a public place. The only privilege which the public have in a public road is that of passing over it. If they misbehave in it, they create a nuisance. The road is for travel and for no other purpose." *Judge Ashe* said, in *S. v. Davis,* 80 N. C., 351: "He (the defendant) seemed to have rested his defense upon the ground that he was in the public road and had the right to do there as he pleased. In this he was mistaken. The public have only an easement in a highway—that is, the right of passing and repassing along it. The soil remains in the owner, and where one stops in the road and conducts himself as the defendant is charged to have done, he becomes a trespasser, and the owner has the right to abate the nuisance which he is creating. The principle of *molliter manus* does not apply to a case like this, where the trespasser, armed with a pistol, is acting in such belligerent defiance. See *S. v. Buckner,* 61 N. C., 558. The defendant used language which was calculated and intended to bring on a fight, and a fight ensued. He is guilty. *S. v. Perry,* 50 N. C., 9; *S. v. Robbins,* 78 N. C., 431."

In our case it was a pistol duel which ensued from the defendant's aggressive conduct, and the multitude with him supplied the place of the required force or violence, as it certainly tended to intimidate the plaintiffs and to put them in fear. *S. v. Laney,* 87 N. C., 535. It is, therefore, because the acts were committed in a public place and were just as much calculated to produce a breach of the peace as if actual entry had been made upon the premises, which could be done in a moment, that we cannot escape the conviction that this invasion of the defendant and his conspirators was conducted in such numbers and with such a display of force as to overawe and intimidate the plaintiffs, and it surely tended to a breach of the peace. He is contending that it did actually lead to that result, as he is charging the plaintiff W. O. Saunders with assaulting him and putting him on the defensive, so that he returned his fire, and we have an alleged duel; yet (476) nobody is guilty—and surely not the aggressors!

The cases collected in Walser's Index-Digest of the Criminal Law, at pages 162-166, will be found, when examined, to fully sustain our view of the facts of this case, when considered in their legal aspect. "A person who merely stops on the sidewalk in front of a man's house and re-

mains there, using abusive and insuling language towards him, commits a (civil) trespass." 28 A. & E. Enc., 553, citing *Adams v. Rivers,* 11 Barb. (N. Y.), 3901.

It is argued, and with some plausibility, that the court erred in allowing the jury to award punitive damages, in addition to those which are actual and compensatory. It would be exceedingly strange if a civil injury, which is also a crime, does not entitle the injured party to vindictive damages, and yet it is said that the reason why the law should be so is the very fact that the defendant will be punished in the criminal indictment, if convicted. But he may not be either indicted or adequately punished. Whatever may be the law elsewhere, this Court has held, according to the rule, which we think is general, that when the defendant has been indicted and punished for the crime, the pecuniary punishment can be considered by the jury in reduction of punitive damages. *Johnston v. Crawford,* 61 N. C., 342. Is not this the fair and equitable rule? Should the wrongdoer escape his full and proper measure of punishment in the civil suit until he is ready to show that he has made proper amends to the public in the criminal prosecution? Even then the payment of the fine may be considered only in reduction of the damages, as we have shown, and does not bar the claim to vindictive damages. In *Sowers v. Sowers,* 87 N. C., 303, *Chief Justice Smith* says: "Even after conviction and punishment by fine under an indictment for an assault, it would not defeat the right of the injured party to recover exemplary damages, or, as it is sometimes called, 'smart money,' and could only be made available in reduction of damages," citing *Smithwick v. Ward,* 52 N. C., 64, and approving the law thus stated by *Judge Manly:* "This element, in the estimate of dam-
(477) ages, is allowed, to punish the defendants for violating the laws, and by making them *smart,* to deter others as well as themselves from similar violations. The principle upon which society acts in punishing criminally is precisely the same. The public never is actuated by revenge, but solely by a motive of self-protection, and punishes to prevent a repetition of the offense by the culprit, or its perpetration by others." It is not, and should not be, his liability to be criminally indicted and punished for the same offense that entitles him to any reduction, but his actual prosecution and punishment for the same. Sedgwick, one of our most accurate writers upon this subject, has given this rule to guide us: "Thus far we have been speaking of the great class of cases where no question of fraud, malice, gross negligence, or oppression intervenes. Where either of these elements mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive, or exemplary damages; in

other words, blends together the interests of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender." 1 Sedgwick on Damages, p. 53; 13 Cyc., 106.

We had occasion to consider this question in *Jackson v. Telephone Co.*, 139 N. C., 347, and in that case, after a review of the precedents, we arrived at this conclusion: "The doctrine is well settled that the jury, in addition to compensatory damages, may award exemplary, punitive, or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly or with criminal indifference to civil obligations (*R. R. v. Prentiss,* 147 U. S., 106), or (the defendant) has been guilty of an intentional and willful violation of the plaintiff's rights. *R. R. v. Arms,* 91 U. S., 489; *Hansley v. R. R.,* 117 N. C., 565."

Barry v. Edmunds, 116 U. S., 550, sustains the doctrine in the following words: "It is settled in this Court that in an action for trespass, accompanied with malice, the plaintiff may recover exemplary damages in excess of the amount of his injuries, if the *ad damnum* is properly laid." See, also, *Williams v. R. R.,* 144 N. C., 498. Even under the rule as stated in *Remington v. Kirby,* 120 N. C., 320, the plaintiff was entitled to punitive damages. It is the willful (478) disregard of the rights of another, treating him with contempt or insult, or willfully or wantonly trespassing upon his lawful rights, that requires rebuke and makes the necessity for vindicatory justice; sets an example to wrongdoers and appeases an offended society, whose members should be permitted to live in peace and without molestation, and not be subjected to disturbance in their Sunday devotions or in their quiet and peaceful homes, by an unlawful invasion by those who, strangely enough, imagine that they can resent alleged grievances by themselves becoming the violators of the law.

This is an aggravated case, and the verdict was none too large. A citizen returning from church on a Sabbath evening is accosted on the street by the defendant and his associates and offensive epithets applied to him, and he is pressed upon so hard that he is compelled to seek protection and safety in the recesses of his home; and still the defendant contends that these acts are but a simple violation of the plaintiff's rights, without any features of aggravation, when it appears that he fired into the house and narrowly missed killing or severely injuring plaintiff's wife—a defenseless woman, whom he should have seen, as she was standing under the light. This case is the equal of any in our law books for its flagrancy, whatever the provocation may have been, and calls, if any state of facts can call, for the award of punitive damages.

Chief Baron Pollock (of the Exchequer Chamber) said that vindictive damages were generally awarded in actions of trespass, if accompanied with circumstances of insult or humiliation, or if the wrong is willfully committed in reckless or contemptuous disregard of the plaintiff's rights. In such a case, he thought—and his associates, *Barons Bramwell, Wilde* and *Channel,* agreed with him—the jury should be free to assess damages beyond those which are awarded in the ordinary case, where the wrong is unattended by any such circumstances, and he added that the courts have always recognized the distinction between damages given (479) with a liberal and a sparing hand. *Embleu v. Myers,* 6 Harlst and Norman, 54; *Day v. Woodworth,* 13 How (U. S.), 363, 371; *McNamara v. King,* 7 Ill., 432. If a wrong is willful, compensatory damages are not adequate, but the defendant must pay an additional sum for the sake of society and to discourage a repetion of his offense against its laws.

In a case where the circumstances of the assault were much less aggravated than those appearing in the record, *Chief Justice Gibbs* said: "I wish to know, in a case where a man disregards every principle which actuates the conduct of good citizens, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low station of life who should behave himself in this manner? I do not know upon what principle we can grant a rule (for a new trial) in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damages that the plaintiff may sustain."

The subject of punitive damages has been considered at this term in a learned opinion by *Justice Hoke,* delivered in *Blow v. Joyner, ante,* 140, a case much like this in some of its features.

But the defendant's counsel contended that there were no actual damages, and, at most, the plaintiffs could recover only nominal damages; and this being so, it follows that no exemplary damages can be awarded. We do not assent to the premises or the conclusion. In answer to a similar contention, we find the following in 1 Sedgwick on Damages (8 Ed.), sec. 361: "If the plaintiff has suffered no actual loss, he cannot maintain an action merely to recover exemplary damages. A plaintiff has no right, the courts say, to maintain an action *merely* to inflict punishment; exemplary damages are in no case a right of the plaintiff, and cannot, therefore, become a cause of action. If, however, a right of action exists, though the loss is nominal, exemplary damages may be recovered in a proper case; for the plaintiff had a right to maintain his action apart from the privilege of recovering exemplary damages. So in case of a malicious trespass on land, though the actual damage is nominal, exemplary damages may be recovered." *Wilson v. Vaughan,*

23 Fed., 229; *Hefley v. Baker,* 19 Kansas, 9. The same rule (480) was applied by *Chief Justice Wilmot* in *Tullidge v. Wade,* 3 Wis., 18. It is erroneous, though, to assume that there was no actual damage done by the defendant which gave the plaintiff a right to substantial compensation. He deliberately shot into the house, frightened and alarmed the plaintiffs, who were rightfully and peacefully its occupants. These and some other acts are properly subjects of fair compensation, and not merely of nominal damages. In *Rogers v. Spence,* 13 M. & W., 571, *Chief Justice Denman* said: "The actions of trespass on real and personal property were an extension of that protection which the law throws around the person, and substantial damages may be recovered in respect of such rights, though no loss or diminution in value of property may have occurred."

It is held to be the law that an individual whose rights of person or property are thus violated is generally entitled to recover damages for pecuniary loss, physical pain if any, inconvenience, injury to feelings, and mental suffering, pain, vexation, anxiety, the sense of wrong, shame or humiliation in the sufferer's breast, resulting from an act dictated by a spirit of willful injustice, or by a deliberate intention to vex, degrade, or insult, the latter being sometimes called *solatium*—solace or recompense for the wounded feelings, as distinguished from special or pecuniary damages. 1 Sedgwick (8 Ed.), sec. 37 *et seq.* Inconvenience, annoyance, or discomfort may also be considered. This, of course, is physical, and must not be purely imaginative, and must be produced through the medium of the senses, not flow from mere delicacy of taste or refined fancy or abnormal sensibility. It must be in a tangible form and assessable at a money value. 1 Sedgwick, sec. 42, and cases cited; *Williams v. R. R., supra;* 4 Sutherland on Damages, secs. 1010a and 1241.

"The motive with which a wrong is done in some cases affects the rule by which compensation is measured or losses estimated. Where there is fraud or other intentional wrong, compensatory damages are given with a more liberal hand by juries and their verdicts in such cases are less closely scanned by courts than in cases where that element is absent. . . . But there is a more liberal allowance of dam- (481) ages where the tort is an aggressive one, and the entire damages or some part of them are not capable of measurement by some standard of value or definite rule."

We again remind those who are disposed to take the law into their own hands and punish their enemies or a supposed wrongdoer, that there is a sufficient legal remedy for every alleged grievance, and if they will not resort to the courts where it can be enforced, but prefer to act in

defiance of constituted authority, the fault and the consequences will all be theirs, and they have no reason to complain if that same offended law, whose peaceful methods they have ignored, rebukes their defiance with heavy damages.

It is suggested in the evidence that W. O. Saunders had committed some gross impropriety by criticising a minister of the gospel in his newspaper. The specific offense is not pointed out, nor are we in any way informed as to the nature of his criticism. But this is all immaterial. Perhaps he may have greatly exceeded the limits of fair and proper comment, and that which he did should be reprobated. We cannot say how this is, nor need we, as the matter is not before us. There is one thing very certain, though: the defendant, and the multitude he was leading, had no right to resent what he had said by approaching him and his home in a hostile manner, with threats and menaces, and with a deadly weapon, to execute revenge upon him, however grievous his offense against them or against society, and not even if it was a criminal libel he had published. Government could not, upon any other principle, exist or continue as it was designed to be, when organized for the peace, safety, welfare, and happiness of the people. If the plaintiff, W. O. Saunders, has committed any wrong, if he has willfully criticised a minister or committed any other offense against public decency or social order, we have not the slightest word to utter in extenuation of the outrage; but he should be punished by the law and not by the mob.

No error.

Cited: *May v. Tel. Co.*, 157 N. C., 423; *Webb v. Tel. Co.*, 167 N. C., 489; *Trogdon v. Terry*, 172 N. C., 542.

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(482)

J. B. MOORE v. J. A. WESTBROOK.

(Filed 9 November, 1911.)

1. Partnership—Contribution of Partners—Dissolution—Payment of Creditors—Interest—Profits.

A partner is not entitled to interest on his contribution to the partnership funds or assets until after the date of the dissolution of the firm and the partnership creditors have been paid, in the absence of an agreement to that effect; and the reason applies with greater force to the interest upon profits, which cannot be sooner ascertained.

2. Partnership—Contributions — Dissolution — Payment of Debts — Adverse Interests—Statute of Limitations.

The statute of limitations begins to run against a claim of an advancement made by one of the partners to the firm upon a dissolution after the firm's creditors have been paid, for at that time the relationship between the parties becomes adverse.

3. Appeal and Error—Statute of Limitations—Burden of Proof—Evidence—Objections and Exceptions.

When without exception appearing, and jury trial waived, the trial judge has found against a party pleading the statute of limitations, as to whether the ruling of the judge can be reviewed on appeal, the burden being upon the party pleading the statute, *quære.*

4. Appeal and Error—Reference—Findings of Fact—Objections and Exceptions—Assignments of Error—Procedure.

A party appealing from a finding of fact by the referee, upon the ground that there was no evidence to support it, should enter his exception to the evidence before the referee as well as to the findings of fact, and have both exceptions reviewed by the judge, and then on appeal embrace in his assignments of error the exceptions to the evidence, for the appellate court is not required to examine the record for incompetent evidence not pointed out by exception, and pass upon its admissibility.

5. Reference—Issues Demanded.

The trial judge should submit to the jury issues demanded by a party to a case referred who has not waived his right, under the reference, to a jury trial.

6. Appeal and Error—Trial Court—Discretion.

Exceptions to the rulings of the trial judge made within his discretion are not reviewable on appeal.

7. Reference—Trial—Pleadings—Amendments—New Matter—Evidence.

On additional matters entering the controversy upon amendment to pleadings allowed after reference of the cause has been made and the referee's report received, the parties should be allowed to introduce further evidence; but no reversible error is found if, notwithstanding the refusal of the trial judge to permit such further evidence, the jury has found in favor of the party excepting, on the new matter introduced by the amendments.

APPEAL from *Peebles, J.,* at March Term, 1911, of PENDER. (483)

The summons in this action was issued on 23 August, 1907. The plaintiff filed the complaint on 18 December, 1907, in which he alleged:

1. That he and the defendant and one S. W. Troublefield, on or about the....day of....., A. D. 1892, formed a copartnership for the purpose of growing truck and other produce for market, the agreement

being that the said J. B. Moore was to furnish the land for said co-partnership at and for the price of $7 per acre per year and to pay one-third of the expenses and to receive one-third of the profits; and the said J. A. Westbrook was to pay one-third of the expenses and receive one-third of the profits; and the said S. W. Troublefield was to be paid the sum of $16.50 as a salary for his time not taken by the firm of J. A. Westbrook & Co., one-third of said salary to go as his part of the expenses of said firm, and to receive one-third of the profits, said firm to operate under the firm name of Westbrook, Moore & Co., which said firm continued in active business up to and including the year 1899, when it ceased active business.

2. That during all the years the said firm was actively engaged in said business, the defendant kept the books of accounts of the said firm and received all the moneys coming to said firm, and now has them in his possession.

3. That from the time of the organization of said firm, and for each year it did business, the said firm was prosperous and made a considerable profit from said business, having used 17½ acres of land furnished by the plaintiff at the rate of $7 per acre, and said firm has never paid the plaintiff the rent due for the said land.

4. That during all the years the said firm did business, and up to the present, the defendant has had the use of the money belonging to the said firm and has used the same for his profit and gain, and (484) though the said firm ceased active business in the year 1899, the affairs of the said firm have not been settled up between the partners, though all the debts have long since been paid except the rent money due this plaintiff, and this plaintiff has demanded of the defendant a settlement of the said firm's affairs and a payment to him of his share of the profits of the said business, but the defendant has failed and refused to settle with the plaintiff, though he has repeatedly promised to do so.

5. That the plaintiff verily believes that his share of the profits of the said business for the said years amounts to the sum of $2,700, if not more; the exact amount thereof this plaintiff cannot say, for the reason that the books of account of said business and the money is now and always has been in the hands of the defendant, and this plaintiff has not had access to the same.

The defendant answered, admitting the partnership on the terms alleged, and its dissolution in 1899, and denying any liability for rents, or that there were any profits made by the partnership.

At January Special Term, 1910, an order of reference was made, the defendant not excepting thereto, and to which the plaintiff excepted, reserving the right to have the issues of fact tried by a jury.

The referee filed his report on 23 September, 1910, as follows:

1. That the plaintiff, J. B. Moore, the defendant, J. A. Westbrook, and one S. W. Troublefield, did, in the early part of 1892, form and enter into a copartnership for the purpose of growing truck and other produce for market on the terms and conditions set out in the first paragraph of the complaint and admitted in the answer.

2. That pursuant to said copartnership agreement, work was begun about February, 1892, the several parties complying with their respective parts of the partnership contract set up in the first (485) paragraph of the complaint and admitted in the answer.

3. That the copartnership began to ship strawberries in the spring of 1893, and continued in business without interruption until the close of the strawberry season in 1899, to wit, on or about 1 June, 1899.

4. That beginning with the year 1893, the partners met from time to time, after the close of the shipping seasons, and went over the business for the past year.

5. That at these several meetings all the parties were present with their books, papers, and rceords, at which times they ascertained the net results of the respective years in dollars and cents, showing profits or loss, as the case might be, and how much.

6. That according to the terms of the agreement between the copartners, Mr. J. A. Westbrook, the defendant, was to receive the moneys derived from the sale of produce, and did receive them, and Messrs. Troublefield and Moore to keep the expense account.

7. That at these annual meetings, every item of expense connected with the conduct of the business was considered and added together and the sum total was deducted from the total receipts, showing the net profit or loss, as the case happened to be.

8. That after deducting the total expenses incurred in the conduct of the business, the copartners, operating under the firm name of Westbrook, Moore & Co., made the following profits for the respective years:

1893	$ 426.00
1894	546.00
1895	486.00
1896	552.87
1899	195.87
Making a total of	$2,206.74

But that no money was paid to plaintiff on account of said profits, except $14.70.

9. That after considering all expenses and receipts for the (486) years 1897 and 1898 combined, the copartnership lost, during these two years, about $657.81.

10. That the plaintiff, J. B. Moore, was entitled to one-third of the profits, and was chargeable with one-third of the loss of said copartnership.

11. That no final settlement or accounting has been had among said copartners.

Upon the foregoing "findings of fact" the referee draws the following conclusions of law:

1. That the contract made and entered into by the plaintiff, J. B. Moore, the defendant, J. A. Westbrook, and one S. W. Troublefield, as set forth in the first allegation of the complaint, was a copartnership contract.

2. That such a contract is lawful and contains nothing illegal, immoral, oppressive, or contrary to public policy, and that said contract was binding upon all parties thereto.

3. That the defendant, J. A. Westbrook, stood in a fiduciary capacity with respect to his copartners, plaintiff J. B. Moore and S. W. Troublefield, which relationship imposed upon him the burden of a strict accounting to his copartners, plaintiff J. B. Moore and S. W. Troublefield, for all funds coming into his hands in such capacity.

4. So that the referee recommends that the plaintiff recover judgment against the defendant for $735.58, being one-third of the total amount of profits made by the copartnership during its existence, less $219.27, being the plaintiff's share of the loss for the years 1897 and 1898, and $9.80 being two-thirds of the check for $14.70 not heretofore accounted for. That is to say, that plaintiff is entitled to recover judgment against the defendant for the net sum of $506.51, together with the costs of this action.

5. Considering this case in the light of all circumstances, the referee recommends that the plaintiff should not recover any interest on the amount due, except from the date of summons, 23 August, 1907.

Respectfully submitted, this 23 September, A. D. 1910.

R. W. HERRING, *Referee.*

Both parties filed exceptions to the report, and the plaintiff (487) demanded a jury trial.

The exceptions of the defendant were as follows:

As to findings of fact:

1. To finding of fact No. 6, for that it appears from the plaintiff's own evidence that plaintiff Moore and one S. W. Troublefield received some of the moneys derived from the sale of produce by said firm.

2. To finding of fact No. 8, for that there is no competent evidence upon which to base said finding.

3. To finding of fact No. 11, for that the testimony of the plaintiff and the witness Troublefield shows a settlement to have been made with the defendant.

4. To the above referred to finding of fact No. 8, for that the same is so vague and indefinite as to amount to no finding in law, in so far as it is attempted to find that any profits were made by the said firm.

As to conclusions of law:

1. To conclusion of law No. 4, if the same shall be considered by the court to be a conclusion of law, for that the same is based upon findings of fact without competent evidence to support such findings, and which finding is so vague and indefinite as to amount to no finding.

2. To conclusion of law No. 5, in so far as the same may be considered as a conclusion of law by the court, and in so far as it may involve any conclusion that there is any amount due from the defendant to the plaintiff.

At March Term, 1911, an amendment to the complaint was allowed alleging, in addition to the matters set out in the original complaint, that he had made advances to the partnership amounting to about $1,500, and that the defendant was liable for one-third thereof and interest.

The defendant answered the amendment, denying that the advancements were made, and pleading the three-years statute of limitations thereto.

He also asked to be allowed to plead the statute of limitations as to the claim for rents, but his Honor would not permit him to do so, because the claim for rents was in the original complaint, and (488) the defendant excepted.

Evidence as to the advancements made by the plaintiff was offered by both parties before the referee and he made his findings thereon. The case was tried before the jury upon the evidence taken before the referee.

The defendant offered additional evidence, not introduced before the referee, on the claim for advancements, and, upon the refusal of his Honor to allow it, excepted.

The jury returned the following verdict:

Second. Should the said J. A. Westbrook have turned over to the plaintiff his one-third of said profits, on the 1st day of June of the year they were made, and as they were earned, and did he fail to do so, and used the plaintiff's one-third of said profits as his own? Answer: Yes.

Third. Has the defendant paid to the plaintiff any part of said net profit, and if so, when, and in what amount? Answer: No.

Fourth. Did the plaintiff advance to the said firm the items as set out and claimed by him to have been advanced, in plaintiff's fourth exception, during the years mentioned in said exception, aggregating the sum of $1,559.04, or any part thereof, and if so, which items, if he did not advance them all? Answer: Yes.

Fifth. Did the defendant Westbrook pay to the plaintiff any other sums of money on account of the said copartnership, other than the credit mentioned in the fourth exception, amounting to the sum of $916.32, and if so, what sums were so paid, and the date of payment? Answer: No.

Sixth. Did the defendant keep the money of the said firm with his own, and use it as his own, except that part paid out by him for said firm? Answer: Yes.

Seventh. Did the defendant Westbrook ever pay to the plaintiff any money on account of his share in the profit of said firm; if so, when and what amount? Answer: No.

Eighth. Should the plaintiff recover interest on the amounts advanced by him to the firm, and not repaid to him, from the 1st day of
(489) June of each year that they were advanced, until repaid, and if not, then from what date should the plaintiff recover interest? Answer: No; from the time the firm ceased to do business.

Ninth. Should the plaintiff recover interest on his share of the profits of said firm from the 1st day of June of each year when they were earned, until paid, and if not, then from what date should the plaintiff recover interest? Answer: No; from time firm ceased to do business.

Tenth. What amount of yearly rent is the plaintiff entitled to recover of the defendant, if any, for the years 1892, 1893, 1894, 1895, 1896, 1897, 1898, and 1899? Answer: $40.83⅓.

Eleventh. Is the plaintiff entitled to interest on the rent money due him, from the 1st day of June of each year that the rents became due, and if not, from what date should the plaintiff recover interest on the rents? Answer: No; from time firm ceased to do business.

Twelfth. Were the copartners to meet on or about the 1st day of January each year, after the shipping season, and have a settlement with each other, and divide the profits, as claimed by the plaintiff in his fifth exception? Answer: Yes.

It was agreed that the judge might pass upon the issues of fact raised by the plea of the statute of limitations to the amendment of complaint.

The court then found as a fact from the said evidence and the pleadings that the plaintiff's claim for his advances was barred by the statute of limitations, to which finding of the court the plaintiff excepted.

There was no evidence that the partnership owed any debts at the time of the dissolution in 1899, except the debts between the partners, or that there was anything to be done, except to settle.

The plaintiff demanded settlement of the defendant from time to time, and the defendant denied any liability.

His Honor rendered judgment in favor of the plaintiff for his part of the profits and rents, with interest thereon from 1 January, 1900, and denied his motion for judgment for advances made, holding that this claim was barred by the statute of limitations. (490)

The plaintiff excepted:

(1) Because his Honor held that the claim for advances was barred by the statute of limitations.

(2) Because the court erred in refusing to give judgment for the plaintiff for interest on his rents and profits from the year they became due or were earned.

The defendant excepted:

(1) For the error in refusal of the court to overrule finding of fact No. 8, as found by the referee, and conclusions of law Nos. 4 and 5, as found by the referee, first exception, for that no competent evidence was introduced upon which to base the said finding of fact and said conclusions of law.

(2) That the court committed error in submitting to the jury each and all of the issues which appear in the record.

(3) That the court erred in submitting to the jury the evidence taken before the referee and in submitting the cause to the jury upon such evidence.

(4) That the court erred in refusing to permit the defendant to plead the statute of limitations as to the amounts alleged to be due as rents.

(6) That the court erred in refusing to allow the defendant's motion to set aside the verdict.

(7) That the court erred in refusing to grant the defendant a new trial.

(8) That the court erred in signing the judgment which appears of record.

E. K. Bryan, J. T. Bland, E. L. Larkins, and John D. Kerr for plaintiff.

Robert Ruark for defendant.

PLAINTIFF'S APPEAL.

ALLEN, J., after stating the case: The exceptions of the plaintiff cannot be allowed.

(491) As to the claim for interest, it is alleged in the complaint that the partnership "continued in active business up to and including 1899, when it ceased active business," and the judgment appealed from, based on the findings of the jury, allows interest from 1 January, 1900, which according to the complaint was the time of the dissolution. There is no claim that the defendant agreed to pay interest.

"A partner is not entitled to interest on capital which he contributes to the firm, although his contribution is greatly in excess of that of his copartners, unless they have agreed he may have interest." 30 Cyc., 698.

The cases cited in the note fully sustain the text. *Sheppard v. Smith,* 20 Ala., 750; *Carpenter v. Hathaway,* 87 Cal., 439; *Tutt v. Land,* 50 Ga., 350; *Thompson v. Noble,* 108 Mich., 25; *Lamb v. Rowan,* 83 Miss., 53; *Smith v. Smith,* 18 R. I., 722; *Hart v. Hart,* 117 Wis., 663; *Rodgers v. Clement,* 162 N. Y., 422.

In the last case the Court says: "If the moneys advanced by the plaintiff to the firm were contributions of capital or additions to plaintiff's capital, then he was not entitled to interest on the same, since he must rely upon the profits of the business to compensate him for the investment, unless there was a special agreement between the partners that interest should be allowed."

The reason applies with greater force to the claim for interest on profits, which cannot be ascertained until after the dissolution.

The question was considered by *Ruffin, C. J.,* in *Holden v. Peace,* 39 N. C., 228. He says: "The general rule for interest, on accounts in ordinary dealings, is that it is chargeable only after an account has been rendered, so that the parties can see which is the debtor and what he has to pay, unless it be agreed otherwise, or the course of business shows it to have been otherwise understood. This applies still more forcibly as between partners, because their accounts cannot be fully made up between them without, in truth, taking all the accounts of the firm—in other words, without a dissolution; and it is impossible to tell before what either would be bound to pay or entitled to receive. There-
(492) fore, if the parties mean that interest should be charged on the accounts of the partners, for dealings in the shop and money withdrawn for personal expenses or other things, from year to year, the course is to come to an agreement to that effect, and then for balances appearing upon the individual accounts, annually or oftener, according to the agreement to that effect, charges of interest are made from time to time, or if omitted, will be allowed in making the final settlement. If there be no agreement upon the subject, it must be understood that the parties, especially when they have no separate property, were aware that each must draw from the firm the means of sup-

porting himself and his family, and that an exact equality could not be expected in those matters, and, therefore, that it was not intended that interest should be charged during the partnership."

The exception to the ruling that the claim for amounts advanced by the plaintiff is barred by the statute of limitations is equally untenable.

It does not appear that there were any debts to be paid or collected at the time of the dissolution of the partnership, and nothing remained to be done except to settle. The relationship between the parties then became adverse, and the right of action accrued to the plaintiff.

Murray v. Penny, 108 N. C., 324, seems to be directly in point. In that case the partnership between the plaintiff and defendant was formed in 1884, and dissolved in 1885. The action was commenced in 1890 to recover $400, which the plaintiff alleged to be due him on a fair accounting, and the defendant relied on the limitation of three years as a defense. It was held that the plaintiff's cause of action was barred, and the Court said: "Unless there is some agreement, express or implied, fixing a period for accounting beyond the time of dissolution, or circumstances that render an accounting impossible, the statute begins to run from the time the partnership in fact dissolved. Wood on Lim., sec. 210. During the existence of the partnership the partners mutually sustain the relation of trustee and *cestui que trust.* Where there are debts still due the firm, and after dissolution one of the partners is to collect them, or other circumstances showing (493) that a settlement is impossible, the relation of trust between the partners may continue till some act puts them in adversary position to each other. Nothing of that kind is in evidence. There is nothing to show that any debts were outstanding and uncollected, or that any trust remained to be executed. On the contrary, it appears that an immediate settlement was possible, and that both partners agreed that it should be made at once."

We have passed on the exception of the plaintiff as to the statute of limitations, but it is doubtful if he can raise the question on this record, as the plea of the statute by the defendant casts the burden on the plaintiff to prove that his cause of action is not barred *(Hussey v. Kirkman,* 95 N. C., 64), and a jury trial being waived on this issue, the judge, without any exception to evidence, has found the fact against the plaintiff.

We find

No error.

DEFENDANT'S APPEAL.

ALLEN, J. The first exception of the defendant is to the refusal of the court to overrule a finding of fact made by the referee.

The exception is not based upon the ground that there was no evidence to support the finding, but that there was no competent evidence, and a proper consideration of it would require us to go through the entire record, and pass on the admissibility of evidence, when there is no assignment of error that incompetent evidence had been admitted.

This we are not required to do. If the appellant desired to preserve the exception, it was his duty to enter his exception to the evidence before the referee, and to except also to the finding of fact, and to have both exceptions reviewed by the judge, and then on appeal to embrace in his assignments of error the exceptions to the evidence.

We find, however, on an examination of the evidence of the plaintiff, that he testified to facts justifying the finding, and the rule is
(494) well settled that we cannot review the action of the judge when there is any evidence.

It was the duty of the judge to submit the issues to the jury, upon demand of the plaintiff, as he had not waived his right to a jury trial, and the exception of the defendant to such action cannot be sustained.

The fourth, fifth, sixth, and seventh assignments of error are to rulings within the discretion of the judge; and the eighth assignment is formal for the purpose of preserving the other exceptions.

The third assignment would not be free from difficulty if it had not been held that the claim of the plaintiff for advances made to the firm was barred by the statute of limitations; but with this decision in favor of the defendant, he cannot complain that he was not allowed to offer evidence in addition to that introduced before the referee on the claim.

The general rule is, undoubtedly, as his Honor held, that upon the coming in of a report, under a compulsory reference, the issues are to be determined by the jury on the evidence before the referee; but if an amendment is allowed, after the report is filed, containing an additional charge, the parties ought to be allowed to offer evidence as to such charge, because it was not embraced in the reference.

The defendant has not, however, suffered any injury by the refusal to allow him to introduce the evidence, as there is no recovery against him on the additional matter contained in the amendment.

We find no error of which the defendant can complain.

No error.

Cited: *Makely v. Montgomery,* 158 N. C., 590.

J. C. HORNER v. OXFORD WATER AND ELECTRIC COMPANY.

(Filed 9 November, 1911.)

1. Appeal and Error—Taxing Costs—Reference—Questions of Law.

A ruling of the Superior Court judge that as a matter of law he is precluded by a former judgment from taxing the cost of a reference, is reviewable in the Supreme Court.

2. Same—Procedure—Interpretation of Statutes.

A former judgment appealed from and affirmed by the Supreme Court, "that the defendants do recover against the plaintiff and the surety on his prosecution bond the costs of this action," does not preclude a subsequent trial judge from taxing the cost of reference "against either party or apportioning it among the parties in his discretion" (Revisal, sec. 1268); and, in this case, it is ordered that at a subsequent term the trial judge pass on the question and tax the cost of the reference in accordance with the statute.

APPEAL from *Daniels, J.*, at May Term, 1911, of GRANVILLE. (495)

Motion to divide the fees of referee and commissioner between plaintiff and defendant, under Revisal, sec. 1268. The court denied the motion, and plaintiff appealed.

Graham & Devin and B. S. Royster for plaintiff.
John W. Hinsdale for defendant.

BROWN, J. At August Term, 1910, of GRANVILLE, *Judge Lyon* rendered judgment against the plaintiff dissolving the restraining order theretofore issued, and ordered, "That the defendants do recover against the plaintiff and the surety on his prosecution bond the costs of this action." From said judgment plaintiff appealed to Supreme Court, which affirmed the judgment. *Horner v. Electric Co.*, 153 N. C., 535.

Upon the opinion being certified down, the defendant, at May Term, 1911, moved for judgment in accordance with said opinion. Plaintiff moved that the allowance to the referee and stenographer and commissioner to take depositions be paid equally by plaintiff and defendant. The court "being of opinion that he is concluded by the judgment rendered at a former term, adjudging that the defendant recover of plaintiff the payment by defendant of any part of the costs, adjudged that the defendant above named do recover against plaintiffs above named the costs of this action, including an allowance to the referee of $375; $75 of which shall be paid to his stenographer as a part of the costs of the referee, and costs of taking depositions, Francis J. McLaughlin,

commissioner, $38.75, and Harry Winfield, commissioner, $20. It is ordered that the clerk shall tax the said amounts in the costs in this action." From this ruling the plaintiff appealed.

The court made no allowance to referee and commissioner at August Term, 1910, when the judgment was rendered which this Court (496) affirmed; but those fees were fixed and allowed by *Judge Daniels* at May Term, 1911. His Honor bases his refusal to apportion them upon a supposed lack of power, thinking he was precluded by the former judgment.

In that he was in error, and as he founds his ruling upon a lack of power, it is reviewable. *S. v. Fuller,* 114 N. C., 894; *Martin v. Bank,* 131 N. C., 123. We think he had as much right to apportion or divide the fees, if he saw fit to do so, as he had to fix them at all.

Under Revisal, sec. 1268, fees of referees and commissioners to take depositions may be taxed against either party or apportioned among the parties, in the discretion of the Superior Court. *Cobb v. Rhea,* 137 N. C., 298; *Field v. Wheeler,* 120 N. C., 269.

As the judge who tried the cause and rendered judgment failed to pass on the matter of referee's fees and commissions, and as the judgment then rendered contains no reference to them, it was entirely within the power of the Superior Court at a subsequent term to adjust them.

The Superior Court will hear and pass on the motion and tax them as a whole against plaintiff or apportion them in its sound discretion between plaintiff and defendant.

Reversed.

JAMES A. ZACHARY, ADMINISTRATOR OF HERBERT H. BURGESS, v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 9 November, 1911.)

1. Railroads—Interstate Commerce—Federal Employers' Liability Act.

The act of Congress of April 12, 1908, known as the Federal Employers' Liability Act, applies only to a carrier by railroad while engaged in interstate commerce, and only to an employee "suffering injury while he is employed by such carrier in such commerce."

2. Same.

The killing of a railroad employee by a local switch engine while backing down the main line for the purpose of cutting out box cars from an interstate train, to place them in making up an unconnected train to run from and to points in the State, after he had left the train and was crossing the railroad yards to his boarding place, does not constitute a cause which falls within the provisions of the Federal Employers' Liability Act.

3. Same—Lessor and Lessee—North Carolina Railroad.

By reason of its lease to the Southern Railway Company, the North Carolina Railroad Company does not become an interstate carrier, and while the latter is held to be liable as lessor for the negligent acts of omission or commission in certain instances when an injury is inflicted by its lessee, yet the Federal Employers' Liability Act can have no application when it appears that the employee was injured after he was off duty from an interstate train, and expecting to go on duty after another train had been made up for a destination within the State.

4. Railroads—Master and Servant—Railroad Crossings—Negligence—Questions for Jury.

Evidence tending to show that plaintiff's intestate, an employee of a railroad, was killed at night by defendant railroad company's shifting engine running backward without light or flagman on the end of the tender, at the rate of fifteen or twenty miles an hour, and while he was going to his boarding place, where he and other employees customarily passed, is sufficient for the jury upon the question of defendant's negligence.

5. Railroads—Crossings—Look and Listen—Master and Servant—Nature of Employment.

While an employee of a railroad must exercise reasonable care for his own safety, the rule that one who crosses a railroad track must, as a matter of law, look and listen before doing so, does not apply in all its strictness to one who is employed in a railroad yard and whose duty makes it necessary for him to go frequently upon the tracks.

6. Railroads — Crossings — Master and Servant — Nature of Employment — Contributory Negligence—Questions for Jury.

There was evidence tending to show that defendant's fireman, who had just come in on defendant's train, was hurrying across its tracks at night to his boarding house for his supper, going by the way ordinarily used by himself and other employees, with the purpose of soon returning to go out as fireman on another train of the defendant, and was run over and killed by defendant's switching engine running backward at the rate of fifteen or twenty miles an hour, without light or lookout on the end of the tender; that another engine nearby with its blower on was making a loud noise so that the bell of the engine causing the death could not be heard by the intestate. There was evidence to the contrary: *Held*, the question of contributory negligence was not one of law, but for the jury to determine.

APPEAL from *Daniels, J.*, at February Term, 1911, of GUIL- (498) FORD.

The action is brought to recover damages for the negligent killing of Herbert H. Burgess, a fireman in the employment of the Southern Railway Company, the lessee of the defendant, at Selma N. C., 29 April, 1909.

These issues were submitted to the jury:

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

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

3. What amount, if any, is the plaintiff entitled to recover? Answer: $2,000.

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

John A. Barringer, G. S. Bradshaw, and T. M. Calvert for plaintiff.
Wilson & Ferguson and John K. Graves for defendant.

BROWN, J. There are twenty-three assignments of error in the record, none of them relating to the reception or rejection of evidence. These assignments present for consideration the three principal contentions of the defendant:

1. That the act of Congress of 22 April, 1908, known as the Federal Employers' Liability Act, applies, and that the cause should have been determined under the provisions of that act.

2. That there is no sufficient evidence of negligence.

3. That in any view of the evidence, the intestate was guilty of such contributory negligence as under the law of this State bars recovery.

Does the Federal act Apply?

(499) Plaintiff's intestate was fireman of engine 862, which was standing at the time of the occurrence on the cinder track at Selma, N. C. He had been oiling his engine and preparing it to take a train from Selma to Greensboro, which was made up at Selma. He started across the tracks to go to his boarding house before leaving, and was stricken and killed by a local switch engine, which at the time was backing down the main line for the purpose of cutting out two cars, which had come in from Pinners Point, Va., on train 72 for transportation to Greensboro, N. C. Train 72 is known as Pinners Point train via Selma to Goldsboro, N. C.

Engine 862 was not attached to any cars at the time, but was being prepared to haul a train from Selma to Greensboro composed of miscellaneous cars. All cars brought in from Pinners Point, Va., by train 72 for points west of Selma are included in this train.

We are of opinion that the Federal act does not apply, and that the case was properly tried under the State law.

The act applies only to a carrier by railroad while engaging in interstate commerce, and only to an employee "suffering injury while he is employed by such carrier in such commerce."

The point was not discussed on the argument or in the briefs, but it occurs to us that the North Carolina Railroad is not an interstate railroad, nor is that corporation itself engaged in interstate commerce. Its tracks and property lie wholly within the State of North Carolina, extending from Goldsboro to Charlotte. It is true, the tracks and property are leased to the Southern Railway Company, a corporation of another State, that is engaged in both inter- and intrastate commerce; but that does not necessarily make the North Carolina Railroad Company an interstate carrier within the meaning of the act of Congress, any more than A would be made a wholesale grocery merchant because he had leased his warehouse to B, who conducted such business in it, and had assumed responsibility for B's debts.

The corporation known as the North Carolina Railroad Company is in existence, has its officers and directors, receives its annual rents from its lessee, the Southern Railway Company, and distributes them among its stockholders; but it is not an interstate carrier within the meaning of the Federal act. (500)

It is also true that this Court has held in *Logan v. R. R.*, 116 N. C., 941, that this lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business on the lessor's road, it matters not what kind of commerce the lessee is engaged in at the time. But that is because a railroad corporation cannot escape its responsibility by leasing its road. It is still liable for its lessee's acts of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either.

We do not think the Federal act applies, for the reason that the deceased at the time when killed was not employed by the Southern Railway, the lessee, in interstate commerce. At the time he was killed the deceased was not engaged in an act of any kind of commerce. He was on the way to his boarding house for a purpose entirely personal to himself and not on the carrier's business. The deceased had oiled and prepared his engine to make the run from Selma to Greensboro, points within this State. The engine was stationary and had not been attached to any cars. The deceased was on his way to his boarding house, and was killed by a local switch engine which was then unattached to any cars, but going for two cars from Pinners Point, Va., for the purpose of attaching them to the train that engine 862 was expected to pull. So far as the evidence shows, the deceased nor his engine had ever been engaged in any other work except this local run from Selma to Greensboro.

If the contention of the defendant can be maintained, then it follows that all employees of railways that do an interstate business are necessarily employed in interstate commerce. The ticket seller who sells a

ticket to a traveler going beyond the State, the car cleaner who cleans the car he is to travel in, the man who loads the engine tender with coal which is to pull him, and the gatekeeper who examines his ticket and passes him on to his car, are all employed in interstate commerce.

The Employers' Liability Act of 1906 was declared repugnant to the Constitution because by its terms it embraced all employees of a
(501) railroad, interstate and intrastate, and that the two were so interblended in the statute that they were incapable of separation. *Employers' Liability cases,* 207 U. S., 463. If the contention of the learned counsel for defendant be well founded, then the subsequent act of 1908 would apply to all employees of a railway engaged in both kinds of commerce, however remotely they are connected with it. This would accomplish the very end which it would seem could not be accomplished by the Federal Congress under the first act. The contention would extend the power of Congress to almost every conceivable subject of railway transportation, however inherently local, and would destroy the authority of the States over matters which from the beginning have been under their control.

Was the evidence of negligence sufficient to justify the court in submitting the matter to the jury? We think so. The evidence offered by plaintiff tends to prove that the deceased was compelled to cross the several tracks of the railroad to go from his engine to his residence; that it was customary for all employes to pass to and fro over these tracks; that it was dark at the time and the switching engine was running backwards, tender foremost, from fifteen to twenty miles an hour. Two witnesses testify that there was no light whatever on the end of the tender that was moving forward, nor was any flagman there. This is ample evidence of negligence to go to the jury. *Ray v. R. R.,* 141 N. C., 84; *Smith v. R. R.,* 132 N. C., 819; *Purnell v. R. R.,* 122 N. C., 832.

Was the plaintiff's intestate, in any view of the evidence, guilty of such contributory negligence as bars recovery? We think not, and that his Honor properly submitted that matter to the consideration of the jury. Had it appeared from the evidence offered by plaintiff that his intestate was guilty of contributory negligence, it is settled by precedents that the court may sustain the motion to nonsuit or direct a verdict upon that issue. *Baker v. R. R.,* 150 N. C., 562; *Strickland v. R. R., ib.,* 4.

Under the conditions surrounding the intestate we cannot say, as matter of law, that in any view of the evidence he was guilty of contributory negligence. His Honor properly submitted the matter to
(502) the jury under what is commonly known as the rule of the pru-

dent man. There is strong evidence of contributory negligence, but the evidence is not all of that character from which only one inference can be drawn.

If nothing appeared in evidence except the testimony of Oliver, the engineer of the switching engine that killed the intestate, it may be that the court might well have sustained the defendant's contention. But there are many facts and circumstances in evidence which tend to exculpate the intestate and to explain his conduct. The intestate was evidently in a hurry to go to his residence and return to his engine; he was compelled to cross six tracks; there was no other way; it was the universal custom for the employees to cross these tracks passing to and from their places of residence on the south side; the big freight engine 719 was standing on the track about eight feet from main line with its blower on, making a very loud noise, so that the bell of the switching engine could not be heard by the intestate, who at the time came from behind No. 719 and started to step on main track and was killed by the switch engine. The engineer of that engine says that the intestate did not look, and that if he had looked he could have seen the switch engine. That is the construction put by the engineer upon intestate's conduct from the engineer's point of view, but under all the circumstances, taking the evidence as a whole, it ought not to be held to be conclusive. The intestate could not well hear the ringing bell or the approach of the switch engine because of the blowing off of 719. It was dark and possibly he could not see the switch engine. He had the right to rely upon the invariable requirement that an approaching engine would display a headlight at night. Had there been a headlight he probably would have seen it before he stepped upon the track. The absence of it may have misled him, and lured him to his death.

While an employee must exercise reasonable care, the rule that one who crosses a railroad track must, as a matter of law, look and listen before doing so, does not apply in all its strictness to one who is employed in a railroad yard and whose duties make it necessary for him to go frequently upon the tracks. *Wolf v. R. R.*, 154 N. C., (503) 571; *Sherrill v. R. R.*, 140 N. C., 255; *Weiss v. Bethlehem Iron Co.*, 88 Fed., 23; *R. R. v. Jackson*, 78 Ark., 100; *R. R. v. Peterson*, 156 Ind., 364; *Shoner v. Pennsylvania Co.*, 130 Ind., 170; *McMarshall v. R. R.*, 80 Iowa, 757; *Jordan v. R. R.*, 58 Minn., 8.

It is well said by *Mr. Justice Manning* in his clear and well-considered opinion in *Farris v. R. R.*, 151 N. C., 483: "While we are in no wise inclined to relieve the person crossing the tracks of a railroad from the imperative duty of observing the measure of caution so well established for his safety by the well-considered decisions of this and other courts,

yet 'it cannot always be said that he is guilty of contributory negligence, as a matter of law, because he did not continue to look and listen at all times continuously for approaching trains, where he was misled by the company or his attention was rightfully directed to something else as well' (3 Elliott on Railroads, sec. 1166a), or that he failed to look in opposite directions at the same moment of time."

Taking into consideration the whole evidence, and weighing the conditions and circumstances surrounding the intestate, we are of opinion that his Honor properly submitted the question of contributory negligence to the jury and overruled the motion to nonsuit.

The charge is a full and clear presentation of both sides of the controversy, and we find no error in it of which the defendant can justly complain.

No error.

Cited: *Myers v. R. R.*, 162 N. C., 345; *Renn v. R. R.*, 170 N. C., 150; *Hinson v. R. R.*, 172 N. C., 652.

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(504)

THE TOWN OF TARBORO v. H. L. STATON.

(Filed 9 November, 1911.)

1. Cities and Towns—Street Improvements—Abutting Owners—Assessments—Notice—Front-foot Rule.

The proper authorities of a town, acting under legislative powers conferred, may pass a valid and enforcible ordinance requiring the owners of property abutting upon a street to curb and gutter the portion of the street in front of their property according to certain stated specifications, the one-half of the cost to be borne by the town and the other half by the owners of abutting property according to frontage, with provision that on failure of the owners to make these improvements within thirty days after due notice given, the work shall be done by the town authorities and the proportionate part of the cost thereof assessed against the property of the adjoining owners in the manner stated.

2. Same—Legislative Powers—Governmental Functions—Equality—Power of Courts.

While these assessments are upheld on the theory of special benefits conferred, and which bear some reasonable relation to the burdens imposed, authority to make them is referred to the sovereign power of taxation, which is primarily and as a rule exclusively a legislative power; and where the Legislature, or a municipal government exercising legislative power expressly conferred for the purpose, has provided for a local improvement of this character, its action is conclusive as to the necessity for the improvement; and in establishing general rules, by any of the

recognized methods, imposing special assessments for its construction and maintenance and in applying these rules or methods to the property of an individual owner, the courts are permitted to interfere only in rare and extreme cases, in which it is clearly manifest that the principle of equality has been entirely ignored and gross injustice done.

3. Same—Resulting Benefits—Equalization—Constitutional Law.

Where a municipal ordinance of the kind indicated directed the construction of a curb and gutter along a public street, one-half of the cost to be borne by the town and the other half by the abutting property-owners, to be assessed according to the front-foot rule, an assessment according to the rule established of $63.12 against plaintiff's property having a frontage of 252½ feet is not so unreasonable or oppressive as to justify the interference of the court, and the position is not affected by the fact that the commissioners in making the assessment did not, in the particular instance, take into consideration the question of special benefits to the owner's lot.

4. Cities and Towns—Street Improvement—Abutting Owners—Assessment—Notice.

The provision of a statute affording an abutting owner on a street ample opportunity to appear and question the amount or validity of an assessment made on his property for street improvement there, is valid. *Kinston v. Loftin*, 149 N. C., 255, cited and approved.

WALKER, J., dissenting.

APPEAL from *Whedbee, J.*, at June Term, 1911, of EDGE- (505) COMBE. Action to enforce a lien for special assessments.

It appeared that the municipal authorities of Tarboro, acting under power expressly conferred by the Legislature, had passed an ordinance requiring the owners of property abutting on that part of Main Street from Church Street to Howard Avenue to curb and gutter the portion of the street in front of their property according to certain stated specifications, the one-half of the cost to be borne by the town and the other half by the owners of abutting property according to frontage, and providing further, if any abutting owners should fail to make said improvement within thirty days after due notice given, the proper officers of the town should have same done, and that one-half costs thereof should be assessed against said property owners at so much per front foot, etc. That defendant, after notice duly given, had failed and refused to comply with the terms of the ordinance. The work was done by the authorities, the cost thereof requiring an assessment of 50 cents per front foot, and showing plaintiff's portion to be $63.12.

The act in question declares the amounts properly assessed to be a lien on respective lots enforcible by action in the Superior Courts, and

contains the provision: "And in his answer to the action so instituted the owner shall have the right to deny the whole or any part of the amount claimed to be due by the town, and to plead any irregularity in reference to the assessment, and the issue raised shall be tried and the cause in other respects disposed of according to law and the prac-
(506) tice of the court."

Defendant resists recovery chiefly on the ground (1) that the property of defendant in fact received no special benefit by reason of the alleged improvement; (2) that such special benefits were in no wise considered by the authorities when the assessment was ordered or made; and, having made answer to this effect, tendered issues presenting his position, and same were declined.

On issues submitted by the court, the jury rendered the following verdict:

1. Did the commissioners of Tarboro in making the assessment take in consideration the special benefits the property assessed received in addition to the benefits received by the community at large? Answer: No.

2. Was the work done according to the requirement of the notice served on the property-owner? Answer: Yes.

3. Is the defendant's lot so situated and located that any assessment charged against it should not be measured by the frontage rule? Answer: No.

4. What amount, if any, is the plaintiff entitled to have charged and assessed as a lien against the property of the defendant described in the complaint? Answer: $63.12, which is admitted to be one-half of the actual reasonable cost of the curbing and gutter.

Judgment on the verdict, and defendant excepted and appealed, assigning for error the refusal to present or consider the questions embodied in his issues.

W. O. Howard for plaintiff.

G. M. T. Fountain and Marshall C. Staton for defendant.

HOKE, J., after stating the case: The right to impose burdens of this kind and the method of assessment by the frontage rule, in cases like the present, have been upheld in several decisions of our Court, as in *Kinston v. Wooten,* 150 N. C., 295; *Kinston v. Loftin,* 149 N. C., 255; *Asheville v. Trust Co.,* 143 N. C., 360; *Hilliard v. Asheville,* 118 N. C., 845; *Raleigh v. Peace,* 110 N. C., 32. While it is said
(507) in these and other cases that assessments of this character can only be upheld on the "theory of special benefit conferred and which bear some reasonable relation to the burdens imposed," the right to

make them as a general proposition is referred to the sovereign power of taxation, which is primarily, and as a rule exclusively, a legislative power. And it is held with us, and the ruling is, we think, in accord with the great weight of authority, that in reference to a local improvement, governmental in its nature, and the action of the Legislature, or of local authorities exercising legislative power expressly conferred for the purpose, is conclusive as to the necessity for a given improvement and in establishing general rules, by any of the recognized methods, imposing special assessments for its construction and maintenance. And in applying these rules or methods to the property of an individual owner and on the question of amount, the legislative declaration shall so far prevail that it is only in rare and extreme cases that the courts are allowed to interfere. Speaking to this question in *Raleigh v. Peace, supra,* the Court held: "The power to levy such assessments is derived solely from the Legislature, acting either directly or through its local instrumentalities, and the courts will not interfere with the exercise of the discretion vested in the Legislature as to the necessity for or the manner of making such assessments, unless there is a want of power or the method adopted for the assessment of the benefits is so clearly inequitable as to offend some constitutional principle." And in *Asheville v. Trust Co.,* 143 N. C., 360, it was said: "It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits and defeated by satisfying a court that no special and peculiar benefits are received. If the Legislature has fixed the district and laid the tax for the reason that, in the opinion of the legislative body, such district is peculiarly benefited, its action must in general be deemed conclusive." Again, in *Kinston v. Wooten, supra,* it was held: "As a general rule, the assessment of adjoining property by a city for the paving of its streets and sidewalks by the front-foot rule will be upheld; but in instances (508) where it is made to appear that in applying this rule to the property of an individual owner there is a marked disproportion between the burden imposed and any possible benefit, so that it is manifest that the principle of equality had been entirely ignored and gross injustice done, the court may interfere and afford proper relief."

In this case the Court further said: "It will thus be seen that, while the right of the court to interfere for the protection of the individual owner of property is recognized, its exercise can only be justified and upheld in rare and extreme cases, when it is manifest that otherwise palpable injustice will be done and the owner's right clearly violated. This limitation arises of necessity in this scheme of taxation, for in its practical application it would well-nigh arrest all imposition of these

burdens if each individual owner of property were allowed to interfere and stay the action of the officials on any other principle." The opinion then refers with approval to the case of *Atlanta v. Hamlein,* 96 Ga., 383, and in which *Atkinson, J.,* said: "As a general proposition, upon the question of benefit, whether general or special, the owner is concluded by an expression of the legislative will. Where power is conferred upon the municipal authorities, in their discretion, to inaugurate a system of street improvements, with the power likewise conferred of imposing upon the abutting lot owners a proportionate share of the cost of such improvements, such power may be well exercised by the city authorities without giving notice of any character to the lot owner; and it is inconsistent with the proper exercise of the taxing power, and would tend to a manifest embarrassment of the public in the prosecution of these public improvements, if, upon every assessment, the lot owner were entitled to have the question judicially determined whether or not he would be benefited by the proposed improvement. As to whether he was benefited or not is a question which should address itself to the discretion of the municipal authorities. Their judgment upon this subject is ordinarily, except in the most extreme cases, conclusive; but,

(509) as we have before stated, it is not allowable that the municipal authorities, under the guise of a public improvement, should arbitrarily deprive the citizen of his estate. If, therefore, in the levy of such assessments, the cost of the improvement be so disproportionated to the value of the estate sought to be improved as that the levy of the assessment amounts to a virtual confiscation of the lot owner's property, such assessment cannot be upheld as a legal or valid exercise of the power to tax for such improvements."

These decisions are sustained, we think, as stated, by the weight of well-considered authority. The case of *Norwood v. Baker,* 172 U. S., 269, as interpreted and applied by subsequent decisions of the same high Court not being in direct or necessary antagonism to the view presented, see *French v. Asphalt Paving Co.,* 181 U. S., 324; *Wight v. Davidson,* 181 U. S., 371; *Tonawanda v. Lyon,* 181 U. S., 389; *Atlanta v. Hamlein, supra; Preston v. Rudd,* 84 Ky., 150; *Wheeler v. District Court,* 80 *Minn.,* 293; Elliott on Roads and Streets (3 Ed.), sec. 685; Hamilton Special Assessments, sec. 181; Judson on Taxation, sec. 359.

This, then, being the correct principle, the position contended for by defendant can in no wise be sustained. The statute confers ample authority. The front-foot rule has been adopted and declared a correct and proper method and the amount assessed against defendant, $63.12 for a frontage of 252½ feet, would seem to be reasonable, just, and moder-

ate. Certainly there is nothing in the record or in the evidence which shows or tends to show facts which would authorize the Court to interfere or stay collection of the amount charged.

On the question of notice, the provision of the law, affording defendants an opportunity to appear and question the amount or validity of an assessment, has been approved and held sufficient in a statute of similar import in *Kinston v. Wooten* and *Kinston v. Loftin, supra,* the doctrine being stated in *Loftin's case* as follows: "A statute authorizing such an assessment which provides for a notice that will enable the property owner to appear before some authorized tribunal and contest the validity and fairness of the assessment before it becomes a fixed charge on his property is not open to the objection that it deprives the owner (510) of his property without due process of law."

There is no error, and the judgment below must be affirmed.

No error.

WALKER, J., dissenting: This is a very important case, and the principle, which is said in the opinion of the Court to control it, is far-reaching in its necessary consequences. It is held, substantially, that the State, either directly by legislative enactment, or indirectly by acting through some local municipal body, may practically take the citizen's property for a public use without just compensation, if that use consists in improving the streets and sidewalks of a village, town, or city. I do not, for a moment, controvert the position that abutting property in a town may be assessed to pay expenses of improvements, when it is especially benefited thereby; but there is no more power or right to make the owner of abutting property pay for improvements of streets or sidewalks, where there is no benefit to him, than there is to tax him for the general public benefit, when there is no return to him in the way of protection to himself or his property, or to take his property by condemnation or otherwise, without just compensation. One is as much confiscation as the other. The Legislature may provide for the determination of the question of benefit to any particular property, and, perhaps, under the authorities, the decision of the tribunal so authorized to consider and decide whether there is a special benefit and how much it is, and to provide whether it shall be paid for by the front-foot rule or by establishing districts for the assessment of such benefits, may not be reviewed; but that is a very different question from the one presented in this case, where the defendant's property is made to pay tribute to the public, regardless of benefit to his property and without even providing any method for deciding whether his property has received a special benefit or not. Under the charter of the plaintiff, the owner is required to pave, curb, or otherwise improve the sidewalk in front of his lot, and to pave or improve

one-fourth of the street, without reference to benefits of any kind, and upon his failure to do so the town commissioners are au-
(511) thorized to have the work done, and "the cost thereof shall be borne by the owner or owners of such lot and shall constitute a lien to the same extent that municipal taxes assessed against the same are a lien thereon." This is not in accordance with our Constitution, the Constitution of the United States, or the principles of natural justice and right, as declared by one of our greatest jurists, *Chief Justice Ruffin,* in *Davis v. R. R.,* 19 N. C., Anno. Ed. 460, where it is said: "The principle (of compensation) is, however, so salutary to the citizen, and concerns so nearly the character of the State, that it may well be urged that it must be consecrated by its adoption in some part of the free Constitution of this State. We should be reluctant to pronounce judicially our inability to find it in that instrument. If it be not incorporated therein, the omission must be attributed to the belief of the founders of the Government that the Legislature would never perpetrate so flagrant an act of gross oppression, or that it would not be tolerated by the people, but be redressed by the next representatives chosen. There is no doubt that, while the Legislature and people of this State expressly restricted the action of the General Government on this subject, it must have been supposed by the people that their own local government was in like manner restrained, or would never act in a manner to make such a restraint necessary. There is, however, no clause in that instrument which seems to bear on the point, unless it be that which is relied on in the argument for the defendant. It is the 12th section of the Bill of Rights, which declares, 'that no freeman shall be disseized of his freehold, or deprived of his life, liberty, or property, but by the law of the land.' Under the guaranty of this article, it has been held, and in our opinion properly held, that private property is protected from the power of despotic resumption, upon a legislative declaration of forfeiture, or merely to deprive the owner of it, or to enrich the treasury, unless as a pecuniary contribution by way of tax. Such acts have no foundation in any of the reasons on which depends the power, in virtue of the right of eminent domain, to take private property for the public use, and they could not be sustained by the offer of the fullest
(512) compensation. Though not so obvious, it may also be true that the clause under consideration is restrictive of the right of the public to the use of private property, and impliedly forbids it, without compensation." This fair and equitable principle has been so uniformly adopted in subsequent decisions of this Court, following the precedent thus established by *Davis v. R. R.,* that no one now attempts to gainsay that, under our system of State government, a man's property cannot be taken directly or indirectly, nor can he be deprived

of the use of the emoluments thereof, without just compensation for the loss to him. Where is the difference between compelling him to pay the amount of an assessment levied upon his lot and which constitutes a lien thereon until paid, and to pay which it may be sold and thereby deprive him of it, and taking directly by condemnation for a public use? None at all, except in form. In the one case you make him give up his money to save his land—and money is itself property—and in the other you take the land itself without the right of redemption by paying the money. With all due deference to my brethren, who have overruled my opinion, I take leave to say that there is no *decision* to be found in the books and no authority elsewhere, that holds the arbitrary provision of this charter and the proceedings taken in pursuance thereof to be valid. It is far better that ambitious villages, towns and cities should not grow so rapidly, than that the sacred rights of the citizens should be destroyed or even impaired.

A similar idea was advanced by *Judge Bynum* in *French v. Commissioners*, 74 N. C., 692, in speaking of our dealing with the property and rights of others, with special reference to the power of taxation. "The other and better way, however," he said, "is to reduce *the expenditures*. The old proverb, 'Cut the garment according to the cloth,' has in it much practical wisdom. It is illustrated every day in private life, and is the foundation of individual integrity, contentment, and success. In every relation of wholesome life men adapt their wants and expenditures to their income. No good reason can exist why the same obligation does not rest upon corporations and is not equally as practicable. Instead of which, as things now go, those who are intrusted with other people's money and property, whether States or counties, in- (513) stead of practicing prudence and economy in the discharge of their trust, seem emulous of each other in extravagance. The end of such a course is easily seen, and must be one of disaster."

It is much better not to progress so rapidly than to make the citizen pay tribute to the public, for which he receives no corresponding benefit, apart from that enjoyed by other members of the community.

Judge Dillon said: "Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest; and to the extent of special benefits it is everywhere admitted that the Legislature may authorize local taxes or assessments to be made." 2 Dillon on Mun. Corp., 933 (3).

I will refer to one case decided by this Court, and then pass to a general consideration of the other authorities cited in the opinion, and to what is said upon the subject by the text-writers. In *Kinston v. Wooten*, 150 N. C., 300, referring to *Norwood v. Baker*, 172 U. S., 269, and *French v. Paving Co.*, 181 U. S., 324, which is erroneously sup-

posed to have modified it, it is said that "the system provided in the different States will usually be recognized by the Federal courts as conclusive, in so far as they establish general rules for making assessments; yet, if in applying these rules, or any given method, to the property of an individual, it should appear that there is a marked disproportion between the burden imposed upon the lot owner and any possible benefit his property may derive from the improvement, so that it will manifestly appear that the presumption of equality had been entirely ignored and gross injustice done, the court will interfere and grant relief." What greater inequality can there be between a burden imposed and no benefit at all in return? If, as said in that case, the courts will intervene and enjoin the assessment if the burden is great and the benefit small, what will the court do when there is *all* burden and no benefit, as in this case? for as the jury have found that benefits (514) were not considered at all, we must assume there are none, for there are none shown to exist by the decision of a judicial tribunal or even of an arbitrary one. And then again, the charter gives to the commissioners, who may be a municipal oligarchy, the unlimited and arbitrary power to assess a citizen out of his property without the slightest regard to his benefits or the right of compensation for property forcibly taken from him for the benefit of the public. This despotic power resides in the board of commissioners, to be exercised at their will, and they may simply declare, in the exercise of it, that the abutting owner shall pay all the costs of the improvement. Remember that I have fully conceded the right of the Legislature, by itself or through a local municipal body, to prescribe the manner in which the benefit may be ascertained, and to levy or apportion the assessment according to some rule, by district, front foot, superficial area, or value, or otherwise, so that there is not such manifest disproportion between burden and benefit as to work oppression or shock our sense of justice. But how can we adjudge that there is such a disproportion unless we have, at least, some tangible idea of what the benefit is, so that we may compare it with the burden? Proportion must exist between two or more well-known things—something that can be seen or understood. It cannot be predicated of something that is not known as between it and something that is known. All burden and no benefit does not suggest the idea of proportion, and that is the nonproportion which this charter, and the ordinances adopted in pursuance of it, have established. Recent text-writers on this subject, who have reviewed all the decisions rendered up to the time their treaties were published, have thus stated the conclusion reached by them, after examining all the authorities, many of which are cited in the notes to the section we quote, which is as follows:

"In order to justify a local assessment, the improvement must not only be public in its nature, but it must confer an especial and local benefit upon the property which is so assessed therefor. If the improvement confers an especial local benefit it is no objection to an assessment therefor that it is constructed so as to benefit the public as much as possible and to injure it as little as possible. Improvements of (515) this sort must 'have a double aspect of general public benefit and also of peculiar local benefit.' The attempt to state in general terms what constitutes a local special benefit has often been made. 'Benefits are special when they increase the value of the land, relieve it from a burden, or make it especially adapted to a purpose which enchances its value.' 'Whatever gives an additional value to the particular parcel of land is a special and not a general benefit, and it may be a special benefit though not an immediate one.' Without such local benefit the improvement may be public in character, so that the expense thereof may be borne by general taxation; but a local assessment, based upon the theory of benefits, cannot be levied therefor." Jones & Page on Assessments, sec. 284.

Norwood v. Baker, 172 U. S., 269, is directly opposed to the decision in this case. It was there held that an assessment upon abutting property by the front foot, without taking special benefits into account, for the entire cost and expense of opening a street, including not only the amount to be paid for the land, but the cost and expense of the proceedings, is a taking of private property for public use without compensation.

It is said, though, that the *Norwood case* has been reconsidered since by that Court and so qualified, modified, and explained that there is little or nothing, as an authority, left of it. I do not agree to this criticism of the case or to the effect of later decisions upon it as an authority. It has been distinguished in some cases, but not overruled, and its authority as a precedent, when more recent cases reviewing it are rightly considered, has not even been impaired, at least, so far as the question involved in this case is concerned.

It is supposed that the case of *French v. Barber Asphalt Paving Co.,* 181 U. S., 324, and the other cases cited in the opinion from that volume of the reports of the same Court, have so modified the decision in *Norwood's case* as to diminish if not destroy its weight as an authority. I do not think so. The reasoning in those cases is devoted largely to a consideration of the manner of apportioning the assessment, (516) whether "in proportion to frontage, the area, or the market value of the land, or in proportion to the benefits as estimated by commissioners," without any reference to the other methods. But there will be seen running through all of the discussions in these cases that there

must be some determination that the property is benefited, and then the Legislature may decide, in its discretion, how the assessment may be apportioned. This will appear by the extract I have just taken from *Wright v. Davidson,* 181 U. S., at p. 379 (cited in the opinion of the Court), and this expression of the Court in that case: "The class of lands to be assessed for the purpose may be either determined by the Legislature itself, by defining a territorial district, or by other designation; or it may be left by the Legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited." The Legislature may decide that certain lands within a given or prescribed area will be benefited by an improvement, and form a taxing district for the purpose of apportioning the assessment. It is not the method of apportionment that I am criticising, but the taking of a citizen's property, not only without just compensation, but without any compensation; and you may as well take his land specifically as his money. There is no difference, as far as he is concerned. In *French v. Barber Asphalt Co., supra,* the Court, in attempting to show that *Norwood's case* does not conflict with the decision in that case, says that the decree in the *Norwood case* did enjoin the making and collecting of the special assessment, as being equivalent to confiscation or a taking of property for a public use, without just compensation and, therefore, without due process of law in violation of the fourteenth amendment; but it further says that it left the village of Norwood free "to make a new assessment upon the plaintiff's abutting property for so much of the expense of the opening of the street as was found, upon due and proper inquiry, to be equal to the special benefits accruing to the property"; the matter being left, with this limitation, under the control of the local authorities.

(517) In *Williams v. Eggleston,* 170 U. S., 304, it was said by the Court upon this very question: "Neither can it be doubted that, if the State Constitution does not prohibit, the Legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement. But the power of the Legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional

law that the imposition by the Legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country." In *Norwood v. Baker* the Court thus expressed itself: "Undoubtedly, abutting owners may be subjected to *special assessments to meet the expenses of opening public highways in front of their property,* such assessments, according to well-established principles, resting upon the ground *that special burdens may be imposed for special or peculiar benefits* accruing from public improvements. *Mobile County v. Kimball,* 102 U. S., 961, 703, 704; *R. R. v. Decatur,* 147 U. S., 190, 202; *Bauman v. Ross,* 167 U. S., 548, 589, and authorities there cited. And according to the weight of judicial authority, the Legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvement." But while this is true, it has not the power itself, nor can it be conferred upon municipal boards, to arbitrarily take the property of the citizen without any reference to benefits to be received by him from the public improvement. In *Raleigh v. Peace,* 110 N. C., (518) at p. 38, *Justice Shepherd* said: "It is, therefore, preëminently just, as well as the duty of the lawmaking power, to provide for an equitable adjustment of such burdens in proportion to the benefits conferred." *Ruffin, J.,* says in *Shuford v. Commissioners,* 86 N. C., 552: "(Such measures) are committed to the unrestrained discretion of the lawmaking power of the State, only, as I take it, that the burden imposed on each citizen's property must be in proportion to the advantages it may derive therefrom."

It is well not to vest too much authority in local tribunals, in the matter of taking or assessing private property. It is liable to great abuse and often tends to oppression. Unlimited discretion is dangerous, and no man's property or rights should be held subject to the mere will or caprice of another. This is a government in which responsibility of the public official to the people is of the first importance. Power, it has been said, is always, though gradually, stealing from the many to the few; and recently this tendency has been somewhat increased and accelerated. This arbitrary element in government should be eliminated to the extent that such a course is consistent with the due and proper administration of public affairs and the welfare of the people. The citizen should be made to fell that he holds and enjoys his property under the protection of the law, and not at the mere pleasure of one who may prove to be a petty despot, and who is not bound by any law or any restraint save his own will. This particular assessment may be just and right, and the real facts, if disclosed, might show that the defendant is only required to pay for the special benefit he will receive,

which is the compensation for the loss of his money, but there is no provision of law for ascertaining the facts, and the case must be considered as if it had been found that his property will not be benefited at all. I adhere to the rule established in the *Norwood case,* that the exaction from the owner of private property of the cost incurred in making a public improvement, or in substantial excess of the special benefits accruing to him, is, in either case, a taking of his property under the guise of taxation, without compensation, and when there is no
(519) provision for compensation at all, it is confiscation. All systems or schemes of taxation are based upon the idea of benefit to those who must bear their share of the public burden, and can be justified upon no other principle, and assessments for local improvements are conceded by the authorities to be an exercise of the taxing power. My conclusion is that the assessment in this case was laid upon an arbitrary principle, there being a total failure to exercise the judgment of the Legislature or the board in determining the actual benefit, or as to whether there was any benefit, and, therefore, the assessment is void. The amount involved should make no difference in the application of the fundamental principle of justice and the Bill of Rights (Article I, sec. 17), and if anything, we should guard most zealously against wrong to and oppression of those who are the least able to resist the encroachment and aggression of a despotic power, not that the weak and humble have any greater legal rights than those more fortunate, but for the reason that they are more exposed to the danger of a wrong use of absolute power, and less able to defend themselves against it. When enforcing the claims of the public, we should be careful not to overlook the natural and constitutional rights of the citizen, which should not be sacrificed even to promote the public welfare.

Cited: Justice v. Asheville, 161 N. C., 74; *Drainage Comrs. v. Mitchell,* 170 N. C., 326.

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(520)

H. K. HAMILTON, ADMINISTRATOR OF McCOY HAMILTON, v. HINES BROTHERS LUMBER COMPANY.

(Filed 9 November, 1911.)

1. Railroads—Master and Servant—"Flying Switch"—Negligence—Evidence—Questions for Jury.

When it appears that plaintiff's intestate, in an action for damages against a railroad company for his negligent killing, was engaged within the scope of his employment in uncoupling cars from which other cars

were being switched upon a siding, and that while the cars were moving he had placed himself on the front of a car for the purpose of uncoupling others from it, and was seen in this position by a witness, and a moment after he had disappeared, having fallen between the cars, to his injury and consequent death, evidence tending to show that at the time of the injury defendant's engineer was making what is known as a "flying switch," and that this method of switching cars is not a safe and proper one to pursue, is sufficient upon the defendant's negligence to be submitted to the jury on that issue, and a motion as of nonsuit should not be sustained.

2. Nonsuit—Evidence, How Considered.

Upon defendant's motion to nonsuit upon the evidence, the court will not select a portion of a witness's statement more favorable to the defendant, for the evidence making for plaintiff's claim must be taken as true and interpreted in the light most favorable to him, and if therefrom "two minds could reasonably draw different conclusions from the evidence, and one of them would be favorable to plaintiff, the matter is for the jury."

3. Railroads—Master and Servant—Fellow-servant Act—Logging Roads—Negligence—"Ways"—Interpretation of Statutes.

The Fellow-servant Law, Revisal, sec. 2646, applies to logging roads operated by the agency of steam; but the right of action given an employee injured by reason of defective "machinery, ways, or appliances," by the use of the word "ways" refers in that particular to roadways and objective conditions relevant to the inquiry which it is the duty of the employer to provide; and not, as in this case, where the alleged negligent killing of an employee was by reason of the negligence of the defendant's engineer in making a flying switch, a method testified to as not being a safe and proper one.

4. Railroads—"Flying Switch"—Master and Servant—"Assumption of Risks"—Continuing to Work—Contributory Negligence.

Where it is shown that plaintiff's intestate was killed while acting under the direction of defendant's engineer in making a "flying switch," which was not a safe and proper one to pursue, the doctrine of assumption of risks is not applicable in its technical meaning; and the effect of the intestate having worked on in the presence of dangerous conditions which are known and observed must be considered on the question whether the attendant dangers were so obvious that a man of ordinary prudence and acting with such prudence should have quit the employment rather than incur them.

5. Railroads—"Flying Switch"—Master and Servant—Continuing to Work—Contributory Negligence—Disobedience of Orders—Evidence.

When, in an action against a railroad company for damages for the negligent killing of plaintiff's intestate, a brakeman and switchman, while making a "flying switch," the defense is relied on that the intestate continued to do the work when the danger of thus switching was obvious

and apparent to him, it is competent for the plaintiff to show that the engineer sent some one to help the intestate perform the services then required of him, as relevant to the inquiry as to whther the intestate was acting with the knowledge of the engineer as vice-principal, or acting under his orders; or whether the intestate had reasonable apprehension of being discharged if he disobeyed them.

(521) APPEAL from *Peebles, J.*, at March Term, 1911, of LENOIR.

Action to recover for alleged negligent killing of intestate by defendant. At the close of plaintiff's evidence, on motion, the court ordered a nonsuit, and plaintiff excepted and appealed.

G. V. Cowper and Y. T. Ormond for plaintiff.

Rouse & Land, Loftin & Dawson, and McLean, Varser & McLean for defendant.

HOKE, J. There was evidence tending to show that, in September, 1910, the intestate, an employee, was run over and killed by a train of defendant company; that, at the time of the occurrence, the intestate, a youth between eighteen and nineteen years of age, was acting as fireman, he and the engineer composing the train crew, the duties of intestate being to fire the engine, couple and uncouple the cars, and change the switches; that the train in question consisted of an engine and twelve or thirteen logging trucks or cars, two of them, several cars back from the end, being loaded with a barrel of oil and feedstuff, and was backing at the time with the purpose of cutting out these loaded cars and leaving the empties on a siding near at hand; that with this end in view, and while the train was in motion, approaching the switch, the intestate left the engine and went along the skeleton cars of the train and to the forward end of the loaded cars and took a position to uncouple the empty cars, in front. About the same time, one Lonnie Emerson, a young man who was also on the engine, but without regular duties, so far as the testimony shows, was requested by the engineer to go forward and assist the intestate by uncoupling the empties, which were just behind the loaded cars, the intent being for intestate (522) to change the switch, throw the empty cars in front and rear onto the siding, and allow the loaded cars to remain upon the main line; that when Lonnie Emerson had reached his position, he looked off for a moment, and when he looked back the intestate, who had been sitting, as stated, on the front part of the loaded cars, where they were to be uncoupled, had disappeared; he had fallen between the cars and two of them had run over him, causing injuries from which he died in about three-quarters of an hour. There was also evidence tending to show that this plan was what is termed a flying switch; that it

was not a safe and proper way to pursue in cutting out the loaded cars, and was forbidden by the company's rules. Speaking to this question, plaintiff, H. K. Hamilton, intestate's father, on his examination in chief testified as follows:

Q. You have heard the kind of switching that was being done on this road. Will you state from your knowledge as an engineer and from your experience how that work should be done and the proper way to do it?

The Court: He can state what is a safe and an unsafe way.

A. The safe way would be to back your train to the switch and stop and cut off your cars.

Q. Can it be done any other way? A. Yes, there are other ways that it is frequently done. Our rule book says you can't make a switch that way.

Q. From your knowledge of this kind of work as an engineer, other than by the usually accepted rules of trainmen doing this kind of work in this part of the country, is it considered a safe and proper way to uncouple cars when moving down grade without stopping?

Q. Have you had experience in running log trains? A. Yes, I have handled quite a bit. I will answer that it is not safe to make a flying switch anywhere.

Q. What kind of switching is that which has been described? A. That is a flying switch when you have a car to shift without stopping the train, or the train is in action all the time.

It is true, the witness, in his cross-examination, qualifies this (523) statement to some extent, but, as we have said in a recent case, "We are not at liberty to select the more favorable portions of a witness's statement and act on it for defendant's benefit. We have repeatedly held that, on a motion for nonsuit, the evidence making for plaintiff's claim must be taken as true and interpreted in the light most favorable to him." *Dail v. Taylor,* 151 N. C., 289; *Deppe v. R. R.,* 152 N. C., 80. As the case goes back for a new trial, we do not deem it desirable to make any extended reference to the inferences permissible and arising on the testimony, but, applying the rule well recognized with us, "That if two minds could reasonably draw different conclusions from the evidence, and one of them would be favorable to plaintiff, the matter is for the jury" (*Allen, J.,* in *Harvell v. Lumber Co.,* 154 N. C., 262), we are of opinion that the question of defendant's negligence should be submitted for the jury's decision.

On the conduct of the intestate, while we have held that our statute, known as the Fellow-servant Law, Revisal, sec. 2646, applies to these logging roads, we do not think that the terms of the law, giving a right of action to an employee injured by reason of defective "machinery,

ways, or appliances," refer to conditions as now disclosed in the testimony; the term "ways," we think, having reference rather to roadways and objective conditions relevant to the inquiry and which it is the duty of the employer to provide. The negligence, if any, imputable to defendant on the testimony, is by reason of negligent directions given and methods established, by the employer, subjective in their nature and to which the statute on the facts presented was not intended to apply. It is well understood, however, that an employer of labor may be held responsible for directions given or methods established, of the kind indicated, by reason of which an employee is injured, as in *Noble v. Lumber Co.,* 151 N. C., 76; *Shaw v. Mfg. Co.,* 146 N. C., 235; *Jones v. Warehouse Co.,* 138 N. C., 546, and, where such negligence is established, it is further held, in this jurisdiction, that the doctrine of assumption of risk, in its technical acceptation, is no longer applicable (*Norris v. Cotton Mills,* 154 N. C., 475; *Tanner v. Lumber Co.,* 140 N. C., (524) 475), but the effect of working on in the presence of conditions which are known and observed must be considered and determined on the question whether the attendant dangers were so obvious that a man of ordinary prudence and acting with such prudence should quit the employment rather than incur them." *Bissell v. Lumber Co.,* 152 N. C., 123; and, on the issues, as to plaintiff's conduct, the fact that the particular service was rendered with the knowledge and approval of the employer or his vice principle or under his express directions, if given; also, the employee's reasonable apprehensions of discharge in case of disobedience, etc., may be circumstances relevant to the inquiry. *Hicks v. Mfg. Co ,* 138 N. C., 322. In this view, we think the statement of the witness Lonnie Emerson was properly received in evidence, "that the engineer requested the witness to go out on the train and help McCoy." It tended to show that the intestate was doing his work with the knowledge of the engineer, and it was also relevant on the question whether he was not acting under the engineer's orders. Applying the rules as they obtain with us, to the facts in evidence, we are of opinion that there was error in directing a nonsuit, and the order to that effect must be set aside.

Error.

Cited: Russ v. Harper, ante, 450; *Hamilton v. Lumber Co.,* 160 N. C., 48; *Pigford v. R. R., ib.,* 99, 100; *Poe v. Tel. Co., ib.,* 316; *Beck v. Bank,* 161 N. C., 206; *Johnson v. R. R.,* 163 N. C., 442; *Tate v. Mirror Co.,* 165 N. C., 280, 284; *Ridge v. R. R.,* 167 N. C., 521.

NORTH CAROLINA CHRISTIAN CONFERENCE v. JOHN ALLEN.

(Filed 9 November, 1911.)

1. Religious Denominations—Congregational—Individual Churches—Management—"Conference."

In a congregational religious system or denomination, as distinguished from a connectional one, the association of churches is purely voluntary for the purpose of joining their efforts for missions and similar work, having no supervision, control, or governmental authority of any kind over the individual congregations, which are absolutely independent of each other.

2. Same—Appointment of Pastor.

A congregational association of churches has no authority to appoint a pastor for one of its churches to supersede the one whom that church has regularly appointed.

3. Same—Trustees at Will—Notice—Interpretation of Statutes.

A church has authority to appoint a "suitable number" of its own trustees under our statutes for the purpose of acquiring and holding church property, "from time to time and at any time . . . in such manner as such body, etc., deem proper," and remove them or any of them at will, and while the congregational regulations of the denomination with which the church in question is affiliated has provided a notice to be given for the trial of "offenses," it does not apply to the election or removal of trustees nor take from the church its rights when in conflict with the statutes. Revisal, secs. 2670, 2671.

4. Same—"Majority Rule"—Interference.

A church of the congregational system having the right under our statutes to remove its trustees or any of them at will, and having duly and regularly elected certain trustees to supersede several theretofore elected, holds the church property through those trustees later elected, and has the right to the use of the church for religious services without molestation from the trustees removed, or from its conference; especially so, in this case, where the trustees as newly constituted were a majority, even counting the deposed ones.

ALLEN, J., dissenting.

APPEAL from *Daniels, J.*, at May Term, 1911, of GRANVILLE. (525)

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

B. S. Royster, A. A. Hicks, and T. T. Hicks for plaintiff.

Graham & Devin for defendant.

CLARK, C. J. This was an action by the North Carolina Christian Conference and several members of the "Rock Spring Christian Church, colored," for an injunction against Rev. John Allen, Thomas Grissom, John Meadows, Ben. Smith, and James Bailey from interfering with the plaintiffs in their occupation and control of said "Rock Spring Christian Church" building and property and their conduct of public worship in said building.

It appears by the evidence, both for the plaintiffs and defendants, that said "Rock Spring Christian Church," and it is so found
(526) by the judge, is of the Christian faith, whose government is congregational, and that the North Carolina Conference of said church is a merely voluntary association, exercising no control over the church property or the congregation, and hence the plaintiff, the North Carolina Christian Conference, has no right or interest in the church property and is not a proper party to this action.

In *Simmons v. Allison,* 118 N. C., 770, we had occasion to call attention to the distinction between those churches whose organization is connectional, such as the Protestant Episcopal, the various Methodist churches, the Presbyterian, the Roman Catholic, and others which are governed by large bodies, such as dioceses, conferences, and synods and the like, in which the individual congregations bear the same relation to the governing body as counties bear to the State, and, on the other hand, the congregational system which is in use among the Baptists, the Congregational, and the Christian and other denominations. In these latter, the individual congregation is each an independent republic, governed by the majority of its members and subject to control or supervision by no higher authority. To the latter order the "Rock Spring Christian Church" belonged. The churches of the congregational system often combine into associations, conferences, and general conventions. But unlike such organizations under the connectional system, these bodies under the congregational system are purely voluntary associations for the purpose of joining their efforts for missions and similar work, but having no supervision, control, or governmental authority of any kind whatsoever over the individual congregations, which are absolutely independent of each other.

To the latter system the "Rock Spring Christian Church, colored," belonged. It appeared in evidence that this congregation had reelected the Rev. John Allen their pastor, in the fall of 1909. He had already served as such for eight years. Soon afterwards, on Sunday, 18 December, 1909, Rev. J. A. Alexander appeared at the church, claiming that he was sent by the North Carolina Christian Conference.

At that time there were three trustees, Arch. Preddy, Alex.
(527) Brooks, and Thomas Grissom. The first two named being a

majority of the trustees, sided with Rev. J. A. Alexander, and they claiming control of the building, said Alexander held services therein. Rev. John Allen and the majority of the congregation objected, but Brooks and Preddy claimed to be the legal custodians of the property. The majority of the congregation, with the Rev. John Allen, with commendable forbearance, refrained from any interference. It appears from the evidence of the plaintiff that the objecting membership headed by the Rev. John Allen, were very largely in the majority. It appears in the evidence that from 7 to 12 members, including the two trustees, were with Alexander, and that 36 members, including one trustee, sided with Rev. John Allen. This small minority, after holding services, were dismissed, whereupon Pastor Allen and his 36 members took possession and held services, in spite of the prohibition of Alex. Brooks and Arch. Preddy. It was the regular day for church conference. The minutes show that the meeting then regularly met and reëlected John Allen pastor by 36 votes; that resolutions were also passed removing Alex. Brooks as trustee for "forbidding the members to meet in the church," and A. R. Preddy for "forcing his way into the church and removing the lock"; and thereupon the defendants John Meadows and James Bailey, named herein as defendants, were elected trustees in their place. The contest, therefore, turns upon the validity of the election of said trustees at a regular church meeting and the removal of the other two, for Thomas Grissom, the other trustee, had sided with the majority and the Rev. John Allen.

Revisal, 2670, provides that any religious body "may from time to time, and at any time, appoint in such manner as such body, society, or congregation deem proper, a suitable number of persons as trustees"; and Revisal, 2671, provides: "The body appointing shall remove such trustee or any of them." In *Thornton v. Harris,* 140 N. C., 499, it was held that under those sections any church has a right "to remove its trustees at will." The trustees of a church have no property interest as against the governing body of the church. They are merely agents, or, as it is expressed in one of our opinions, "A church (528) trustee is a mere *locum tenens.*" Speaking algebraically, trustees are merely *x, y,* and *z.* For legal purposes, they represent the church as to the world. But as to the *cestuis que trustent* they can be appointed at will. The statute requires no notice or cause to be shown. The discipline of the Christian denomination with which the "Rock Spring Church" is affiliated provides for ten days' notice for trial of "offenses." But this applies to moral delinquencies or infractions of church discipline—in short, to trials for offenses. It could not abridge, and does not even refer to, the power given by the statutes to remove or appoint trustees at will.

The "Rock Spring Church" under the congregational polity is an independent entity, recognizing no superior in its government. Under the polity of the denomination to which it belongs the majority of the members control its government and management. The minutes of the church show that they had cause to remove Preddy and Brooks as trustees, who had taken possession of the church, because, being a majority of the trustees, they had held the building for hours for a small minority and in behalf of a minister not elected by the congregation, against the majority of the members and regularly elected pastor. Even if the congregation had not possessed the right to remove Brooks and Preddy at will, still there was no restriction in the statute, or in the church discipline, limiting the number of trustees, and the election of the two new trustees was certainly valid. These two, with Thomas Grissom, who had remained loyal to the majority, constituted a majority of the trustees, and it was error to enjoin them from controlling the property and conducting public worship.

The minutes of the church show that after the 36 members, together with their duly chosen pastor, John Allen, obtained possession of the church, upon its vacation by Rev. Alexander and the small minority, services were regularly conducted. Such services appear to have been opened by singing, not inappropriately, the hymn "When I can read my title clear." The text discussed by the pastor, Rev. John Allen, (529) is given as Jeremiah, chap. II, verse 24. The nature of the sermon preached on that text and its application to the occasion is not so clear.

The defendants have a majority of the trustees—three out of five—even if Preddy and Brooks were not properly removed; and they have all the trustees if they were legally removed, as we think is the case under our statute, and the judgment below must be

Reversed.

Cited: Tripp v. Comrs., 158 N. C., 184; *Windley v. McCliney,* 161 N. C., 319; *Gold v. Cozart,* 173 N. C., 613.

MARTHA C. REA v. J. K. REA, ADMINISTRATOR OF C. W. REA, DECEASED.

(Filed 9 November, 1911.)

1. Contracts—Married Women—Personal Property — Consequences — Interpretation of Statutes.

The provision of Laws 1911, ch. 109, that a married woman may "contract and deal so as to affect her real and personal property as if she were a *feme sole*," except in instances of contract between her and her husband

(Revisal, sec. 2107), does not extend to conveyances of personalty by the wife to the husband, and certainly when it would lead to an absurd conclusion, as in instances of a gift from the wife to her husband.

2. Contracts—Married Women—Separate Property—Personalty—Interpretation of Statutes.

The object of Revisal, sec. 2107, requiring certain findings and conclusions of the probate officer to be made with reference to contracts between the wife and husband in relation to her separate property, was to prevent the wife making any contract with her husband whereby she would incur a liability against her estate which in future might prove a burden or charge upon it, or cause a charge or impairment of her income or personalty.

3. Contracts—Conveyances—Married Women—Separate Property—Realty—Privy Examination.

The statutory requirement of a privy examination in conveyances of realty by married women is merely a regulation to ascertain whether the wife really executed the deed.

4. Constitutional Law — Married Women — Jus Disponendi — Husband and Wife—Contracts—Fraud.

The Constitution gives a married woman full power of *jus disponendi* of her personalty, and there is no restriction imposed thereon by statute; and hence an absolute conveyance thereof from a wife to her husband is valid, except when procured by fraud or duress the transaction can be impeached just as if made to any one else. The right of married women to contract and convey real and personal property summed up by CLARK, C. J.

WALKER and BROWN, JJ., concurring; HOKE and ALLEN, JJ., dissenting.

APPEAL by defendant from *Justice, J.*, at Spring Term, 1911, (530) of CHOWAN.

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

C. S. Vann for plaintiff.

W. M. Bond and Pruden & Pruden for defendant.

CLARK, C. J. On 6 April, 1908, the plaintiff, who owned 46 shares of stock in the Edenton Cotton Mills, delivered same to C. W. Rea, her husband, having indorsed on the certificate as follows:

For value received, I hereby sell, assign, and transfer unto C. W. Rea the shares of stock represented by the within certificate, and do hereby irrevocably constitute and appoint W. O. Elliott, secretary, attorney to transfer the said stock on the books of the within corporation, with full power of substitution in the premises. MARTHA C. REA.

April 6, 1908.

In the presence of C. W. Rea.

On 8 April, 1908, said C. W. Rea surrendered said certificate to said cotton mill and the same number of shares were issued to him. C. W. Rea died in 1909 and the certificate of stock which had been issued to him went into the hands of his administrator.

The plaintiff contends in this action that said assignment, delivery, and transfer of said stock by her was a nullity because of noncompliance with Revisal, 2107.

There is a broad distinction between conveyances and contracts. Revisal, 2107, applies only to contracts. Laws 1911, ch. 109,
(531) provides: "Subject to the provisions of section 2107, Revisal 1905, every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried; but no conveyance of her real estate shall be valid unless made with the written assent of her husband, provided by section 6, Article X of the Constitution, and a privy examination as to the execution of the same, taken and certified as required by law." This recognizes that section 2107 applies to contracts, and that the only restriction upon conveyances by her is that constitutional one requiring the "written assent" of her husband as to conveyances of realty and her privy examination in such case.

Revisal, 2107, is equally explicit. It comes under subhead 3, entitled "*Contracts* between husband and wife," and provides: "No *contract* between a husband and wife during coverture shall be valid to affect or charge any part of the real estate of the wife or the accruing income thereof, for longer time than three years next ensuing the making of such contracts, or to impair or charge the body or capital of the personal estate of the wife, or of the accruing income thereof, for longer time than three years next ensuing the making of such contracts, unless such contract shall be in writing, and be duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of *femes covert,* it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be."

An examination of section 2107 shows that it applies solely to contracts and not to conveyances; indeed, the word "contract" is used five times in that section. The object of the Legislature was clearly
(532) to prevent the wife making any contract with her husband whereby she should incur a liability against her estate which in future

might prove a burden or charge upon it, or cause a change or impairment of her income or personalty. To that end not only a privy examination was required, but the certificate of a magistrate that the contract is not unreasonable or injurious to her. This provision does not attempt to apply to conveyances by her as to which the act of 1911 retains the constitutional restriction in regard to realty, that there must be the written assent of the husband and statutory privy examination. Had the act attempted to impose a further restriction upon the conveyance of married women of realty, such as the approval of a third person, it would be in conflict with the Constitution, which gives her the power to convey her realty, if she has "the written assent of her husband."

The majority of this Court has sustained the statutory requirement of a privy examination in conveyances of realty by married women, but solely upon the ground that it is not an additional restriction, but merely a regulation to ascertain whether the wife really executed the deed.

As to conveyances by the wife of her personalty, the Constitution gives her full power of *jus disponendi,* without any restriction whatever. Nor is there any statute whatever that in any way has attempted to restrict it. This matter has been fully considered and settled by this Court in a remarkably well-considered and able opinion by *Mr. Justice Walker* in *Vann v. Edwards,* 135 N. C., 661, which leaves nothing to be added. That case overruled *Walton v. Bristol,* 125 N. C., 419, so far as it could be construed to intimate a different conclusion. In *Sydnor v. Boyd,* 119 N. C., 481, the wife attempted to assign her life insurance policy to her husband so as to make it payable to him at her death, and guaranteed "the validity and sufficiency of the foregoing assignment." This was an executory contract which would have changed or diminished the corpus of her estate at her death, and she would have incurred liability upon her guarantee. The Court held that this was a contract, and invalid because not made in compliance with The Code, 1835 (now Revisal, 2107).

If Revisal, 2107, had included conveyances, it would have been invalid as to the transfers by a married woman of her personality, because the Constitution gives her as to them the absolute *jus* (533) *disponendi,* as if *feme sole,* without any restriction whatever. It would have been invalid as to conveyances of realty, because requiring the assent of a third person over and above the "written assent" of her husband, which is the only requirement of the Constitution, and an addition to the privy examination required by statute, which has been held a mere regulation and not a restriction upon the right of the woman to convey. In this case the husband actually witnessed the

transfer in writing, which, under the authority of *Jennings v. Hinton,* 126 N. C., 51, is a sufficient compliance with the requirement of the written assent of the husband to conveyance of realty.

In this case there does not appear to have been any consideration, and the assignment was not only a conveyance, but a gift. No magistrate could certify that a gift by a woman to her husband is for her benefit or does not diminish her estate. It would be a startling proposition that a married woman who by our Constitution has full control of her property, as if unmarried, cannot make a present to her husband if she sees fit. It is a matter of everyday occurrence. Whether she make her husband a gift of money, a dressing gown, or a pair of slippers, it would be astonishing if she could recover it from his administrator, or from him if there should be a divorce. Of course, if the conveyance or gift by her has been procured by fraud or duress, it can be impeached just as if made to any one else.

Summing up, the rights of married women in North Carolina as to conveyances and contracts are:

As to conveyances of personalty: There is no restriction whatever upon her right to dispose of her personalty as fully and freely as if she had remained unmarried, either in the Constitution or by any statute. *Vann v. Edwards,* 135 N. C., 661, cited with approval by *Justice Connor* in *Ball v. Paquin,* 140 N. C., 91.

As to conveyances of realty: The Constitution requires only (534) "the written assent" of the husband. The statute superadds only a regulation providing for a privy examination, which has been upheld on the ground that it is not an additional requirement, but merely a method of ascertaining if the deed is really her voluntary act.

As to contracts: Laws 1911, ch. 109, provides that a married woman is authorized to contract and to affect her real estate and personal property thereby in the same manner and to the same effect as if she were unmarried, excepting only contracts whereby she may incur liability to her husband, as to which the provisions of Revisal, 2107, are retained.

The conveyance of the stock by the wife was not restricted by the Constitution or any statute. If, reversing *Vann v. Edwards,* 135 N. C., 661, it were now held otherwise, the cotton mills could be held liable, and every bank, railroad company, and other corporation which has transferred stock in like cases to this. *Wooten v. R. R.,* 128 N. C., 119. While the Legislature has seen fit to guard contracts whereby a wife may incur liability to her husband, it has not attempted to restrict her right of conveyance, still less to forbid gifts by her to her husband without the approval of a justice of the peace.

Upon the case agreed, judgment should have been entered in favor of the defendant.

Reversed.

WALKER, J., concurring: The transaction in this case was a gift, which excludes the idea of any contract between the husband and wife, and for this reason there is no law forbidding it, in substance or in form. If it had been an executed contract of sale, I think, in that form, it also would have been valid; and in neither case does Revisal, sec. 2107, apply. The law in regard to a married woman's dealings with reference to her separate property, up to its present stage of development, I think, may be stated thus:

1. She may will her property without the consent of her husband, and as if she were a *feme sole* (Const., Art. X, sec. 6), and, in (535) this way, she may deprive him of his estate by the curtesy. *Tiddy v. Graves,* 129 N. C., 620; (*S. c.,* 127 N. C., 502); *Ex parte Watts,* 130 N. C., 237; *Halyburton v. Slagle,* 132 N. C., 947; *Watts v. Griffin,* 137 N. C., 572.

2. She may convey her real property, with the written consent of her husband evidenced by her privy examination.

3. She may dispose of her personal property by gift or otherwise, without the assent of her husband, and as if she were unmarried. *Vann v. Edwards,* 135 N. C., 661; Laws 1911, ch. 109.

4. By virtue of the Martin act (Public Laws 1911, ch. 109), she may now contract and deal, so as to affect her real or personal property, in the same manner and with the same effect as if she were unmarried, unless the contract belongs to the class of those described in Revisal, sec. 2107, or unless it is a conveyance of her real property, when the formalities required by the existing law, for its validity, must be observed; those two cases being expressly excepted in the act of 1911. But Revisal, sec. 2107, does not embrace gifts or sales of personal property by the wife to the husband, as the general right to make these, as if she were unmarried, is given by the Constitution, and cannot be restricted or impaired by legislation.

Section 2107, which is still in force, applies, therefore, only to her executory contracts, and she cannot enter into any such contract with her husband which will affect or change any part of her real estate, or the accruing income thereof, for a longer period than three years from the making of the contract, or which will impair or change the body or capital of her personal estate, or the accruing income thereof, for a like period, the Constitution not having removed her common-law disability as to executory contracts, and the act of 1911 having expressly excepted section 2107 from its operation. *Kearney v. Vann,* 154 N. C., 311.

Subject to the views herein stated, I assent to the conclusion reached by the *Chief Justice* in the opinion delivered by him for the Court.

BROWN, J., concurring: I have heretofore always concurred in the decisions of this Court in respect to the powers of *feme coverts*. These cases began with *Harris v. Jenkins,* 72 N. C., 183, and ended, I believe, with *Bank v. Benbow,* 150 N. C., 782. (536)

By the Martin act (introduced by Senator J. C. Martin in the General Assembly of 1911) the wives have been emancipated and are placed on an equal footing with their single sisters, except that in order to convey their real estate they must still have the written consent of their husbands.

I see no especial reason now for withholding from them the privilege of conferring gifts upon their husbands without the supervision and sanction of a justice of the peace or other judicial officer.

I think the opinion of the *Chief Justice* is a fair construction of the Revisal, sec. 2107, and also of the Constitution, and I give it my approval.

HOKE, J., dissenting: I do not think that Article X, sec. 6, of our Constitution had or was intended to have effect upon conveyances or contracts *between* husband and wife, but that such transactions have been and should continue to be proper subjects of legislative regulation, unaffected by that instrument. This, in my judgment, being a correct position, I am of opinion that section 2107 of our Revisal, the section controlling on the subject referred to, should be upheld in its integrity and construed as it is plainly written. It has been sustained and applied in numerous and repeated cases before this Court ever since its enactment, forty years ago; was recognized as the law of the land in a decision at the last term in *Kearney v. Vann,* 154 N. C., 311, and was expressly retained and approved by our Legislature at its last session. Public Laws 1911, ch. 109. Further, I am utterly unable to perceive how a decision, setting aside the safeguards provided by this statute, and affording facilities for a married woman to deprive herself of her property, and, in many instances, of a home for herself and children, in favor of an improvident husband, can be properly regarded as part of an enlightened and progressive policy, or in any way having a tendency to *liberate* married women from the shackles of tyrannous precedent, and, in my opinion, the statute should be upheld (537) in its entirety. Holding the view, however, as stated, I think it a matter of supreme importance that this question should be considered *as settled,* and shall, therefore, *make no further protest.*

I am authorized to say that ASSOCIATE JUSTICE ALLEN concurs in this view.

Cited: Jackson v. Beard, 162 N. C., 112; *Singleton v. Cherry,* 168 N. C., 404; *Butler v. Butler,* 169 N. C., 587, 595.

L. S. OVERMAN, ADMINISTRATOR, v. MATTIE LANIER ET AL.

(Filed 9 November, 1911.)

1. Appeal and Error—Reference—Trial Judge—Judgment Pro Forma—Constitutional Law.

It is required of the trial judge to review and pass upon exceptions to a report of a referee as to the facts found and the conclusions of law thereon, and a *pro forma* judgment entered by him for any reason cannot be reviewed by the Supreme Court on appeal under Article IV, sec. 8, of our Constitution, for it is only *decisions* of the lower courts which may thus be considered.

2. Appeal and Error — Reference — Judgment — Burden of Presumptions — Procedure.

The presumption on appeal to the Supreme Court is that the judgment of the lower court is correct, and a *pro forma* judgment entered by the trial judge confirming a report of a referee improperly throws the burden of this presumption upon the appellant and is unfair to him, and to the Supreme Court, which has a right to the judge's well-considered conclusions.

3. Appeal and Error—Reference—Pro Forma Judgments—Costs—Records—Another Appeal.

It appearing from the statement made in the Supreme Court by the parties of record, that the trial judge entered a *pro forma* judgment, by consent of both parties, without consideration, upon a report of a referee, the cause is remanded to the judge holding the courts of the district from which the appeal comes, with direction that he carefully review the findings of fact and conclusions of law of the referee wherever excepted to and enter his deliberate judgment as to each exception. Each party is taxed with one-half the costs of appeal, and the appellants allowed to withdraw and record and use so much of it as is useful and appropriate, should he deem another appeal desirable.

APPEAL from *Lyon, J.,* at May Term, 1911, of ROWAN. (538)

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

T. F. Kluttz, E. C. Gregory, T. J. Jerome, E. J. Justice, L. H. Clement, and Charles W. Tillett for plaintiff.

Walser & Walser, G. W. Garland, Burwell & Cansler, Manly, Hendren & Womble for defendant.

CLARK, C. J. This case was referred by consent, and on the coming in of the report there were many exceptions, both to the findings of facts and to the conclusions of law. The record states that all exceptions were overruled and that the court confirmed the report in all respects. Both sides appealed. When the case was called in this Court it was stated by counsel on both sides that the judge below, owing to the rush of business and the anxiety of both parties to get the case sent up for review, had entered a *pro forma* judgment without having really considered any of the exceptions.

Under the former system, before the Constitution of 1868, this Court was the creation of the Legislature, and under the construction of the creating act causes in equity were usually transmitted to this Court upon a *pro forma* judgment because this Court passed upon the findings of fact. But under the Constitution of 1868, Art. IV, sec. 8, this Court reviews upon appeal any *"decision"* of the courts below. When a *pro forma* judgment is rendered, there has been no decision, and hence no appeal can be entertained. In *S. v. Locust*, 63 N. C., 575, which was a civil judgment upon a peace bond, this Court said: "We take occasion to remind the judges of the Superior Courts that we will not hereafter consider cases sent to this Court upon *pro forma* judgments, as this Court is entitled to the benefit of their well-considered opinions upon questions of law which may arise in such cases."

In *Hines v. Hines*, 84 N. C., 125, the Court cites with approval the above quotation from *S. v. Locust*. In *Miller v. Groome*, 109 N. C., 149, the Court said: "It was perfectly competent for the judge, *upon review*, if he thought so, to adopt the findings of fact and con-
(539) clusons of law of the referee, and then they would become the findings and conclusions of the court; but it was error in his Honor to summarily dispose of the exceptions by overruling them and confirming the report without reviewing and passing upon them judicially."

In *Thompson v. Smith, ante*, 345, *Mr. Justice Walker* reviews the subject and says: "When exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusions both upon the facts and upon the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases—use his own faculties and ascertain the truth, and form his own judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible errors on his part, but because we cannot *review* the ref-

eree's findings in any other way. The point was presented clearly and directly in *Miller v. Groome,* 109 N. C., 148, and controls this case." And thereupon it was further said: "The cause is remanded with directions that the judge of the Superior Court will review the referee's findings of fact and his rulings as to law upon the exceptions thereto."

There are other decisions to the same effect. But the above are sufficient, if indeed any authority were needed under the terms of our Constitution. The litigants are entitled to, and should have, the opinion of the learned lawyer who presides in the Superior Court, who should carefully review the entire evidence and make his own findings of fact, and enter his own conclusions as to the law. If this is done in a perfunctory way, as by a *pro forma* judgment, there is no method in which the findings of fact by the referee can be reviewed when there is any evidence whatever upon the findings excepted to. This Court also, as well as the parties, are entitled to the aid of the judgment of the court below after the full consideration of the cause by him. The presumption is that the judgment below is correct, and the burden is upon the appellant to overcome that presumption. It is not fair to him nor to this Court to throw the burden of that presumption against either party unless the judge has fully and carefully considered the cause before rendering the judgment, as it is his duty to do in every (540) case.

If this were a consent judgment, no appeal would lie. Besides, "Consent judgments are in effect merely contracts of the parties," and have no validity as precedents. *Bank v. Comrs.,* 119 N. C., 226, and cases there cited.

Even if this Court had power to recognize such a course as was here taken, it would not do so, because the result would be to transfer into this Court, without review or consideration by the judge below, all cases where there is a report by a referee. It would result that this Court would necessarily be compelled to review the findings of fact by the referee, a duty which devolves upon the trial judge. The cause must therefore be remanded, as in *Thompson v. Smith, ante,* 345, to the judge holding the courts of the district, with directions that he carefully review the findings of fact and conclusions of law of the referee wherever excepted to and enter his deliberate judgment as to each exception.

As the *pro forma* judgment was entered with the assent of both parties, each will pay half the costs of this appeal. It may be that the judgment entered by the judge below upon consideration of the case in accordance with law, and as herein directed, may prove satisfactory to

one or to both parties. But if there should be an appeal from his judgment, the appellant may use so much of the printed matter sent up in this case as may be useful and appropriate in that appeal. To that end all the printed matter sent up in this case may be withdrawn by the parties.

Remanded.

Cited: *Fisher v. Toxaway Co.*, 165 N. C., 668.

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(541)

J. P. MULLINAX v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 9 November, 1911.)

1. Telegraphs—Death Message—Error in Transmission — Delivery — Negligence—Evidence—Nonsuit—Instructions.

Evidence tending to show that while attempting to deliver a message announcing a death the agent of a telegraph company was informed where the addressee could be found, and made no personal effort to deliver it there, but intrusted the communication to another who was not in the defendant's employment, and that had the message been correctly transmitted and delivered as sent the addressee could and would have attended the funeral, is sufficient upon the issue of defendant's negligence, and a motion to nonsuit or instructions directing a verdict for defendant on the evidence should be refused.

2. Telegraphs—Contributory Negligence—Information—Evidence.

In an action to recover damages from a telegraph company for mental anguish caused by the defendant's negligence in failing to correctly transmit and properly deliver a message announcing a death, thereby causing his absence from the burial of the deceased, the plaintiff must show more than mere negligence on defendant's part, for if it appears that he received information of the death from some other source in time to attend the funeral, and under such circumstances that he could have gone and failed to go, he would be guilty of contributory negligence, the proximate cause of the injury, which would bar his recovery.

3. Telegraphs—Negligence—Telegrams—Principal and Agent—Information —Damages.

A telegraph company cannot escape liability for damages when it intrusts to another the delivery of information to the addressee of a message announcing a death, which by reasonable efforts it should have delivered in time to have avoided the consequences.

4. Same—Rule of the Prudent Man—Burden of Proof.

It is the duty of an addressee who has received partial information from another concerning a message wherein his name was erroneously

transmitted, announcing the death of one "Jennie Rans," which should have been "Jennie Rains," not to be negligent himself; and the burden is upon him to show that he acted as a reasonably prudent man would have done under all the circumstances in making inquiry from the defendant's agent or otherwise, or that he had not been put upon such reasonable inquiry as should have caused him to go to the funeral, and thus avoid the damages sought.

5. Same—Negligence.

A telegram addressed to "J. H. Mullinax," announcing the death of "Jennie Rains," was erroneously transmitted to "J. H. Mullins," announcing the death of "Jennie Rans." The defendant telegraph company introduced evidence tending to show reasonable efforts to deliver it, and subsequently that its agent received information from a certain person that the plaintiff could be found at a certain place, and such person took a memorandum of the substance of the message and communicated it to the plaintiff and his wife. There was conflicting evidence as to whether the plaintiff knew himself to be the addressee or that the deceased was a sister of his; and if the sending point of the message had been communicated to him the night before he would have known that the deceased was his sister. There was evidence tending to show that if the message had been correctly communicated to him promptly that night he could have made necessary financial arrangements in time to have taken a train to his destination and reached there for the funeral: *Held*, the burden was upon the defendant to show, on the question of contributory negligence, that the plaintiff could have gone to the funeral of the deceased had he acted within the rule of the prudent man.

6. Telegraphs—Contributory Negligence—Death Message—Postpone Funeral.

In an action for the recovery of damages for mental anguish alleged by plaintiff as caused by defendant's negligence in not properly transmitting and sooner delivering a telegram relating to a death, the burden is upon the defendant to show, if the defense is relied on, that the damages could have been avoided by the postponement of the funeral, and the plaintiff cannot be chargeable for the failure to postpone it by one over whom he had no control, in this case the husband of plaintiff's deceased sister.

APPEAL from *Daniels, J.*, at May Term, 1911, of ORANGE. (542)

This is an action to recover damages for mental anguish, caused, as the plaintiff alleges, by the negligence of the defendant in the delivery of a telegram, notifying him of the death of his sister, Jennie Rains, which prevented him from attending her funeral.

Jennie Rains lived at Franklinsville, in Randolph County. It was admitted that on 28 February, 1910, about 3 o'clock p. m., the following telegram was delivered to the agent of the defendant at Franklinsville:

To J. P. MULLINAX, *care Eno Cotton Mills, Hillsboro, N. C.:* (543)

Jennie Rains killed this morning by a cow. Funeral to-morrow evening. Answer. T. A. SLACK.

And that when received by the agent of the defendant at Hillsboro, at 3:35 p. m. of the same day, it read as follows:

To J. H. MULLINS, *care E. C. M. H. B.:*

Jennie Rans killed this morning by a cow. Funeral to-morrow evening. Answer. E. A. SLACK.

It was also admitted that the sister of the plaintiff was buried about 2 o'clock p. m., on 29 February, 1910, and that the plaintiff could have reached Franklinsville in time for the funeral on a train leaving Hillsboro at 5 o'clock p. m. of 28 February, and on one leaving the same place at 4 o'clock a. m. of 29 February.

The telegram was delivered to the plaintiff in the form in which it was received at Hillsboro, about 8 a. m. of 29 February, and the plaintiff immediately telegraphed that he would be at Franklinsville on the next train, which telegram was received before the funeral.

It was also admitted that the plaintiff went to Franklinsville on the next train after the telegram was delivered to him, and reached there about 5 o'clock p. m. of 29 February, after his sister was buried.

The plaintiff introduced evidence tending to prove that he had been the engineer at the Eno Mills for seven years and was well known; that he worked within 500 or 600 yards of the office of the defendant, and that if the telegram had been promptly delivered, as it was when received by the defendant, he could and would have gone to Franklinsville in time for the funeral.

There was evidence on the part of the defendant that the telegram was promptly sent out by its messenger boy, and that he made inquiry for J. H. Mullin, and could not find such a person.

J. M. O'Neill, a witness for the defendant, testified that he was the manager of the defendant at Hillsboro, and that W. E. Haynes was its operator; that on the night of 28 February he had a conversation (544) with Mr. H. S. Cates; that Mr. Cates, Haynes, and himself were at supper, and Haynes remarked to the witness that the boy had not delivered this death message; could not find the party, J. H. Mullin; that Mr. Cates spoke up and wanted to know who was dead, and Haynes then repeated the message to him; that Mr. Cates said: "Maybe that is Jess Mullinax," and said, "I am going right on back to the store, and he lives close to the store, and if it is some of his people, I will notify him"; that Mr. Cates took an envelope, as witness remembers, out of his pocket, and copied down what Mr. Haynes told him was in the message from Franklinsville, and that Jennie Rans had been killed by a cow and would be buried to-morrow afternoon; was not sure whether he told him who it was signed by or not; that Mr. Cates copied that down

on an envelope he took out of his pocket; that it was in the afternoon; they were at supper, and that time of the year they had supper about 6 o'clock; that they were at Miss Bettie Conklin's boarding-house near the depot; that he was in the telegraph office that night; that he was in there nearly every night on an average until about 11 o'clock; that he had two lamps burning; the doors were not open, but anybody could get in that wanted to; Mr. Mullinax did not come to the office that night; witness was present when he came there the next morning; he came in and Mr. Haynes was at the telegraph table and witness was at the other side of the office, and Mullinax asked if there was a message for him, and Mr. Haynes told him there was one for J. H. Mullin, which might be intended for him, and gave it to him; Mullinax read it and signed for it; the message was addressed to J. H. Mullin; that when the message was delivered to Mullinax he sent a message to Mr. T. A. Slack; that this message was delivered to Mr. Haynes; Mullinax left on the train at 10:25 or 10:28.

H. S. Cates, who was a merchant in Franklinsville, witness for the defendant, testified: "I live just south of the Occoneechee Mountain, about a mile and a half from the depot, and am not connected in any way with the Western Union Telegraph Company, and have (545) no interest in the result of this litigation. When I went to supper just beyond the station, when I went into the dining-room at Miss Bettie Conklin's, Mr O'Neill was sitting at the table, and he and Mr Haynes were discussing about a message, and Mr. O'Neill asked me if I knew a party by the name of J. H. Mullins on the hill, and I told him I did not, but I did know a party by the name of J. P. Mullinax, who lived near my store, and I asked him about the message, and he told me about it, and I said I rather expected it was for Mr. Mullinax, and I said: 'If you will give me a copy of it, or give me the message, I will carry it there,' and Mr. Haynes gave me a copy. I took a right copy—don't know that I copied it exactly, but I took the outline. I don't know that I got a statement that the funeral would be the next evening, but I got a statement that Jennie Rains was dead. I got the statement that it was from Franklinsville, sent by some Mr. Slack. After I ate supper, I went back to the store, and I sent some party, I don't remember who, to see Mr. Mullinax. He lived off the path a distance, and I sent a party by to tell Mr. Mullinax to come to the store, I wanted to see him; and in a few minutes Mr. Mullinax and his wife came in the store and I was out, and when I came in he told me he had been waiting about five or ten minutes, and he asked me what I wanted to see him about, and I told him I had a message, and had a copy of it in my pocket, and I began to look for it and could not find it at once, but afterwards I did find it and read the message to him. I read that a Mrs. Jennie Rans from Frank-

linsville was dead. I don't believe I stated when she would be buried. I told him she had been killed by a cow, and that Mr. Slack sent the message. I don't think I told him any initials. I told him that Mr. Slack had sent a message stating that Jennie Rans, of Franklinsville, had been killed by a cow. I don't think Mr. Mullinax said anything, but Mrs. Mullinax said: 'You have got some people up there, and I expect it is your sister,' and they remarked to each other one thing and another about it, and I think they finally decided it was his sister; but I told him the message was for J. H. Mullins. His wife said in a few minutes, 'You will have to go, won't you?' and he said, 'Yes,' and she said 'You had better get ready and go.' This was about 8 o'clock on the night of the 28th."

There was other evidence on the part of the defendant tending (546) to corroborate this evidence.

The plaintiff was examined as a witness, and among other things, said: That he was fond of his sister, as much so as any brother could be of a sister; that it had been something like a year and a half or two years prior to her death that he had seen her; she lived at the same place she did when she died, when he last saw her; that he has suffered mental anguish and regretted the failure to see her before she was put away; that it had given him a lot of trouble; that he has been running an engine at the Eno Cotton Mills; he has had the same job ever since he has been there; that his reason for going to the telegraph office on the morning of 1 March and making inquiry about a telegram, was that the night before Mr. Scott Cates sent for him to come up to his store, about 8 o'clock; he went there, and it was some time after he got there before he saw Mr. Cates—some twenty or twenty-five minutes; finally Mr. Cates came in and said Mr. O'Neill, the agent, told him there came a telegram for somebody saying his sister was killed; it sounded like Jennie Rans or Jennie Renn, or something like that; Mr. Cates had written it down, but he had lost the paper; Mr. Cates said Jennie Rans or Jennie Renn, or something like that, and a name sounding like J. H. Mullin; it was not his name, but sounded something like him, and it might be for him; that he did not think much about it at the time and went on home; the next morning he got to thinking about it, and went to the depot; that he went to the depot after he had gone to work; that he went to the office as soon as it was opened; the mill opens at 6 o'clock, which was before the opening of the telegraph office; the telegraph office was not open at the time Mr. Cates spoke to him; that they did not have any night train and had closed up; that he did not know where Mr. O'Neill lived; that if the telegram had been delivered on the evening of 28 February, he would have gone right away to Franklinsville to his sister's funeral, on the first train he could have got, if he had been sure

about it; that he is pretty sure he could have arranged with the (547) mill between 3:25 and 5:28 to have gotten off; that in a case of that kind he certainly could have gone.

Cross-examination:

That on the night of 28 February he went to Mr. Cates' store in response to a message from Mr. Cates, sending for him; he did not know what Mr. Cates wanted; that his wife went with him; that they went into the store together.

Q. When you went in there, didn't Mr. Cates tell you that he had had a talk with Mr. Haynes and Mr. O'Neill? A. No, sir.

Q. Didn't he tell you that the telegraph company had gotten a message saying that Jennie Rains, who lived at Franklinsville, had gotten killed, and it was addressed to some one named J. H. Mullin, and he thought it might be for you? A. No, sir; he didn't tell me that way.

Q. Didn't he say there was a message for J. H. Mullins, saying Jennie Rans or Jennie Rains had been killed, and sent from Franklinsville? A. He told me Mr. O'Neill had asked him to see if there was anybody there by that name, and he thought it was so much like my name, it might be for me. He didn't say anything about Franklinsville.

Q. He told you the message stated Jennie Rains had been killed by a cow? A. Jennie Rans, he said.

Q. Had been killed by a cow and the funeral would be to-morrow? A. Yes, sir.

Q. Didn't he tell you that the message was from Franklinsville? A. If he did, I don't remember it. If he had said anything about Franklinsville, I would have been more sure of it.

Q. Didn't your wife turn to you and say, "Jim, that is your sister, and you had better get ready to go?" A. No sir; not that I know of.

Q. After you had this conversation with Mr. Cates, you never went down to the telegraph office? A. No, sir; not that night.

Q. You went home? A. Yes, sir.

That the next morning about 8 o'clock he went to the tele- (548) graph office and got the message, and at 8:10 he sent a telegram.

Q. You went down and asked them to see this message addressed to J. H. Mullin? A. Yes, sir; and I saw it was from Franklinsville and I was pretty sure it was my sister.

Q. Then you telegraphed to T. A. Slack that you would be there on the next train? A. Yes, sir.

Q. If you had left there at 4 o'clock in the morning you would have got to Franklinsville exactly the same time as if you had left at 5:38 in the afternoon? A. Yes, sir; and I would have left if I had been sure it was my sister.

That after he telegraphed Mr. Slack, he went to Franklinsville; that after his talk with Mr. Cates he did not go to Miss Conklin's, where Mr. Haynes was boarding, to find out anything about the message; that he knew Mr. Haynes was working at the telegraph office; that he never went to where he was boarding and he never went to the station until the next morning.

Redirect examination:

He went to the mill after he got the message and saw Mr. Webb, who was secretary and treasurer, and arranged with him to get off; the mill closed at 6 o'clock; that he did not go to the depot on the night of 28 February; that he did not go to the depot that night because the depot was shut up and there was no use to go down there, "and I was not sure it interested me anyhow to go." That he did not know the depot was shut up; knew it was customary for it to be shut up; he did not go down to see whether it was shut up or not. That on the morning of 1 March he got the money to go to Franklinsville on; that he got it from Mr. Webb at the office; that he could not have gone without first getting the money, and did not have the ready money that night; that the mill was not open that night and that he did get the money without any trouble at the mill in the daytime when he asked for it.

The wife of the plaintiff corroborated his evidence.

Exceptions were taken by the defendant to the refusal of its motion to nonsuit, the failure to give certain prayers for instructions, and to parts of his Honor's charge, all of which are embraced in five (549) propositions:

(1) That the information given to the plaintiff by the witness Cates was as full as that he acted on the next morning, and that he received it in time to leave Hillsboro at 4 o'clock a. m. of 29 February, and in time to reach Franklinsville before the funeral, and that, therefore, his failure to act on this information was negligence and the proximate cause of the nijury.

(2) That this information, if not as full as that he received next morning, was sufficient to put the plaintiff on inquiry, and that he failed to make the inquiry, and was therefore negligent, and that this was the proximate cause of his injury.

(3) That predicated on the two preceding propositions, the plaintiff was guilty of contributory negligence on his own evidence.

(4) That if the funeral of the sister could have been reasonably postponed until the arrival of the plaintiff, and her husband declined to postpone it, the answer to the third issue should be "Nothing."

(5) That his Honor erred in charging that the burden of the second issue was on the defendant.

The jury returned the following verdict:

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

2. If so, did the plaintiff, by negligence on his part, contribute to said injury? Answer: No.

3. What damages, if any, is the plaintiff entitled to recover? Answer: $1,000.

From a judgment in accordance with the verdict, the defendant appealed.

S. M. Gattis and Bryant & Brodgen for plaintiff.

King & Kimball, George H. Fearons, and A. S. Barnard for defendant.

ALLEN, J. The negligence of the defendant cannot be disputed. It failed in its duty in that it transmitted the message incorrectly, and also in making no inquiry and no effort to deliver to the plaintiff, after being informed that it was probably intended for him. (550)

It is, however, true, as the defendant contends, that negligence alone will not entitle the plaintiff to recover, and that he must go further and show that this negligence was the proximate cause of his injury.

It is also true that contributory negligence on the part of the plaintiff is fatal to his action, and that if he received information of the death of his sister from some other source, in time to attend the funeral, and under such circumstances that he could have gone, and failed to go, that he would be guilty of contributory negligence, and the negligence of the defendant would not be proximate.

There is practically no dispute as to the law. The controversy is as to the facts, and as to the meaning and effect to be given to the evidence.

If we construed the evidence of the plaintiff as the defendant does, or if we were permitted to dispose of the case on the evidence of the defendant alone, we might be justified in denying a recovery; but in our opinion his Honor held correctly that on the whole evidence the question of proximate cause and contributory negligence was for the jury, and this he submitted to them under proper instructions.

The plaintiff does not say that the witness Cates told him that there was a telegram for him saying his sister was dead, but that a telegram had come for some one with a name like J. H. Mullin, that Jennie Rans or Jennie Renn was dead. He denies that he was told that the telegram came from Franklinsville.

The conversation with Cates was at 8 or 9 o'clock at night, when the telegraph office was closed; he had no money and the mills were closed, where he could have gotten money.

According to the plaintiff, he received the additional information the next morning, that the telegram was from Franklinsville, and then concluded it was his sister.

If the telegram had been transmitted correctly and had been promptly delivered, the plaintiff would have received it before 4 o'clock p. m. of 28 February, when the mills were open, and he says he could (551) have gotten the money for his expenses, and would have left Hillsboro on the 5 o'clock train, and if so, would have reached Franklinsville in time for the funeral.

The defendant cannot, under these circumstances, escape liability by imposing upon one, who owed no duty to the plaintiff, the obligation of conveying information which the plaintiff says was imperfect, and at night, when the plaintiff had no money and could not get it, and when the office of the defendant was closed.

We have considered the first three propositions, insisted on by defendant, largely on the evidence of the plaintiff, because they are presented under a motion to nonsuit, and under prayers for instructions directing a verdict in favor of the defendant on the first and second issues, all of which should have been denied, if there was any aspect of the evidence upon which a verdict could have been returned in favor of the plaintiff.

His Honor imposed upon the plaintiff all that is required by law. He charged the jury that the burden was on the plaintiff to prove negligence, and that this negligence was the proximate cause of his injury, that is, that it prevented him from attending the funeral.

He also said, as to the duty of the plaintiff: "It was his duty to exercise the care of a man of ordinary prudence, notwithstanding the fact if the defendant had been negligent in getting the address wrong and the name wrong and the signature wrong, still he owed the duty not to be negligent himself, but to exercise the care of a man of ordinary prudence under all the circumstances. If he did that, you would answer this issue, 'No.' If the defendant has satisfied you from all this evidence, evidence of the plaintiff and the defendant all taken together, that he failed to act as an ordinarily prudent man would have acted under all the circumstances, you will answer it 'Yes.' It was his duty, if information came to him that was reasonably calculated to put him on inquiry as to whether or not the dead woman was his sister—it was his duty to exercise ordinary care to find out whether or not it was his sister; and if he failed to exercise such ordinary care in making inquiry and in ascertaining and in attending her funeral, that (552) is the reason he suffered, then he is guilty of contributory negligence, and you will answer this issue 'Yes.' Or if he knew from what was told him by Mr. Cates that it was his sister, and then he did not exercise ordinary care to supply himself with the necessary funds,

and to make his arrangements to get off and go in time for the funeral, then he would be guilty of negligence, and if that negligence caused him to fail to get to the funeral, and brought about his suffering, then you should answer that issue 'Yes.' So, at last, the whole question upon this issue comes down to whether or not he exercised the care of an ordinarily prudent man under all the circumstances, taking into consideration what had been said to him and what he knew and what he did, the time of night, the fact that he had no money at the time, his character and standing in the community, as to whether or not he could have secured the necessary funds and could have gotten off, whether he should have concluded that she was his sister, whether he made inquiry about it and pursued the investigation and acted as a man of ordinary prudence would have acted under all the circumstances. If he did, your answer to this issue should be 'No,' that is, that he was not guilty of contributory negligence. But if the defendant has satisfied you that he failed to exercise the care of a man of ordinary prudence in the particulars I have mentioned, or any of them, then you will answer the issue 'Yes.' "

We do not agree with the defendant as to its fourth contention.

There is no evidence that the funeral of the sister could have been reasonably postponed, and if this fact appeared, we fail to see how the act of her husband, over whom the plaintiff had no control, in declining to do so, could affect his right to recover.

His Honor correctly held that the burden of the second issue was on the defendant.

The cases of *Hocutt v. Telegraph Co.,* 147 N. C., 186, and *Hauser v. Telegraph Co.,* 150 N. C., 557, relied on by the defendant, are not in conflict with this view.

No issue of contributory negligence was submitted in either (553) case, and consequently the question here raised of the burden of proof on that issue could not be involved.

What is said by *Justice Walker* in the last case, as to the burden of proof, relates entirely to the question of proximate cause, as is clearly shown by the language he uses. He says: "The burden of proof was not upon the defendant to show that the plaintiff had not exercised diligence, but upon the plaintiff to show not only that the defendant had been guilty of negligence, but that its negligence was the proximate cause of the damage to him.

This appears to us a clear case of negligence on the part of the defendant, resulting in damage to the plaintiff, and it has been presented to the jury with a just recognition of the rights of both parties.

No error.

Cited: Medlin v. Tel. Co., 169 N. C., 506.

(554)

C. T. PEELE v. ISA G. POWELL, ADMINISTRATRIX.

(Filed 9 November, 1911.)

1. Statute of Frauds—Debt or Default of Another—Parol Promise—Original Liability.

The liability of a promisor to answer, "upon special promise, the debt, default, or miscarriage of another person" under the statute of frauds, is governed by whether the promise creates an original obligation or is collateral to it and merely superadded to the promise of another to pay the debt, he remaining liable, for in the latter instance the promisor is not liable unless there is a writing to that effect, whether the promise is made at the time the debt is created or not.

2. Same—Credit.

The obligation of a promisor to answer for the "debt, default, or miscarriage of another" is original and binding if made at the time or before the debt is created, when the credit is given solely to the promisor or to both.

3. Same—Express Promise—Consideration—Evidence.

To make the oral special promise binding upon the promisor to answer for the debt, etc., of another, the promise must be express and not solely implied by law, and founded upon a consideration such as the immediate and pecuniary benefit of the promisor in the transaction, as in instances of joint principals, or the release of the original debtor, or harm or benefit passing between the promisor and the creditor, or to pay out of a particular fund of the debtor in the hands of the promisor; but if the funds are not actually in his hands and he does not receive them, his promise is not personally binding.

4. Statute of Frauds—Debt or Default of Another—Consideration Expressed—Implication.

A written promise to answer for the debt, etc., of another need not express the consideration, and it may be established by parol.

5. Statute of Frauds—Debt or Default of Another—Parol Promise—Liability—Definition.

A parol promise to answer for the debt, etc., of another which is not enforcible is defined to be "an undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made continues liable." *Sheppard v. Newton*, 139 N. C., 535, cited and approved.

6. Statute of Frauds—Debt or Default of Another—Evidence of Debt—Deceased—Transactions and Communications.

In an action upon the special promise of the deceased, against his administrator, for goods sold and delivered to another, it is competent for the plaintiff to prove the indebtedness of such other person by his verified account and other competent evidence, as such would not involve evidence

of transactions and communications with a deceased person, prohibited by statute, but to recover of the estate of the deceased, the promise to answer for the debt must be shown in a manner not prohibited by the statute of frauds.

7. Statute of Frauds—Debt or Default of Another—Promise—Running Accounts—Specific Occasion—Evidence.

In an action against a promisor to recover on an account of goods sold and delivered, there was testimony by a witness, an employee of the plaintiff, that about the time of the sale of the last item the plaintiff told him not to let the debtor have any more goods without the written order of the promisor; that the debtor had no credit: *Held*, evidence that the debtor had credit prior to that time, and a general statement made by the witness that the goods had been theretofore sold on the credit extended the promisor must be accompanied by evidence of something said or done by the promisor authorizing the extension of credit, to have any weight.

8. Statute of Frauds—Debt or Default of Another—Promise—Insufficient Evidence.

In an action to hold an alleged promisor liable for a running account of goods sold to another, evidence that the promisor told the plaintiff to let the debtor have goods and he would see that they were paid for, without anything to show that goods were sold the debtor at that time, should not be construed as prospective and retrospective, so as to include goods sold before and after that time.

9. Same—Declarations.

Evidence of a parol declaration of a promisor to pay the debt of another, in an action upon the promise, that the promisor had told the plaintiff that the debt was all right, is not sufficient to make the promisor liable.

10. Evidence—Running Account—Book Items.

In an action upon a running account, the items appearing upon the ledger and day-book of the plaintiff are mere declarations in his own interest, and as such are incompetent when standing alone and unsupported by proper evidence to make them competent.

WALKER, J., dissenting; HOKE, J., concurring in dissenting opinion.

APPEAL from *Carter, J.*, at May Term, 1911, of BERTIE. (555)

This is an action brought by C. T. Peele against Isa G. Powell, administratrix of Edgar Powell, to recover $286.65 and interest thereon from 27 March, 1907, the value of goods sold and delivered to J. T. Cook, for which it is alleged the defendant's intestate is liable.

The plaintiff offered the following evidence: An itemized and verified statement of account of goods sold and delivered to J. T. Cook for the amount alleged to be due by him in his complaint. Objection by defendant sustained, and plaintiff excepted.

The account was against Tom Cook, Edgar Powell, security. Luther Bryant testified: That he was clerk in plaintiff's store from 1 January, 1906, till the end of the year 1908; that for all goods sold to J. T. Cook from 22 February, 1906, to 27 March, 1907, the credit therefor was extended to Edgar Powell; that about the time of the last-mentioned date Mr. Peele told him (the witness) not to let Mr. Cook have any more goods without a written order from Mr. Powell. Cook had no credit at that time and was a tenant of Mr. Powell. That in
(556) July, 1906, he heard Powell tell plaintiff to let Cook have goods and he would see that they were paid for.

F. L. Bishop testified as follows: "On or about 25 March, 1908, I met Mr. Powell in the road, and in the conversation between us, Mr. Powell stated that Mr. Peele had him charged with a great big account that Mr. Cook had made at his store, and that he did not think that he ought to pay it, because Mr. Peele ought not to have let Mr. Cook have so many goods on such a crop as Mr. Cook was then working, but that he (Mr. Powell) had told Mr. Peele to let Mr. Cook have some goods, and that he reckoned he would have to pay it. I then told Mr. Powell what Mr. Peele had told me to tell him; that he presented Mr. Cook's account to him (Powell), and unless he made some arrangements about that account, that he (Peele) was going to take some steps to collect it; that Mr. Peele said that he hated to take such measures against him, and that he wanted to avoid it if possible, but that he could not afford to lose the account."

L. J. Brewer testified: That in March, 1906, he was at Powell's house and saw some one going out the gate, and that he asked Mr. Powell who it was, and he replied that it was Charlie Peele, who had been to see him about Cook's account, and that he told him that it was all right. He testified, also, that on another occasion, at the sheep shelter, in 1908, that Mr. Powell told him that Mr. Peele had a large account against him for Tom Cook, and that it amounted to about $290.

The plaintiff offered to prove by himself that he sold the goods to Cook, and the amount of the sales, which was excluded, and the plaintiff excepted. He also offered in evidence his ledger and day-book, for the purpose of proving the account against Cook, and excepted to its exclusion.

The principal controversy between the plaintiff and the defendant is as to the effect of the evidence, the defendant contending that it is not sufficient, under the statute of frauds, to bind the estate of his intestate.

His Honor was of this opinion, and upon the conclusion of
(557) the evidence entered judgment of nonsuit, and the plaintiff excepted and appealed.

L. L. Smith for plaintiff.
Winston & Matthews for defendant.

ALLEN, J., after stating the case: The liability of a promisor to answer, "upon special promise, the debt, default, or miscarriage of another person" has been considered in numerous decisions of this Court, and there is frequently much difficulty in determining whether a particular promise is within the statute.

The term "special promise" means an express promise, and not one implied by law. Browne Stat. Frauds, sec. 166.

Whether oral or in writing, it must have a consideration to support it (*Draughan v. Bunting,* 31 N. C., 10; *Stanly v. Hendrix,* 35 N. C., 87; *Combs v. Harshaw,* 63 N. C., 198; *Haun v. Burrell,* 119 N. C., 547); but if in writing, the consideration need not appear in the writing, and may be shown by parol. *Nichols v. Bell,* 46 N. C., 32; *Haun v. Burrell,* 119 N. C., 547.

If the promise is based on a consideration, and is an original obligation, it is valid, although not in writing. *Hospital Assn. v. Hobbs,* 153 N. C., 188.

The obligation is original if made at the time or before the debt is created and the credit is given solely to the promisor, as in *Morrison v. Baker,* 81 N. C., 80; *Sheppard v. Newton,* 139 N. C., 536, or if credit is given on the promises of both, as principals and as jointly liable, and not on the promise of one as the surety for the other. Browne Stat. Frauds, sec. 197; *Horne v. Bank,* 108 N. C., 119.

So is a promise, made after the debt is created, when by reason of the promise the original debtor is released (*Sheppard v. Newton,* 139 N. C., 379; *Jenkins v. Holly,* 140 N. C., 379), and also if it is a promise to pay out of funds placed in the hands of the promisor by the debtor (*Stanley v. Hendrix,* 35 N. C., 86; *Threadgill v. McLendon,* 76 N. C., 24; *Mason v. Wilson,* 84 N. C., 53; *Voorhees v. Porter,* 134 N. C., 604), or if a promise based on a new consideration of benefit or harm passing *between the promisor and the creditor. Whitehurst v. Hyman,* 90 N. C., 489.

If, however, there is a promise to pay out of a particular (558) fund, and the fund is not received by the promisor, it is not binding. *Bagley v. Sasser,* 55 N. C., 350.

If one, under the former practice, was arrested in a civil action, and was released on the oral promise of another to pay the debt, the promise was binding because the release from arrest satisfied the original debt (*Cooper v. Chambers,* 15 N. C., 261; *Draughan v. Bunting,* 31 N. C., 10), but it was otherwise of an oral promise to pay upon condition that

the creditor would not arrest the debtor, because the debtor remained liable. *Britton v. Thrailkill,* 50 N. C., 331; *Rogers v. Rogers,* 51 N. C., 300; *Combs v. Harshaw,* 63 N. C., 198.

Where the promise is for the benefit of the promisor, and he has a personal, immediate, and pecuniary benefit in the transaction, as in *Neal v. Bellamy,* 73 N. C., 384, and in *Dale v. Lumber Co.,* 152 N. C., 653, or where the promise to pay the debt of another is all or part of the consideration for property conveyed to the promisor, as in *Hockaday v. Parker,* 53 N. C., 17; *Little v. McCarter,* 89 N. C., 233; *Deaver v. Deaver,* 137 N. C., 242; *Satterfield v. Kindley,* 144 N. C., 455; or is a promise to make good notes transferred in payment of property, as in *Adcock v. Fleming,* 19 N. C., 225; *Ashford v. Robinson,* 30 N. C., 114, and in *Rowland v. Rorke,* 49 N. C., 337, the promise is valid although in parol.

If, however, the promise does not create an original obligation, and it is collateral, and is merely superadded to the promise of another to pay the debt, he remaining liable, the promisor is not liable, unless there is a writing; and this is true whether made at the time the debt is created or not. *Smithwick v. Shepherd,* 49 N. C., 197; *Bagley v. Sasser,* 55 N. C., 350; *Scott v. Bryan,* 73 N. C., 582; *Rowland v. Barnes,* 81 N. C., 239; *Haun v. Burrell,* 119 N. C., 547; *Garrett-Williams Co. v. Hamill,* 131 N. C., 59; *Sheppard v. Newton,* 139 N. C., 535, and *Supply Co. v. Finch,* 147 N. C., 106.

In our opinion, this case falls within the last class.

There is no evidence of benefit to the intestate, and while the jury would have been justified in finding from the evidence that he (559) promised to pay, it is not sufficient to sustain a finding that it was more than a promise to pay the debt of Cook, for which he (Cook) remained liable.

The verified account and the evidence of the plaintiff were competent to prove the indebtedness of Cook, as neither involved a transaction or conversation with the deceased, and there would be error in their exclusion, which would entitle the plaintiff to a new trial, if there was evidence of a valid promise of the intestate to pay.

It was because his Honor thought there was no such evidence that he ruled as he did, and we concur in his opinion.

The definition of a promise to answer for the debt of another, which is not enforcible, adopted in our Court and applicable here, is: "An undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made continues liable." *Sheppard v. Newton, supra.* Tested by this rule, we think the action cannot be maintained.

The account began on 22 February, 1906, and ended 27 March, 1907. The witness for the plaintiff, Bryant, testified that about the time of the last date (27 March, 1907) the plaintiff told him not to let Cook have any more goods without a written order from Powell, and that Cook had no credit at that time. The inference is that Cook had credit prior to the time, and no goods were afterwards sold to him. It is true that same witness also said that for all goods sold to Cook, credit was extended to Powell; and this would be entitled to great weight if he had stated something said or done by Powell authorizing the extension of credit. A similar statement was made by a witness in *Garrett-Williams Co. v. Hamill,* 131 N. C., 59, and was held insufficient to charge the promisor.

Again he says, in July, 1906, he heard Powell tell the plaintiff to let Cook have goods, and he would see that they were paid for. He does not state whether or not any goods were sold to Cook at that time, and so far as we can see, the promise related to a single transaction, and there is no evidence that it is embraced in the account sued on.

We would not be justified in giving such a promise both a (560) retrospective and prospective construction, to include the part of the account before the promise and that part made after it.

The evidence of the witnesses Brewer and Bishop does not show liability on the part of the intestate.

The most material statement made by either is by Brewer: "That in March, 1906, he was at Powell's house and saw some one going out the gate, and that he asked Mr. Powell who it was and he replied that it was Charlie Peele, who had been to see him about Cook's account, and that he told him that it was all right."

We will assume that "him," as last used, applies to Peele, although it is not certain; but, if so, it was "Cook's account" that was all right, and there is no suggestion in the evidence that Cook was not liable therefor. Suppose he had said, "Cook owes Peele an account, and I have promised to pay it.'. No one would contend that this would create a legal liability, and the evidence is not as strong as this.

The action is against the estate of a deceased person. The intestate lived one year and eight months after the last item in the account, and no action was instituted against him during this period. The defendant administratrix has no personal knowledge of the transactions, and death has destroyed any opportunity of replying to the evidence of the plaintiff. Under these circumstances the evidence should be carefully examined, and if it does not conform to the requirements of the law, it should be so declared.

The ledger and day-book of the plaintiff were properly excluded, as they were mere declarations of the plaintiff in his own interest. *Bank*

v. Clark, 8 N. C., 36; *Bland v. Warren,* 65 N. C., 374; *Dyeing Co. v. Hosiery Co.,* 126 N. C., 294.

We find

No error.

WALKER, J., dissenting: It is suggested, in opening the opinion of the Court, that there is frequently much difficulty in determining whether a particular promise to answer for the debt, default, or miscarriage of another person falls within the provisions of the (561) statute of frauds. It would not seem so difficult if we did not attempt to apply well recognized principles, which are clearly stated in the opinion, to disputed facts, and the situation would be much simplified and the difficulty otherwise encountered would be removed if, when the facts are not settled, the case should be submitted to the jury, which is invariably done in other cases, to ascertain what the promise or contract was or what was the intention, understanding, and agreement of the parties. Was it the intention of Peele and Powell that the latter should become the sole and responsible debtor, or, in other words, did he promise *for himself* to pay the debt, or did he promise as surety or guarantor for Cook? In the former case the promise would be an original one, not within the statute, and in the latter it would be a superadded one, Cook still remaining liable for the debt. I have the highest and best authority for saying that this case should have gone to the jury, so that they might find what was the promise. It was so held (*Chief Justice Pearson* delivering the opinion) in *Threadgill v. McLendon,* 76 N. C., 24, when there was much less dispute about the facts, or where the facts were much more significant of the true nature of the promise than are those in this case. In *Threadgill's case* McLendon requested Threadgill to furnish to one Treadaway (who was a cropper of McLendon) such goods and supplies as he might want, and he (McLendon) would see that Threadgill was paid for them, and that upon this request and promise Treadaway obtained credit at Threadgill's store and received the goods as he wanted them, amounting in value to $156. That of this account, $56 was charged to McLendon and $100 to Treadaway. This Court, after stating that the trial judge had attached too much importance to the manner of making the entries upon the books, said: "Considering the fact that the defendant was bound to furnish the cropper with necessary supplies and had a lien upon the crop, it ought to have been left to the jury to say whether the credit was not in the first instance given to the defendant and the entries on the books made simply to discriminate what was for farm (562) purposes and what for the personal use of the cropper and his family." Ours is a much stronger case than that for a submission

to the jury of the vital question as to the nature of the promise, as understood by the parties. I find abundant evidence in the record which tends most strongly to show that Powell understood and agreed with Peele to become himself the payer, regardless of Cook, and that he was looked to as the sole responsible debtor. And still weightier, if anything, as an authority, is the opinion of the present *Chief Justice* in *Jenkins v. Holley,* 140 N. C., 379, where it is said: "The evidence offered by plaintiff should have been left to the jury, with any evidence the defendant might offer, upon the issue whether Holley became sole debtor or was merely responsible if Wilson did not pay." The facts of the case are substantially like those we find in this record. There was evidence in that case, and there is evidence here, that the plaintiff had "looked to" the defendant as his debtor, and that defendant said it was "all right"; and upon this state of facts, it was said in *Jenkins v. Holley:* "The language was strong, if not, indeed, conclusive evidence" of a promise not within the statute; and then follows what is above quoted from the opinion, to the effect that the case should, at least, have gone to the jury to ascertain the intention of the parties.

In *Sheppard v. Newton,* 139 N. C., 536, the judge held, as did the lower court in this case, that the promise was within the statute, and ordered a nonsuit. This ruling was reversed by this Court upon appeal, and a new trial awarded, *Justice Hoke* saying, in the course of the opinion: "A statement on the same subject, somewhat more extended and very satisfactory, will be found in Clark on Contracts, p. 67, as follows: 'There must either be a present or a prospective liability of a third person for which the promisor agrees to answer. If the promisor becomes himself primarily and not collaterally liable, the promise is not within the statute, though the benefit from the transaction accrues to a third person. If, for instance, two persons come into a store and one buys, and the other, to gain him credit, promises the seller, "If he does not pay you, I will," this is a collateral undertaking, and must be in writing; but if he says, "Let him have the goods and I will (563) pay," or "I will see you paid," and credit is given to him alone, he is himself the buyer and the undertaking is original. In other words, whether the promise in such a case is within the statute depends on how the credit was given. If it was given exclusively to the promisor, his undertaking is original; but it is collateral if any credit was given to the other party.' To like effect are the decisions of our own Court. *Whitehurst v. Hyman,* 90 N. C., 487; *White v. Tripp,* 125 N. C., 523." It will be observed that the case he puts, where the promisor is liable and cannot hide himself behind the statute, is the very one we have under consideration. "Let him have the goods and I will pay," or "I will see you are paid."

We will see presently, when I review the evidence, that credit was given to Powell alone. It was not necessary that Powell should say, as intimated in the opinion, that credit should be given to him alone, in order to bind him, or that he should have expressly assented to such a course; but if he requested that the goods be sold on his credit, as he most assuredly did, and Peele, acting upon his request and induced thereby sold the goods on his credit and looked to him alone, the promise was binding as an original one. It was, at least, as *Chief Justice Clark* said, and as *Justice Hoke* clearly suggests, a question for the jury as to what was meant and as to "how the credit was given." *Sheppard v. Newton, supra.* Quoting from that case again, its concluding words: "Applying these principles to the foregoing statement of the evidence, the Court is of opinion that there was error in directing a nonsuit, and the plaintiff is entitled to have his cause submitted to the jury on the question whether the defendant is not answerable as the original or present debtor on the plaintiff's demand." This is striking language and worthy of much consideration. It would attract the attention of any one familiar with the evidence in this case, as showing a close similarity between the two.

Let me now notice two other cases decided by this Court. In *White v. Tripp,* 125 N. C., 523, it appeared that the goods were charged (564) to both the promisor and the person (defendant's son) who received the goods, or for whose benefit they were purchased. The Court held that this fact was not controlling and that the case was one for the jury. Plaintiff testified that he gave sole credit to the father, Joseph Tripp, without there being any evidence that the latter had assented to such an arrangement. It did not occur to the Court that such assent was necessary. It was held that the case was one for the jury as to the intention of the parties, upon the question as to whom was the credit given. The Court, with reference to the state of the proof, said: "If the defendant authorized the selling to the son, the plaintiff could recover, although the goods were charged to J. B. Tripp in the manner stated in the case. He also charged the jury on the law of principal and agent, and that if the credit was given to J. B. Tripp, with Joseph Tripp as surety, then the defendant would not be liable. There is nothing in these instructions of which the defendant can justly complain. The promise, as the jury have found it to be under the charge, is not required to be in writing. *Neal v. Bellamy,* 73 N. C., 384. The liability of the defendant depends upon his agreement with or promise to the plaintiff, and not upon the manner in which the plaintiff stated the account on his books. The latter was evidence, properly before the jury, under the circumstances, and for the purpose already stated." As will be seen, the charge was approved and

the judgment was affirmed, the Court holding that the liability of Joseph Tripp, the promisor, depended upon his agreement with the plaintiff, and not upon the manner in which the goods were charged on the books, it being for the jury to say what was the intention. *Justice Hoke,* in *Dale v. Lumber Co.,* 152 N. C., 651, states the law clearly, and in principle that case is not unlike this one. He says: "In *Emerson v. Slater,* 63 U. S., 28-43, in a decision on this section of the statute of frauds, the Court said: 'But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the (565) debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.' This position has been sustained and applied in other cases by the same Court, notably in *Davis v. Patrick,* 141 U. S., 749, in which it was held: 'In determining whether an alleged promise is or is not a promise to answer for the debt of another, the following may be applied: (1) If the promisor is a stranger to the transaction, without interest in it, the obligations of the statute are to be strictly upheld; (2) but if he has a personal, immediate, and pecuniary interest in a transaction in which a third party is the original obligor, the courts will give effect to that promise. The real character of a promise does not depend altogether upon form of expression, but largely upon the situation of the parties, and upon whether they understood it to be a collateral or direct promise.' "

Powell had a business purpose, and, too, a pecuniary one to subserve, as appears in this case, as Cook was his tenant, without credit and unable to get supplies to make his crop without the credit of Powell at Peele's store. He made the promise to advance his own interest, and no doubt received the full benefit of it in the way of rent, and perhaps, enough besides to pay for the goods and supplies Peele furnished to his tenant Cook, at his request, as he had a lien under the statute for both rent and advancements. Therein consists the extreme hardship of the Court's ruling, and the facts of the case so strongly appeal to my sense of justice and right, as did the facts in *Liverman v. Cahoon, ante,* 187, at this term, where the statute of limitations was pleaded, that I could not, and cannot in this case, refrain from giving my reasons at length for my earnest dissent from the conclusion, as well as the reasoning, of the Court. I think that in both cases the defendants were seeking to take an unconscionable advantage of the plaintiffs, and one which the law, according to my understanding of it, did not contenance, much less justify. The statute of limitations and the statute of frauds are to be considered as good legal defenses, when applicable to the facts,

but they were designed, as *Chief Justice Pearson* said in *Threadgill v. McLendon, supra,* "to prevent fraud" and not as a cloak for it.
(566) There is no evidence in this case that the plaintiff ever trusted Cook for a moment, for it appears that he was utterly insolvent and without credit, and for that very reason the promise was made by Powell. Who can doubt, upon the evidence, that the credit of Powell alone entered into the transaction? He knew his tenant had no credit, and that his crop would be lost unless he should become the debtor to Peele. There is, at least, evidence of all this, which should have been submitted to the jury.

Our judicial duties at this term have been so onerous and exacting that I have little or no time to examine the authorities very closely, but a mere cursory reading of them warrants me in saying that they fully support my conclusion. "An oral promise to pay for goods furnished to a third person at the request of the promisor, and on his sole credit, is an original undertaking and not within the statute of frauds. The same rule applies in respect of other considerations moving from the promisee and beneficial to a third person at the request and upon the sole credit of the promisor, such as the advancing of money, the rendering of services, renting premises, bailing goods or supplying board." 29 A. & E. Enc., 923-930, where the law is fully stated and authority will be found covering every point in this case, and especially does it sustain the view that the case is, at least, one for the jury. In *Morrison v. Baker,* 81 N. C., 76, it was held that "Where goods are furnished to A. upon the unconditional promise of B. to pay for them, it is not an undertaking to pay the debt of another, but the personal debt of B."

It is clear to my mind, upon the conceded facts, that the promise of Powell to Peele was, in law, not a collateral, but an original one; but if not so, as matter of law, the question as to the nature of the promise should have been submitted to the jury.

Now as to the evidence: Luther Bryant testified: "I was a clerk in plaintiff's store from 1 January, 1906, till the end of the year 1908; for all goods sold to J. T. Cook from 22 February, 1906, to 27 March, 1907, the credit therefor was extended to Edgar Powell; that about the time of the last-mentioned date Mr. Peele told me not to let Mr. Cook have any more goods without a written order from Mr. Powell.
(567) Cook had no credit at that time, and was a tenant of Mr. Powell."

It is true, he afterwards said that Powell told plaintiff "to let Cook have the goods and he would see that they were paid for." But how does this affect Powell's liability? It does not exclude the idea that he would be solely responsible to Peele. Identical words were not allowed any such effect in *Threadgill v. McLendon, supra.* They

rather strengthen the other evidence. The Court says it does not appear that he let Cook have any goods at that time. Why, Luther Bryant had already said that there was a running account at the store from 22 February, 1906, to 27 March, 1907, goods having been furnished between those dates by Peele to Cook, solely upon Powell's credit. It is also stated by the Court, in the opinion, that Peele told his clerk, Bryant, about 27 March, 1907, not to let Cook have any more goods without a written order from Powell, and that Cook had no credit, and it is argued from this that Cook had credit prior to that time and no goods were afterwards sold to him; but no such inference, I respectfully submit, is at all warranted. Bryant expressly stated that Cook *never* had any credit between 22 February, 1906, and 27 March, 1907. It makes no difference whether he got any goods afterwards or not. Besides, the court excluded all evidence as to the account between Peele and Cook, and thus prevented the plaintiff from proving and developing his case. His ruling was wrong, of course, as the transaction between Peele and Cook was no transaction with the deceased party, Powell. The reason why Bryant was instructed not to let Cook have any more goods without an order from Powell was that he was increasing his account to such an extent and so rapidly that he thought it right to notify Powell and get his order. Powell himself referred to this afterwards, according to the witness F. L. Bishop. It also appears from Bishop's and Brewer's testimony, that Powell admitted his liability to Peele and stated that it was "all right." This kind of admission is held to be some evidence of an independent and original promise, in the begining of the transaction, to pay for the goods himself, as will appear by reference to the A. & E. Enc. above cited. It is not necessary to give the promise "a retrospective and prospective construction to (568) include the part of the account before the promise and that part made after it," as said in the Court's opinion, for there is ample evidence to show a promise both at the time of the first conversation, before any goods were furnished, and afterwards. And, again, when Powell said "it was all right," it is plain to my mind, from the context, what he meant, and there is but one interpretation to be placed upon his words. He referred to his liability for the account, for that was what Peele had gone to his home to see him about, and nothing else. In one sense he was referring to "Cook's account," and that is that Cook had got the goods which Powell had promised to pay for, and he went to see him about it for the purpose of getting his money. But he *never* intimated, by word or act, that he looked to Cook for the money. Why should he look to an insolvent? "You can't get blood out of a turnip," (*ex nihilo nihil fit*), to speak figuratively, and Peele knew that Cook would never have any money for him, and for that reason he depended upon Powell alone.

The fact that Powell is dead is utterly irrelevant to the question. The statute of frauds does not protect a man because he is dead, any more than it does a living person. They both stand with reference to it on an equality—one has no greater right under it and is entitled to no greater consideration than the other.

The case of *Garrett-Williams Co. v. Hamill,* 131 N. C., 57, so much relied on by the Court, with other cases of a like kind, and which was strenuously urged upon our attention by defendant's counsel as directly in point, does not fit this case by any means. The promise there was by T. A. Hamill to pay if F. A. Hamill did not. "We went to Whitakers, and T. L. Hamill bought goods and said ship goods in future to F. A. Hamill whenever he needed them until he notified us not to ship, and he would see us paid, and to collect from F. A Hamill (569) when I came around, and if F. A. Hamill failed to pay, he would."

That was distinctly a collateral promise—a promise of T. A. Hamill *superadded* to that of the principal debtor, F. A. Hamill.

It seems to me that the necessity which the Court found for explanatory argument upon the facts, in order to show that the statute does not apply, is a cogent reason for sending the case to a jury.

My conclusion is (1) that the plaintiff was deprived of the right to develop his case by erroneous rulings of the court upon the testimony, and (2) that the evidence is such as to require the intervention of a jury; and for either or both reasons the nonsuit should be set aside and a new trial ordered.

JUSTICE HOKE concurs in the dissenting opinion of JUSTICE WALKER.

Cited: Hospital v. R. R., 157 N. C., 462; *Whitehurst v. Padgett, ib.,* 427; *Van Gilder v. Bullen,* 159 N. C., 296; *Partin v. Prince, ib* , 555; *Craig v. Stewart,* 163 N. C., 536; *Powell v. Lumber Co.,* 168 N. C., 638; *Holland v. Hartley,* 171 N. C., 378; *Handle Co. v. Plumbing Co., ib.,* 303; *Charlotte v. Alexander,* 173 N. C., 518.

M. J. HENDRICKS AND WIFE, EMMA, v. MOCKSVILLE FURNITURE COMPANY.

(Filed 9 November, 1911.)

1. Contracts—Interdependent Conditions—Performance.

One who seeks to recover upon a contract containing interdependent conditions for him to perform, must show a compliance with the conditions on his part in order to recover.

2. Contracts, Interpretation of—Intention—Construed as a Whole.

The court, in construing a contract, will examine the whole instrument with reference to its separate parts to ascertain the intention of the parties, and will not construe as meaningless any part or phrase thereof when a meaning may thus be found by any reasonable construction.

3. Same — Independent Conditions — Performance — Executory Contracts — Title—Damages.

A contract appearing to be a bargain and sale of certain timber interests in land further stipulated that the grantor was to cut the timber into lumber at a certain price per thousand feet, keep it stacked for six months, with advances of money to be made by the grantee in certain proportions, and the balance of the purchase price to be paid when the lumber was delivered to the defendant's factory: *Held*, the title to the timber did not pass to the grantee, for by a proper interpretation of the contract its subject matter was the sale of lumber, to which the title would only vest upon the performance by the grantor of his obligation to hold it for six months and then deliver it to the grantee; and hence the contract was executory and the latter would not be liable for any loss by fire occurring to the lumber while it was in the grantor's possession, before the expiration of the six months and its delivery under the terms of the contract.

APPEAL from *Lyon, J.*, at Spring Term, 1911, of DAVIE. (570)

This action is to recover the purchase price of certain lumber, which the plaintiffs, M. J. Hendricks and wife, Emma G. Hendricks, alleged they sold to the defendant.

On 23 December, 1905, the plaintiffs and defendant entered into the following contract:

NORTH CAROLINA—Davie County.

This contract, made and entered into this day by and between M. J. Hendricks of Davie County, N. C., The Mocksville Furniture Company, witnesseth: That the said M. J. Hendricks has bargained, sold to the said Mocksville Furniture Company, its successors, and does hereby bargain, sell, and convey to said Mocksville Furniture Company and its successors all the oak and poplar timber (except the young trees and some for board purposes) suitable for furniture purposes on the followings lands situate in Davie County, N. C., and bounded as follows, to wit:

On the east by the lands of Mrs. B. C. Rich and Mrs. M. E. Tatum and Mocksville Furniture Company; on the north by the lands of Mocksville Furniture Company and Sam Eaton; on the west by the lands of Miss Mattie Eaton; on the south by the lands of J. W. Etchison and A. J. Hutchins and L. A. Furches, containing 200 acres more or less. The price to be paid for said lumber by said Mocksville Furniture Com-

pany is $15 per thousand feet, less the mill culls, delivered at their factory in Mocksville, N. C., after the said lumber has been sawed and stacked by the said M. J. Hendricks for six months, and he agrees to cut and saw the whole within one year from this date. The Mocksville Furniture Company agrees to advance to said M. J. Hendricks $7.50 per thousand feet as soon as said lumber is stacked on sticks, and the
(571) balance to be paid by said Mocksville Furniture Company when the same is delivered at Mocksville as aforesaid. Received of Mocksville Furniture Company $100, advanced on above lumber, receipt of which is hereby acknowledged.

Witness my hand and seal, this the 23d day of December, 1905.

M. J. HENDRICKS. [SEAL.]

Witness: J. MINOR. EMMA G. HENDRICKS.

About the last of August or the first of September, 1907, acting under this contract, the plaintiffs had at their mill, about eight miles from Mocksville 30,000 feet of lumber in stacks, but which had been stacked less than six months, and 2,000 feet of lumber, which had been recently sawed and was not stacked, all of which was about that time destroyed by fire without negligence on the part of plaintiff or defendant.

The defendant advanced to the plaintiff $7.50 per thousand on the 30,000 feet which had been stacked, and nothing on the 2,000 feet.

Thereafter the plaintiff delivered to the defendant 30,000 feet of lumber under said contract, upon which had been advanced $7.50 per thousand, and demanded payment of the remainder of the contract price, which the defendant refused, claiming that the plaintiffs owed it the amount it had advanced on the lumber which was burned.

His Honor held that under said contract the title to the lumber was in the defendant, and rendered judgment in favor of the plaintiffs for $480, being $7.50 per thousand on the 30,000 feet and $15 per thousand on the 2,000 feet, both of which lots were burned, and $7.50 per thousand on the 30,000 feet delivered, and for $32.36, which the defendant admitted it owed on other matters.

The defendant excepted and appealed.

Jacob Stewart and E. E. Raper for plaintiff.
E. L. Gaither and T. B. Bailey for defendant.

ALLEN, J., after stating the case: The determination of the
(572) controversy between the plaintiffs and the defendant depends upon the interpretation of their contract. If it is executory, and under its provisions the title to the timber was not in the defendant, there could be no liability, because it is admitted that the timber had

not been stacked six months, and there was no delivery at Mocksville—material stipulations, which the plaintiffs agreed to perform.

This is upon the familiar principle that one who seeks to recover upon a contract with interdependent conditions must show performance on his part. *Lowing v. Rintles*, 97 N. C., 350.

As was said in *Hornthal v. Howcott*, 154 N. C., 229: "The object of courts in the construction of a paper-writing is to discover what the parties to it intended, and whether apt language has been used to give effect to that intention," and, "The intent as embraced in the entire instrument is the end to be attained, and each and every part of the contract must be given effect, if this can be done by any fair and reasonable interpretation." *Davis v. Frazier*, 150 N. C., 451.

In this last case *Justice Hoke* quotes with approval Lawson on Contracts, secs. 388 and 389, as follows: "The third main rule is that that construction will be given which will best effectuate the intention of the parties, to be collected from the whole of the agreement; and, to ascertain the intention, regard must be had to the nature of the instrument, the condition of the parties executing it, and the objects which they had in view. . . . Courts will examine the whole of the contract, and so construe each part with the others that all of them may, if possible, have some effect, for it is to be presumed that each part was inserted for a purpose and has its office to perform. So, where two clauses are inconsistent they should be constructed so as to give effect to the intention of the parties as gathered from the whole instrument. So every word will, if possible, be made to operate, if by law it may, according to the intention of the parties."

If we apply this rule of construction, and look at the entire instrument, what did the parties intend?

The plaintiff argues with much force that there is nothing ambiguous in the language used, and that it says in express (573) terms that the timber is conveyed to the defendant.

This conclusion is reached, however, by looking at only a part of the contract, and that part, standing alone, has no consideration to support it. If the parties intended the title to the timber to pass upon the execution of the contract, it would be reasonable to expect the conveyance of the timber to be upon consideration of so many dollars, or for a certain amount per thousand feet. It nowhere appears that the defendant agreed to buy or pay for timber. It wanted lumber, and agreed to pay for it when delivered at Mocksville.

The amount paid in advance is not spoken of as a payment, but an advancement.

Another circumstance which tends to show that it was not the intention of the parties that the paper-writing should operate to pass the

title to the timber at the time it was signed is that a part of the land on which the timber stood belonged to Mrs. Hendricks, and there is no seal to her signature, and no probate and private examination as to her. Mr. Hendricks said on his examination: "The description of the land in the contract covers about 150 acres of the lands of myself and wife." Also, there is no provision allowing the defendant to enter and cut, upon failure of the plaintiff to do so.

As it appears to us, the situation of the parties was this: The plaintiffs had timber, which they wished to sell, and the defendant needed lumber. The plaintiffs agreed to cut and saw their timber into lumber and deliver it at Mocksville for $15 per thousand feet; but as the defendant could not use green lumber, it was stipulated that the lumber should be stacked six months before delivery and that the defendant should advance $7.50 per thousand feet to aid in payment of operating expenses.

This is, in our opinion, a proper interpretation of the contract, and if so, it is executory and the title to the lumber was not in the defendant at the time of the fire.

(574) A contract, in many respects similar to the one now before us, was considered in *Wiley v. Lumber Co., ante,* 210. In that case plaintiff and another sold to the defendant "all the pine and gum timber of every description above the size of 12 inches at the base on a certain tract of land," the written contract of conveyance and sale providing that defendant should have full time to have said timber cut and removed from said land, and extending in any event for such purpose to the full term of three years. The instrument also conveyed to defendant, the grantee, the privilege to have a right of way over the grantor's lands and to erect thereon necessary tramroads, etc., for the purpose of carrying out the timber; and there was further provision that the grantors were to cut and deliver said timber at the log bed of defendant's tramroad and to be paid therefor at the rate of $4 per thousand, etc., and *Justice Hoke,* speaking for the Court, says: "Defendant is right in the position that when one has bought and paid for a lot of growing timber, and same has been conveyed him with the privilege of removal within a given time, the contract as to the removal is so far unilateral that the purchaser is not obligated to cut and remove the timber. If he fails to do so within the time, his right or estate therein is forfeited and enures, as a rule, to the owner of the land. We have so held in two cases at the last term. *Hornthal v. Howcott,* 154 N. C., 228; *Bateman v. Lumber Co.,* 154 N. C., 248. But the contract in question here is not of that character. Applying to it the accepted rule of construction, that 'The intent of the parties as embodied in the entire instrument is the end to be attained, and that each

and every part must be given effect, if this can be done by any fair and reasonable interpretation' (*Davis v. Frazier,* 150 N. C., 451), a perusal of this entire instrument will disclose that while it begins by reciting $450 as the consideration, the controlling stipulation of the contract provides that the parties plaintiff were to cut and deliver 'said timber' at the log bed and the parties defendant were to pay for the same the sum of $4 per thousand 'feet'; and it is also expressly provided that the $450 first referred to as the consideration was only an advancement on the contract price and to be accounted (575) for as the timber was delivered."

There was error in the ruling of the court, and a new trial is ordered.

New trial.

Cited: Refining Co. v. Construction Co., 157 N. C., 281; *Highsmith v. Page,* 158 N. C., 229; *Midgett v. Meekins,* 160 N. C., 444; *Byrd v. Sexton,* 161 N. C., 572; *Lefler v. Lane,* 167 N. C., 269; *Gilbert v. Shingle Co , ibid.,* 289; *Finger v. Goode,* 169 N. C., 73.

J. A. GALLIMORE v. HENRY K. GRUBB AND A. J. BECK.

(Filed 15 November, 1911.)

1. Deeds and Conveyances—Contracts to Convey—Deed in Escrow—Purchase Money—Payment—Evidence—Questions for Jury.

A suit upon a contract to convey lands, with a deed placed in escrow to be delivered upon the payment of the balance of the purchase price, with conflicting evidence upon a point at issue as to whether the deed was to be inoperative if the purchase money was not paid in full within a certain time, presents a question for the jury.

2. Issues Submitted—Issues Tendered—Appeal and Error.

There is no reversible error in refusing proper issues tendered when those submitted by the trial judge were sufficient to enable the parties to present every phase of the controversy.

3. Deeds and Conveyances—Contracts to Convey—Encumbrances—Title—Pleadings—Evidence.

In an action brought to enforce a contract to convey lands, presenting an issue as to whether the plaintiff offered to pay the balance of the purchase money if the defendant would clear the property of liens, which he was obligated to do, it is competent for the plaintiff to put in evidence the complaint as well as the answer, when the relevant parts of the answer otherwise would not have been clear.

4. Deeds and Conveyances—Contracts to Convey—Purchase Money—Tender—Waiver.

The refusal by defendant of plaintiff's offer to pay the balance of the purchase money for lands which the former contracted to convey is a waiver of a formal tender thereof.

5. Deeds and Conveyances—Contract to Convey—Clear Title—Absence of Warranty—Purchase Money—Encumbrances—Equity—Judgment.

An agreement made by the vendee of lands to take a deed without warranty is not a waiver of his right to demand a clear title, and he is not required to take the land with liens thereon, but may insist upon their cancellation before he pays the purchase money and takes the deed; and where their payment can be made and the liens discharged, the courts may direct the payment of a sufficient part of the purchase money to the holders of the encumbrances, though they are not parties to the suit; or may authorize the vendee to pay them off on the failure of the vendor to remove them, and reimburse himself out of his deferred payment of the purchase price.

APPEAL by defendants from *Lyon, J.*, at June Term, 1911, (576) of DAVIDSON.

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

E. E. Raper for plaintiff.
Walser & Walser and Thomas J. Shaw for defendants.

CLARK, C. J. On 3 January, 1910, the defendant sold and contracted in writing to convey the land in controversy to plaintiff for $2,500; $50 was paid in cash. On the same day defendant and wife executed a deed for the property duly signed and acknowledged, and delivered same to one Beck to hold till the purchase money was paid in full and then to be delivered to the plaintiff. This deed was in fee simple, with the usual covenants and warranty. On 6 January plaintiff paid Grubb $1,200 more on the purchase price and arranged to borrow the balance of the money. He repaired the house with his own lumber about 12 January, and 15 January, with consent of Grubb, moved upon the land. Grubb had represented the land to be clear of encumbrances. Plaintiff learning that there was a mortgage for $100 on the land and a judgement in favor of the United States for $250 penalty, interest and cost, called Grubb's attention to the liens, who admitted the mortgage, but said it was not due, and he would pay it off when it fell due, and claimed that the judgment had been settled. Plaintiff offered to pay the balance of the price for the land, but wanted the liens satisfied and the title cleared, or proposed to pay the price less the liens. The defendant refused to clear the title of these liens

or to accept the price less the amount of the liens, and insisted upon plaintiff paying the price in full. In the latter part of February Grubb demanded back and obtained from Beck the deed he (577) had deposited with him. On 10 March plaintiff brought this action to enforce specific performance of the contract, offering to pay balance of money as above. Grubb offered to pay back the money which had been paid, which plaintiff refused to accept.

Grubb contended that the deed had been deposited with an agreement that the purchase money should be paid in full in a week or ten days, and, if it was not done, that the contract would be canceled. This the plaintiff denied, and the jury found that issue in favor of the plaintiff.

The defendant tendered certain issues which the court declined, and submitted those in the record. The issues submitted were sufficient to enable the parties to present every phase of the controversary. When such is the case, as this Court has repeatedly held, the parties have no ground to complain. *Pretzfelder v. Insurance Co.,* 123 N. C., 165; *Tuttle v. Tuttle,* 146 N. C., 487. On examination of the issues, we do not see that the defendant has been deprived of presenting any contention of his as to the facts.

The exceptions to the charge are not well taken. The case turned almost entirely upon the disputed facts, and were fully answered by the jury in favor of the plaintiff.

The defendant also excepted because the judge allowed the complaint to be put in evidence. The court allowed the complaint and answer to be put in evidence, but solely for the purpose of showing that the plaintiff had offered to pay the balance of the purchase money if the defendant would clear the property of the liens and the admissions in the answer, which would not have been clear unless the complaint was also put in evidence.

It was not necessary to present the money, when defendant stated he would not take the plaintiff's offer to pay it. This was a waiver of any formal tender. *Hughes v. Knott,* 138 N. C., 105; *Phelps v. Davenport,* 151 N. C., 22.

The jury find that Grubb agreed to convey said land free from encumbrances. But if he had not, the law is thus stated in *Leach v. Johnson,* 114 N. C., 88: "Unless the vendee has otherwise agreed, it is his undoubted right to demand a clear title. 1 War. Ven- (578) dors, 315. That the vendee agreed to take a deed without warranty is not a waiver of the right to demand a clear title; on the contrary, the fact that a warranty in the conveyance is waived is all the stronger reason why the vendee should insist upon the cancellation of all liens and encumbrances, since he will have no warranty to fall back

upon if the title should prove to be defective. The vendee in such case is not cut off from his rights till he has paid the purchase money and taken the deed."

As to the form of the judgment, "In a suit either by vendor or vendee, where the encumbrances can be discharged by mere payment thereof, and are not larger in amount than the purchase money due, the court in its decree may direct the payment of a sufficient part of the purchase money for the purpose to the holders of the encumbrances instead of the vendor, even though such holders are not before the court; or the court may authorize the vendee to remove the lien on failure of the vendor to remove it, and to reimburse himself out of his deferred payments of the purchase price." 36 Cyc., 745 (4).

No error.

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(579)

J. A. DAVIDSON v. SOUTHERN RAILWAY COMPANY.

(Filed 15 November, 1911.)

1. **Railroads — Crossings—Issues—Negligence — "Last Clear Chance"—Evidence.**

In an action for damages to plaintiff's team while endeavoring to cross defendant railroad company's track at a public crossing, no issue as to the last clear chance is raised on evidence tending to show, on plaintiff's part, that at a signal from defendant's watchman he was endeavoring to and would have crossed safely except for the act of defendant's yardmaster in slapping his mules in the face, causing them to run into a passing train; and on defendant's part, that the watchman signaled the plaintiff's driver to stop, and that the injury was caused by his not having done so and by whipping up his team when the yardmaster was endeavoring to prevent his crossing at the time.

2. **Issues—"Last Clear Chance"—Objections and Exceptions—Issues Submitted—Issues Requested.**

When the complaining party has not submitted an issue, or excepted to the issues tendered, he cannot successfully appeal for the failure or refusal of the judge to submit the issue.

3. **Railroads — Crossings—Contributory Negligence—Instructions—Evidence —Intimation of Court.**

In an action for damages for injury to plaintiff's mules and wagon at a railroad crossing in a collision with the passing train of defendant railroad company, under conflicting evidence as to whether the proximate cause was the negligence of the defendant's employees or the negligence of the plaintiff's driver in whipping up the mules when the employees were endeavoring to keep them from crossing the track, it is reversible error

appearing of record for the trial judge to instruct the jury that they should answer the issue as to contributory negligence in the affirmative, should they find that plaintiff's driver, by assisting the defendant's employees to stop the mules, could have avoided the injury complained of; and if they do not so find, they will answer this issue "Yes."

APPEAL from *Lyon, J.*, at May Term, 1911, of IREDELL. (579)

These issues were submitted without objection:

1. Were plaintiff's mules and wagon injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Were the mules and wagon injured by the contributory negligence of the plaintiff's driver, as alleged in the answer? Answer: Yes.

3. What damage, if any, is the plaintiff entitled to recover? Answer: .....

The court rendered judgment for defendant, and plaintiff appealed.

H. P. Grier, Z. V. Long for plaintiff.
L. C. Caldwell for defendant.

BROWN, J. The evidence for plaintiff tends to prove that his driver, Arthur Johnson, approached defendant's tracks at Statesville with a view to crossing; that the watchman signaled him to cross, and as he was driving across, the yardmaster hit the mules (580) in the face and tried to stop them, and that in consequence they were injured by a train. Plaintiff contends that if the yardmaster had not interfered, his team would have safely crossed.

The defendant's evidence tends to prove that the watchman signaled the driver to stop before he started across the tracks; that he did not heed the signal; that when the yardmaster attempted to stop and turn the mules, the driver whipped them up, in consequence of which the approaching train ran into them.

It is contended that his Honor should have submitted an issue as to the last clear chance. Upon the evidence in this case and the contentions of the parties, we do not think the issue is raised. If it was, however, the plaintiff failed to tender the issue and except to those submitted.

The plaintiff excepted to the charge of the court upon the second issue, which is as follows: "Now, the defendant contends that if you should find that the defendant was negligent, if you should find that it signed, or invited the plaintiff's driver, Johnson, to come on with the wagon and team, that still plaintiff's servant was guilty of contributory negligence; when he was on the main track, when they tried to stop him—the evidence, you will remember, tends to show that the plaintiff Johnson was on the middle track, the main track;

that Garrison jumped off the car and ran and hit the mules in the face with his hat, caught hold of one of them, and the flagman ran around with his flag trying to flag them down; the evidence tends to show that the driver of plaintiff's team put whip to them and forced them on. If you find that to be a fact, notwithstanding the negligence of the defendant, if you find that the defendant was negligent; if you further find that, notwithstanding the defendant's negligence, the plaintiff could have avoided the injury by assisting the flagman and Garrison to stop the mules and not whip them, and if you find that his putting whip to the mules and not trying to stop is the proximate cause, the burden being on the defendant to show by the greater weight of the evidence, it would be your duty to answer the second issue 'Yes.' If you do not find that it was the negligence on the
(581) part of Johnson, the driver, why you would answer the second issue 'Yes.'"

It may be that his Honor inadvertently used the word "Yes" at close of the above paragraph, and intended to use the word "No." But we are bound by the record.

If the evidence offered by the defendant is believed, the driver Johnson was guilty of very gross negligence which directly caused the injury and would bar a recovery; but this evidence was controverted by plaintiff.

The instruction of the court, as appearing in the record, was tantamount to directing a verdict. He charged, substantially: "If you do not find that Johnson was guilty of negligence, you will answer second issue 'Yes.'" This is manifest error and entitles plaintiff to another trial. We doubt not that the record is erroneous, or else that it was a *lapsus lingua* upon the part of the careful and painstaking judge; but it appears so in the record, and we are bound by it. It is our duty to state that the case on appeal was agreed to by counsel and not submitted to the judge.

New trial.

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(582)

R. H. URQUHART v. DURHAM AND SOUTH CAROLINA RAILROAD COMPANY.

(Filed 15 November, 1911.)

1. Railroads—Master and Servant—Safe Place to Work—Evidence—Questions for Jury.

The plaintiff, a brakeman on defendant railroad company's train, demanded damages from the company in this action for an injury to his foot, which was mashed by the revolving wheel of an engine to a train upon

which his services were engaged, and introduced evidence tending to show negligence in that the defendant furnished an old engine with a dangerous step and one placed too high up for safety in boarding a moving train; that defendant permitted a sprinkling hose to drip water on the step and form ice there, making the step more dangerous; that defendant did not instruct him, an inexperienced hand, in the discharge of his duties; that it was necessary for plaintiff to use this step in the performance of his duties; that he had been instructed to use this step, and had done so with the knowledge of the conductor, and that instruction had been given to another employee to remove the ice which had formed on the step, which had not been done, and that the ice was not seen by him in attempting to board the engine at night while running three or four miles an hour at a station: *Held*, the case was properly submitted to the jury upon the question of negligence and contributory negligence.

2. Railroads — Master and Servant — Safe Place to Work — Assumption of Risks.

The doctrine of assumption of risks has no application where an employee of a railroad company is injured in the discharge of his duties, proximately caused by defective ways or appliances furnished by the company which his employment requires him to use.

3. Defective Steps—Negligence.

A step to an engine or tender without sides thereto is a defective appliance.

4. Appeal and Error—Objections and Exceptions—Jury—Time for Consideration—Discretion of Trial Judge.

An exception that the jury considered the issues in an action for personal injury only twenty minutes before rendering their verdict will not be considered on appeal, the matter resting in the discretion of the trial judge to set aside the verdict or to send the jury back to reconsider their verdict, when it appears to him that there was misconduct on the part of the jury or a contemptuous or flippant disregard of their duties in giving consideration to the issues.

APPEAL from *Daniels, J.*, at March Term, 1911, of DURHAM.

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

Bryant & Brogden for plaintiff.

Manning & Everitt and J. W. Hinsdale for defendant.

CLARK, C. J. This is an action to recover damages for personal injury caused by the negligence of the defendant. The defendant took ninety-four exceptions, but abandoned fifty-one of them in this Court.

While the record is voluminous and the exceptions numerous, the matter for decision lies in a very small compass. The (583)

case comes within the principles of law laid down in *Coley v. R. R.*, 128 N. C., 534; *S. c.*, 129 N. C., 407. The plaintiff was employed by the defendant 1 December, 1907, as a brakeman on its road. Twenty-four days later he lost his foot by reason, as he alleges, of negligence on the part of the defendant.

The plaintiff contends there was negligence on the part of the defendant, in that (*a*) it furnished an engine without a step, as was usual and necessary on railroads properly equipped; (*b*) that the step upon the tender was defective and dangerous and was too high to be reached with safety in boarding a moving train; (*c*) that it permitted water to drip from the sprinkler hose on the step of the tender and form ice there, making a dangerous place to board the train; and (*d*) that he, being a green hand, without experience, was required, in the discharge of his duties, to board the train, when in motion, without any proper warning or instructions as to his duties and the dangers. He insisted that by reason of this negligence, when he undertook to board the moving train his left foot slipped from the tender step, passed under the wheels of the moving tender, and was so crushed that amputation was necessary.

The defendant admitted the absence of the step from the engine, contended that one was unnecessary, denied the other allegation of negligence, pleaded assumption of risk and also contributory negligence on part of plaintiff in attempting to board the tender as he did. It especially urged that plaintiff was rear brakeman, and should not have attempted to board the engine or tender at all.

In reply, plaintiff contended he had duties in the rear and front; that he boarded the engine and rode there as often as he did elsewhere; that he had been ordered so to do; that this was necessary in the discharge of his duties; was done in the presence of the conductor in charge of the train, and that the duties on the rear of the train were assigned by the superintendent of the road to another on the afternoon of the injury, in presence of the plaintiff, just a few hours before he (plaintiff) was hurt.

There was evidence that the plaintiff was inexperienced as (584) a brakeman, that no written or printed rules were furnished him nor in use by the defendant, and that he was not instructed or cautioned as to dangers incident to his employment. The plaintiff was discharging various duties as brakeman on the train, sometimes being in the coach and sometimes on the engine. The train reached Wilson siding about dark and stopped to unload some freight. Plaintiff helped in the discharge of this duty, and when the freight had been unloaded, the conductor signaled the train forward. Plaintiff, in order to be in front, to change the switch at next station, undertook to mount the tender. The train was moving at the rate of three

or four miles an hour. He could not mount the engine, because there was no step. A boy who was permitted to go on the train was also standing in his way. Plaintiff then caught the grab-iron on the tender and undertook to get on board by means of the step on the tender. There was but one step on the tender, which was 30 inches from the ground. The first effort resulted in his foot slipping off. He made a second effort, with the same result, and his foot that time slipped from the edge of the tender step, there being no side to the step or guard to prevent it. A hose sprinkler was leaking. From this cause the step was wet and covered with ice. The wheel was just a few inches from the rear of this step, and plaintiff's foot when it slipped a second time passed in front of the wheel and was crushed between the wheel and iron rail. It was getting dark, and plaintiff did not know that ice was on the steps at that time. When the train started out that afternoon the superintendent had told the boy to knock the ice off, saying "some one was going to get their neck broke"; but the ice had not been removed.

There was also evidence that the defendant was using an old second-hand engine, that there was a grab-iron on the engine for the use of those mounting it, but no step on the engine. There was also evidence by experienced engineers that prior to the time of this injury steps for mounting engines and tenders were in general use which were made of iron with sides and backs to them, so that the foot when placed therein would not slip out. There is also evidence that such a step was in use on the only other engine on this road, and two steps on its tender. There is also evidence that this ten- (585) der step was too high; that there was but one step 26 inches above the cross-ties and 30 inches from the ground; that it was dangerous, defective, and not a safe appliance; that it had no back to protect the foot from slipping through and no side-guards or pieces to keep the foot from slipping off; that it was a wooden step worn so that it was beveled, which caused it to slant; that the hose used by defendant for sprinkling the coal had been carelessly left above the step; that it was leaking, and the water dripping therefrom had frozen on the step, making it dangerous.

The defendant contended that the plaintiff was guilty of contributory negligence in that he failed to take hold of both grab-irons at the same time, which the defendant contended was the proper way. But it did not contend that the plaintiff had ever been instructed or warned by it to board the train in that way. The defendant also offered evidence that the plaintiff was a rear brakeman and should not have attempted to board the engine or tender, but offered no explanation of the fact that prior to the injury he had frequently ridden on the engine with the conductor without reproof.

Upon all the evidence the case was properly submitted to the jury under a charge which followed our well-settled precedents, and the jury found that there was negligence on the part of the defendant and that the plaintiff was not guilty of contributory negligence.

There was no issue as to assumption of risk, and this Court has held in *Coley v. R. R.*, 128 N. C., 534; *S. c.*, 129 N. C., 407, and *Biles v. R. R.*, 139 N. C., 532, that under the fellow-servant law, Revisal, 2646, assumption of risk is not open to the defendant where the injury was proximately caused by defective ways or appliances.

Every phase of the contention of the parties in the case has been so often before the Court, and the judge in his charge and his rulings upon the evidence has so carefully followed the precedents, that it would serve no useful purpose to go over the exceptions in detail (586) and reiterate our former rulings. No new proposition of law nor new application of an old one is presented.

The last exception is that the jury did not remain out more than twenty minutes before bringing in their verdict. The case had doubtless been so fully, carefully, and indeed minutely, presented to their consideration in every aspect by the able counsel in the cause, both in presenting the testimony and in arguing the case, as well as by the lucid instructions of his Honor, that the jury doubtless thoroughly understood the points at issue and did not need more time. Of that they are usually the best judges. We know of no rule by which this Court can estimate the time, or lay down a rule, as to how long a jury shall remain in consultation before bringing in their verdict. Of course, if there was misconduct on the part of the jury or a contemptuous or flippant disregard of their duties in considering a matter submitted to them, the trial judge is intrusted with the power and the duty to rebuke them and either send them back to reconsider the case or to set aside their verdict. But this is a matter which is left to his sound discretion, and cannot be intelligently reviewed by this Court.

No error.

GRADED SCHOOL TRUSTEES OF ELIZABETH CITY
v. R. L. HINTON ET AL.

(Filed 13 September, 1911.)

Appeal and Error—Final Judgment—Procedure.

A premature appeal will be dismissed upon motion duly made. The complaining party should note exceptions to the ruling of the trial judge and appeal from final judgment.

WEST *v.* WILKINSON.

APPEAL from *O. H. Allen, J.*, heard at chambers, by consent, as of the March Term, 1911, of PASQUOTANK.

The Graded School Trustees of Elizabeth City brought proceedings for condemning the adjoining lands of defendant for school purposes, with the required allegations, and defendant appealed from the order of the clerk of the Superior Court refusing to transfer (587) the cause to the civil-issue docket, holding that the pleadings raised no issue of fact, and appointing commissioners to lay off the lands, assess their value, and report their proceedings, etc.

At a regular term the order of the clerk was confirmed, and the defendants appealed to the Supreme Court.

J. K. Wilson and R. W. Turner for plaintiffs.
C. E. Thompson and Pruden & Pruden for defendants.

PER CURIAM. This appeal is premature, and upon motion is dismissed. Exceptions should be noted, and when a final judgment is rendered an appeal may be taken. *Hendrick v. R. R.*, 98 N. C., 431; *R. R. v. Warren*, 92 N. C., 620; *Telegraph Co. v. R. R.*, 83 N. C., 420.

Appeal dismissed.

Cited: *Bradshaw v. Bank*, 172 N. C., 633.

C. B. WEST v. C. L. WILKINSON.

(Filed 20 September, 1911.)

Issues—Real Controversy.

In this action by a contractor for balance due for constructing a building, the issue submitted presents the real controversy, and no error is found.

APPEAL from *Ferguson, J.*, at March Term, 1911, of PITT.

This was a suit for the balance due on a contract for the construction of a building. The contentions of the parties appear in the pleadings. There was a verdict and judgment for the plaintiff, and the defendant appealed to this Court.

This issue was submitted:

1. Was the building completed according to contract? Answer: Yes.

S. J. Everett for plaintiff.
Julius Brown for defendant.

(588) PER CURIAM. Upon an examination of the record, we are of opinion that the issue submitted presented the real controversy between the parties and upon the finding in response thereto the plaintiff is entitled to the judgment rendered.

We think the controversy almost exclusively one of fact, and we find no error in the record which we think necessitates another trial.

No error.

TWIDDY, APPELLANT, v. DARE LUMBER COMPANY.

(Filed 27 September, 1911.)

APPEAL by plaintiff from *O. H. Allen, J.*, at May Term, 1911, of DARE.

B. G. Crisp and Winston & Matthews for plaintiff.
D. M. Stringfield and Ward & Grimes for defendant.

PER CURIAM. This is a second appeal in the case of *Twiddy v. Lumber Co.*, 154 N. C., 237, and the evidence is substantially as it was on the former appeal.

We see no reason for changing our opinion, and the judgment is Affirmed.

E. M. DAIL v. LEE J. TAYLOR.

(Filed 27 September, 1911.)

Appeal and Error—Former Appeal.

This case was tried substantially in accordance with the decision of the Supreme Court previously rendered, and no error is found.

APPEAL by defendant from *Ferguson, J.*, at Spring Term, 1911, of PAMLICO.

There was verdict for the plaintiff. Judgment thereon, and defendant excepted and appealed.

(589) *D. L. Ward, T. W. Davis, H. L. Gibbs, and Z. V. Rawls for plaintiff.*
M. H. Allen and Simmons & Ward for defendant.

PER CURIAM. The principles applicable to this case were fully considered and stated on a former appeal, as reported in 151 N. C., 284. There is no substantial difference in the facts as they now appear, except that the testimony tending to show negligence on the part of the defendant has been greatly strengthened. The Court has carefully examined the record, and is of opinion that the cause has been tried in accordance with the former decision referred to, and that no reversible error appears. The judgment is therefore affirmed.

No error.

R. O. JEFFRESS v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 4 October, 1911.)

APPEAL by plaintiff from *Ferguson, J.*, at March Term, 1911, of PITT.

Harry Skinner for plaintiff.
Moore & Long for defendant.

PER CURIAM. We have examined the several assignments of error and the record in this appeal. The only issue related to the question of damage, and we find no error in the record which in our opinion necessitates another trial.

No error.

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

(Filed 4 October, 1911.)

Timber Interests—Period for Cutting.

Judgment below is affirmed, with the suggestion that the lower court fix the time within which the timber described in the judgment be removed, probably not to exceed twelve months from the beginning of the next civil term of that court.

APPEAL by defendant, Mollie E. Morton, from *Ward, J.*, at (590) the November Term of CRAVEN.

W. D. McIver for appellant.
Guion & Guion and Moore & Dunn for appellee.

PER CURIAM. This case is reported in 154 N. C., 337. When our opinion was certified down, his Honor, *Judge Ferguson,* rendered a final judgment, to which the defendant Mollie E. Morton excepted and from which she appealed.

We are of opinion that the judgment is strictly in accord with the opinion of this Court, but we suggest that the court fix a time within which the timber described in the judgment be removed, which should not exceed probably twelve months from the beginning of the next civil term of the Superior Court of Craven County.

Let the costs of this appeal be taxed against defendant Mollie E. Morton.

Affirmed.

J. E. RICHARDSON v. T. M. EDWARDS ET AL.

(Filed 1 November, 1911.)

Negligence — Contributory Negligence — Issues — Instructions — Harmless Error.

In an action for damages for personal injuries received, the first issue being upon the question of defendant's negligence causing the injury, the second issue read, "If so, did plaintiff contribute to his injury?" *Held,* the error in the second issue was cured under an instruction that the jury should consider the issue as if it had read, "Did the plaintiff contribute by his own negligence to his injury?"

APPEAL by plaintiff from *O. H. Allen, J.,* at February Term, 1911, of UNION.

These issues were submitted:

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

(591) If so, did the plaintiff contribute to his injury? Answer: Yes.

3. What damage, if any, did plaintiff sustain?

From the judgment rendered the plaintiff appealed.

Stack & Parker for plaintiff.

Redwine & Sikes, Adams, Armfield & Adams for defendants.

PER CURIAM. The form of the second issue is defective. The record shows that his Honor instructed the jury to consider the issue as if it

read, "Did the plaintiff contribute by his own negligence to his injury?" which is the usual and approved from. We think the error was fully cured.

We have examined the other assignments of error, all of which relate to the charge of the court, and find them to be without substantial merit.

The case was fairly put to the jury in accord with the well-settled decisions of this Court.

No error.

Cited: *S. v. Murphy,* 157 N. C., 616; *Donnell v. Greensboro,* 164 N. C., 337; *Bank v. Wilson,* 168 N. C., 560.

J. H. WARREN v. ATLANTA AND YADKIN RAILWAY COMPANY.

(Filed 1 November, 1911.)

Appeal and Error—Demurrer—Amended Complaint.

When an amended complaint is filed by leave of court upon demurrer to the original one, an appeal by the defendant for the overruling of the demurrer thus filed will not be reviewed in the Supreme Court.

APPEAL by defendant from April Term, 1911, of GUILFORD.

J. I. Scales and Justice & Broadhurst for plaintiff.
Wilson & Ferguson for defendant.

PER CURIAM. This is an action for personal injury, heard upon demurrer at April Term, 1911. The demurrer was overruled, and defendant excepted and appealed. It was admitted upon the argument in this Court that when the demurrer was overruled the plaintiff asked and obtained permission to file an amended complaint. (192) The demurrer was interposed to the original complaint. We cannot pass upon the demurrer to the original complaint, as it is superseded by the new complaint.

When the plaintiff by permission filed an amended complaint at the time when the demurrer was overruled, the defendant should have either demurred or answered to the new complaint. As this amended complaint is not in the record we cannot tell whether it states a cause of action or not. It may allege very different facts from the first complaint. The defendant will be allowed to demur or answer the amended complaint.

Appeal dismissed.

Cited: *Warren v. Susman,* 168 N. C., 462.

GEORGE W. HUGHES AND WIFE, BETTIE, v. THE LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 9 November, 1911.)

Insurance—Policies—False Representations—Equity.

This action to recover premiums paid for a policy of life insurance and interest thereon, alleging that it was induced by the false representations of defendant's agents, is controlled by the principles announced in *Whitehurst's case*, 149 N. C., 273; *Jones' case*, 151 N. C., 54; *Jones' case*, 153 N. C., 388; *Sykes' case*, 148 N. C., 13, and similar ones.

APPEAL from *Daniels, J.*, at May Term, 1911, of ALAMANCE.

Civil action, brought to recover on certain policies of insurance issued by defendant.

These issues were submitted to the jury:

1. Did the defendant, through its agents, represent to plaintiffs that it could, and would, issue to said plaintiffs insurance policies on their lives and upon the lives of their children, with provisions therein stipulated that at the end of ten years from dates thereof the plaintiffs might withdraw the whole amount of premiums paid in, with 4 per cent interest thereon? Answer: Yes.

(593) 2. If so, were such representations false? Answer: Yes.

3. If so, were such representations relied upon by the plaintiffs? Answer: Yes.

4. If so, were the plaintiffs induced thereby to enter into said contracts of insurance? Answer: Yes.

5. Did the plaintiffs waive their rights to rely upon said false representations? Answer: No.

6. What amount are plaintiffs entitled to recover of the defendants? Answer: The whole amount paid in, with 6 per cent interest from the beginning of policy to the last payment.

From the judgment rendered defendant appealed.

Dameron & Long and John H. Vernon for plaintiffs.

W. H. Carroll for defendant.

PER CURIAM. A careful examination of the record in reference to the twenty assignments of error discloses no substantial error committed upon the trial.

There is no material respect in which this case differs from the several cases brought by this defendant to this Court heretofore. *Caldwell v. Insurance Co.*, 140 N. C., 100; *Sykes v. Insurance Co.*, 148 N. C., 3; *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; *Briggs v. Insurance Co.*, 155 N. C., 73.

We do not think the subject needs further discussion.

No error.

CHARLES E. ROSEMOND v. JOHN McPHERSON.

(Filed 9 November, 1911.)

Appeal and Error—Certiorari—Appeal Dismissed—Assignments of Error—Printing Brief.

Case docketed and dismissed under Rule 17, the appellant moving too late for writ of *certiorari*, and not having made out his assignments of error or grouping his exceptions, or filing his brief in time.

APPEAL by defendant from *Daniels, J.*, at May Term, 1911, of (594) ORANGE.

J. W. Graham for plaintiff.
C. D. Turner for defendant.

PER CURIAM. This appeal is dismissed. The motion to docket and dismiss under Rule 17 was made before the appellant applied for writ of *certiorari* to bring up case on appeal. The appellant did not file his brief within the time prescribed and the case on appeal contains no assignments of error or grouped exceptions, as required by the rules of this Court.

Appeal dismissed.

LEE THOMPSON v. REVOLUTION COTTON MILLS.

(Filed 15 November, 1911.)

Master and Servant—Order of Vice Principal—Negligence—Contributory Negligence—Evidence—Questions for Jury.

Plaintiff was injured while employed in running a lapper in defendant's cotton mill, and introduced evidence tending to show that he was instructed by the vice principal of the defendant that if, in operating the machine, the cotton became lumpy, to remove it while the machine was in motion, but to stop the machine for certain other purposes; that there was a certain defect in the machine tending to make the cotton lumpy, and that it was dangerous to carry out this instruction; that the injury was caused while plaintiff was acting as directed. There was evidence to the contrary: *Held*, a motion to nonsuit upon the evidence was properly refused, and under a fair and comprehensive charge in this case upon the principles of negligence and contributory negligence an actionable wrong has been established under the verdict for plaintiff.

THOMPSON *v.* COTTON MILLS.

APPEAL from *O. H. Allen, J.*, at August Term, 1911, of GUILFORD.

Civil action to recover damages for personal injuries, caused by alleged negligence of defendant.

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

E. D. Kuykendall and Sapp & Williams for plaintiff.
King & Kimball and Thomas S. Beall for defendant.

PER CURIAM. It was chiefly urged for error that the court refused to nonsuit plaintiff on motion duly entered, but the Court is of
(595) opinion that the motion was properly overruled. On the trial it appeared that plaintiff, an employee of defendant company, was engaged at the time in running a lapper, and in the operation of the machine the cotton would "at times get lumpy" and it would become necessary for plaintiff to put his hand in the machine to remove the lumps, or it would result in "thin-ended lap." There was testimony, on part of plaintiff, tending to show that the boss of the lapper-room, who stood towards plaintiff in the position of vice principal of defendant company, had given plaintiff special directions that "if anything got in the beater box he was to lay the belt on the loose pulley and stop the machine, but if any lumps, etc., got at the doors, to remove them without stopping the machine. He said you would lose time in stopping the belt; that you could make a lap while you stopped the machine and started up again." The evidence, further, tended to show that this was an unsafe method of doing the work; that defendant company was guilty of negligence in giving directions of the kind indicated, and that, on the occasion in question, the plaintiff, in endeavoring to follow them out, had his hand seriously injured. As the Court understands it, the testimony of plaintiff tended to show, further, that certain wires, placed in the machine with the purpose of keeping the cotton from becoming lumpy, had been permitted, by defendant, to "become crooked and out of line and in such a negligent condition as to unnecessarily cause the cotton therein to become lumpy and thereby rendered the machine defective and more dangerous to operate"; and that plaintiff had, several times, given notice of the improper condition of the wires, and the employee charged with the duty had failed to have them fixed.

There was much evidence on the part of defendant company to the effect that the machine was in good condition; that no such instruction as claimed by him had been given plaintiff, but that he had, both by general rules and repeated and special instructions, directed
(596) plaintiff never to put his hand in the machine when in motion.

In this conflict of evidence, under a fair and comprehensive charge in which the principles of negligence and contributory negligence, as applicable to the facts, were correctly stated, the jury have accepted the plaintiff's version of the occurrence, and, this being true, an actionable wrong has been established. After careful consideration, the Court finds no reversible error, and the judgment in plaintiff's favor must be affirmed.

No error.

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(597)

STATE v. T. S. DAVENPORT ET AL.

(Filed 13 September, 1911.)

1. Indictment—Counts—Election—Practice.

The solicitor is not put to his election as to which of several counts in a bill of indictment relating to one transaction he will prosecute, until the close of the evidence; and the trial judge is not required until then to restrict the trial to any special count.

2. Forcible Trespass—Title—Possession.

Forcible trespass is a crime against the possession and not against the title.

3. Same—Evidence, Incompetent.

The question to be determined under an indictment for forcible trespass is whether the defendant unlawfully ousted the occupant from the possession of the *locus in quo*, and evidence is incompetent which tends to show the defendant's title, or that those in possession were endeavoring to avoid civil process in an action involving title, or the process of injunction, by going across the State line, which ran through the *locus in quo*, whenever process was attempted to be served on them by the lawful officers of this State.

4. Forcible Trespass—Definition—Possession.

Forcible trespass is the high-handed invasion of the actual, and not the constructive, possession of another, when he is present in person, or through his agents and employees, and forbids the same, putting him or them in fear, inciting resistance by force, and under circumstances endangering the public peace.

5. Same—Assault.

It is sufficient evidence of an assault upon a trial for forcible trespass, if the trespasser uses such threats or menaces, which he attempts to execute, as to cause the one in possession to reasonably apprehend imminent danger in remaining there.

6. Forcible Trespass—Evidence Sufficient—Intent.

In this case, evidence of forcible trespass *held* sufficient, that defendant's employer and another lumber company claimed the title to a tract of timber land known as Allen Swamp. The defendant through its agents and employees was in possession of a part of the lands, claiming possession of the whole. The prosecutor's agents and employees then entered into possession of another locality of the swamp and built camp of log huts, whereupon the defendants, about forty in number, armed themselves with axes and guns, demanded the possession of the prosecutor's agents and employees, and, being refused, proceeded to tear down and burn the huts without physical resistancse being offered: *Held*, further, evidence of the intent of defendants not to injure the prosecutor's witness was incompetent.

7. Forcible Trespass—Right of Possession—Unlawful Entry.

Entering upon lands in the possession of another, against his will, with a strong hand or with a multitude of people, as, in this case, with forty persons, some of them armed with axes and others with guns, is unlawful, even though the entry were made under a superior title. Revisal, sec. 3670. The common and statute law discussed by WALKER, J.

8. Counsel—Improper Remarks—Harmless Error—Instructions.

Improper remarks made by counsel to the jury are not reversible error when it appears that the court has instructed the jury not to consider them, but to confine themselves in their consideration to the facts bearing upon the issues; and exception to the instructions not being more specific or full, must be taken by way of prayers for special instruction thereon. The trial judges are cautioned to immediately and fully correct abuses of this character.

9. Forcible Trespass—Misdemeanors—Accessories—Aiders and Abettors.

In misdemeanors there are no accessories, and in this case those who were present in numbers, some armed with axes and others with guns, while one of their number caused the prosecutor's agents to abandon the *locus in quo*, were his aiders and abettors and equally guilty of forcible trespass.

(598) APPEAL by defendants from *O. H. Allen, J.*, at Spring Term, 1911, of GATES.

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

Attorney-General Bickett and Assistant Attorney-General G. L. Jones for the State.

Aycock & Winston, Ward & Grimes, and Charles Whedbee for defendants.

WALKER, J. The defendant Davenport and seventeen others were indicted and convicted, in the court below, of forcible trespass in tearing down three shacks, which had been erected in a lumber or logging camp,

and which were each about 10 feet long and 7 feet wide, made of poles and covered with tar paper, and had been built upon the land two or three days before the alleged trespass. The defendants have appealed to this Court and now allege that the learned judge who presided at the trial committed thirty-four errors in his several rulings during the hearing of the cause. The case had its origin in a dispute between the Roper Lumber Company and the Richmond Cedar Works over the title to a certain tract of land lying in that portion of the Dismal Swamp known as the Allen Swamp, which has as its northern boundary the dividing line between this State and Virginia, along which there is a canal running east and west with the said line. A careful perusal of the evidence taken in the case convinces us that the prosecutor, representing the Roper Lumber Company, and the defendants, representing the Richmond Cedar Works, were, at the time of the alleged trespass, vying with each other in an effort to gain the actual possession of the premises, in order to gain some advantage in defending the title to the land. The Roper Lumber Company, by its servants and agents, had actual possession of the land known as Allen Swamp, at the place where the huts had been constructed. The defendants, representing the Richmond Cedar Works, entered upon this part of Allen Swamp while the prosecutor was in actual and peaceable possession thereof, and ordered its servants and agents, who were then in charge of the same, to quit the premises. There were about forty members of the invading force, some of whom carried axes and others guns, and when compliance with (599) their demand was refused, they proceeded to demolish the huts and then to burn them. There was no physical resistance made by those in actual possession of the *locus in quo*, who held the possession until the cabins began to fall and then abandoned the premises to the defendants.

An extract from the testimony of the principal defendant, T. S. Davenport, will suffice to show the essential facts of the case upon which our conclusion as to the law will be based:

"Ours (camps) were built eight days before the Roper Company's. The camps of the Richmond Cedar Works had been occupied all the time during those eight days and all full of men. I think there was close between thirty and forty men who had stayed in those camps in the Allen Swamp—the camps of the Richmond Cedar Works. These camps were all close as a half a mile to the ones the Roper Company put up. When I found they were there, I took my men and went there. First went to Hawks' camp and said, 'Hawks, I have come here to take possession of this camp; the Richmond Cedar Works sent me here to hold possession of these woods, and I am going to take possession of this camp and cut it down and burn it.' He says, 'My things are all in

there,' and I said, 'I will take care of the things; get them out'; and he and Sanders got them out. They came out of the camp and I cut the camp down and threw it on the fire. That was the end of that camp. Then I took my men and went out on down the ditch where they had just built three camps down there. That was on Wednesday. We went on to the Mathias camp. They were all standing outside of the camp, and I said, 'Mr. Mathias, are you in charge of these woods now?' He said, 'Yes.' I said, 'I am going to take possession of the camps, cut them down and burn them up.' I told him my reason, that the Cedar Works sent me there to hold possession and I was going to do it. He is the only man I parted my lips to. I then told him I was going to cut the camps up. He said, 'You may cut the others down, but you won't cut this one down.' I said, 'This is the best looking camp; this is the one I am going to take first.' He says, 'I'll be damned if you cut this one down.' I said, 'Boys, fall in on this camp.' Before that he leaves his door and goes back in the camp, and as they had then (600) commenced to tear the roof up, he said, 'Let me get my bed and things out, and then I will get out.' I said, 'All right.' Then I said, 'Boys, get in there and help him get his bed out and other things.' He had some peas on the fire, and I had the boys take those out, and I told them to take all out and take his bed and lay it out there somewhere and then go ahead and cut the camp down."

The contention of the defendant seems to be that they should have been allowed to show that they had constructive possession of the place where the trespass is alleged to have been committed, by reason of the fact that they were in actual occupation of the remainder of Allen Swamp; that the prosecutor, by its servants and agents, had unlawfully entered upon the land, which was the property of the Richmond Cedar Works, and had wrongfully withheld the same, and that when they demanded possession of the land they were merely asserting the right and title of the Richmond Cedar Works to the same, and had no unfriendly feeling toward the parties in possession and did not intend to injure them.

Before entering upon a discussion of the main question involved in the case, we will refer to one technical objection made during the course of the trial by the defendants. When the solicitor had read the three indictments, the defendants moved that he be required to elect upon which count in each of the bills he would rely. The court overruled this motion and held that it would not require the election until the evidence had been heard. The motion was not renewed at the close of the evidence. It appears that the solicitor abandoned all the charges except the one for forcible trespass, and did not prosecute for malicious injury to property, and the judge so stated in the charge to the jury. It can-

not be doubted now that the solicitor was not put to his election until the close of the evidence, or at least that the judge was not required to restrict the trial to any special count until he could intelligently do so by knowing what the evidence in the case would be. This was decided in *S. v. Parish,* 104 N. C., 679, where it was said: "This Court has repeatedly held that the presiding judge may, in his discretion, hear the evidence on a number of counts in a single indictment (601) charging felony, or 'on a number of distinct bills, treating each as a count of the same bill,' and refuse to require the solicitor to elect till the close of the evidence for the State." It may well be doubted whether the solicitor could be required to elect in this case, as the charges all grew out of the same transaction. "The common law rule is, that if an indictment contains charges distinct in themselves and growing out of separate transactions, the prosecutor may be made to elect or the court may quash. But where it appears that the several counts relate to one transaction, varied simply to meet the probable proof, the court will neither quash nor force an election." *S. v. Morrison,* 85 N. C., 561. There was no error, therefore, in the ruling of the court upon the defendant's motion for an election by the solicitor.

The defendants proposed to prove how far the line of the land was from the State line, with a view of showing that the prosecutor's servants and agents had come from Virginia and squatted on the land, and had then avoided the service of process and a restraining order by crossing the line again into Virginia. They further proposed to introduce in evidence a map of the premises for the use of one of the witnesses in explaining his testimony. The witness stated that he did not require it for that purpose, as he was familiar with the land; and further, they offered deeds and other evidence for the purpose of showing the title to and possession of Allen Swamp outside of the *locus in quo.* All this evidence was excluded by the court, and, we think, properly. The facts intended to be established by the rejected evidence were not releavant to the case. It could make no difference whether the Richmond Cedar Works owned the land or not, or whether they failed to obtain service upon the prosecutor in the suit brought for the possession of the land and for an injunction. The only question in the case is whether the prosecutor's servants and agents were in possession of the particular land on which the trespass was committed, and whether the defendants attempted to oust them forcibly and violently. Forcible trespass is a crime against the possession and not against the title. *S. v. Fender,* 125 N. C., 649. If the Richmond Cedar Works had a better title than the prosecutor to the premises, or a better right to the pos- (602) session thereof, it should have been asserted by due process of law, and not by a violation of the criminal law of the State. *S. v.*

Hovis, 76 N. C., 117. The right or title to land cannot be vindicated with the bludgeon, but the party who claims the better title must, if it be denied or the actual possession of the land be refused, upon a lawful demand made for the same, resort to the peaceful methods and processes of the law for his redress and the recovery of his property. If, instead of pursuing this course, he elects to use violence, the law holds him criminally responsible for his act. *S. v. Webster,* 121 N. C., 586, where it is said: "As forcible trespass is essentially an offense against the *possession* of another and does not depend upon the title, it is proper to exclude evidence of title in defendants on trial under an indictment for such offense."

The principle governing such cases is clearly expressed by *Judge Gaston* in *S. v. Bennett,* 20 N. C., 170: "We perfectly agree with the judge that the guilt or innocence of the persons charged with respect to the offense described in the indictment did not depend upon the question whether Curry had the right to the property, or the right to its possession, but whether he had, in fact, the *possession* therof at the time when that possession was charged to have been invaded with such lawless violence." It has ever been the definition of forcible trespass in this State that it is the high-handed invasion of the actual possession of another, he being present and forbidding the same, and the title is not in question. It is sufficient, to constitute the offense, that the act complained of be done in the presence of the owner or person in possession (*presenti domino*) and must involve a breach of the peace or tend thereto. There must have been something done at the time of the entry to put the prosecutor in fear or incite him to force, either to prevent the wrongs or to protect his title to the property. Whether the title is in the prosecutor or the defendant is of no moment in forcible trespass.

It is the invasion of the actual possession of another, and not his constructive possession, done in his presence and under such circumstances as endangers the public peace, that makes the offense. (603) This is stated to be the law by the younger *Judge Ruffin* (who displayed distinguished ability in this Court, and a man who was eminent in his profession and at the bar as a criminal lawyer) in the case of *S. v. Laney,* 87 N. C., 535, and it is sustained by numerous decisions of this Court. *S. v. McCanless,* 31 N. C., 375; *S. v. Ross,* 49 N. C., 315; *S. v. Woodward,* 119 N. C., 838. In *S. v. Covington,* 70 N. C., 71, *Judge Bynum* says that to constitute the offense of forcible trespass, there must be a demonstration of force, as with weapons or multitude of people, so as to make a breach of the peace or directly tend to it, or such as is calculated to intimidate or put in fear, citing *S. v. Ray,* 32 N. C., 39.

What is said by the present *Chief Justice* in *S. v. Mills,* 104 N. C., at p. 905, covers this case more fully, perhaps, than any other expression to be found in the cases. In substance, it is this: "The offense of forcible trespass consists in entering upon land in the actual possession of another, with a strong hand. There must either be actual violence used or such demonstration of force as is calculated to intimidate, or alarm, or involve, or tend to a breach of the peace. The use of force must be such as to create a reasonable apprehension in the mind of the adversary that he must yield to the demand made upon him in order to avoid a breach of the peace", citing *S. v. Covington, supra; S. v. Pollok,* 26 N. C., 305; *S. v. Pearman,* 61 N. C., 371; *S. v. Lloyd,* 85 N. C., 573. We are not called upon in this case to say whether or not it is necessary that the demonstration of force accompanying the act of invasion should consist either in a multitude of people or in the display of weapons, in order to become such an entry with a strong hand as will constitute the offense. Whether the entry is sufficiently violent will depend, to some extent, upon the circumstances of each particular case. For example, in *S. v. Hinson,* 83 N. C., 640, the act of a man riding into the yard or curtilage of a house occupied only by a woman, after being forbidden so to do, and remaining there cursing her, was held by this Court to be such an act of force as was calculated to intimidate her or put her in fear, and therefore, sufficient to constitute forcible trespass. The essential element of the offense is that the conduct of the defendant must be such as is calculated to intimidate the party (604) in possession and to put him in fear, or to compel him, by threats of violence which are sufficient to overawe a man of ordinary firmness, to abandon or surrender his right to the possession, or to desist from the assertion of the same.

The learned counsel for the defendant, in the argument before us, urged that, at common law, if the party having the better right or title has lost his possession by the unlawful entry of another, he is entitled to regain it by the use of such force as is necessary for the purpose, provided it does not amount to an actual breach of the peace, whereas one not having a lawful right of entry is guilty of trespass if he goes upon the land with a strong hand under circumstances calculated to excite terror, although the force used does not amount to a breach of the peace. This doctrine, if it ever had any real existence at the common law, and this is extremely doubtful when the authorities are carefully examined and considered, has long since been repudiated by the courts and abrogated by statute. They rely upon what is said by *Judge Pearson* in *S. v. Ross,* 49 N. C., 315, but the force of this expression was greatly weakened, if not entirely destroyed, by the decision in *S. v. Shepard,* 82 N. C., 614, where it will be found that *Chief Justice Smith* strongly

intimates that the distinction thus made, if it ever existed, was swept away by our statutes. In 1 Hawkins Pleas of the Crown, ch. 28, at p. 495, we find the law thus stated: "It seems that, at common law, a man disseized of any land (if he could not prevail by fair means) might lawfully regain the possession thereof by force. But this indulgence of the common law, in suffering persons to regain the lands they were unlawfully deprived of, having been found by experience to be very prejudicial to the public peace, it was thought necessary, by many severe laws, to restrain all persons from the use of such violent methods of doing themselves justice." Blackstone, whose book on the criminal law is of the highest authority, follows Hawkins, and in his fourth volume, at p. 148, says: "An eighth offense against the public peace is that of a forcible entry and detainer, which is committed by violently taking or keeping possession of lands with menace, force, and arms, and (605) without the authority of law. This was formerly allowable to every person disseized or turned out of possession, unless his entry was taken away or barred. But this being found very prejudicial to the public peace, it was thought necessary, by several statutes, to restrain all persons from the use of such violent methods, even of doing themselves justice, and much more if they had no justice in their claim."

In *King v. Wilson,* 8 Term, 357, *Lord Kenyon* said that perhaps some doubt may hereafter arise respecting the statement of Mr. Sergeant Hawkins that "at common law the party may enter with force into that to which he has a legal title," and the Court of King's Bench reversed its own opinion as to the correctness of this proposition. But however that may be, it is very sure that the law has been changed by statute, both in England and in this country, so that now it is plain and unmistakable. This statute is the one referred to by both Hawkins and Blackstone. It was enacted in the fifth year of the reign of Richard II., and is known as chapter 7 in the compilation of the laws of England for that period, and is as follows: "And also the King defendeth, That none from henceforth may make any entry into any lands and tenements but in case where entry is given by law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body and thereof ransomed at the king's will." This statute was substantially adopted in this State, and will be found in the following revisions: Revised Code, ch. 49, sec. 1; Code, sec. 1028; Pell's Revisal, sec. 3670. Mr. Pell has appended a note to the section, containing a full collection of all the cases decided by this Court upon the subject, and with reference thereto it is conclusively and uniformly held that whatever may have been the common law in regard to this matter, it is now unlawful,

even where the party is the real owner of the land, to enter thereon with strong hand or with multitude of people, when the law authorizes them to enter only in a peaceable and easy manner; and he who enters otherwise, or with strong hand, is guilty of a misdemeanor. (606)

The case of *S. v. Pollok,* 26 N. C., 305, is a decisive one against the defendants. The only difference between the two cases is that the show of force in *Pollok's case* was much less formidable and impressive than it was shown to be in this case. *Judge Daniel* there said it was unnecessary that the prosecutor's possession was held under title if, at the very time of the forcible entry, it was peaceably held and enjoyed by him, and that personal violence is not an essential ingredient of the offense; but if there is such a show of force as to create a reasonable apprehension in the mind of the party in actual possession that he must yield to avoid a breach of the peace, and he does yield, it would be a surrender upon compulsion or force and such as would make it a forcible trespass at common law. Proceeding, he said: "The defendant contended that the offense was not complete until some actual breach of the peace had been committed. But the law is, where the party, either by his behavior or speech, at the time of his entry, gives those who are in possession just cause to fear that he will do them some bodily harm if they do not give way to him, his entry is esteemed forcible, whether he cause the terror by taking with him such an unusual number of servants, or by arming himself in such a manner as plainly to indicate a design to back his pretentions by force, or by actually threatening to kill, maim, or beat those who continue in possession, or by making use of expressions which plainly imply a purpose of using force against those who make resistance," citing *Wilson's case,* 8 Term Rep., 357; Roscoe on Evidence, 374-377; 1 Hawkins Pleas of the Crown, ch. 64, sec. 27. If the facts recited in that case constitute forcible trespass at common law, surely the facts of this case must receive a like construction; and when the statute of Richard II. is considered, there can be no doubt as to the criminality of the defendants' conduct. This statute has been adopted, we believe, in most of the States of the Union. Discussing its provisions, the Court, in *Scott v. Willis,* 122 Ind., 1, said: "The owner of land who is wrongfully held out of possession by one who has no legal or equitable right may embrace the opportunity and gain peaceable possession if he can; but unless he can obtain possession without force or show of violence, his sole remedy is (607) to invoke the aid of legal proceedings." In *Reader v. Purdy,* 41 Ill., 285, it is held that the statute against unlawful entry on land, by necessary implication, if not in terms, forbids a forcible entry, even by the owner, upon the actual possession of another. "It is urged," says the Court, "that the owner of real estate has a right to enter upon

and enjoy his own property. Undoubtedly, if he can do so without a forcible disturbance of the possession of another; but the peace and good order of society require that he shall not be permitted to enter against the will of the occupant, and hence the common-law right to use all necessary force has been taken away. He may be wrongfully kept out of possession, but he cannot be permitted to take the law into his own hands and redress his own wrongs. . . . It has been constantly held that any entry is forcible, within the meaning of this law, which is made against the will of the occupant. The statute of forcible entry and detainer should be construed as taking away the previous common-law right of forcible entry by the owner, and as providing that such entry must be therefore held illegal in all forms of action." This decision was approved in *Chicago v. Wright,* 69 Ill., 318. See, also, *Hyatt v. Wood,* 4 Johnson, 150; *Ives v. Ives,* 13 *ibid.,* 235.

When the undisputed facts of this case are brought to the test of these principles, we find no difficulty in adjudging the defendants guilty upon their own best showing. The defendants formed themselves into a band of armed invaders, to execute their will and assert their alleged claim to the land, without regard to consequences and in defiance of law and order. They advanced upon the unpretentious and crude huts set up by the prosecutors' servants for their temporary use and comfort, with all "the pomp and circumstance of war"—a small battalion armed and equipped to meet any emergency and to overcome all opposition. This doughty band of warriors went forth to battle, bent on conquest or annihilation, and if they had not met with instant capitulation from a submissive enemy, there can be no doubt that there would have been a gory field of conflict. As said by the Attorney-General, "the bat-
(608) tle of the Dismal Swamp would have been on, and fought to the finish." They accomplished their unlawful purpose by expelling their adversary from the premises; and yet it is argued that, having the better title, they were in the exercise of their lawful right and within the pale of the law. We do not think so. The law of the mob is not a safe rule of conduct and is not the law of the Commonwealth, and the sooner this is realized by those who would essay to maintain their rights or redress their supposed grievances by becoming lawbreakers themselves, the better it will be for them and the peace and good order of society. We cannot too emphatically condem such conduct as subversive of all good government and of the cardinal principle upon which it is based. If the citizen defiantly takes the law into his own hands to assert his rights or to punish others for violating them, whatever the provocation, he will soon find that the hand of that same offended law will be laid heavily upon him as an usurper of its prerogative, and he should be made to feel its weight and its just retribution. Right does

not always make might, nor does might make right, and the two united cannot be allowed to override the dignity and majesty of the law, to which law every good citizen should render willing submission and obedience. The doors to our courts are wide open, and any one may enter who feels aggrieved in respect of his person or his property, and he will find there a remedy for the full reparation of the wrong. If he will not do this, but will rather redress his wrong in his own way, he should not be surprised if he is made to pay the penalty of his own offense against the law.

The defendants' counsel cited *Walker v. Chanslor,* 17 L. R. A., 455, and *Souter v. Codman,* 14 R. I., 119, to support the positoin that one who has, in law, the title or right of possession may enter forcibly upon the land in the assertion of his right; but even a slight examination of those cases will disclose that they refer only to the civil liability of the owner for such an entry, and hold that he would not be liable in a civil action for the same, that is, in an action *quare clausum,* or trespass *vi et armis,* or for assault and battery, "even if the force used would subject the owner to an indictment at common law for a breach of the peace, or under the statute of forcible trespass or entry." They do not (609) reach this case. The possession of the prosecutor, by his servants and agents, was sufficient in this case to sustain the charge of forcible trespass, the entry having been made violently and with a strong hand, and those in possession having been intimidated and put in fear. Such conduct on the part of the defendants was an assault, as it compelled the prosecutors to desist from doing what they had the lawful right to do, at least, until the law had passed upon the disputed title. *S. v. Daniel,* 136 N. C., 571. In that case it is said: "The principle is well established that not only is a person who offers or attempts by violence to injure the person of another guilty of an assault, but no one by the show of violence has the right to put another in fear and thereby force him to leave a place where he has the right to be. *S. v. Hampton,* 63 N. C., 13; *S. v. Church,* 63 N. C., 15; *S. v. Rawles,* 65 N. C., 334; *S. v. Shipman,* 81 N. C., 513; *S. v. Martin,* 85 N. C., 508, 39 Am. Rep., 711; *S. v. Jeffreys,* 117 N. C., 743. It is not always necessary, to constitute an assault, that the person whose conduct is in question should have the present capacity to inflict injury, for if by threats or a menace of violence which he attempts to execute, or by threats and a display of force, he causes another to reasonably apprehend imminent danger, and thereby forces him to do otherwise than he would have done, or to abandon any lawful purpose or pursuit, he commits an assault. It is the apparently imminent danger that is threatened, rather than the present ability to inflict injury, which distinguishes violence menaced from an assault. *S. v. Jeffreys* and *S. v. Martin, supra.* It is sufficient if the aggressor,

by his conduct, lead another to suppose that he will do that which he apparently attempts to do. 1 Archb. Cr. Pr., Pl. and Ev. (8 Ed. by Pomeroy), 907, 908."

All of which brings us to the conclusion that there is no reason why we should halt between two opinions in passing upon the guilt of the defendants. The evidence is all one way, and so is the law. It would be a reproach to the administration of justice if the law were (610) otherwise and we could decide the other way.

If we may compare this transaction with a great historical event, when Lord George Gordon assembled his followers in St. George's Fields to march upon Parliament and present their petition against Popery, we find that, while they were engaged in the exercise of the lawful right of petition, one of the highest and most sacred constitutional rights of the subject, and while their leader was afterwards acquitted by the jury, influenced as they were by the great skill and eloquence of Erskine, and not because he was less a lawbreaker, the Court of King's Bench (*Lord Mansfield* presiding), before which he and his followers were tried, did not listen with much patience or consideration to the plea that the righteousness of the cause justified the offense, and many of his less fortunate adherents were convicted of treason and executed. Charles Dickens, in his graphic description of the Gordon riots in Barnaby Rudge, makes Simon Tappertit say: "What's the matter here? Do you call this order?" Well might he thus exclaim, for not even can the most sacred right be unlawfully and violently enforced; and so the Court decided. 21 State Trials, 485 (563).

All the testimony offered by the defendants to show a constructive possession, that is, a possession of some other part of the land under a deed or color of title, was irrelevant and properly excluded by the court.

There are one or two of the other exceptions which require some notice. In his address to the jury, one of the prosecuting attorneys used this language: "The jury should find the defendants guilty, as their fines will be paid by the Richmond Cedar Works, a foreign corporation with headquarters in Virginia, a foreign State, where its officers sit back with slippered feet and direct this thing to be done." The defendants objected to these remarks at the time they were made, and the judge fully cautioned the jury, not at that time, but in his charge, to disregard them and to confine their inquiry to the single question as to the forcible entry. We think the caution was sufficient, but if not, the defendants should have requested the judge to make it so. This they did not do. *Simmons v. Davenport,* 140 N. C., 407. A request of this kind would have brought forth a proper response from the (611) court. "If a party desires fuller or more specific instructions,

he must ask for them, and not wait until after the verdict has gone against him and then, for the first time, complain of the charge." *Simmons v. Davenport, supra.* See, also, *Kendrick v. Dellinger,* 117 N. C., 491; *McKinnon v. Morrison,* 104 N. C., 354; *S. v. Debnam,* 98 N. C., 712; Clark's Code (3 Ed.), pp. 535 and 536; *Justice v. Gallert,* 131 N. C., 393; *S. v. Groves,* 119 N. C., 822. Speaking to an objection of the same nature as this one, the Court said in *S. v. Tyson,* 133 N. C., at p. 699: "A party will not be permitted to treat with indifference anything said or done during the trial that may injuriously affect his interests, thus taking the chance of a favorable verdict, and afterwards, when he has lost, assert for the first time that he has been prejudiced by what occurred. His silence will be taken as a tacit admission that at the time he thought he was suffering no harm, but was perhaps gaining an advantage, and consequently it will be regarded as a waiver of his right afterwards to object. Having been silent when he should have spoken, we will not permit him to speak when, by every consideration of fairness, he should be silent. We will not give him two chances. The law helps those who are vigilant, not those who sleep upon their rights. He who would save his rights must be prompt in asserting them."

But it must not be understood that we approve or commend the language of the attorney. It was a clear abuse of the privilege of counsel, as argued by defendants, to use such words in debate before the jury. The State does not ask for the conviction of a defendant except upon the facts and the law, stripped of all extraneous matter—the naked facts—and anything done which is calculated to prejudice the jury should be promptly rebuked by the presiding judge, and such instructions given to the jury as will remove all prejudice and restore their minds to an equilibrium, readjusting the unsteady balance, so that justice may be administered fairly and impartially. This is an important matter, and judges cannot be too alert or too much "on their guard" to instantly correct such abuses occurring in the course of the trial.
It is their highest duty to do so, and they should at all times be (612) firm and prompt in its discharge. Sometimes, we are aware, learned counsel use intemperate speech in the heat and zeal of an argument which they, themselves, regret afterwards in their cooler and calmer moments; but this being so, it is nevertheless the duty of the judge to see that the trial is conducted fairly, without regard to that fact. Again quoting from *S. v. Tyson,* 133 N. C., at p. 698: "We conclude, therefore, that the conduct of a trial in the court below, including the argument of counsel, must be left largely to the control and direction of the presiding judge, who, to be sure, should be careful to see that nothing is said or done which would be calculated unduly to prejudice any party in the prosecution or defense of his case, and when counsel grossly

abuse their privilege at any time in the course of the trial the presiding judge should interfere at once, when objection is made at the time, and correct the abuse. If no objection is made, while it is still proper for the judge to interfere in order to preserve the due and orderly administration of justice and to prevent prejudice and to secure a fair and impartial trial of the facts, it is not his duty to do so, in the sense that his failure to act at the time or to caution the jury in his charge will entitle the party, who alleges that he has been injured, to a new trial. Before that result can follow the judge's inaction, the objection must be entered at least before verdict," citing *Knight v. Houghtalling,* 85 N. C., 17. In the passage taken from *S. v. Tyson,* we did not intend to decide that a failure of the judge to act immediately would be ground for a reversal, unless the abuse of privilege is so great as to call for immediate action, but merely that it must be left to the sound discretion of the court as to when is the proper time to interfere; but he must correct the abuse at some time, if requested to do so; and it is better that he do so even without a request, for he is not a mere moderator, the chairman of a meeting, but the judge appointed by the law to so control the trial and direct the course of justice that no harm can come to either party, save in the judgment of the law, founded upon the facts,
(613) and not in the least upon passion or prejudice. Counsel should be properly curbed, if necessary, to accomplish this result, the end and purpose of all law being to do justice. Every defendant "should be made to feel that the prosecuting officer is not his enemy," but that he is being treated fairly and justly. *S. v. Smith,* 125 N. C., 618. In *Jenkins v. Ore Co.,* 65 N. C., 563, *Justice Reade* said: "Zealous advocates are apt to run into improprieties; and it must generally be left to the discretion of the judge whether it best comports with decency and order to correct the error at the time by stopping or reproving the counsel or wait until he can set the matter right in his charge. It must often happen that the judge cannot anticipate that the counsel is going to say anything improper, and it may be said before the judge can prevent it, as in this case. . . . And the question was whether he was obliged to stop the counsel then and there and reprove him, or whether he would wait and correct that and all other errors when he came to charge the jury. Ordinarily, this must be left to the discretion of the judge. But still it may be laid down as law, and not merely discretionary, that where the counsel *grossly* abuses his privilege, to the manifest prejudice of the opposite party, it is the *duty* of the judge to stop him then and there; and if he fails to do so, and the impropriety is gross, it is good ground for a new trial."

In this case the judge responded fully and adequately in his charge to the objection, and the remarks of the counsel are, therefore, presumed to

be harmless. They were not what may be called a "gross" breach of privilege. It must be assumed that the jurors were honest and intelligent enough to heed the warning of the court. Besides, the defendants are guilty on the admitted facts, and therefore, in no degree have they been prejudiced.

The remaining objection to the conviction is that Davenport's associates were not aiders and abettors, or, at least, that the court erred in giving the following instruction: "If one party was committing the acts as charged, and others were present, either participating or ready and intending to aid or assist if it became necessary, all would be equally guilty." The defendant's counsel, in their excellent brief, criticise this part of the charge in the following language: "This (614) is undoubtedly not the rule govering aiders and abettors. The rule as laid down by *Ruffin, C. J.*, in *S. v. Hildreth*, 32 N. C., 440, is that 'the aider and abettor must either incite the principal to action, or else must deter others from interfering to prevent the criminal conduct of the principal.' The very limit of the rule is, the aider and abettor would be guilty with the principal if he was present *with knowledge of the principal*, ready to aid or assist. The reason is that this knowledge on the part of the principal emboldens him because he has the assurance of assistance. 12 Cyc., 186." Even within this definition of the term "aider and abettor," we find no difficulty in adjudging the other defendants guilty as principals, upon the facts of the case, for in misdemeanors there are no accessories. A person aids and abets when he has "that kind of connection with the commission of a crime which, at common law, rendered the person guilty as a principal in the second degree. It consisted in being present at the time and place, and in doing some act to render aid to the actual perpetrator of the crime, though without taking a direct share in its commission." Black's Dict., p. 56, citing 4 Blackstone, 34. An abettor is one who gives "aid and comfort," or who either commands, advises, instigates, or encourages another to commit a crime—a person who, by being present, by words or conduct, assists or incites another to commit the criminal act (Black's Dict., p. 6); or one "who so far participates in the commission of the offense as to be present for the purpose of assisting, if necessary; and in such case he is liable as a principal." 1 McLain Cr. Law, sec. 199. Within any well recognized definition, the codefendants of Davenport were at least "aiders and abettors," if they were not principals. *Rex v. Gordon*, 21 State Trials, 485.

We have discussed this case at much greater length than we would otherwise have done, because the learned and able counsel for the defendants insisted most earnestly and zealously that no forcible trespass had been committed under the law as laid down by the standard author-

ities, and we, therefore, deemed it proper to review and restate the law in a matter so vital to the tranquility and welfare of the com-
(615) munity, and to do so in no uncertain terms, so that it may be well understood that individuals cannot usurp the power of the law, and, by their own procedure and in a violent manner, either protect or assert their rights of property. Such conduct is "against the peace and dignity of the State, and contrary to the statute in such cases made and provided." Again we say that the cry of the mob must not be mistaken for the voice of the law.

It may be added that the defendant could have been properly indicted and convicted either of a forcible trespass, a riot or rout (*S. v. Hathcock,* 29 N. C., 52; *S. v. York,* 70 N. C., 66), or an unlawful assembly (2 McLain Cr. Law, sec. 1003), all misdemeanors at common law; and the sentence pronounced in this case by the able and humane judge, which was mild, considering the aggravated circumstances, has, therefore, worked no legal injury to them.

There is no apparent error in the case, and it must be so certified.

No error.

Cited: Saunders v. Gilbert, post, 474; *S. v. Jones,* 170 N. C., 754, 756; *Massey v. Alston,* 173 N. C., 225, 226.

STATE v. LONNIE VAUGHAN.

(Filed 13 September, 1911.)

Prisoner's Declarations—Caution—Evidence—Reversible Error.

Upon a preliminary hearing before a justice of the peace upon a charge of larceny, the magistrate asked the defendant if he desired to be a witness, who responded in the affirmative, and was "sworn" with the other witness. It appeared that he was an ignorant young negro, and without counsel: *Held,* the failure of the magistrate to caution him that he was not required to testify and that his refusal to do so would not prejudice him, renders his declarations incompetent as evidence. Revisal, sec. 3194.

APPEAL from *Joseph S. Adams, J.,* at February Term, 1911, of HERTFORD.

There was a verdict of guilty, and from the judgment pronounced the defendant appealed.

(616) *Attorney-General by J. C. Little for the State.*

Winborne & Winborne for defendant.

BROWN, J. The insufficiency of the evidence to convict was strongly urged by counsel for defendant, but as there is to be another trial it is unnecessary to pass on the exception. The second exception is to the ruling of the court admitting declarations of the defendant before the justice of the peace upon a preliminary examination, upon the ground that it did not appear that the defendant was duly cautioned in accordance with the statute. Revisal, sec. 3194.

It appears in the record that the justice "swore" the defendant along with all the other witnesses at the preliminary hearing and then asked the defendant if he desired to be a witness. Defendant said he did, and was examined.

The defendant is a young, ignorant negro, and was not represented by counsel before the justice.

We think both the letter and spirit of the statute require that the defendant should have been advised of his rights by the justice, to the effect that he was not required to testify; that he was at liberty to refuse to answer any question put to him, and that his refusal to answer shall not be used to his prejudice. *S. v. Parker,* 132 N. C., 1018; *S. v. Simpson,* 133 N. C., 677.

When the defendant is represented by counsel and placed upon the stand as a witness in his own behalf, no caution is necessary.

In this case the prisoner was not advised of his rights, but was practically invited by the justice to take the stand.

New trial.

STATE v. MANSON MARABLE.

(Filed 20 September, 1911.)

Larceny and Receiving—Evidence—Questions for Jury.

Tried for larceny of tin, there was evidence tending to show that the prosecutor had been missing the tin from his shop and that he found it on defendant's house and identified it by its marking. Defendant's statements to prosecutor were contradictory as to where he got the tin. Upon the stand the defendant testified he got the tin from an entirely different person from those he had told the prosecutor of, and this person testified he had gotten it from a dead man: *Held,* evidence sufficient to go to the jury upon the question of knowingly receiving stolen property.

APPEAL from *Ferguson, J.,* at January Term, 1911, of PITT. (617)

The defendant was indicted for larceny of some tin, and a count in the bill for receiving the tin knowing it to have been stolen. There was a verdict of guilty of receiving the tin knowing it to have

been stolen, and judgment imprisoning defendant for four months, to be worked on the roads of Pitt County, from which judgment the defendant appealed to the Supreme Court.

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

Julius Brown for defendant.

BROWN, J. The only question presented for our consideration is the sufficiency of the evidence submitted to the jury.

The evidence tends to prove that the prosecutor Jenkins had been missing tin from his shop; that in searching for the tin he found it on defendant's house. Prosecutor identified the tin by certain marks and there was corroborative evidence in support of such identification. The evidence also shows that defendant told the prosecutor and another witness that he got the tin from Sears, Roebuck & Co. The prosecutor proposed to go with defendant to the railroad office and examine the books, but the defendant declined to go, and then said that he got the tin from a man near the railroad, and he would rather pay for it than to tell the man's name or have any trouble about it, and he did pay the prosecutor $15 for the tin.

On the trial the defendant testified that he got the tin, not from Sears, Roebuck & Co., nor from a man who lived near the depot, but from one Edmundson, and Edmundson said that he got it from a dead man.

(618) The court charged the jury that the fact that the tin was found in the defendant's possession did not create a presumption of guilt under the circumstances of this case, but that it was a circumstance which, taken with all the other evidence, must satisfy the jury beyond a reasonable doubt.

We see no error in this of which the defendant can justly complain. If erroneous, it was in defendant's favor. The finding of the tin in defendant's possession, together with the different and conflicting statements made by defendant in attempting to account for its possession, warranted the judge in submitting the question of defendant's guilt to the jury.

No error.

STATE v. W. J. COLE.

(Filed 4 October, 1911.)

1. Primary Elections—Legislative Acts—Constitutional Law.

An act providing for a primary system for election to a public office is constitutional and valid.

2. Indictments—Sufficiency—Counts—Informalities—Primary Elections.

An indictment against a manager of a primary election for county officials, charging (1) that defendant "did unlawfully, willfully, and fraudulently count and call but fourteen votes for T., a candidate for the office of treasurer . . . when in fact twenty votes were duly and lawfully cast" for him, and (2) a like charge in respect of fraudulently not calling and counting votes cast at such primary for A. for the office of treasurer, expresses the charges sufficiently, and may not be quashed because of "informalities or refinements." Revisal, sec. 3254.

3. Primary Elections—Purity of Elections—Count—Indictable Offense.

Any conduct of the manager of a primary election for county officials which interferes with the freedom or purity of the election is punishable at common law, and under Revisal, sec. 3576.

4. Primary Elections—Indictments—Manager of Primaries—False Returns—County Officials—Oaths.

An indictment against a manager of a primary election for county officials in making unlawful returns need not necessarily charge that the defendant was a State or county officer, or that he took the oath of office. It is sufficient to allege that the defendant was such manager, for his duties under the statute devolved upon him by virtue of his office.

5. Primary Elections—Indictment—Managers of Primaries—False Returns—Qualification of Electors.

It is the duty of the manager of a county primary for the election of county officials to call and count the ballots cast for the various candidates, and the question of the qualification of the electors whose votes he failed to count is unnecessary in considering an indictment against the manager for fraudulently not counting the votes.

6. Primary Elections—Manager of Primaries—False Returns—Indictments—Misjoinder—Counts—Election by Solicitors.

The joinder of counts in an indictment against a manager of a county primary election of officers, that he unlawfully, etc., failed to count the ballots cast for T., a candidate for the office of treasurer, and also of A., a candidate for that office, at the same election, is proper, and the solicitor is not required to elect between the counts.

7. Primary Elections—Manager of Primaries—False Returns—Filing and Registration—Evidence.

That a paper-writing purporting to be the return of a primary election, signed by the managers, was filed and recorded in the office of the register of deeds, does not make it competent evidence upon the trial of the manager of the election for unlawfully, etc., not returning the count of the ballots cast, the filing and registration not being required by statute. It is necessary to prove the returns by competent evidence.

APPEAL by defendant from *Joseph S. Adams, J.*, at February (619) Term, 1911, of WARREN.

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

Attorney-General T. W. Bickett, Assistant Attorney-General George L. Jones, and J. C. Little for the State.

B. B. Williams, T. T. Hicks, and Thomas M. Pittman for defendant.

CLARK, C. J. The defendant was a manager of a primary election held in Smith Creek Township, Warren County, 9 August, 1910,
(620) under the provisions of chapter 749, Laws 1909, "To provide for and regulate the holding of primary elections in Warren County." He is indicted upon two counts in one bill: (1) That he "did unlawfully, willfully, and fraudulently count and call but fourteen votes for W. S. Terrell . . . a candidate for the office of treasurer of said Warren County, when in fact and truth twenty votes were duly and lawfully cast for said W. S. Terrell"; and (2) a like charge in respect of fraudulently not calling and counting votes cast at such primary for H. B. Alston for the office of treasurer.

From a verdict of guilty and judgment thereon the defendant appeals to this Court: (1) For errors committed upon the trial. (2) Because the statute providing for such primary election is unconstitutional and void.

The indictment was under section 3576 of the Revisal and at common law.

If the act is unconstitutional, it would be unnecessary to consider the other exceptions; but we take it that it is scarcely necessary to discuss the proposition. The primary system has been so long and so generally recognized that it has become an essential part of our political system. "In the early days of the Republic the nominating system, as now known, did not exist," says Merriam on Primary Elections. "Candidates for local office were presented to the electorate upon their own announcement, upon the indorsement of a mass-meeting, or upon nomination by informal caucuses, while aspirants for State office were generally named by a 'legislative caucus' composed of members of the party in the Legislature." Candidates for President were named by the congressional caucus. After a long struggle the legislative caucus and the congressional caucus were overthrown, largely by the influence of Andrew Jackson, under whose leadership the nominating convention system was adopted. The evils which have grown up under the latter system are too well known to be discussed. The primary system was inaugurated as a relief from those evils. The first primary law was enacted in California in March 1866, and was closely followed by the New York act in April of
(621) the same year. In 1871, Ohio and Pennsylvania followed their lead, and in 1875, a similar law was passed in Missouri. From that time on the primary system has spread to all parts of the country, and various changes and modifications have been adopted from time to time to cure the evils therein which became apparent.

In this State the first primary laws were enacted in 1901, the first act passed (chapter 524) applying to Mecklenburg County. Chapter 752 in the same year provided the primary system for the counties of Anson, Cabarrus, Dare, Durham, Forsyth, Granville, Haywood, Henderson, Johnston, Northampton, Orange, Pamlico, Richmond, Tyrrell, Wake, and Washington.

In 1903, chapter 123 provided primaries for Richmond County, and chapter 793 for Henderson County.

In Laws 1905, primaries were provided (chapters 795 and 837) for New Hanover County and city of Wilmington.

In 1907, primaries were provided: chapter 116, for Union and Onslow counties; chapter 190, for Rowan and Camden counties; chapter 247, for Buncombe County and Asheville Township; chapter 347, for Robeson County; chapter 399, for Scotland County; chapter 405, for Guilford County and city of Greensboro; chapter 761, for Columbus County; chapter 926, for the counties of Anson, Beaufort, Bladen, Columbus, Davidson, Durham, Halifax, Lenoir, Madison, Martin, Nash, Onslow, and Wake.

In 1908 (Special Session), chapter 57 provided a primary election in New Hanover County.

In 1909, statutes in regard to primaries were enacted: chapter 494, for Halifax and Nash counties; chapter 771, for Hertford County; chapter 850, for Union County; chapter 876, for Cumberland County; chapter 883, for Scotland County.

In 1911, primaries were enacted: Public-Local Laws, chapter 309, for Wilson County; chapter 342, for Warren County; chapter 412, for Nash County; chapter 572, for Richmond County; chapter 620, for Wake County and the city of Raleigh; chapter 624, for the counties of Currituck, Camden, and Chowan; chapter 633, for Beaufort County; chapter 635, for Wayne County; chapter 719, for John- (622) ston County; chapter 749, for Cumberland County; chapter 764, for the counties of Bladen, Dare, Gaston, Green Northampton, and Pamlico.

Several of the above acts were amendments to correct defects which by experience had been found in prior acts. There may be other primary acts, but those cited are sufficient to show that the primary system and its regulation by law has become an integral part of our political system in North Carolina as well as elsewhere.

While the primary system has not heretofore been before this Court, it has been discussed in numerous decisions in other States and the constitutionality of statutes regulating primary elections has been fully recognized. Among such cases are *Spier v. Baker* (Cal.), 41 L. R. A., 196; *Britton v. Commissioners,* 51 L. R. A., 115; *McCarthy v. Moore* (Minn.), 59 L. R. A., 447, and cases cited in the notes thereto; *Breckon*

v. Commissioners (Ill.), 5 A. & E. Anno. Cases, 562. In the notes to the last case the citations are numerous, giving adjudications upon almost every feature of the primary system. The constutionality of a subject which has been so fully, so long, and so widely recognized by the courts and by legislation cannot be seriously discussed.

As to the exceptions for alleged errors during the trial: Exception 1, for refusal to quash the bill, was properly denied. The indictment expressed the charge against the defendant "in a plain, intelligible, and explicit manner." The grounds urged for quashing savored "of informalities or refinements," for which no bill can be quashed. Revisal, 3254.

The defendant moved to quash the bill because (1) the bill of indictment does not charge any offense within the terms of the act of 1909, ch. 749, nor of section 3576 of the Revisal, nor at common law; (2) that it does not allege that defendant was a State or county officer; (3) that it does not allege that the acts and omissions complained of devolved upon him by virtue of his office; (4) that it does not allege by what authority he was made pollholder and manager for the alleged primary;

(6) that it does not allege for what, if any, political party such
(623) primary was held; (7) that it does not allege that defendant failed or refused to count the votes for any *bona fide* member of the political party for which such primary was held, nor that he was a qualified elector and had taken the prescribed oath that he was a resident of the precinct, was a duly qualified elector, and had not voted before in said primary election; (8) that it is not alleged that the persons for whom such votes were cast and not counted were qualified candidates, entitled to receive votes in such primary for nomination to the office of Treasurer of Warren County.

This primary election was a public election, and any conduct which interferes with the freedom or purity of the election is punishable at common law. Bishop Cr. Law, sec. 471; *S. v. Jackson,* 73 Maine, 91; *Commonwealth v. Silsbee,* 9 Mass., 417; *Commonwealth v. McHale,* 97 Penn., 397. As to the other exceptions, it is not necessary to charge that the defendant was a State or county officer. The bill alleges that he was manager of the election, and his duties under the statute make him an officer. It was unnecessary to allege that those duties devolved upon him by virtue of his office or that he took an oath. *S. v. Wynne,* 118 N. C., 1206; *S. v. Powers,* 75 N. C., 281. It is sufficiently charged that it was a Democratic primary election.

It is unnecessary to discuss the qualification of the electors whose votes the defendant failed to count. These votes had been cast. They had passed the challenger, and when the defendant reached these bal-

lots in the box it was his plain duty to call and count them. He had no right to rule out the votes even if he believed they were invalid, and it is not pretended that he did so.

The two counts in the bill of indictment pertained to the conduct of the defendant at the same time and place and of the same nature and in the same matter of counting votes for the same office. The joinder was proper and did not make the bill multifarious and it was not error to refuse to require the solicitor to elect. It is not unusual in an indictment for larceny to lay the property in one count in A. and in another count in B. or to joint counts for an assault upon different persons when parts of the same act.

The only exception which has given us any difficulty is the (624) second exception. The secretary of the county board of elections and deputy register of deeds was permitted to testify that a paper purporting to be the return of the primory election of Smith Creek Township, held 9 August, 1910, signed by H. F. Hooker and W. J. Cole (defendant), managers, was filed and recorded in the office of the register of deeds. This return was not proven at the trial, and its filing and registration, not being required by the statute, could add nothing to its validity and could not be proof of its execution, particularly as it had not been probated, but was merely shown to be on file and recorded. It was error, therefore, to receive it. For which error there must be a New trial.

STATE v. L. M. SANDLIN.

(Filed 4 October, 1911.)

1. Murder—Special Venire—Regular Jurors—Interpretation of Statutes.

Chapter 343, Laws 1909, providing a term of court for New Hanover County, provides that jurors drawn for the term "shall be regular jurors and subject only to the challenges now allowed by law to regular jurors." Hence, when the regular panel for the first week had been exhausted and a case for a capital felony was reached on Saturday and continued to Monday of the following week, it was not required that a special venire should have been drawn under Revisal, secs. 1973, 1974, and objections to the regular panel is without merit.

2. Murder—Defenses—Insanity—"Not Guilty"—Double Issues—Waiver—Inherant Prejudice.

The prisoner was permitted to amend his plea upon trial for murder and set up insanity as a defense, and without objection a double issue as to defendant's insanity and guilt were submitted to the jury: *Held*, (1) the prisoner waived his right by not excepting at the time; (2) the submission of the double issue was not inherently prejudicial, and did not constitute reversible error.

3. Appeal and Error—Error in Transcript—Certiorari—Ex Mero Motu—Correction.

In this appeal by the prisoner from verdict and judgment of murder in the first degree, his counsel objected to the judgment, as the record sent up disclosed a verdict of "guilty of the felony and murder in manner and form as charged in the bill of indictment." *Ex mero motu* the Supreme Court sent down an instanter *certiorari*, to which the clerk returned that the entry on the docket showed that the jury returned their verdict in writing as follows: "2. Is the defendant guilty of the felony and murder of which he stands charged? Answer: Guilty of murder in the first degree." The clerks of the Superior Courts are cautioned that they send up transcripts that are "true, full, and perfect," and *Held*, no error in the judgment rendered below in this case.

(625) APPEAL from *Cline, J.*, at July Term, 1911, of NEW HANOVER.

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

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

L. Clayton Grant for defendant.

CLARK, C. J. The prisoner was convicted of murder in the first degree in killing his wife. The evidence is that the wife had left her husband after a quarrel and moved to another house, where she kept boarders. On the day of the homicide the prisoner went to his wife's house. After some conversation, he commenced beating his wife. She screamed and ran from the dining-room into the parlor. The defendant followed, beating her. She ran from the parlor into the hall, and the prisoner still followed her. When she got into the hall the prisoner pulled out his pistol and shot her three times, twice in the back and once in the neck. The doctor testified that either shot would have killed her. She fell, and the prisoner stepped over the body and out onto the porch and shot himself in the head, but not seriously. One Moss, who occupied an adjoining room, said to him: "Throw that pistol down." He threw it down on the porch and Moss picked it up. The prisoner then said: "I killed her, and I intended to kill her."

(626) The coroner, who was also a physician, testified as to the pistol shots, and on cross-examination testified that he did not consider the prisoner at all insane. The prisoner offered no testimony, asked for no special instructions, and took no exceptions to the charge.

The prisoner in his brief relies upon the second assignment of error. The trial began on Saturday of the first week of the term. The regular panel of that week was exhausted. When the court met again on Monday, the regular jurors who had been drawn for service during the second week, by virtue of a special act for New Hanover, chapter 342,

Laws 1909, were called. The first juror who was tendered was challenged on the ground that this act did not apply to capital cases, but that a special venire should have been drawn under Revisal, 1973, 1974. The act in question provides that jurors so drawn "shall be regular jurors and subject only to the challenges now allowed by law to regular jurors." This also disposes of the assignments of error 3, 4, 6, and 7, which were because the judge held that such were regular jurors and not subject to challenge as talesmen.

The other assignments of error which were not abandoned need not be mentioned, except the 15th, which was because insanity at the trial being insisted on, the judge at the instance of the prisoner allowed his plea to be amended to allege it, and thereupon submitted to the jury the double issue as to the prisoner's insanity at the trial and as to his guilt. The double issue was submitted without exception at the time, and was therefore waived unless it was inherently prejudicial. In *S. v. Haywood*, 94 N. C., 847, the Court, while not approving such practice, held that it was not error in law, stating that this practice had been pursued in other trials, citing *Rex v. Little*, Russ &-R., 430; *Regina v. Southey*, 4 Foster & Fin., 864; Buswell on Insanity, sec. 461.

We do not see how any prejudice could have arisen to the prisoner on this occasion. Insanity at the time of the homicide could of course be set up as a defense on the other issue as to the prisoner's guilt.

The record as sent up recited that the jury returned a verdict, (627) "Guilty of the felony and murder in manner and form as charged in the bill of indictment." The brief of the prisoner objected to a judgment on such verdict as his last assignment of error. The Court *ex mero motu* sent down an *instanter certiorari (S. v. Randall*, 87 N. C., 571; *S. v. Craton*, 28 N. C., 164), to which the clerk returned that the entry on the docket showed that the jury returned their verdict in writing as follows:

"1. Is the defendant now insane? Answer: No.

"2. Is the defendant guilty of the felony and murder of which he stands charged? Answer: Guilty of murder in the first degree."

As the judge filed as a part of the record his formal judgment, in which he recited that the jury "rendered the verdict as appears of record, finding the said L. M. Sandlin guilty of murder in the first degree," it is not easy to understand how so material an error in the transcript could have occurred. This being an appeal *in forma pauperis*, it is possible that the transcript may have been copied by another, and the very careful and painstaking clerk must have been inadvertent to the omission of the exact form of the verdict as rendered. It is the duty of the clerk to certify that the transcript is "a true, full, and perfect transcript

of the record," and too much care cannot be taken by clerks to verify the correctness of the transcript in all cases, both civil and criminal.

The homicide in any phase of the evidence, if believed by the jury, was murder in the first degree, and one of peculiar atrocity. If there are extenuating circumstances they do not appear in this record. There could hardly be any extenuating circumstances, if the evidence sent up is a true statement of the occurrence.

No error.

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(628)

STATE v. ASHTON SMITH AND HENRY O. CAULEY.

(Filed 11 October, 1911.)

1. Cruelty to Animals—Dogs—Property Rights.

A dog is a domestic animal, and not *ferœ naturæ*, and as such is a subject of property, and it is unnecessary to show that he is of a pecuniary value to the owner to maintain an indictment for cruelty forbidden by the statute. Revisal, sec. 3299.

2. Cruelty to Animals—Dogs—Bad Reputation—Killing—Defense of Property.

Upon a trial for the crime of willfully killing a dog, the property of the prosecutor, under the provisions of the Revisal, sec. 3299, proof of the bad reputation of the dog, or that he had been guilty of past depredations, will not justify taking his life, for it is not the dog's predatory habits nor his past transgressions, nor his reputation, however bad, but the doctrine of self-defense, whether of person or property, that gives the right to kill; and the statute does not change the common law in its application to this doctrine.

3. Same.

In the actual and necessary defense of property in killing a dog, upon an indictment under Revisal, sec. 3299, it is not necessary to show that the owner knew of his vicious propensities or that there was no other mode of defending the thing assailed.

4. Cruelty to Animals—"Animal"—Interpretation of Statutes.

Revisal, sec. 3299, makes it criminal to willfully or cruelly kill or injure any useful animal, employing that word, as appears, merely in the sense of "living animal," and cruelty is defined in the same section to mean "any act, omission, or neglect, whereby unjustifiable physical pain, suffering, or death is caused or permitted."

5. Cruelty to Animals—Unlawful Killing—Evidence—Instructions—Harmless Error.

A charge to the jury, on a trial of an indictment, under Revisal, sec. 3299, for the willful killing of the prosecutor's dog, that if the dog was actually killing the prosecutor's turkeys at the time it would be no defense or justi-

fication, is harmless error, the charge being otherwise correct and there being ample evidence for conviction, and no evidence that the danger to the turkeys was imminent or such as called for immediate action.

APPEAL by defendants from *Peebles, J.*, at May Criminal Term, 1911, of LENOIR.

The facts are sufficiently stated in the opinion of the Court (629) by *Mr. Justice Walker.*

Attorney-General Bickett and Assistant Attorney-General G. L. Jones for the State.

Rouse & Land for defendants.

WALKER, J. The defendants were indicted in the court below for the crime of willfully killing a dog, the property of the prosecutor. It would be vain and unprofitable to discuss, for the purpose of deciding, that a dog is a living creature within the meaning of Revisal, sec. 3299, under which the indictment was drawn and presented by the grand jury. We have held that he is a subject of property, a domesticated animal, and not merely *feræ naturæ,* and that a civil action may be maintained for damages caused by an injury to him, though he may have been guilty of some "youthful indiscretion" or harmless transgression. A dog is like a man in one respect, at least—that is, he will do wrong sometimes; but if the wrong is slight or trival, he does not thereby forfeit his life. The opinion of *Judge Gaston* in *Dodson v. Mock,* 20 N. C. (Anno. Ed.), 282, has been generally taken as a clear and accurate statement of the law in regard to the right of property in this much petted and sometimes useful animal. That was a civil action to recover damages for killing the plaintiff's dog, the defendant contending that a dog was not property, and, therefore, no action would lie for any injury to him. In view of this contention, *Judge Gaston* said: "It was not necessary for the maintenance of the action that the plaintiff's dog should be shown to have pecuniary value. Dogs belong to that class of domiciled animals which the law recognizes as objects of property, and whatever it recognizes as property it will protect from invasion by a civil action on the part of the owners. It is not denied that a dog may be of such ferocious disposition or predatory habits as to render him a nuisance to the community, and such a dog, if permitted to go at large, may be destroyed by any person. But it would be monstrous to require exemption from all fault as a condition of existence. That the plaintiff's dog on one occasion stole an egg, and afterwards snapped at the heel of the (630) man who had hotly pursued him *flagrante delicto;* that on another occasion he barked at the doctor's horse, and that he was shrewdly suspected in early life to have worried a sheep, make up a catalogue of

offenses not very numerous nor of a very heinous character. If such deflections as these from strict propriety be sufficient to give a dog a bad name and kill him, the entire race of these faithful and useful animals might be rightly extirpated."

It was next held in *S. v. Latham,* 35 N. C., 33, that the owner has such property in a dog that an indictment for malicious mischief in killing him will lie. These cases were followed by others, deciding different questions, but all recognizing the general rule that a dog is property. *Perry v. Phipps,* 32 N. C., 259; *Mowery v. Salisbury,* 82 N. C., 177 (right to tax them). In *S. v. Latham, supra,* the indictment was for malicious mischief, and the judge, by his charge, let the guilt of the defendant turn altogether upon an affirmative answer to the question whether the defendant, in killing the dog, was acting in defense of his property, without regard to whether or not he did so from malice to the owner. This was held to be error, as the gist of the offense was malice to the owner, and the killing, from passion excited against the dog by the injury or threatened injury to property, was not any defense, provided the defendant was actuated by malice towards the owner. In that case, *Judge Nash* took occasion to say: "By the old authorities, a dog was not a subject of larceny, because it was without value. But, notwithstanding, it is a species of property, recognized as such by the law, and for an injury to which an action at law will be sustained. *Dodson v. Mock,* 20 N. C., 282. Many actions have been brought in this State, and in England, for injuries to such property. 8 Bl. Com., 393-4. If, then, dogs be personal property, they are protected by the law, and the owner has such an interest in them as that he can protect and defend them; and the destruction of them, from malice to the owner, is in law malicious mischief."

Although counsel did not so contend, we will say that the dog is not an animal of such base nature or low degree, whatever his pedi-
(631) gree may be, as not to be entitled to the consideration and full protection of the law, or as to subject him to outlawry if he has a bad reputation, or at least a habit of killing fowls, so that if he lurks near where they are to be found, although they are protected by a sufficient fence or other barrier against his predatory and ferocious disposition, he may be killed, even if he is not engaged in the actual attempt to slay and devour his supposed prey, or the danger of his doing so is not so imminent or immediately threatening that a prudent and reasonable man would be led to believe that his property is in jeopardy. We cannot give our assent to this principle. Admit such a right, and the peace and good order of society would be seriously endangered and could not well be preserved, for the exercise of such a right would excite the most angry passions and resentment of the dog's owner and eventu-

ally result in personal violence, thus disrupting the peace and quiet of the community. So thought *Judge Pearson* in *Morse v. Nixon*, 51 N. C., 293. But we think that the dog is not an animal of such low origin and of such a base nature as to be beyond the pale of the law. The right to slay him cannot be justified merely by the baseness of his nature, but it is founded upon the natural right to protect person or property. He has the good-will of mankind because of his friendship and loyalty, which are such marked traits of his character that they have been touchingly portrayed both in song and story. Why, then, should he be declared an outlaw and a nuisance, and forfeit his life without any sufficient cause? This was never the law. Neither at the common law nor since the passage of our present statute prohibiting cruelty to ani-animals can a dog be killed for the commission of any slight or trival offense (*S. v. Neal*, 120 N. C., 614); nor to redress past grievances (*Morse v. Nixon, supra*). As said by *Chief Justice Pearson* in the last cited case: "It may be the killing will be justified by proving that the danger was imminent—making it necessary 'then and there' to kill the hog in order to save the life of the chicken, or prevent great bodily harm." It was well said by the *Chief Justice* in that case, that in order to recover damages in a civil action for injuries to property committed by a hog (or dog), the plaintiff must prove, as we say, (632) a *scienter*, that is, knowledge of his vicious propensities, as in the case of the deer in the Saratoga Park (99 U. S., 645), where it was held: "Certain animals *ferœ naturœ* may doubtless be domesticated to such an extent as to be classed, in respect to the liability of the owner for injuries they commit, with the class known as tame or domestic animals; but inasmuch as they are liable to relapse into their wild habits and to become mischievous, the rule is that if they do so, and the owner becomes notified of their vicious habit, they are included in the same rule as if they had never been domesticated, the gist of the action in such a case, as in the case of untamed wild animals, being not merely the negligent keeping of the animal, but the keeping of the same with knowledge of the vicious and mischievous propensity of the animal. Wharton Negligence, sec. 922; *Decker v. Cammon*, 44 Me., 322. Three or more classes of cases exist in which it is held that the owners of animals are liable for injuries done by the same to the persons or property of others, the required allegations and proofs varying in each case. 2 Bl. Com., per. Cooley, 390. Owners of wild beasts, or beasts that are in their nature vicious, are liable under all or most all circumstances for injuries done by them; and in actions for injuries by such beasts it is not necessary to allege that the owner knew them to be mischievous, for he is presumed to have such knowledge, from which it follows that he is guilty of negligence in permitting the same to be at large. Though the

owner have no particular notice that the animal ever did any such mischief before, yet if the animal be of the class that is *ferœ naturæ*, the owner is liable to an action of damage if it get loose and do harm. 1 Hale P. C., 430; *Worth v. Gilling*, L. R., 2 C. P., 3. Owners are liable for the hurt done by the animal even without notice of the propensity, if the animal is naturally mischievous; but if it is of a tame nature, there must be notice of the vicious habit. *Mason v. Keeling*, 12 Mod., 332; *Rex v. Huggins*, 2 Ld. Raym., 1574. Damage may be done by a domestic animal kept for use or convenience, but the rule is that the owner is not liable to an action on the ground of negligence, with-
(633) out proof that he knew that the animal was accustomed to do mischief. *Vrooman v. Sawyer*, 13 Johns. (N. Y.), 339; *Buxendin v. Sharp*, 2 Salk., 662; *Cockerham v. Nixon*, 33 N. C., 269. Domestic animals, such as oxen or horses, may injure the person or property of another, but courts of justice invariably hold that if they are rightfully in the place where the injury is inflicted, the owner of the animal is not liable for such an injury, unless he knew that the animal was accustomed to be vicious; and in suits for such injuries such knowledge must be alleged and proved, as the cause of action arises from the keeping of the animal after the knowledge of its vicious propensity. *Jackson v. Smithson*, 15 Mee. & W., 563; *Van Leuven v. Lyke*, 1 N. Y., 515; *Card v. Case*, 5 C. B., 632; *Hudson v. Roberts*, 6 Exch., 697; *Dearth v. Barber*, 22 Wis., 73; *Cox v. Burbridge*, 13 C. B., N. S., 430."

It would, therefore, be strange if a person is privileged to take the law into his own hands and redress supposed and past grievances by an extrajudicial method or remedy, under circumstances which may not entitle him to sue for and recover damages in a civil action. Such a view of the law was adopted in *Dodson v. Mock*, 20 N. C., 282, but it has been said of that case by the Court in *Morse v. Nixon, supra* (opinion by *Chief Justice Pearson*), that *Judge Gaston* fell into error in his dictum that a dog may, by reason of his predatory habits, become a public nuisance, so that any person may kill him in order to abate the nuisance, although not specially injured or aggrieved. We think the law of this State is correctly stated by *Judge Gaston* (as far as he went) in *Parrott v. Hartsfield*, 20 N. C., 242 (Anno. Ed.), as follows: "The law authorizes the act of killing a dog found on a man's premises in the act of attempting to destroy his sheep, calves, conies in a warren, deer in a park, or other reclaimed animals used for human food and unable to defend themselves. *Barrington v. Sumers*, 3 Lev., 28; *Leonard v.* Wilkins, 9 John., 233." In the actual and necessary defense of property, it is not necessary to show that the owner of the dog knew of his
(634) vicious propensities, or that there was no other mode of defending the things assailed. Com. Dig. Pleader, 3 m. 33.1, sec. 336.

"The law is different where the dog is chasing animals *ferœ naturæ*, such as hares or deer in a wild state, or combating with another dog. In these cases a necessity for the act of killing must be made out, or the killing will not be justified. *Wright v. Ramscot,* 1 Saun., 82; *Vere v. Ld. Cawdor,* 11 East, 567. The object of the law in conferring this authority is not to punish past wrongs, but to prevent wrongs impending or menaced. It may, therefore, be exercised before the injury is begun, if, in truth, it be imminent—for otherwise the preventive remedy may be too late." *Parrott v. Hartsfield, supra.* This Court (by *Chief Justice Pearson*) in *Morse v. Nixon,* approved the rule as stated thus by *Judge Gaston.* It is true that *Judge Pearson* added this qualification or expressed this doubt: "But we are inclined to the opinion that even under these circumstances it is not justifiable to kill the dog. It should be impounded or driven away, and notice given to the owner, so that he may put it up. At all events, this course is dictated by the moral duty of good neighborship." But we conclude that the better doctrine is the first one stated by the learned *Chief Justice* and the one fully sustained by the opinion of the Court in *Parrott v. Hartsfield, supra.* If the danger to the animal, whose injury or destruction is threatened, be imminent or his safety presently menaced, in the sense that a man of ordinary prudence would be reasonably led to believe that it is necessary for him to kill in order to protect his property, and to act at once, he may defend it, even unto the death of the dog, or other animal, which is about to attack it. We understand this to be the law as declared in a very brief opinion of the Court (by *Rodman, J.*) in *Williams v. Dixon,* 65 N. C., 416, citing and approving what is said to that effect in *Parrot v. Hartsfield* and *Morse v. Nixon.* It is taken for granted in *Runyan v. Patterson,* 87 N. C., 343, that if a hog or dog is caught *in flagrante delicto* or "red-handed," that is, while in the act of injuring property, such as turkeys or chickens, he may be shot on the spot by their owner, citing the above cases. Why not if he is about to spring upon his prey and when the necessity of protecting his property reasonably appears to its owner to be just as imperative? Our statute, (635) Revisal, sec. 3299, makes it criminal to willfully or cruelly kill or injure any useful animal, employing that word in the sense of any "living creature," and "cruelty" is defined in the same section to mean "any act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted."

So far as this case is concerned, and the point raised by the defendant, we do not think the statute has materially changed the law as formerly declared. The defendant is guilty at common law, and surely under the statute, if he unjustifiably killed the dog; and what is an unwarranted or unjustifiable killing has already been fully stated.

Upon the facts of this case, we are of the opinion, and so decide, that the defendants were guilty, and that while the judge erred when he charged that if the dog was actually killing the turkeys it would be no defense or justification for the killing, this error was harmless, as there was no evidence that the danger to the turkeys was imminent and the necessity to kill was apparent. The fact that the dog had visited the premises before, if it had been proven, would not justify the defendant's act in slaying him. It is not the dog's predatory habits, nor his past transgressions, nor his reputation, however bad, but the doctrine of self-defense, whether of person or property, that gives the right to kill. The dog was not in a position, with reference to the turkeys, to make the danger to them imminent, he being in the road or street outside the defendant's yard, with an impassable fence and closed gate between him and them. He could easily have been driven away without resorting to extreme punishment, for it was nothing but punishment inflicted upon him for his supposed past transgressions, that is, resentment and retaliation. It was an act unlawful at common law, and willful within the meaning of the statute, even as construed in *S. v. Clifton,* 152 N. C., 802.

No error.

Cited: Newell v. Green, 169 N. C., 463.

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(636)

STATE v. ED. STEWART.

(Filed 11 October, 1911.)

1. Manslaughter—Evidence Sufficient—Competency.

Evidence in this case held competent and sufficient for conviction of manslaughter, at least, which tended to show that a teacher at a negro school violently assaulted his pupil, sixteen or seventeen years old, with a stick of lightwood about two feet long, the size of witness's arm, by striking him several times on the head, stunning him and causing him to stagger around like a drunken person; that he went to the door bleeding at the nose and told the prisoner he thought he had no right to beat him so much; that the pupil did not offer to hit the teacher; that the pupil had lived with a witness, his aunt, for five years, and that morning about 11 o'clock he went home, walking fast, his head thrown back, crying, his nose bleeding, and he staggered about the room, lying at intervals upon the bed, that he was taken to a doctor about five miles away, and when witness saw him next, in about two hours, he was lying on the floor of a neighboring store, nearly dead; and by an expert physician that he made a *post-mortem* examination, and that deceased died from cerebral hemorrhage, caused presumably by a blow or fall.

2. Objections and Exceptions—Evidence, Competent in Part.

When some of the testimony of a witness is competent and some is not, a general objection to the whole will not be sustained.

3. Witness, Expert—Physician—Opinion from Observation.

An expert who has made a *post-mortem* examination of the deceased, whom the prisoner is accused of having murdered, may express his opinion as to the cause of the death without having a hypothetical question propounded to him, as his opinion is not based on the evidence of other witnesses.

4. Witness, Expert—Opinion—Hypothetical Question—Statement of Facts—Part Statement—Objections and Exceptions.

In hypothetical questions asked an expert witness, a physician, as to the cause of the death of one whom the prisoner is accused of having murdered, upon the assumption that the jury found certain facts, in evidence, to be true, it is not necessary that all the facts should be stated; and if the party objecting thinks that an omitted fact would have elicited a different opinion from the witness, he should have incorporated it in his questions on cross-examination.

5. Witnesses—Competency—Findings by Court—Objections and Exceptions.

The trial judge, upon questioning an eight-year-old witness introduced by a party litigant, ascertained that the witness did not know who made her, had no knowledge of the obligation of an oath, and did not know what they would do with her if she told a lie on the witness stand, and found that she was not qualified to testify. No objection was made to this in the trial court: *Held*, (1) objection on appeal is too late; (2) the evidence sustained the ruling of the court.

APPEAL from *Peebles, J.*, at February Term, 1911, of SAMPSON. (637)

The defendant is charged in the indictment with the crime of murder, and was convicted of manslaughter.

Cleveland Bronson, a witness for the State, gave the following account of the killing, which was corroborated by several witnesses: "The prisoner was teaching school at the colored Herring Schoolhouse in Lisbon Township. I was passing by there at the morning recess. It was raining when I got there. I was hunting and had my gun, and I set my gun down at the schoolhouse door; this was about the 26th of last January. The scholars were out of school at that time. I went in the schoolroom and was talking with the defendant. He soon rang his bell for the scholars to come in again. After they had all come in and taken their places, he asked Bishop Wright, the deceased, why he did not march out right at recess. Bishop Wright said he thought he did march out like he had been marching out before. The teacher told him no, he did not; that he turned off at one side, when the rule was that he should march straight in front of the door far enough for all the other scholars to clear the steps. Then the prisoner asked deceased:

'Are you too grown-up to obey orders?' Deceased said: 'No, I am not; I came here to obey orders.' The prisoner then said: 'Obey my orders, or I will beat you down to the floor.' The teacher then ordered Bishop to come out to him. The teacher then ran into Bishop and threw him on the floor; they tussled a while, and the teacher reached and got a piece of lightwood about the size of my arm and about 2 feet long, and hit deceased with it two or three licks on the head and got up off him. Bishop Wright went to pull up by side of house and
(638) the teacher struck him again with the piece of lightwood on the side of the head. He stood a few minutes like he was stunned. He trembled just like when you hit a hog, and was bleeding at the nose."

Defendant objects. Objection overruled, and defendant excepted. First exception.

"Bishop staggered around in schoolhouse like drunken person; he staggered up against stove and chairs in the room."

Defendant objects. Objection overruled. Defendant excepted. Second exception.

"Bishop Wright went out the door bleeding at the nose, and told the teacher that he did not think he had the right to beat him up that way."

Defendant objects. Objection overruled. Defendant excepted. Third exception.

"Bishop Wright was about sixteen or seventeen years old; he did not hit or offer to hit the teacher during the fight."

Victoria Herring testified as follows: "I am sister-in-law to Bishop Wright. Bishop's mother was dead and he lived with us since he was five years old. About 11 o'clock a. m., Bishop Wright came home, walking fast, head thrown back; he was crying and his nose was bleeding and he staggered about the room and lay down on the bed; he was first up and then down."

Defendant objected; overruled, and defendant excepted. Fifth exception.

"He stayed about a half hour. He lived with my husband and myself. My husband soon came home and hooked up a horse and buggy and took him off. The doctor lived about five miles. I saw him next at D. L. Herring's store, about two hours afterwards, about two miles from my house, lying down on the floor, kinder struggling. He was nearly dead."

Defendant objected; overruled and excepted. Sixth exception.

"Three or 4 o'clock he died."

Dr. Cooper, who was found by the court to be an expert, stated that he made the *post-mortem* examination of the deceased, and that

he died from cerebral hemorrhage—effusion of blood on the brain. (639) The defendant excepted. Caused presumably by a blow or fall. The defendant excepted.

The defendant testified in his own behalf, and his Honor told the jury, if they believed him, to return a verdict of not guilty.

Attorney-General Bickett and Assistant Attorney-General George L. Jones for the State.

J. D. Kerr and Fowler & Crumpler for defendant.

ALLEN, J. We have examined all of the exceptions appearing in the record, and find nothing of which the defendant can justly complain.

It appears to us that he has been dealt with mercifully, as the evidence would have sustained a verdict of murder in the second degree, if not one in the first degree.

Many of the exceptions were evidently taken as matter of precaution, during the progress of the trial, and not with the expectation that they could be successfully urged as ground for a new trial.

The first three exceptions belong to this class, as the witness had to tell what took place at the time of the difficulty, if permitted to testify at all.

The exception to the evidence of McKinley Herring is equally untenable. He was an eye-witness, and the objection is to the whole of his evidence. We do not think any part of his evidence incompetent; but if it were otherwise, and some of the evidence was competent, and some not, a general objection to the whole evidence could not be sustained. *S. v. Ledford,* 133 N. C., 722.

The exceptions to the evidence of Victoria Wright are without merit, and require no discussion.

It was not necessary to propound a hypothetical question to Dr. Cooper, as he was expressing an opinion as the result of his own examination, and not one based on the evidence of other witnesses.

Dr. Sloan, an expert, was asked his opinion as to the cause of death, upon the assumption that the jury found certain facts in evidence to be true.

The defendant objected because one fact, as to which there was (640) evidence, was not incorporated in the question.

We said at the last term, in *S. v. Holly,* 155 N. C., 485: "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."

If the defendant thought the fact, which was omitted, would have elicited a different opinion from the witness, it was his right and duty to incorporate it in a question on cross-examination.

The defendant offered Mattie Andrews, a girl eight years old, as a witness. The court refused to permit her to testify, and makes the following statement as to the witness: "The exception in regard to Mattie Andrews was made the first time in the statement of appellant's case on appeal. The court asked Mattie Andrews who made her; she said she did not know. The court asked her if she knew anything about the obligation of an oath. She said no. The court then asked her what they would do to her if she told a lie on the witness stand. She said she did not know. The court found as a fact that she was not qualified as a witness, and stood her aside. No exception taken at the time and no statement made to the court as to what they expected to prove by the witness.'

We cannot go outside the case on appeal, and as no exception was taken, we cannot consider the objection. Besides, the evidence sustained the findings and ruling of the court.

It was discretionary with the judge to allow or to refuse further examination of the witnesses.

The prayers for instruction were substantially given. We find No error.

Cited: *R. R. v. Mfg. Co.*, 169 N. C., 169; *S. v. Tate, ibid.*, 374; *S. v. Merrick*, 172 N. C., 872.

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(641)

STATE v. L. S. ROCHELLE.

(Filed 1 November, 1911.)

1. Intoxicating Liquors—Unlawful Sales—Revenue License—Defense—Evidence—Presumptions.

Upon a trial for the illegal sale of intoxicating liquors, it is not reversible error for the judge to exclude from the evidence a *subpœna duces tecum* issued to the collector of internal revenue for the purpose of showing that no license to sell had been issued to the defendant, as no presumption is raised on the question of an illegal sale because no U. S. license to sell has been issued him.

2. Intoxicating Liquors—Unlawful Sales—Alibi—Evidence Scrutinized—Instructions.

In defense to an action for the illegal sale of intoxicating liquors, the defendant relying on an *alibi*, it was not error for the trial court to quote from a Supreme Court decision, that the defendant's evidence in such cases "should be closely scrutinized because of its liability to abuse," when it appears that he carefully and properly explained how this evidence should be scrutinized and accepted by the jury, and that an *alibi*, if found by them, would be a complete defense.

STATE *v.* ROCHELLE.

APPEAL by defendant from *O. H. Allen, J.*, at July Special Term, 1911, of DURHAM.

Attorney-General T. W. Bickett and Assistant Attorney-General George L. Jones for the State.

V. S. Bryant and B. S. Royster for the defendant.

CLARK, C. J. The defendant was convicted of the illegal sale of intoxicating liquor. The first exception is because the court declined to allow him to put in evidence a subpœna *duces tecum* issued by the State for Wheeler Martin, Collector of Internal Revenue, to bring with him a list of all persons in said county who had obtained United States license to sell liquor. It is true that when a man takes out United States license to sell liquor, under our statute a presumption arises that he is engaged in that business. But the fact that he has no such license from the United States Government does not raise a presumption that the defendant is not engaged in the illegal sale of liquor. It may well be that the defendant did not consider such license necessary for his purpose, or profitable or prudent. It costs (642) money and makes evidence against him.

The only other exceptions requiring notice are exceptions 3 and 4 to the charge of the court, as follows:

Exception 3. "If the defendant attempts to prove an *alibi,* and fail in it, it becomes a circumstance for the jury to consider. They can regard it entirely as unproven, and they can also consider the failure to establish an *alibi,* if the jury find he has failed in doing so, and give it such force as the jury may deem proper."

Exception 4. "You should carefully consider the evidence offered to establish an *alibi,* because of its liability to abuse, as our Supreme Court says."

In *S. v. Jaynes,* 78 N. C., 504, *Bynum, J.*, said that evidence of an *alibi* "should be closely scrutinized because of its liability to abuse." His Honor, therefore, was, as he said, simply quoting from a decision of this Court. We do not understand him as intimating that failure to prove an *alibi* was any evidence of guilt. He simply said that evidence of that kind should be closely scrutinized. Indeed, his Honor in that connection himself fully explained the meaning of the word "scrutinize," as follows: "It simply means that you should cautiously examine the evidence of the character I have alluded to, the evidence of the detective, the evidence of the defendant, the evidence tending or intending to establish an *alibi.* By scrutinizing, I have already said, you should study it carefully and examine it and cautiously receive it. You should carefully examine and scrutinize the evidence of the detective, because of his bias, likely to exist by reason of his

employment to find the evidence. You should carefully scrutinize the evidence of the defendant because of his interest. You should carefully scrutinize the evidence offered to establish an *alibi* because of its liability to abuse, as our Supreme Court says." Thus read in connection with the context, the expression of the careful and cautious judge who tried this case could not have been misunderstood by the jury, and was but a statement of the law as laid down by this Court.

His Honor further told the jury that if the defendant estab-
(643) lished an *alibi*, it is a complete defense; and as to the defendant's testimony, he told them that while the jury should scrutinize it and receive it cautiously, yet if after scrutinizing it they were satisfied of the truth of it, they should give it the same force and effect as that of any other witness.

No error.

STATE v. JIM LEAK.

(Filed 1 November, 1911.)

1. Objections and Exceptions—Sufficiency of Evidence—Verdict—Procedure.

Objection that there was not sufficient evidence to sustain a conviction of the offense charged will not be entertained after verdict.

2. Rape—Assault with Intent—Evidence Sufficient.

Evidence of an assault upon a twelve-year-old girl with the intent to commit rape held sufficient which tended to show undue familiarities taken with the person of the girl by the prisoner in placing his hands upon her person under her clothes, in a secluded place, desisting when a neighbor called her, and appearing at the time to be listening for interruptions; and that this familiarity had been taken in like manner previously on the same day.

3. Instructions—Prayers Requested—Substance—Sufficient Compliance.

The prayers for special instruction requested by defendant in an action for an assault with intent to commit rape being substantially given, no error is found therein.

4. Rape—Assault with Intent—Burden of Proof.

In order to convict of an assault with the intent to commit rape, not only the assault, but the intent, must be shown beyond a reasonable doubt, and the purpose of accomplishing the intent notwithstanding resistance made.

5. Rape, Assault with Intent—Conviction—Less Offense.

When the prisoner is tried for an assault with intent to commit rape, the jury may return their verdict of a less offense, assault and battery, or simple assault, if there is evidence thereof.

6. Rape, Assault with Intent—Other Acts—Intent—Evidence.

Upon a trial for an assault with the intent to commit rape, it is competent to show that a short time before it is alleged the defendant committed the assault with the felonious intent, the prosecurix passed him as he was sitting on the steps, and that he caught her by the ankle and said, "You are as fat as a pig, aren't you?" as evidence tending a show another assault committed under the indictment, and the prisoner's animus and intent upon the second assault.

7. Rape—Assault with Intent—"Listening"—Opinion—Fact.

The testimony of the prosecutrix, that the prisoner "listened" at the time of making the alleged assault with intent to commit rape, is not objectionable upon the ground that it was an expression of an opinion. *Britt v. R. R.*, 148 N. C., 37; *Wilkinson v. Dunbar*, 149 N. C., 20, cited and approved.

8. Appeal and Error—Evidence—Exclusion of Answers.

On appeal, exceptions to exclusion of answers will not be reviewed when it does not appear what was the nature of the testimony excluded.

APPEAL from *Ferguson, J.*, at September Term, 1911, of RICH- (644)
MOND.

The defendant is charged in the indictment with the crime of assaulting Maggie Hasty, who was about 12 years of age, with the intent to commit rape, and upon conviction was sentenced to a term of five years in the State's Prison.

The assault is alleged to have been committed at the home of the prosecuting witness, where the defendant, who is an old negro man, was working; and the only person on the premises, except the defendant and the witness, was a little sister of the witness. Neighbors lived within a short distance, but, if the evidence of the State is believed, the place of the assault was at the back of the house, on the stairs leading into the basement, which was at least partially concealed.

Maggie Hasty was examined as a witness for the State, and testified to the assault and the circumstances surrounding her at the time. Among other things, she said that the defendant had his hand on her person under her clothes, when a neighbor called her, and that he then desisted. The witness was permitted to say that the defendant had put his hands on her before on the day of the assault, and
the defendant excepted. Also on what part of her person the (645)
defendant had his hands when the neighbor called her, and
defendant excepted. Also that when committing the assault the defendant "would kind of listen," and defendant excepted.

She was asked on cross-examination if the defendant was "considered bright," and if he did not have the reputation "of not being strong-minded." Upon objection, the witness was not permitted to answer either question, and the defendant excepted.

The defendant tendered the following prayers for instructions:

(1) That the evidence must show beyond a reasonable doubt, not only an assault, but that the defendant intended to gratify his passion on the person of Maggie Mae Hasty, and that he intended to do so at all events, notwithstanding any resistance made on her part. If they are not so satisfied, they cannot convict the defendant of an assault with intent to commit rape upon the said Maggie Mae Hasty.

(2) That the defendant can be convicted of the lesser offense of assault and battery or a simple assault.

(3) That the jury must find beyond a reasonable doubt from the evidence that the defendant placed his hand upon the person of Maggie Mae Hasty with the intent and purpose at the time, notwithstanding any resistance she might make, and at all events, to gratify his passion on her person, before he can be convicted of an assault with intent to commit rape.

There was no request to charge the jury that there was not sufficient evidence to sustain the indictment, but upon the rendition of the verdict the defendant moved the court to set aside the verdict (1) as being against the weight of the evidence, (2) for errors in the admission and rejection of testimony, for errors in his Honor's charge to the jury, (3) for failure to give the special instructions asked by the defendant.

Attorney-General Bickett and Assistant Attorney-General George L. Jones for the State.

Defendant not represented in this Court.

ALLEN, J. Upon an examination of the record, we find no (646) error which entitles the defendant to a new trial. The objection that there was not sufficient evidence to sustain a conviction cannot be entertained after verdict. *S. v. Harris,* 120 N. C., 578; *S. v. Huggins,* 126 N. C., 1055; *S. v. Williams,* 129 N. C., 582. But if it had been made in apt time, it could not avail the defendant, as the evidence is as conclusive as in *S. v. Page,* 127 N. C., 512, and stronger than in *S. v. Garner,* 129 N. C., 536, in which judgments upon verdicts of guilty were approved.

His Honor gave the defendant the benefit of all instructions requested, as appears from the following excerpt from his charge:

"The evidence must show, beyond a reasonable doubt, not only an assault, but that the defendant intended to gratify his passion on the

person of Maggie Mae Hasty, and that he intended to do so at all events, notwithstanding any resistance made on her part; and if the evidence does not so satisfy your mind, you cannot convict the defendant of the assault with intent to commit rape upon the said Maggie Mae Hasty. The defendant can be convicted of the lesser offense of assault and battery or simple assault. The jury must find, beyond a reasonable doubt, that he placed his hands upon the person of Maggie Mae Hasty with the intent and purpose at the time, notwithstanding any resistance she might make, and at all events, to gratify his passion on her person, before he can be convicted of an assault to commit rape."

It was competent for the State to prove that the defendant placed his hands on the prosecutrix at another time on the day of the assault, as evidence of another assault of which the defendant could have been convicted under the indictment, and as tending to prove the animus and intent of the defendant. *S. v. Murphy,* 84 N. C., 742; *S. v. Parish,* 104 N. C., 692; *S. v. Adams,* 138 N. C., 693.

The evidence objected to was that a short time before it is alleged the defendant committed the assault with the felonious intent, that the prosecutrix passed the defendant as he was sitting on the steps, and that he caught her by the ankle and said: "You (647) are as fat as a pig, ain't you?"

The exceptions to the refusal to permit the witness to say whether or not the defendant was considered bright, or had the reputation of not having a strong mind, are without merit. There is nothing to indicate what was expected to be proved, or what answer would have been given to the questions, and so far as we can see, the witness would have answered both questions in the negative.

It does not, therefore, appear that the defendant has been prejudiced by the ruling. The evidence of the prosecutrix, that the defendant was listening, was objected to upon the ground that it was an expression of an opinion. We do not think so. The rule applicable to evidence of this character is clearly and accurately stated in McKelvey on Evidence, p. 220 *et seq.,* as follows:

"The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence.

"A witness may say that a man appeared intoxicated or angry or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense, and within the meaning of the phrase, 'matter of fact,' as used in the law of evidence, it is not opinion, but is one of the class of things above mentioned, which are better regarded

as matters of fact. The appearance of a man, his actions, his expression, his conversation—a series of things—go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain, and as much a matter of fact, as if he testified, from evidence presented to his eyes, to the color of a person's hair, or any other physical fact of like nature.

"This class of evidence is treated in many of the cases as opinion admitted under exception to the general rule, and in others as matter of fact—'shorthand statement of fact,' as it is called. It seems more accurate to treat it as fact, as it embraces only those impres- (648) sions which are practically instantaneous, and require no conscious act of judgment in their formation. The evidence is almost universally admitted, and very properly, as it is helpful to the jury in aiding to a clearer comprehension of the facts."

This principle has been approved in *Britt v. R. R.*, 148 N. C., 37; *Wilkinson v. Dunbar*, 149 N. C., 20, and in other cases in our reports.

We find

No error.

Cited: Dickerson v. Dail, 159 N. C., 542; *Daniel v. Dixon*, 161 N. C., 379; *S. v. White*, 162 N. C., 617; *In re Smith's Will*, 163 N. C., 466; *S. v. Williams*, 168 N. C., 199; *Lewis v. Fountain, ibid.*, 279; *Warren v. Susman, ibid.*, 464; *Renn v. R. R.*, 170 N. C., 141; *Bane v. R. R.*, 171 N. C., 333.

STATE v. JANE NOWELL.

(Filed 9 November, 1911.)

1. Abduction—Children Under Fourteen—Females—Evidence Sufficient.

Upon trial for abducting or inducing any child under fourteen years, residing with father, mother, etc. (Revisal, sec. 3358), evidence is sufficient for a conviction which tends to show that the defendant and her husband resided at the town of C. and prosecutrix in the town of L.; that defendant solicited the prosecutrix, a girl under fourteen years of age, to go to C. with her, stating that she should have fine clothes, plenty of money, and an easy time, and after several subsequent refusals resulting in indecision, the prosecutrix consented to go and did go to C. with defendant and her husband, the latter paying railroad fare and defendant suggesting a change of dress and doing other things to effect a concealment of the prosecutrix; that from expressions used at C. de-

fendant expected to bring some girls home with her; that after keeping the prosecutrix overnight at C., the defendant refused to let prosecutrix go back to her home; and that she was found by the police at defendant's house and was carried back home by her father.

2. Power of Courts—Contempts—Court's Discretion—Appeal and Error.

Upon trial for an abduction of a girl under fourteen years of age (Revisal, sec. 3358), the counsel for defendant denounced the introduction of a negress to testify to the bad character of the defendant, a white woman, which drew great applause from those in the courtroom. The court had one woman arrested and seated on the prisoner's bench in full view of the jury: *Held*, the action of the trial judge in preserving order in his court, in respect to contempts in the presence of the court, is not subject to review on appeal, unless there is a gross abuse of discretion, which does not here appear.

3. Abduction — Husband and Wife — Coercion — Presumptions — Rebuttal—Burden of Proof—Instructions.

Upon evidence to sustain the charge, it is not error for which the defendant, charged with abduction of a girl under fourteen years of age (Revisal, 3358), can complain, for the judge to instruct the jury that where a married woman commits a crime in the presence of her husband it is presumed, in the absence of proof to the contrary, that she did it under his coercion, and unless the State has satisfied them that this presumption is not true, then they should return a verdict of not guilty. *Semble*, that in cases of this character the presumption that the wife was acting under coercion of her husband does not obtain.

APPEAL from *Daniels, J.*, at September Term, 1911, of ROWAN. (649)

Indictment for abduction of Clara Bell Gibbs under section 3358, Revisal. There was a verdict of guilty. Motion for new trial overruled. The defendant was sentenced to the State's Prison, from which sentence she appeals.

Attorney-General T. W. Bickett and Assistant Attorney-General George L. Jones for the State.

Walser & Walser, Stewart & McRea, and R. Lee Wright for defendant.

BROWN, J. There are twenty-six assignments of error, nine of which relate to the introduction of evidence. We have examined these assignments of error with care and considered the evidence objected to and while his Honor may have been technically wrong in one or two instances, we do not find any substantial error committed in the rulings upon evidence which would warrant us in ordering another trial. The corroborative evidence offered by the State and received in evidence we think comes within the rule as defined by this Court. *S. v. Maultsby*, 130 N. C., 664; *S. v. Freeman*, 100 N. C., 434.

(650) The crime of which the defendant stands convicted is defined in Revisal, sec. 3358, as follows: "If any one shall abduct, or by any means induce any child under the age of 14 years, who shall reside with the father, mother, uncle, aunt, brother, or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, to leave such person or school, he shall be gulty of a felony, and on conviction shall be fined or imprisoned in the State's Prison for a period not exceeding fifteen years."

The evidence for the State tends to prove that the defendant and her husband resided in Charlotte, and that Clara Bell Gibbs, a girl under 14 years, resided in Lexington, N. C., with her parents. She testified that defendant came to her and solicited her to go to Charlotte and reside with her, stating that she should have fine clothes, plenty of money, and an easy time. She refused to go. On 9 May, 1911, defendant again saw her in Lexington, and solicited witness to go with her. The witness refused, saying that her mother was ill, and she could not leave her. She was seen again about 2 o'clock the same day by defendant, and was again urged to leave home and go away with her. She again refused, but gave the matter some consideration. Again that afternoon, about 6 o'clock, she was seen by both defendant and defendant's husband, and they both insisted on her joining them and going away to a life of pleasure. She left them undecided, she said, and then, together with another girl, Vertie Kindly, joined them at the depot that night and the four left on train No. 35 for Charlotte. The tickets for the two girls were furnished by husband of defendant. The defendant and the girls went to Charlotte alone, the husband of the defendant leaving the train at Salisbury. Prosecuting witness testified that she was directed by defendant to change dress on the train at Salisbury, so she would not be recognized, and she did as directed. She further testified that when they arrived at Charlotte the defendant left the two girls in the station until she could secure a carriage, it being understood that they were to join her when she gave the signal. On their way to the home of the defendant the darkey asked defendant (651) if these were the girls, and she said yes. He asked then where the other one was, and she said there was nothing doing with her. Both girls testified that they neither slept nor ate any that night, and next morning both girls cried and insisted on returning home. This request was refused both girls at first, but directly defendant allowed Vertie Kindly to return, but said prosecuting witness could not go. That afternoon the officer in search of her found the prosecuting witness at the home of the defendant, and returned her to her father, and he carried her back to her home in Lexington that night.

The defendant admitted in her testimony that the girl, Clara Bell, went with her, but testified that she went of her own volition, without coercion or persuasion, and introduced evidence tending to contradict and explain the testimony of the witness for the State. The evidence for the State, if believed to be true, is ample to justify a conviction.

During the argument of counsel for defendant, and while denouncing the introduction of a negro witness to prove the bad character of defendant, a white woman, there was great applause. The court had one woman arrested and seated on prisoner's bench in full view of the jury. To this the defendant excepted.

This exception is untenable. The conduct of the court in reference to such matters as the preservation of order and in respect to contempts in the presence of the court must of necessity be left to the sound discretion of the court. The conduct of the judge is not reviewable unless there is a gross abuse of discretion, which does not appear in this record. *S. v. Harrison,* 145 N. C., 414; *S. v. Wilcox,* 131 N. C., 707.

The defendant submitted a prayer for instruction in reference to the defendant acting under the coercion of her husband, and excepted to portions of the charge upon that phase of the case. Upon this subject his Honor charged at some length. He substantially told the jury that where a married woman commits a crime in the presence of her husband it is presumed, in the absence of proof to the contrary, that she did it under his coercion. If you find that the acts leading up to the abduction charged were committed in the presence of the husband of the defendant, and that the actual taking of Clara Gibbs (652) away from Lexington was done by the defendant and her husband, the husband always being present, then the law presumes that the part taken by the defendant was under the coercion of her husband, and unless the State has satisfied you that this presumption is not true, then you should find that the defendant is "not guilty."

Should you find that the act was done under the coercion of the husband in this indictment against the wife, it is not necessary to show that the act was done literally in sight of the husband, but it is sufficient to raise the presumption if it was done near enough to her husband to be under his immediate control or influence.

If the jury find from the evidence that the defendant committed the act or acts for the commission of which she stands indicted, in the presence of her husband or near enough to him to be under his immediate control or influence, then the law raises the *prima facie* presumption that she acted under the coercion of her husband; and if the jury further find that the State has not rebutted this *prima facie* presumption the jury should find the defendant not guilty.

We think this is a statement of the law of which the defendant has certainly no right to complain. *S. v. Williams,* 65 N. C., 398. The court gave her the benefit of a presumption, but it is not a conclusive presumption. The presence of the husband makes out a *prima facie* case of coercion only, and is subject to be controlled by evidence that the wife acted voluntarily and not by compulsion. 15 A. & E., 904; 1 Russell on Crimes, (9 Am., Ed.), 35.

It is not necessary to decide the question, but it may well be doubted whether the defendant could avail herself of such defense against a charge of this character, viz., the abduction of a girl by persuasion. It has been said by the early writers on criminal law that "if the offense be of such a nature that it may be committed by the wife alone, without the concurrence of her husband, she may be punished for it without her husband." Archbold's Crim. Pr. and Pl., 6; I Hawkins Pleas, (653) ch. 1, sec. 13. Among the crimes excepted from the rule are keeping bawdy-houses and offenses of a like character. This principle would cover, we are inclined to think, abducting girls by solicitation for immoral purposes, a business in which the defendant was more likely to be acting upon her own initiative rather than under the coercion of her husband.

We have examined the charge as a whole, and find it to be a full, clear, and correct presentation of the case to the jury and fully as favorable to the defendant as she had just right to expect.

No error.

Cited: S. v. Seahorn, 166 N. C., 377.

STATE v. G. HOUSTON DOVE.

(Filed 15 November, 1911.)

1. Murder—Self-defense—Evidence.

When there is evidence tending to show that the prisoner on trial for the murder of deceased had a quarrel with him at a near-beer stand, followed by a scuffle, and soon thereafter the deceased struck the prisoner down as the latter was leaving; that the prisoner kicked at deceased as he ran under a horse hitched to a buggy standing there, then ran around the buggy and pursued the deceased down the road a short distance, where the deceased was afterwards found with his throat cut, with evidence of identification of the prisoner's footprints there and exclamations of the deceased heard by witnesses at the time and place, that prisoner "has cut me to death"; that the prisoner soon returned bloody, saying

"it was the blood of the other fellow": *Held*, there was no evidence to support the plea of self-defense, especially where a judgment of manslaughter has been rendered on the verdict.

2. Same—Aggressor.

When it appears by the prisoner's evidence, upon a trial for murder, that he and the deceased had words which brought on a conflict resulting harmlessly, in which he testified that he caught the deceased by the coat tail, when he fell to the floor; and soon thereafter there was another conflict on the same subject of quarrel, in which he testified that he kicked at the deceased when he was going around a buggy which separated them, thus renewing the difficulty, the question of self-defense is excluded under the admissions of the prisoner. *S. v. Garland*, 138 N. C., 678, cited and approved.

3. Same—Justifiable Homicide.

The principles of justifiable self-defense held to be applicable in *S. v. Dixon*, 75 N. C., 279, where one may repel force by force, against one who manifestly intends or endeavors by violence or surprise to commit a known felony such as murder and the like, is never permissible in its application except when the prisoner is free from legal blame at the beginning and an actual assault is being made with the present purpose to kill and with the present ability, real or apparent, to carry out the felonious purpose.

4. Murder—Witness—Declarations—Evidence—Impeachment.

Upon a trial for murder evidence is competent on the part of the State tending to show on cross-examination declarations on the part of defendant's witness, after the occurrence and before the trial, made to an officer charged with the duty of arresting the prisoner, that the latter was a bad man, when it has a direct tendency to contradict the testimony he had theretofore given in the prisoner's favor.

APPEAL from *Daniels, J.*, at February Term, 1911, of GRAN- (654) VILLE.

Indictment for murder. At the conclusion of the testimony the solicitor made formal announcement that the State would not ask for conviction of murder in the first degree. The court hereupon charged the jury and verdict was rendered, "Not guilty of the felony and murder charged in the bill of indictment, but guilty of manslaughter." Judgment on the verdict, and the prisoner excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General George L. Jones for the State.

V. S. Bryant and B. S. Royster for defendant.

HOKE, J. It was chiefly urged for error that his Honor declined to allow the jury to consider the plea of self-defense, being of opinion that there were no facts in evidence tending to support such a position. The homicide was shown to have occurred near Benehan, at about 8 o'clock

at night, on 27 January, 1911, and it appeared that the prisoner,
(655) the deceased, and others were at a near-beer stand, when the two had a quarrel, closed in a scuffle, and prisoner got deceased down and was on him; that deceased begged pardon; the parties got up and more beer was ordered, at prisoner's expense. The latter turned to go out, when deceased struck him on the side of the head, knocking him out of the door and flat down on his face. As he rose and got up, deceased ran by him and under a horse, which was hitched to a buggy, standing 7 or 8 feet from the door; that the prisoner kicked at deceased as he darted under the horse; then ran around the buggy and pursued the deceased down the road. Fighting was heard between them, and deceased was heard to say, "Lord have mercy, he has cut me to death!" One witness testified to this exclamation, and said further that he heard a voice, which he took to be prisoner's, reply: "If I haven't, I will." That after this, and in about two minutes from the time the two had disappeared down the road, the prisoner returned to the beer stand, saying deceased had gone home. When prisoner came back he was very bloody; was bleeding himself, from a cut in the neck or side of the head, apparently made by the bottle, and was very bloody on his shirt and both sleeves, the right sleeve being the bloodiest. In this connection a witness stated that prisoner said: "The blood on my arm didn't come out of me; it came out of the other fellow." The body of the deceased was found the next morning, with the throat cut, the doctor testifying that the wound was sufficient to cause death. Another witness said that the cut seemed to have been done from behind. About 150 feet from the beer stand, 30 or 40 feet from the road, in the direction the prisoner and deceased had gone, there was found a pool of blood and signs of a struggle, and the shoe of the prisoner fitted in some of the tracks near this place and going to it and returning to the road; and some little distance beyond this point was the place where the body was found, and there was the track of one person, that of deceased, from the place where the last struggle occurred, to the body.

The prisoner, testifying in his own behalf, admitted having entered into the struggle, in the beer stand; having kicked at deceased as
(656) he went under the horse, and having followed him around the buggy and had a few licks with him, but denied having followed him down the road or having done the cutting. The prisoner's statement being, in part, as follows: "Joe said let's go to the beer stand. Four or five of us went, and I treated the crowd. Then Joe treated. While drinking beer he said, 'Some one told me you were going to throw some beer in my face, and I said if you did I was going to fight you.' I said it didn't amount to anything. Another time he said, 'Don't throw that beer in my face.' I told him that I would not, and whoever told

him that I would, told a lie. He said whoever called him a lie had to fight. I caught him by the coat and he fell on the floor. Turned on his side. Tried to get up. I told him to wait. I believe he proposed to fight, and I did not want to fight, but if nothing else would do I could accommodate him. I told Mangum to give him beer. I turned to go home, and as I turned to step out he struck me on the side of the head with a beer bottle and knocked me out of the door. The buggy was 5 or 6 feet from the door. As soon as I recovered I jumped up and looked back in the house, then looked and saw him going under the horse. I turned and kicked at him. I ran around buggy and met him on the other side. We passed several licks. Several people were there then. We went a little further off and somebody cut me on the neck. I ran far enough around to get out of the way, 5 or 10 steps, then turned and came back in the door. I saw that I was bleeding when I got inside and don't know what cut me. Mangum said it was the beer bottle. I didn't feel the cut until I was outdoors, near the buggy, knocking. The doctor came. I washed my neck before he came and I didn't tell any one that the blood on my coat sleeve came from the other man. I don't remember having any knife. Joe said something about fighting and cutting and took out his knife. I did take my knife out, but don't know what became of it. I did not open it. I told them that they might find my knife at the door where the fight occurred."

There were other facts tending to establish guilt, and, on persual of the entire testimony, there is no room for doubt that the prisoner killed the deceased, and it is equally clear that his Honor cor- (657) rectly ruled that there was no evidence to support the plea of self-defense. According to his own statement, and whether the occurrence is held to consist of one fracas or two, the prisoner was an aggressor. In the first place, "he caught the deceased by the coat when he fell to the floor," and in the second place he kicked at the deceased as he fled, and then, going around the buggy, renewed the difficulty when there was no necessity for him to do so, real or apparent, for his own protection; and in either aspect, the principle of self-defense is excluded and the prisoner is guilty of manslaughter at the least. The doctrine applicable, as it obtains in this State, being stated in *Garland's case* as follows: "It is the law of this State that where a man provokes a fight by unlawfully assaulting another, and in the progress of the fight kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the original assailant to kill in order to save his own life." *S. v. Garland,* 138 N. C., 678, citing with approval Foster's Crown Law, 276, and *S. v. Brittain,* 89 N. C., 481.

Apart from the testimony as to the origin of the difficulty, there is no error to prisoner's prejudice, certainly in the verdict convicting him

of the crime of manslaughter. *S. v. Kendall,* 143 N. C., 659-665; *S. v. Peter Johnson,* 48 N. C., 266. And this view of the homicide is the sufficient answer to another objection, earnestly insisted on by the prisoner, that his Honor declined to give his prayer for instruction No. 8, as follows: "A man may repel force by force, in defense of his person against one who manifestly intends or endeavors by violence or surprise to commit a known felony, such as murder and the like. In such cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kills him in so doing, it is called a justifiable self-defense," the prayer citing *S. v. Dixon,* 75 N. C., 279. The decision in *S. v. Dixon* announces a correct principle of law on the facts as they are there presented, but it has been several times referred to as sustaining a doctrine of "rare and dangerous application," and is never permissible except when actual assault is being made with a present purpose to kill and with the present ability, real or apparent, to carry out the felonious (658) purpose. *S. v. Kennedy,* 91 N. C., 572; *S. v. Blevins,* 138 N. C., 670. In this last case, speaking to the position, the Court said: " True, as said in one or two of the decisions, this is a doctrine of rare and dangerous application. To have the benefit of it, the assaulted party must show that he is free from blame in the matter; that the assault upon him was with felonious purpose, and that he took life only when it was necesary to protect himself. It is otherwise in ordinary assaults, even with deadly weapons. In such case a man is required to withdraw if he can do so, and to retreat as far as is consistent with his own safety. *S. v. Kennedy,* 91 N. C., 572. In either case, he can only kill from necessity. But in the one he can have that necessity determined in view of the fact that he has a right to stand his ground; in the other, he must show as one feature of the necessity that he has retreated to the wall." In this case the evidence tends to show that the prisoner went around the buggy to renew the assault on the deceased; followed him down the road and killed without necessity. Therefore it is that the right of self-defense and the manner and extent of it, as correctly stated and approved in *S. v. Hill,* 141 N. C., 769, *S. v. Hough,* 138 N. C.,663, and *S. v. Dixon, supra,* may not be allowed to avail the prisoner. Nor can the exceptions to the rulings of the court on questions of evidence be sustained.

It appears that on the trial one J. H. Keith, a witness for the prisoner, had testified to his good character, and the State, over objections, was allowed to show declarations on the part of witness, after the occurrence and before the trial, made to the officer charged with the duty of arresting the prisoner, that the latter was a "bad man, dangerous when drunk, and might kill him, etc." The prisoner relying

upon *S. v. Holly,* 155 N. C., 485, in support of the objection. In that well-considered opinion by *Associate Justice Allen* it was correctly held that a witness who had testified to the good character of a prisoner being tried for murder could not be cross-examined as to his knowledge or having heard rumors of *particular facts* or *occurrences* which tended to impeach such character, nor for the purpose of weakening the force of the witness's testimony; but the evidence (659) admitted is not of that character. On the contrary, it consisted of declarations from the witness himself, having a direct tendency to contradict the testimony he had given in prisoner's favor, and was clearly admissible, under the principles approved in *Holly's case* and the other decisions there cited. There is no error in the record, and the judgment of the Superor Court is affirmed.

No error.

Cited: S. v. Gaddy, 166 N. C., 346; *S. v. Kennedy,* 169 N. C., 331.

STATE v. GEORGE MITCHELL.

(Filed 15 November, 1911.)

Spirituous Liquors—Barter and Exchange—Loan of Liquors—Interpretation of Statutes.

When one lends spirituous liquor with the understanding that it shall be returned in kind, the title to the liquor passes absolutely for the consideration of its being replaced, and the transaction is a barter or exchange and comes within the meaning of the word "sale," and therefore is a violation of the State prohibition law. Laws Extra Session of 1908, ch. 71.

APPEAL from *W. J. Adams, J.,* at May Term, 1911, of FORSYTH.

Criminal action for selling liquor in violation of the prohibition law. The defendant was convicted in the recorder's court, and upon appeal to Superior Court was again convicted, and appealed to the Supreme Court.

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

Louis M. Swink and J. S. Grogan for defendant.

BROWN, J. There is but one question presented, and that is, Is it a violation of the prohibition act for one to lend another whiskey upon the understanding that other whiskey will be returned in place of it?

The evidence is contradictory. The prosecuting witness testified that he purchased the liquor for cash, and paid 50 cents down when he made the purchase. The defendant testified that he furnished
(660) whiskey to the prosecuting witness, but that it was a loan, and upon the understanding that the whiskey was to be returned as soon as an order made by prosecuting witness could be received. The point comes up on the charge of the court, who instructed the jury as follows:

"If you find from the evidence, beyond a reasonable doubt, that the witness Curry applied to the defendant for liquor, and it was then and there agreed by and between the witness Curry and the defendant that the defendant would let Curry have whiskey in consideration of an agreement on the part of Curry to deliver to the defendant other whiskey in return for that which he received, and after this agreement was made the defendant delivered to the witness Curry a quantity of whiskey, in consideration of the agreement of Curry to deliver to the defendant a like quantity when Curry's whiskey arrived on the train, such transaction, if not a technical sale, would nevertheless be such as is made unlawful by the statute to which your attention has been directed, and your verdict will be 'guilty.'"

This exact question has never been decided in this State, and it has been decided both ways in other jurisdictions.

The Cyclopædia of Law and Procedure says: "Where the statute prohibits the sale of liquor by certain persons or under certain conditions, when the indictment distinctly charges the sale, there can be no conviction on evidence which proves a gift or exchange of liquor as distinguished from a sale."

Again, on p. 181 of the same volume: "A loan of liquor, with the understanding that it is to be repaid in other liquor of the same kind, is not a sale." 23 Cyc., 269. The author of the article in Cyc. is Henry C. Black, author of the well-known work on Intoxicating Liquors.

The cases cited in the notes do not appear to fully sustain the text. It is held in Georgia that an exchange of liquor does not constitute a sale. *Skinner v. State,* 97 Ga., 690. Same in Arkansas. *Robinson v. State,* 59 Ark., 341. It was so decided in Texas in *Ray v. State,* 46 Tex. Crim. Rep., 176, but specially held otherwise and the *Ray case* overruled in *Tombeaugh v. State,* 98 S. W., 1054.

The true rule, we think, is clearly stated by the Supreme
(661) Court of Texas in the latter case: "While the doctrine of an accommodation exchange seems to have been recognized by this Court in the *Ray case, supra,* in our opinion that case should be overruled. There might be a case—to illustrate, where some mem-

ber of a family should be bitten by a snake, or some venomous insect —that would require the immediate use of whiskey, with no time to send for a physician to obtain a prescription. In such case, it might be allowable to borrow whiskey from a neighbor on account of such emergency. We do not believe the doctrine should be extended beyond some pressing necessity; certainly not to a case of a loan by one club member of whiskey to a stranger in social drinking as a beverage. In our opinion, it makes no difference in this respect whether the party loaning be a club member or not. His exchange of whiskey to another person under the circumstances here detailed would be a sale, and comes under the doctrine announced in *Keaton's case,* 36 Tex. Crim., 259. We fail to see any difference between such transaction and the payment of money for the whiskey at the time."

These cases appear to sustain that view: *Com. v. Clark,* 80 Mass., 367; *Com. v. Abrams,* 150 Mass., 393; *Leach v. State,* 53 S. W. (Texas), 630; *Taggart v. State,* 97 S. W. (Texas), 95; *Sparks v. State,* 99 S. W. (Texas), 546; *Coleman v. State,* 54 Tex. Crim. App., 578; *Beckham v. State,* 54 Tex. Crim. App., 28; *Wilson v. State,* 54 Tex. Crim. App., 13.

Justice Manning, in *S. v. Colonial Club,* 154 N. C., 177, reviews the authorities to some extent, as to what constitutes a sale. Quoting from 2 Black. Com., 446, he says: "A sale is a transmutation of property from one man to another in consideration of some price or recompense in value."

Justice Dilliard in *S. v. McMinn.,* 83 N. C., 668, defines a sale as follows: "A sale is the transmutation of the property in a personal chattel from one to another on a *quid pro quo,* paid or agreed to be paid, and such a change of property in the retail of spirituous liquors by the small measure is usually effected by the delivery of the article and the payment of the price simultaneously; but it may be made in other modes." etc.

We think, tested by these definitions, in any view of the evi- (662) dence the transaction constituted a sale and was a clear violation of the prohibition law of this State.

The transaction was nothing more or less, according to the defendant's own evidence, than a barter of liquor. The title to the liquor passed absolutely, and the same rules of law are applicable to the transaction whether the consideration of the contract is money or other liquor to be delivered at some future date.

As said in *Commonwealth v. Clark, supra,* by the Supreme Court of Massachusetts: "It can make no essential difference in the rights and obligations of parties, that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money, which is but the representative of value or property."

In adopting the prohibition statute enacted by the General Assembly, our voters had in view the prevention of the traffic in intoxicating liquors in the State. If it were allowable to carry on an exchange or barter for whiskey, the law would be rendered practically worthless and incapable of enforcement. Whenever a person was charged with an illicit sale of liquor the defense in most cases doubtless would be that the transaction was only an exchange or barter.

Our statute is very broad and comprehensive in its terms, and its framers evidently had in view not only the prohibition of a sale of liquor for money, but for barter likewise. It reads: "It shall be unlawful for any person or persons, firm or corporation, to manufacture or in any manner make, or sell, or otherwise dispose of for gain," etc. Public Acts, Extra Session, 1908, ch. 71.

We think his Honor was correct in his instructions to the jury.

No error.

INDEX

ABDUCTION.

1. *Abduction—Children Under Fourteen—Females—Evidence Sufficient.*—Upon trial for abducting or inducing any child under fourteen years, residing with father, mother, etc. (Revisal, sec. 3358), evidence is sufficient for a conviction which tends to show that the defendant and her husband resided at the town of C. and prosecutrix in the town of L.; that defendant solicited the prosecutrix, a girl under fourteen years of age, to go to C. with her, stating that she should have fine clothes, plenty of money, and an easy time, and after several subsequent refusals resulting in indecision, the prosecutrix consented to go and did go to C. with defendant and her husband, the latter paying railroad fare and defendant suggesting a change of dress and doing other things to effect a concealment of the prosecutrix; that from expressions used at C. defendant expected to bring some girls home with her; that after keeping the prosecutrix overnight at C., the defendant refused to let prosecutrix go back to her home; and that she was found by the police at defendant's house and was carried back home by her father. *S. v. Nowell*, 648.

2. *Abduction—Husband and Wife—Coercion—Presumptions—Rebuttal—Burden of Proof—Instructions.*—Upon evidence to sustain the charge, it is not error for which the defendant, charged with abduction of a girl under fourteen years of age (Revisal, 3358), can complain, for the judge to instruct the jury that where a married woman commits a crime in the presence of her husband it is presumed, in the absence of proof to the contrary, that she did it under his coercion, and unless the State has satisfied them that this presumption is not true, then they should return a verdict of not guilty. *Semble*, that in cases of this character the presumption that the wife was acting under coercion of her husband does not obtain. *Ibid.*

ADEMPTION. See Wills.

ADMISSIONS. See Pleadings; Instructions.

ADVERSE USER. See Water and Water-courses.

AMENDMENT. See Pleadings; Demurrer.

ANCIENT DOCUMENTS. See Evidence.

APPEAL AND ERROR.

1. *Appeal and Error—Second Appeal—Former Decision—Form of Judgment Below.*—A former judgment of the Supreme Court will not be considered on another appeal from the Superior Court, and on this appeal the only question presented is whether the form of the judgment entered by the lower court is in conformity with the former opinion. *Carson v. Bunting*, 29.

2. *Appeal and Error—Drainage Commissioners—Motion to Dismiss—Premature Appeal.*—The appeal by defendant from the refusal of the

APPEAL AND ERROR—*Continued.*

court to dismiss this action brought against him to determine the title to the office of drainage commissioner is premature and the appeal dismissed. *Mann v. Gibbs*, 44.

3. *Judgment—Questions of Law—Appeal and Error.*—When the lower court rests its judgment as to the removal of an administrator for an interest adverse to the intestate's estate solely upon a question of law, it is reviewable on appeal. *Morgan v. Morgan*, 169.

4. *Appeal and Error—Case—Counter-case—Settlement—Failure to Request Judge.*—Upon the service of a counter-case on appeal it is the duty of the appellant to immediately request the judge to appoint a time and place to settle the case under Revisal, sec. 591, and upon his failure to do so the case of the appellee becomes the case on appeal. *Burlingham v. Canady*, 177.

5. *Sheriff's Returns—Evidence, Prima Facie—Printing Record.*—The appellee, having disagreed to the appellant's statement of the case, had his counter-case served, as appears by the return made by the sheriff thereon. Both cases were then filed in the clerk's office, but by an error which the clerk explained, only the appellee's case was certified to the Supreme Court. Upon an affidavit of appellant's counsel it was contended that no counter-case had been served: *Held*, (1) the return of the sheriff upon the counter-case is *prima facie* evidence that the counter-case had been served as therein stated, and it cannot be contradicted by a single affidavit; (2) as the appellant had failed to request the judge to settle the case under the statute, the counter-case is the case on appeal, which not having been certified and printed, under the rule, the judgment below is affirmed, on motion of appellee. *Ibid.*

6. *Appeal and Error—Second Appeal—Matters Concluded.*—Questions which were well within the scope of the inquiry of the same case on a former appeal will not be considered on a second appeal, and the parties are concluded by the former decision. *Riley v. Sears*, 267.

7. *Appeal and Error—Contention of Parties—Admissions—Instructions—Procedure.*—When made for the first time on appeal, an exception to the charge that it did not correctly state the admissions of the parties will not be considered, as this should have been called to the attention of the judge at the time. *LaRoque v. Kennedy*, 360.

8. *Appeal and Error—Statute of Limitations—Burden of Proof—Evidence—Objections and Exceptions.*—When without exception appearing, and jury trial waived, the trial judge has found against a party pleading the statute of limitations, as to whether the ruling of the judge can be reviewed on appeal, the burden being upon the party pleading the statute, *quære*. *Moore v. Westbrook*, 482.

9. *Appeal and Error—Taxing Costs—Reference—Questions of Law.*—A ruling of the Superior Court judge that as a matter of law he is precluded by a former judgment from taxing the cost of a reference, is reviewable in the Supreme Court. *Horner v. Water Co.*, 494.

10. *Appeal and Error—Reference—Trial Judge—Judgment Pro Forma—Constitutional Law.*—It is required of the trial judge to review and

APPEAL AND ERROR—*Continued.*

pass upon exceptions to a report of a referee as to the facts found and the conclusions of law thereon, and a *pro forma* judgment entered by him for any reason cannot be reviewed by the Supreme Court on appeal under Article IV, sec. 8, of our Constitution, for it is only *decisions* of the lower courts which may thus be considered. *Overman v. Lanier*, 537.

11. *Appeal and Error—Reference—Pro Forma Judgments—Costs—Records —Another Appeal.*—It appearing from the statement made in the Supreme Court by the parties of record, that the trial judge entered a *pro forma* judgment, by consent of both parties, without consideration, upon a report of a referee, the cause is remanded to the judge holding the courts of the district from which the appeal comes, with direction that he carefully review the findings of fact and conclusions of law of the referee wherever excepted to and enter his deliberate judgment as to each exception. Each party is taxed with one-half the costs of appeal, and the appellants allowed to withdraw the record and use so much of it as is useful and appropriate, should he deem another appeal desirable. *Ibid.*

12. *Appeal and Error—Final Judgment—Procedure.*—A premature appeal will be dismissed upon motion duly made. The complaining party should note exceptions to the ruling of the trial judge and appeal from final judgment. *School Trustees v. Hinton*, 586.

13. *Appeal and Error—Former Appeal.*—This case was tried substantially in accordance with the decision of the Supreme Court previously rendered, and no error is found. *Dail v. Taylor*, 588.

14. *Appeal and Error—Certiorari—Appeal Dismissed—Assignments of Error—Printing Brief.*—Case docketed and dismissed under Rule 17, the appellant moving too late for writ of *certiorari*, and not having made out his assignments of error or grouping his exceptions, or filing his brief in time. *Rosemond v. McPherson*, 593.

15. *Appeal and Error—Error in Transcript—Certiorari—Ex Mero Motu—Correction.*—In this appeal by the prisoner from verdict and judgment of murder in the first degree, his counsel objected to the judgment, as the record set up disclosed a verdict of "guilty of the felony and murder in manner and form as charged in the bill of indictment." *Ex mero motu* the Supreme Court sent down an instanter *certiorari*, to which the clerk returned that the entry on the docket showed that the jury returned their verdict in writing as follows: "2. Is the defendant guilty of the felony and murder of which he stands charged? Answer: Guilty of murder in the first degree." The clerks of the Superior Courts are cautioned that they send up transcripts that are "true, full, and perfect," and *Held*, no error in the judgment rendered below in this case. *S. v. Sandlin*, 624.

16. *Appeal and Error—Evidence—Exclusion of Answers.*—On appeal, exceptions to exclusion of answers will not be reviewed when it does not appear what was the nature of the testimony excluded. *S. v. Leak*, 643.

APPEAL FROM CLERK. See Partition.

ARCHITECTS. See Liens.

ARREST. See Courts.

ARREST AND BAIL.

Appeal and Error—Injury to Person—Execution on Person—Insolvent Debtor's Oath—Habeas Corpus—Valid Discharge—Final Judgment—Bond to Stay Execution—Bail.—Judgment being rendered by a court of competent jurisdiction against the defendant in a certain sum for an injury committed to person of the plaintiff—a tort—who appealed without giving bond to stay execution: *Held*, (1) upon the return of execution against defendant's property unsatisfied, an execution upon the person may issue (Revisal, 625, 727); (2) filing an inventory of his property, etc. (Revisal, sec. 1930), will not exempt the defendant from arrest; (3) the execution can only be stayed by giving a bond securing the judgment (Revisal, 598); (4) the writ of *habeas corpus* cannot be successfully sued out (Revisal, 1822, subsec. 2); (5) to obtain the benefits of the provisions of Revisal, 1930 to 1933, the defendant must show a valid discharge from imprisonment; (6) bail cannot be given to release the defendant pending his appeal in lieu of the bond to stay execution. *Howie v. Spittle*, 180.

ASSAULT. See Trespass.

ASSESSMENT. See Cities and Towns.

ASSIGNMENTS OF ERROR. See Appeal and Error.

ASSUMPTION OF RISKS. See Contributory Negligence.

AUCTIONS AND AUCTIONEERS.

1. *Mortgages—Auctioneer—Memorandum—Statute of Frauds—Principal and Agent.*—At a foreclosure sale of land under a mortgage, the auctioneer is the agent of the vendor thereunder for the purposes of the sale, and of the vendee who has become such under the prescribed conditions thereto. *Love v. Harris*, 88.

2. *Same—Signature of Vendee—Intent.*—It is not necessary that the auctioneer at a foreclosure sale subscribe the vendee's name to the memorandum of sale; it is sufficient if the vendee's name appears in the memorandum made by the auctioneer and the intention is manifested thereby to bind him to the sale. *Ibid.*

3. *Same.*—A memorandum made on the back of a notice of sale of land under a mortgage, immediately after the last and highest bid, "Sold to C. J. for $1,500, 22 January, 1910," is a sufficient memorandum to bind the vendee under the statute of frauds, the notice being an offer to sell the property and the memorandum written on the notice an acceptance according to its terms. *Dickerson v. Simmons*, 141 N. C., 325, cited and distinguished. *Ibid.*

AUTOMOBILES. See Negligence.

BARTER AND EXCHANGE. See Intoxicating Liquors.

BILLS AND NOTES.

1. *Negotiable Instruments — Indorsees — Consideration—Notice—Verdict Inconsistent—Procedure.*—In an action brought by the indorsees of a negotiable instrument before maturity to recover against the makers,

BILLS AND NOTES—*Continued.*

the defense was that the note was without consideration and that the indorsees bought with notice at the time of purchase. Upon a former trial the jury found: (1) That the note was indorsed in due course before maturity; (2) that it was not given for a valuable consideration; (3) that the plaintiff's were not purchasers with notice. The presiding judge set aside the verdict on the third issue, and at a subsequent term the jury found that the plaintiffs were purchasers with notice, and the trial judge rendered judgment for plaintiff: *Held*, the findings of the issues by the two juries were inconsistent, and the verdict should have been set aside. *Hardy v. Mitchell*, 76.

2. *Negotiable Instruments—Want of Consideration—Defense.*—The absence of consideration for a negotiable instrument is a defense against any one not a holder in due course. Revisal, sec. 2176. *Ibid.*

3. *Negotiable Instruments—Due Course—Inconsistent Verdict.*—A finding by the jury, in an action upon a negotiable instrument, that the note was indorsed to plaintiff in due course involves the finding that the plaintiff was a purchaser for value, before due, and without notice of any infirmity, and is inconsistent with a further finding that the note was without consideration and that plaintiff purchased with notice. *Ibid.*

4. *Pleadings—Demurrer—Notes—Default of Interest—Maturity—Demand—Evidence—Summons.*—In an action brought upon a note before its maturity under a provision that the note would be due and payable ten days after demand for payment of interest thereon due, a demurrer to the complaint will be denied when there are allegations that demand had been made for the payment of interest after default, which necessarily implies that the demand was made on the defendant, and that the same had not been paid; and it appears from an inspection of the summons, which it is proper for the court to make in such instances, that the stated period of time had elapsed before the institution of the action. *Bank v. Duffy*, 83.

5. *Negotiable Instruments—Holder in Due Course.*—In order to establish the position of a holder in due course of a negotiable instrument so as to shut off counter-claims and defense otherwise available, it must be shown that the instrument is complete and regular on its face, and that title thereto was acquired in good faith, for value before maturity, without knowledge or notice of fraud or other impeaching circumstance; and, except when payable to bearer, the indorsement must be proved when it is denied. *Park v. Exum*, 228.

BOND ISSUES. See Constitutional Law; Drainage Districts.

BOOK ITEMS. See Evidence.

BRIDGES. See Highways.

BURDEN OF PROOF. See Appeal and Error; Negligence.

Negotiable Instruments — Indorsement — Pleadings — Burden of Proof. — When, in an action upon a negotiable instrument claimed by the plaintiff as an indorsee for value, in due course, without notice of any in-

BURDEN OF PROOF—*Continued.*

firmity of the instrument, the answer denies the validity of the indorsement, the burden is upon the plaintiff to show that the instrument had been indorsed and that otherwise he was a holder in due course, in order to shut off the defense arising on the testimony, that it was procured from the makers by fraud or deceit. *Park v. Exum*, 228.

CARRIERS OF GOODS. See Railroads.

1. *Carriers of Goods—Evidence—Condition of Goods at Destination—Negligence—Presumption—Rebuttal—Questions for Jury.*—When goods are shipped over several connected lines of carriers and are found in a damaged condition at destination, there is a presumption that the injuiry was negligently inflicted by the last carrier, subject to be rebutted by evidence, and when the evidence in rebuttal is sufficient a question for determination by the jury is raised. *Boss v. R. R.*, 70.

2. *Carriers of Goods—Penalty Statutes—Damages—Claim—Requirements—Interpretation of Statutes.*—Revisal, sec. 2634, imposing a penalty on common carriers for failure to settle claims for loss or damages to property while in their possession as such, within certain different periods of time for shipments wholly within the State and for interstate shipments, requires that, in order to recover the penalty, the claim must be filed with the company within the time specified and applicable. *Currie v. R. R.*, 432.

3. *Same—Form Sufficient.*—In a suit against a carrier to recover a penalty for failure to settle a claim relating to a shipment of molasses, under Revisal, sec. 2634, the following written demand, "Seaboard Air Line. Bought of N. A. Currie, merchant and cotton buyer, 1 puncheon of molasses, 118 gallons, at 40 cents a gallon. Shipped from Wilmington": *Held*, sufficient. *Ibid.*

4. *Carriers of Goods—Live Stock—Damages—Stipulated Notice—Knowledge of Agent—Liability of Carriers.*—When by reason of the negligence of the carrier a shipment of horses is injured in transportation under its live-stock bill of lading, the carrier is liable in damages, notwithstanding the notice required by its bill of lading has not been given in accordance with its terms, *i. e.*, "the claim for such loss or damage shall be made in writing, verified by the affidavit of the shipper or his agent, and delivered to an authorized officer or agent of the carrier within five days from the time said stock is removed from the car, etc.," if the proper agent of the defendant knew of the injury to the live stock at the time they were being unloaded from the car. *Kime v. R. R.*, 451.

CARRIERS OF PASSENGERS. See Railroads.

Carriers of Passengers—Mileage Book—Exchange for Tickets—Wrongful Refusal—Ejection from Train—Damages.—When the owner of a mileage book has properly requested the carrier's agent for a ticket in exchange for his mileage, to which he was entitled under the rules of the company, and has been refused by the agent, it is incumbent upon the conductor of the carrier to take the mileage on the train for his transportation; and the ejection of the passenger by the

CARRIERS OF PASSENGERS—*Continued.*

conductor because the former did not have the ticket and, after explanation, had insisted on his taking the mileage to destination, subjects the carrier to the payment of the damages sustained in consequence. *Dorsett v. R. R.*, 439.

CASE ON APPEAL. See Appeal and Error.

CAUSAL CONNECTION. See Negligence.

CERTIORARI. See Appeal and Error.

CHILDREN. See Master and Servant; Abduction.

CHURCHES. See Religious Societies.

CITIES AND TOWNS.

1. *Cities and Towns—Defects in Streets—Injury to Pedestrians—Negligence—Notice, Actual or Implied.*—It is the duty of the governing authorities of a town to keep its streets, sidewalks, and drains in a reasonably safe condition so far as this can be accomplished by the exercise of proper and reasonable care and continuing supervision; and, in such cases, upon the issue as to defendant's negligence, under conflicting evidence the jury are to determine whether the authorities had notice or knowledge of the defect complained of as having caused the injury, in time to have remedied it, or whether it had existed for such length of time and under such circumstances that they should have discovered and repaired it. *Johnson v. Raleigh*, 269.

2. *Cities and Towns—Ordinances—Discrimination—Nuisances—Power of Courts.*—The courts will not inquire into the motives of the authorities of a town in passing an ordinance, or as to whose influence caused its passage; but when an ordinance depends upon the power of the town authorities to declare a certain act a nuisance, or whether the ordinance is oppressive or discriminative, it is subject to judicial review. *Barger v. Smith*, 323.

3. *Cities and Towns—Bond Issues—Taxation—Sewerage and Water System—Necessaries.*—Bonds issued by a town for the purpose of extending its water and sewerage system and for making certain necessary street improvements are necessary expenses. *Murphy v. Webb*, 402.

4. *Cities and Towns—Bond Issues—Taxation—Necessary Expenses—Legislative Restrictions—Constitutional Law.*—The Legislature may restrict or limit the power of incorporated towns or cities to tax or contract debts for purposes which fall within the class of necessary expenses, for they are but the State's instrumentalities for the administration of local government; and when this restriction is thus placed upon them, or it is required of them to submit the question of a bond issue to popular vote, and an issue of bonds is made without compliance therewith, the issue is invalid. Constitution, Art. VII, sec. 4. *Ibid.*

5. *Bond Issue — Taxation—Necessaries—Restrictions Repealed.*—Chapter 239 of the Private Laws of 1889 is the charter of the town of Murphy, and section 17 thereof requires that, to levy a tax or issue bonds for

CITIES AND TOWNS—*Continued.*

certain necessary expenses, the question should first be submitted to a popular vote. Chapter 387, sec. 2, Private Laws of 1911, refers to the same subject-matter and repeals section 17 of the Public Laws of 1889, which has no bearing upon or relevancy to the same subject-matter. *Held*, the reference to the Public Laws was evidently a clerical error, and the Laws of 1911 are construed to repeal section 17 of the Private Laws of 1889, ch. 239, sec. 17, so as to take away the legislative restrictions therein imposed. *Ibid.*

6. *Municipal Bonds—Laws 1911, Chapter 86.*—The Laws of 1911, chapter 86, has no application to cities and towns having special provisions authorizing issuing of bonds for construction of sewerage and waterworks, as is the case with the town of Murphy. *Ibid.*

7. *Cities and Towns—Street Improvements—Abutting Owners—Assessments—Notice—Front-foot Rule.*—The proper authorities of a town, acting under legislative powers conferred, may pass a valid and enforcible ordinance requiring the owners of property abutting upon a street to curb and gutter the portion of the street in front of their property according to certain stated specifications, the one-half of the cost to be borne by the town and the other half by the owners of abutting property according to frontage, with provision that on failure of the owners to make these improvements within thirty days after due notice given, the work shall be done by the town authorities and the proportionate part of the cost thereof assessed against the property of the abutting owners in the manner stated. *Tarboro v. Staton*, 504.

8. *Same — Legislative Powers — Governmental Functions — Equality — Power of Courts.*—While these assessments are upheld on the theory of special benefits conferred, and which bear some reasonable relation to the burdens imposed, authority to make them is referred to the sovereign power of taxation, which is primarily and as a rule exclusively a legislative power; and where the Legislature, or a municipal government exercising legislative power expressly conferred for the purpose, has provided for a local improvement of this character, its action is conclusive as to the necessity for the improvement; and in establishing general rules, by any of the recognized methods, imposing special assessments for its construction and maintenance and in applying these rules or methods to the property of an individual owner, the courts are permitted to interfere only in rare and extreme cases, in which it is clearly manifest that the principle of equality has been entirely ignored and gross injustice done. *Ibid.*

9. *Same—Resulting Benefits—Equalization—Constitutional Law.*—Where a municipal ordinance of the kind indicated directed the construction of a curb and gutter along a public street, one-half of the cost to be borne by the town and the other half by the abutting property-owners, to be assessed according to the front-foot rule, an assessment according to the rule established of $63.12 against plaintiff's property having a frontage of 252 1-2 feet is not so unreasonable or oppressive as to justify the interference of the court, and the position is not affected by the fact that the commissioners in making the assessment did not, in the particular instance, take into consideration the question of special benefits to the owner's lot. *Ibid.*

CITIES AND TOWNS—*Continued.*

10. *Cities and Towns—Street improvement—Abutting Owners—Assessment —Notice.*—The provision of a statute affording an abutting owner on a street ample opportunity to appear and question the amount or validity of an assessment made on his property for street improvement there, is valid. *Kinston v. Loftin*, 149 N. C., 255, cited and approved. *Ibid.*

CLAIM AND DELIVERY.

1. *Claim and Delivery — Mortgages — Payments—Other Property—Pleadings—Admissions—Burden of Proof—Appeal and Error.*—In defense to an action of claim and delivery of mortgaged property, the defendant contended, among other things, that certain tobacco delivered to the plaintiff, not embraced in the mortgage, was sold by the plaintiff, who retained the proceeds of the sale, except $112, which he paid to a certain agricultural lienor, at the request of the plaintiff. The amount due under this lien was admitted in the pleadings, and, *Held*, error for the trial judge to put upon the plaintiff the burden of proving it. A new trial is ordered, as the record does not disclose whether the jury, in their verdict, allowed plaintiff this as a credit. *Carroll v. James*, 68.

2. *Wrongful Conversion—Severance of Logs—Good Faith—Innocent Purchaser—Cost of Hauling—Measure of Damages—Claim and Delivery —Waiver.*—In an action for the wrongful conversion of certain sawmill logs which had been purchased in good faith from the supposed owner of the land, but who had in fact but a life estate therein, the measure of damages against an innocent purchaser for value will not be increased by the fact that the logs had been hauled at a great expense to a public landing, by water, and there sold; for in the absence of evidence of any increase in the value of the logs otherwise, the damages will be the value of the logs at the place from which they were cut; and while it would have been otherwise had the action been one of claim and delivery, the plaintiff, by his action, has waived his right thereto. *Wall v. Holloman*, 275.

3. *Demurrer—Parties—Claim and Delivery—Replevy.*—The defendant claimed the ownership of personal property under execution sale in proceedings brought against his debtor, to which the plaintiff was not a party; and plaintiff brought his action for the possession of the property under a prior registered mortgage securing a note past due. The defendant gave a replevy bond for the retention of the property, and not having denied in his answer the allegation that plaintiff was the T. A. K. Company, demurred *ore tenus* that the complaint did not allege the fact of incorporation, if the plaintiff were a corporation, or the names of the partners, if a partnership: *Held*, a demurrer *ore tenus* on the ground of defect of parties will not be sustained. *Kochs v. Jackson*, 326.

CLAIMS. See Interpretation of Statutes.

COERCION. See Husband and Wife.

COLLISION. See Evidence.

COMMISSIONERS. See Drainage Districts.

COMPENSATION. See Executors and Administrators.

CONDITIONS PRECEDENT. See Contracts.

CONFERENCE. See Religious Societies.

CONSTITUTION OF NORTH CAROLINA.

Art. IV, sec. 8. The trial judge may not enter a *pro forma* judgment confirming the report of the referee. It is only his decisions which may be reviewed in the Supreme Court. *Overman v. Lanier*, 537.

Art. VII, sec. 7. A school building is not a necessary expense and bond issue therefor should be submitted to vote of the people. *Ellis v. Trustees*, 10.

Art. VII, sec. 7. When there is a legislative requirement to submit a bond issue for "necessaries" to vote of the people, it must be done to make the issue of bonds a valid one. *Murphy v. Webb*, 402.

CONSTITUTIONAL LAW.

1. *School Districts—Indebtedness—Constitutional Law—Vote of People.*—A special school district created by the Legislature is subject to the restrictions and limitations of the Constitution in reference to municipal indebtedness, and to the methods and powers of taxation therein prescribed. *Ellis v. Trustees*, 10.

2. *Same—Bond Issues—Schoolhouse—Necessary Expense—Injunction.*—The erection of a school building is not a necessary expense within the meaning of Art. VII, sec. 7, of our Constitution, and an issue of bonds for that purpose by a special school district is invalid and may be enjoined, unless the proposed issue shall have accordingly been submitted to a vote of the people. *Ibid.*

3. *Constitutional Law—Married Women—Jus Disponendi—Husband and Wife—Contracts—Fraud.*—The Constitution gives a married woman full power of *jus disponendi* of her personalty, and there is no restriction imposed thereon by statute; and hence an absolute conveyance thereof from a wife to her husband is valid, except when procured by fraud or duress the transaction can be impeached just as if made to any one else. The right of married women to contract and convey real and personal property summed up by CLARK, C. J. *Rea v. Rea*, 529.

4. *Appeal and Error—Reference—Trial Judge—Judgment Pro Forma—Constitutional Law.*—It is required of the trial judge to review and pass upon exceptions to a report of a referee as to the facts found and the conclusions of law thereon, and a *pro forma* judgment entered by him for any reason cannot be reviewed by the Supreme Court on appeal under Article IV, sec. 8, of our Constitution, for it is only *decisions* of the lower courts which may thus be considered. *Overman v. Lanier*, 537.

5. *Primary Elections—Legislative Acts—Constitutional Law.*—An act providing for a primary system for election to a public office is constitutional and valid. *S. v. Cole*, 618.

CONTEMPT. See Courts.

CONTINUANCE. See Courts.

CONTRACTS. See Insurance; Deeds and Conveyances; Jurisdiction.

1. *Written Contracts—Parol Evidence—Conditions Precedent.*—While the express terms of a written contract may not be varied by a contemporaneous oral agreement, it may be shown by parol evidence that such delivery was on condition that the written contract was not to be operative until the happening of some contingent event, or that it was not to be regarded as a contract until the happening of the specified event. *Bowser v. Tarry*, 35.

2. *Contracts, Continuous—Agreement to Take Output of Mill—Termination at Will.*—A contract to take the output of plaintiff's shingle mill, wherein no time is fixed during which it is to last and none is fixed by usage, may be determined at the will of either party upon notice. *Pool v. Walker*, 40.

3. *Evidence—Goods Sold and Delivered—Memoranda—Corroboration.*—In an action to recover the price of cotton seed sold and delivered, it is competent in corroboration of the witness of defendant to introduce the seed book of defendant showing prices paid by the defendant for seed during the time in question, when the entries had been made by the witness himself. *Carson v. Blount*, 103.

4. *Standing Timber—Timber Deed—Unilateral Contracts—Time for Cutting—Expiration—Title to Uncut Timber.*—One who has purchased and had conveyed to himself growing timber, with the privilege of removing it within a given time, is under no obligation to cut and remove the timber, to that extent the contract being unilateral; and upon his failure to do so within the stated period, his right or estate therein is forfeited, and it inures, as a rule, to the owner of the land. *Wiley v. Lumber Co.*, 210.

5. *Standing Timber—Timber Deeds—Contracts—Interpretation.*—In construing a deed conveying the timber interests in lands, the intent of the parties as embodied in the entire instrument controls, and each and every part must be given effect, if it can be done by any fair and reasonable interpretation. *Ibid.*

6. *Standing Timber—Timber Deeds—"All Timber"—Interpretation of Contracts.*—Defendant purchased "all timber" on plaintiff's land under a contract wherein plaintiff was to cut and deliver the timber at defendant's log bed: *Held*, under a correct interpretation of the contract in this case, that the words "all timber" did not include such timber as was of no value, but only such as was fit to be used and sawed and put into boards for ordinary purposes for which timber of that character could be used by sawmill men. *Ibid.*

7. *Contracts—Breach—Tort Feasor—Damages.*—In the absence of specific stipulation, where one has entered into the enjoyment of a right conferred by contract, an interference with such enjoyment on the part of a tort feasor is not imputable to the grantor. *Investment Co. v. Postal Co.*, 259.

8. *Contracts—Cotton—Future Delivery—Wagering Contracts—Actual Delivery—Intent—Questions for Jury.*—A contract for future delivery of cotton, to be a wagering contract upon its face, must necessarily indicate the intention of both parties to have been that the cotton itself should not be delivered and that the contract should be discharged only by the payment of the difference between the contract and the market price. *Harvey v. Pettaway*, 375.

CONTRACTS—*Continued.*

9. *Contracts—Future Delivery—Wagering—Interpretation of Contracts.*—A contract for the sale and delivery of cotton will not be held void upon its face, as a matter of law, merely because it contains definite provision for an adjustment of damage on failure to deliver the cotton. *Harvey v. Pettaway*, 156 N. C., 375, cited. *Rodgers v. Bell*, 378.

10. *Same.*—An innocent party to a contract for the future delivery of cotton at a certain time and place, valid in its terms, cannot lose his rights thereunder merely because of an unexpressed intent of the other party that the cotton was not to be actually delivered, but that the gain or loss under the contract was to be ascertained from the rise or fall of the price of cotton in the market; for to avoid the contract the vitiating purpose must be shared by both. *Ibid.*

11. *Contracts, Wagering—Cotton—Future Delivery—Wholesale Dealer in Cotton—Evidence—Burden of Proof—Interpretation of Statutes.*—A *bona fide* wholesale dealer in spot cotton who purchases the same for future delivery in the ordinary course of his business, under a contract valid on its face, is entitled to have his cause of action tried and determined, when resisted upon the ground that the contract is a wagering one and void under the statute, under the rule which generally obtains, that one who asserts that an "ordinary business contract, valid on its face, is unlawful, is required to prove it by the greater weight of the evidence." *Rodgers v. Bell*, 156 N. C., 378, cited as controlling this case in the interpretation of Revisal, secs. 1689, 1691. *Sprunt v. May*, 388.

12. *Contracts, Wagering—Cotton—Future Delivery—Principal and Agent—Mutual Intent—Evidence.*—A *bona fide* wholesale dealer who sues upon a contract for the future delivery of cotton, which is resisted on the ground that the contract was a wagering one and void under the provisions of Revisal, sec. 1689, is bound by the acts and statements of his agents in negotiating and closing the trade, to the effect that actual delivery was not contemplated or required; and the plaintiff may not recover on the contract merely because he was a *bona fide* wholesale dealer in cotton and only authorized his agent to make a contract for actual delivery, if the agent at the time entered into a contract with the vendor which was condemned by the statute as being a wagering one. *Ibid.*

13. *Contracts—Cotton—Future Delivery—Wagering—Evidence—Questions for Jury.*—A contract for the delivery of a certain amount of lint cotton at a certain place and before a specified time is sufficiently specific to enforce delivery, and though its breach sounds in damages, and equity may not enforce specific performance, it does not necessarily stamp the contract as a gambling one, nor does it necessarily do so because the damages provided in the instrument for its breach differs somewhat from the rule of law otherwise applicable. *Rodgers v. Bell*, 156 N. C., 378; *Sprunt v. May*, 156 N. C., 388, cited as applicable and controlling. *Rodgers v. Brock*, 401.

14. *Statute of Frauds—Contracts, Written—Lessor and Lessee—Registration—Lease—Evidence.*—A written contract of lease of lands is good between the parties without registration, and a creditor of the lessee, who had thought he was selling the goods to the lessor, cannot avail

CONTRACTS—*Continued.*

himself of the want of registration of the lease, in his action against the lessor; and it is therein competent to prove the existence of the lease as a substantive fact. *Plaster Co. v. Plaster Co.*, 455.

15. *Contracts—Married Women—Personal Property—Consequences—Interpretation of Statutes.*—The provision of Laws 1911, ch. 109, that a married woman may "contract and deal so as to affect her real and personal property as if she were a *feme sole*," except in instances of contract between her and her husband (Revisal, sec. 2107), does not extend to conveyances of personalty by the wife to the husband, and certainly when it would lead to an absurd conclusion, as in instances of a gift from the wife to her husband. *Rea v. Rea*, 529.

16. *Constitutional Law—Married Women—Jus Disponendi—Husband and Wife—Contracts—Fraud.*—The Constitution gives a married woman full power of *jus disponendi* of her personalty, and there is no restriction imposed thereon by statute; and hence an absolute conveyance thereof from a wife to her husband is valid, except when procured by fraud or duress the transaction can be impeached just as if made to any one else. The right of married women to contract and convey real and personal property summed up by CLARK, C. J. *Ibid.*

17. *Contracts—Interdependent Conditions—Performance.*—One who seeks to recover upon a contract containing interdependent conditions for him to perform, must show a compliance with the conditions on his part in order to recover. *Hendricks v. Furniture Co.*, 569.

18. *Contracts, Interpretation of—Intention—Construed as a Whole.*—The court, in construing a contract, will examine the whole instrument with reference to its separate parts to ascertain the intention of the parties, and will not construe as meaningless any part or phrase thereof when a meaning may thus be found by any reasonable construction. *Ibid.*

CONTRACTS TO CONVEY. See Deeds and Conveyances.

CONTRIBUTORY NEGLIGENCE. See Evidence; Negligence; Questions for Jury; Instructions; Railroads.

CONVERSION.

Wrongful Conversion—Severance of Logs—Good Faith—Innocent Purchaser—Cost of Hauling—Measure of Damages—Claim and Delivery—Waiver.—In an action for the wrongful conversion of certain sawmill logs which had been purchased in good faith from the supposed owner of the land, but who had in fact but a life estate therein, the measure of damages against an innocent purchaser for value will not be increased by the fact that the logs had been hauled at a great expense to a public landing, by water, and there sold; for in the absence of evidence of any increase in the value of the logs otherwise, the damages will be the value of the logs at the place from which they were cut; and while it would have been otherwise had the action been one of claim and delivery, the plaintiff, by his action, has waived his right thereto. *Wall v. Holloman*, 275.

CORPORATIONS. See Demurrer; Liens; Pleadings.

COSTS. See Appeal and Error; Reference..

COTTON FUTURES. See Contracts.

COUNTERCLAIM. See Landlord and Tenant.

COUNTS. See Indictment.

COURT, INTIMATION OF OPINION BY. See Negligence.

COURTS. See Pleadings.

1. *Appeal and Error—Continuance—Discretion, Abuse of.*—Having continued the case for defendant at a former term, for the sickness and absence of a witness, under condition that defendant would take his depositions and that the cause would peremptorily be tried on a certain day of a subsequent term, the refusal to again continue the case for defendant was in the discretion of the trial judge, and the fact that the depositions had not been taken owing to the temporary recovery of the witness, and his absence was unexpectedly caused by his relapse, is not a gross abuse of this discretion. *Cromartie v. R. R.*, 97.

2. *Jurors—Deputy Sheriffs—Discretion of Court—Appeal and Error.*—It is within the discretion of the trial judge to excuse as a juror a deputy sheriff who, during the term of court, has summoned and mingled with the other jurors and has had charge of them, and not reviewable on appeal. While there is no statute forbidding it, such juror should not be permitted to serve. *McLawhorn v. Harris*, 107.

3. *Appeal and Error—Appeal from Justice's Court—Ejectment—Superior Court—Rents and Damages—Measure of Damages—New Trial on One Issue.*—On appeal to the Superior Court from a judgment of a justice of the peace in a summary proceeding in ejectment wherein it was determined, under the first issue, that the plaintiff was entitled to the possession of the premises, and, under the second issue, to a certain sum, as rents and damages, the plaintiff is entitled to recover in the Superior Court the rents and damages which have accrued to the date of the trial therein, and it is error for the trial judge to limit the recovery to the amount allowed in the justice's court. Error as to the second issue alone having been committed, a new trial upon that issue alone is ordered. *Dunn v. Patrick*, 248.

4. *Appeal and Error—Appeal from Justice's Court—Ejectment—Superior Court—Rents and Damages—Surety—Stay Bond—Measure of Damages.*—The surety on a bond to stay execution on appeal from a judgment of a justice of the peace rendered in summary proceedings in ejectment is liable for such rents and profits to the plaintiff as may accrue to the date of the trial in the Superior Court. Revisal, secs. 2008, 2006. *Ibid.*

5. *Appeal and Error—Appeal from Justice's Court—Entry of Notice.*—In this case the failure of the appellant to enter his appeal from the justice's judgment within the time prescribed by the statute, Revisal, secs. 1491 and 2008, is considered as not material, in view of the special facts of the case. *Ibid.*

6. *Power of Courts—Sentence of Imprisonment—Temporary Withholding of Capias—Conditioned on Prisoner Leaving County—Rearrest—Limitation of Actions.*—A verbal order of the trial judge to the clerk not

COURTS—*Continued.*

to issue a capias to carry into effect a sentence of eight months imprisonment of defendant in the county jail, until fifteen days after the adjournment of court, and his saying to the prisoner if she would leave the county within the fifteen days and not return she would not be compelled to serve her sentence, is not a decree of banishment, as it is for the prisoner's volition as to whether she would leave and avoid serving a legal imprisonment; and the fact that she did leave within the time allowed and returned after a longer period of time than that of the sentence will not avail her as a defense, as her absence was not equivalent to serving her sentence, and there is no statute of limitations in such cases. *In re Hinson*, 250.

7. *Wills—Gifts—Expressed Purposes—Ademption—Questions of Law.*—When a testator has made a bequest of money to a legatee for a specified purpose, and afterwards, during his lifetime, has admittedly made a gift to the legatee of the same amount of money and for the purpose expressed in the will, nothing else appearing to show the intent, an ademption will be decreed as a matter of law. *Grogan v. Ashe*, 286.

8. *Appeal and Error—Costs—Discretion of Lower Court.*—Items of cost, as they arise in an action, are in no legal sense the subject of litigation, and are only incidental in the progress of the cause; and the parties are not entitled to a trial by jury on questions raised in regard thereto. *Hockoday v. Lawrence*, 321.

9. *Public Officials—Recorder's Court—Election of Recorder by Board of Aldermen—Failure to Elect—Continuous Duty—Power of Courts—Mandamus.*—When the Legislature has expressly created a recorder's court for an incorporated town, and in plain terms has required the board of aldermen to elect a recorder therefor at a certain meeting of the board, the board, by failing to act accordingly at the appointed time, may not defeat the legislative mandate, for the duty imposed is a continuing one, time not being of its essence, and the courts will compel it to act, at any time, and do what it has failed to do at the proper or appointed day. *Battle v. Rocky Mount*, 330.

10. *Reference—Findings of Facts—Exceptions—Trial Judge—Deliberation—Some Evidence—Appeal and Error.*—When exceptions are made to the findings of fact of a referee, it is the duty of the trial judge to deliberate and decide upon each exception and draw his own conclusions from the evidence thereon, using his own faculties in ascertaining the truth of the matter; and when he otherwise acts upon the report, and sustains the referee's findings merely because there is some evidence to support them, it constitutes reversible error. The different rule of the Supreme Court on appeal discussed by WALKER, J. *Thompson v. Smith*, 345.

11. *Pleadings—Demurrer—Findings by Court—Contracts to Convey—Married Women—Liens—Homestead Reserved by Deed.*—A demurrer to a pleading which depends upon averments made therein to supply deficiencies in the pleading attacked is a "speaking demurrer," and will be overruled; nor can the demurrer be aided by any findings of fact made by the trial judge to which exception has been taken. The principle when objection is made by demurrer to the complaint, in an action to enforce specific performance of a contract to convey land,

COURTS—*Continued.*

because the wife does not join in the conveyance, when there are existing judgment liens and liens by mortgage reserving a homestead, discussed and applied by WALKER, J., citing and distinguishing *Hughes v. Hodges*, 102 N. C., 237, and *Fleming v. Graham*, 110 N. C., 374, and similar cases. *Dalrymple v. Cole*, 353.

12. *Electricity — Storms — Metal Wires—Conductivity — Effect—Courts—Judicial Knowledge.*—The courts may take judicial knowledge of well-known and established facts, and it was not error for the judge to instruct the jury, upon the evidence introduced, that metal is a good conductor and that it will attract lightning which forms in electrical storms, and carry it to the earth; that the human body is a better conductor than the air, and when sufficiently near to the ends of wires strongly enough charged with electricity, the current will leap through the body to the ground, etc. *Starr v. Telephone Co.*, 435.

13. *Courts, Justices'—Action on Contract—Nonresident Defendants—Bona Fide Residents—Motion to Dismiss—Procedure.*—For a justice of the peace to acquire jurisdiction in an action upon contract against a nonresident of that county there must be other *bona fide* resident defendants; and when it appears that a nonresident of the county has been thus sued with other defendants, who are residents, but not *bona fide* parties, he may subsequently move to dismiss the action in the justice's court and again on appeal in the Superior Court. *Austin v. Lewis*, 461.

14. *Appeal and Error—Trial Court—Discretion.*—Exceptions to the rulings of the trial judge made within his discretion are not reviewable on appeal: *Moore v. Westbrook*, 482.

15. *Reference—Trial—Pleadings—Amendments—New Matter—Evidence.*—On additional matters entering the controversy upon amendment to pleadings allowed after reference of the cause has been made and the referee's report received, the parties should be allowed to introduce further evidence; but no reversible error is found if, notwithstanding the refusal of the trial judge to permit such further evidence, the jury has found in favor of the party excepting, on the new matter introduced by the amendments. *Ibid.*

16. *Appeal and Error—Objections and Exceptions—Jury—Time for Consideration—Discretion of Trial Judge.*—An exception that the jury considered the issues in an action for personal injury only twenty minutes before rendering their verdict will not be considered on appeal, the matter resting in the discretion of the trial judge to set aside the verdict or to send the jury back to reconsider their verdict, when it appears to him that there was misconduct on the part of the jury or a contemptuous or flippant disregard of their duties in giving consideration to the issues. *Urquhart v. R. R.*, 580.

17. *Power of Courts—Contempts—Court's Discretion—Appeal and Error.*—Upon trial for an abduction of a girl under fourteen years of age (Revisal, sec. 3358), the counsel for defendant denounced the introduction of a negress to testify to the bad character of the defendant, a white woman, which drew great applause from those in the courtroom. The court had one woman arrested and seated on the pris-

COURTS—*Continued.*

oner's bench in full view of the jury: *Held*, the action of the trial judge in preserving order in his court, in respect to contempts in the presence of the court, is not subject to review on appeal, unless there is a gross abuse of discretion, which does not here appear. *S. v. Nowell*, 648.

COVENANT IMPLIED. See Landlord and Tenant.

CRIMINAL CONVERSATION. See Evidence.

CROSSINGS. See Negligence; Railroads.

CRUELTY TO ANIMALS.

1. *Cruelty to Animals—Dogs—Property Rights.*—A dog is a domestic animal, and not *ferœ naturœ*, and as such is a subject of property, and it is unnecessary to show that he is of a pecuniary value to the owner to maintain an indictment for cruelty forbidden by the statute. Revisal, sec. 3299. *S. v. Smith*, 628.
2. *Cruelty to Animals—Dogs—Bad Reputation—Killing—Defense of Property.*—Upon a trial for the crime of willfully killing a dog, the property of the prosecutor, under the provisions of the Revisal, sec. 3299, proof of the bad reputation of the dog, or that he had been guilty of past depredations, will not justify taking his life, for it is not the dog's predatory habits nor his past transgressions, nor his reputation, however bad, but the doctrine of self-defense, whether of person or property, that gives the right to kill; and the statute does not change the common law in its application to this doctrine. *Ibid.*
3. *Same.*—In the actual and necessary defense of property in killing a dog, upon an indictment under Revisal, sec. 3299, it is not necessary to show that the owner knew of his vicious propensities or that there was no other mode of defending the thing assailed. *Ibid.*
4. *Cruelty to Animals—"Animals"—Interpretation of Statutes.*—Revisal, sec. 3299, makes it criminal to willfully or cruelly kill or injure any useful animal, employing that word, as appears, merely in the sense of "living animal," and cruelty is defined in the same section to mean "any act, omission, or neglect, whereby unjustifiable physical pain, suffering, or death is caused or permitted." *Ibid.*
5. *Cruelty to Animals—Unlawful Killing—Evidence—Instructions—Harmless Error.*—A charge to the jury, on a trial of an indictment, under Revisal, sec. 3299, for the willful killing of the prosecutor's dog, that if the dog was actually killing the prosecutor's turkeys at the time it would be no defense or justification, is harmless error, the charge being otherwise correct and there being ample evidence for conviction, and no evidence that the danger to the turkeys was imminent or such as called for immediate action. *Ibid.*

DAMAGES. See Measure of Damages; Negligence; Contributory Negligence; Evidence; Slander; Telegraphs; Water and Water-courses.

1. *Forcible Trespass—Assault—Abusive Language — Punitive Damages—Jury's Discretion—Instructions.*—In an action to recover damages for an alleged forcible trespass and assault on the person, where judgment by default and inquiry had been entered at a subsequent term, there was allegation and proof that the defendant did "unlawfully and wrongfully and with a strong hand enter and forcibly tres-

DAMAGES—*Continued.*

pass" on the lot and yard of the plaintiff's residence, and in the presence of plaintiff and his wife "threatened, cursed, abused, and assaulted the plaintiff, and refused to leave" after he had been commanded to do so, but remained and continued to use vulgar and profane language, etc.: *Held*, upon the facts and circumstances of this case, (1) it was permissible for the jury to award punitive damages; (2) the question of punitive damages was properly submitted to the jury as one within their discretion, under a proper charge of the law applicable, and was not a matter of law for the court. *Ibid.*

2. *Water and Water-courses—Wrongful Diversion—Natural Water-course—Overflow—Proximate Cause—Questions for Jury.*—Upon conflicting evidence as to whether damage to plaintiff's lands was caused by the wrongful diversion from the watershed of water into a natural water-course, causing it to overflow and pond water upon the *locus in quo*, or was caused by a failure to properly clear the water-course upon and below the land of plaintiff, the question is for the jury upon proper instructions from the court. *Hooker v. R. R.*, 155.

3. *Water and Water-courses—Permanent Damages—Husband and Wife—Necessary Parties—Easements.*—The action of the trial judge in permitting the wife of the plaintiff to be made a party plaintiff after the jury had been impaneled in his action for permanent damages to his land alleged to have been caused by the defendant's wrongful diversion of the flow of water thereon, is not reversible error, the land being held under a deed to the husband and the wife. The wife was a desirable and perhaps a necessary party in order that on payment of permanent damages an easement might pass to defendant. *Ibid.*

4. *Standing Timber—Timber Deeds—Vendor to Cut nad Deliver—Bilateral Contracts—Breach—Damages.*—When it appears from a deed conveying timber interests in land, under the rules of interpretation applicable, that the vendor was to cut and deliver the timber at the log bed of the vendee, and the vendee was to pay therefor a certain price per thousand feet, and also by express provision that a certain sum first therein referred to as the consideration was only an advancement on the contract price and to be accounted for as the lumber was delivered, the contract is bilateral, and the vendor is entitled to recover such damages as he may have sustained by reason of the vendee's breach thereof. *Wiley v. Lumber Co.*, 210.

5. *Fraud—False Warranty—Deceit—Issues—Punitive Damages.*—When deceit and false warranty are alleged in the exchange of a mule for a mare and in the subsequent substitution by defendant of a mare for the mule, and there is no element of punitive damages involved, ordinarily two separate issues should be submitted to the jury, one each as to warranty and deceit and another as to damages, the damages for the deceit and for the false warranty being the same. *Robertson v. Halton*, 215.

6. *Landlord and Tenant—Lease—Hotel—Water Pipes—Plumbing—Damages to Lessee—Counterclaim.*—A landlord is not liable to the tenant, in the absence of an express agreement, for damages caused by the inefficient working of the water pipes and plumbing system installed

DAMAGES—*Continued.*

in a hotel, the leased premises, and in his action for the rent, etc., such damages may not be successfully set up by the tenant as a counterclaim. *Improvement Co. v. Coley-Bardin*, 256.

7. *Carriers of Passengers—Mileage Exchanged—Refusal—Ejection of Passenger—Punitive Damages.*—The wrongful ejection of the plaintiff, a passenger on defendant's train, by the conductor, porter, and baggagemaster, in a very rough manner, with anger and violence, because he insisted upon the conductor's taking his mileage for his transportation, as under the circumstances he had a right to do, justifies a charge to the jury that in their discretion they might, if they saw fit, award punitive as well as compensatory damages. *Dorsett v. R. R.*, 429.

8. *Forcible Trespass—Assault—Unlawful Assembly—Mob—Evidence—Firing—Aggravation of Damages.*—An action for forcible trespass or assault is shown when it appears that an unlawful assembly of people followed the plaintiff to his home and there remained in such a threatening attitude and using such violent and abusive language as to make him reasonably apprehensive of his safety; and the asserted justification of defendant in firing upon the plaintiff under these circumstances, after plaintiff had fired with the hope of scaring the mob away, is not material, except upon the question of damages. *Saunders v. Gilbert*, 463.

9. *Forcible Trespass—Assault—Unlawful Assembly—Mob—Firing—Aggravation of Offense—Intentional and Willful Acts—Punitive Damages.*—Punitive damages may be awarded, in addition to actual or compensatory damages, in an action of assault or forcible trespass where the defendant has acted wantonly or with criminal indifference to his civil obligations, or has been guilty of intentional and willful violation of the plaintiff's rights; and the defense that a criminal prosecution lies or may be presented will not avail the defendant, though when already convicted the fine imposed may be considered in diminution of the verdict in the civil action when awarding punitive damages to the injured party. *Ibid.*

10. *Forcible Trespass—Assault—Punitive Damages—Foundation.*—An action cannot be maintained solely for the purpose of recovering punitive damages for forcible trespass; but if a right of action exists, though the damages are nominal, the jury may, in a proper case, award punitive damages. *Ibid.*

11. *Same—Evidence.*—The defendant, accompanied by a large multitude of people, had followed plaintiff from church in a threatening manner, and was standing on the street in front of plaintiff's house. In the hope of scaring them away, the plaintiff fired in the air, whereupon the defendant fired several times at plaintiff, without reasonable apprehension of his own safety or that of others, nearly hitting the wife, the other plaintiff, who was at that time on the porch with her husband: *Held*, sufficient for awarding punitive damages, and the defendant in thus taking the law into his own hands cannot justify his act, whatever moral provocation he may have had. *Ibid.*

DANGEROUS CONDITIONS. See Negligence.

DANGEROUS EMPLOYMENT. See Master and Servant.

DANGEROUS INSTRUMENTALITIES. See Negligence.

DEBT OF PARTNER. See Partnership.

DEBT OR DEFAULT OF ANOTHER. See Statute of Frauds.

DEBTS. See Partnership; Descent and Distribution.

DEEDS AND CONVEYANCES. See Contracts; Evidence; Trusts and Trustees; Pleadings.

1. *Deeds and Conveyances—Reservation of Life Estate.*—A reservation of a life estate for himself and wife by the grantor in his deed to lands is valid, and the deed does not become effective until after his own and his wife's death, though as to the latter the reservation cannot operate as a conveyance. *In re Dixon*, 26.

2. *Same—Tenant by Curtesy—Wife's Possession.*—A deed to grantor's daughter, reserving a life estate in himself, does not make the husband of the grantee a tenant by curtesy when he has issue born alive, etc., if the wife predeceases the grantor, the requisite of her possession of the lands being wanting; and the title to the land upon the death of the grantor passes directly to her heirs. *Ibid.*

3. *Deeds and Conveyances—Interpretation—Reservation of Life Estate—Repugnancy.*—In this case, construing the deed as a whole, there is no repugnancy therein apparent by reason of a reservation of a life estate in the lands in the grantor. *Wilkins v. Norman*, 139 N. C., 41, cited and distinguished. *Ibid.*

4. *Deeds and Conveyances—Registration—Sale Under Execution—Title Acquired—Parties.*—A purchaser of personal property at an execution sale cannot acquire any right superior to that of the owners of a prior registered mortgage thereon, who were not parties to the action. *Kochs v. Jackson*, 326.

5. *Deeds and Conveyances—Limitation of Actions—Fraud or Mistake—Executors and Administrators.*—In an action involving title to lands, the defendant claimed by successive conveyances from a devisee to whom the lands had been devised by her father as 100 acres to be cut off in a certain manner from given lines; and plaintiff, who was executor of the devisor, claims 8 acres thereof adjoining his own land as being in excess of the 100 acres devised and which had been surveyed and conveyed under metes and bounds in his absence. The defendant pleaded the twenty, ten, seven, and three years statutes of limitations, which the plaintiff resisted on the ground of mistake (Revisal, 395, 6): *Held*, (1) if the plaintiff's defenses were available against the devisee, it were not so against the subsequent grantees; (2) the statute runs from the discovery of the fraud, "or when it should have been discovered in the exercise of ordinary care"; and as it was the duty of plaintiff, as executor, to have laid off the land to the devisee and put her in possession, and as he could, by a simple calculation from the deed, have discovered that the description embraced 108 acres, and as for twenty years the various owners of the land had cultivated up to the boundaries, the statute had become a bar to the action. *Sinclair v. Teal*, 459.

DEEDS AND CONVEYANCES—*Continued.*

6. *Contracts—Conveyances—Married Women—Separate Property—Realty—Privy Examination.*—The statutory requirement of a privy examination in conveyances of realty by married women is merely a regulation to ascertain whether the wife really executed the deed. *Rea v. Rea*, 529.

7. *Deeds and Conveyances—Contracts to Convey—Deed in Escrow—Purchase Money—Payment—Evidence—Questions for Jury.*—A suit upon a contract to convey lands, with a deed placed in escrow to be delivered upon the payment of the balance of the purchase price, with conflicting evidence upon a point at issue as to whether the deed was to be inoperative if the purchase money was not paid in full within a certain time, presents a question for the jury. *Gallimore v. Grubb*, 575.

8. *Deeds and Conveyances—Contracts to Convey—Purchase Money—Tender—Waiver.*—The refusal by defendant of plaintiff's offer to pay the balance of the purchase money for lands which the former contracted to convey is a waiver of a formal tender thereof. *Ibid.*

9. *Timber Interests—Period for Cutting.*—Judgment below is affirmed, with the suggestion that the lower court fix the time within which the timber described in the judgment be removed, probably not to exceed twelve months from the beginning of the next civil term of that court. *Morton v. Lumber Co.*, 589.

DEFAULT AND INQUIRY. See Judgment.

DEFECTIVE APPLIANCES. See Master and Servant.

DEFECTS IN MACHINERY. See Negligence; Pleadings.

DELIVERY. See Telegraphs.

DELIVERY BY TELEPHONE. See Telegraphs.

DEMAND. See Telegraphs.

DEMURRER. See Pleadings.

1. *Mortgages—Notes—Debtor and Creditor—Additional Security—Maturity—Original Debt—Pleadings—Demurrer.*—When a mortgage creditor has taken a note or other collateral as additional security for his debt, which has matured, he may proceed to collect it according to its tenor, whether the principal debt is due or not, if there is no binding stipulation to the contrary; and in his suit upon the collateral note under these circumstances a demurrer to the complaint will not be sustained. *Bizzell v. Roberts*, 272.

2. *Demurrer Ore Tenus—Defect of Parties—Pleadings.*—A demurrer *ore tenus* to the complaint upon the ground of defect of parties, or that the plaintiff did not have the legal capacity to sue, will not be sustained, as such defense is deemed waived unless taken by a written answer or demurrer. Revisal, sec. 478. *Kochs v. Jackson*, 326.

3. *Same—Corporation—Partnership.*—A demurrer *ore tenus* will not be sustained on the ground that the plaintiff's name appeared to be either that of an incorporated company or a partnership, and that neither the fact of incorporation nor the names of the partners were alleged. Revisal, sec. 478. *Ibid.*

DEMURRER—*Continued.*

4. *Pleadings—Demurrer—Allegations of Pleading Attacked—Extrinsic Matters.*—The pleading to which a demurrer has been filed must itself present the defects against which the demurrer is directed and the latter must stand or fall by the facts alleged in the pleading attacked; and extraneous matters cannot be relied on to show its deficiencies. *Dalrymple v. Cole*, 353.

5. *Same—Findings by Court—Contracts to Convey—Married Women—Liens—Homestead Reserved by Deed.*—A demurrer to a pleading which depends upon averments made therein to supply deficiencies in the pleading attacked is a "speaking demurrer," and will be overruled; nor can the demurrer be aided by any findings of fact made by the trial judge to which exception has been taken. The principle when objection is made by demurrer to the complaint, in an action to enforce specific performance of a contract to convey land, because the wife does not join in the conveyance, when there are existing judgment liens and liens by mortgage, reserving a homestead, discussed and applied by WALKER, J., citing and distinguishing *Hughes v. Hodges*, 102 N. C., 237, and *Fleming v. Graham*, 110 N. C., 374, and similar cases. *Ibid.*

6. *Appeal and Error—Demurrer—Amended Complaint.*—When an amended complaint is filed by leave of court upon demurrer to the original one, an appeal by the defendant for the over-ruling of the demurrer thus filed will not be reviewed in the Supreme Court. *Warren v. R. R.*, 591.

DESCENT AND DISTRIBUTION. See Wills.

Descent and Distribution — Personal Property — Mother Next of Kin, When—Brothers and Sisters of Deceased—Interpretation of Statutes. In the descent and distribution of the personal estate of one who dies intestate, without child or legal representatives of a deceased child, and leaving a widow and mother and brothers and sisters, his mother is the next of kin and entitled to equally share the property with the widow in exclusion of the brothers and sisters (Revisal, sec. 111, 3), and Revisal, sec. 132 (6), has no application. *Wells v. Wells*, 246.

DISCRETION OF JURY. See Damages.

DISCRIMINATION. See Cities and Towns.

DISTRIBUTION. See Descent and Distribution.

DIVERSION. See Water and Water-courses.

DOGS. See Cruelty to Animals.

DRAINAGE. See Water and Water-courses.

DRAINAGE DISTRICTS.

1. *Drainage Districts—Special Districts—Commissioners—Appointment—Interpretation of Statutes.*—The appointment of commissioners for the Drainage District for Mattamuskeet Lake and adjoining lands, ch. 509, sec. 3, Laws of 1909, is to be made, two by the State Board of Education and one by the clerk of the court, without reference

DRAINAGE DISTRICTS—*Continued.*

to sec. 19, ch. 442, Laws of 1909, requiring an election by the owners of the land within the drainage or levee district. *Semble*, the requirements of section 19 are but recommendatory. *Mann v. Gibbs*, 44.

2. *Drainage Districts—Owners of Lands—Bond Issue—Limited Liability.* In proceedings for the drainage of Mattamuskeet Lake under chapter 442, Laws of 1909, wherein an issue of bonds for the purpose was authorized, each tract of land was assessed its pro rata part for the payment of the bonds and interest thereon: *Held*, upon the payment of the assessment upon the land the owner would be discharged from liability and not responsible for the failure of other owners to pay, except through the method of assessment provided by the statute. *Carter v. Commissioners*, 183.

DRAWBRIDGES. See Water and Water-courses.

DUE COURSE. See Bills and Notes.

EASEMENTS. See Parties; Tenants in Common; Water and Water-courses.

EJECTION OF PASSENGER. See Carriers of Passengers.

EJECTMENT.

Appeal and Error—Appeal from Justice's Court—Ejectment—Superior Court—Rents and Damages—Surety—Stay Bond—Measure of Damages.—The surety on a bond to stay execution on appeal from a judgment of a justice of the peace rendered in summary proceedings in ejectment is liable for such rents and profits to the plaintiff as may accrue to the date of the trial in the Superior Court. Revisal, secs. 2008, 2006. *Dunn v. Patrick*, 248.

ELECTION. See Issues; Indictment.

ELECTION OF RECORDER. See Interpretation of Statutes.

ELECTIONS.

1. *Primary Elections—Legislative Acts—Constitutional Law.*—An act providing for a primary system for election to a public office is constitutional and valid. *S. v. Cole*, 618.

2. *Primary Elections—Purity of Elections—Count—Indictable Offense.*—Any conduct of the manager of a primary election for county officials which interferes with the freedom or purity of the election is punishable at common law, and under Revisal, sec. 3576. *Ibid.*

3. *Primary Elections—Indictments—Manager of Primaries—False Returns—County Officials—Oaths.*—An indictment against a manager of a primary election for county officials in making unlawful returns need not necessarily charge that the defendant was a State or county officer, or that he took the oath of office. It is sufficient to allege that the defendant was such manager, for his duties under the statute devolved upon him by virtue of his office. *Ibid.*

4. *Primary Elections—Indictment—Managers of Primaries—False Returns—Qualification of Electors.*—It is the duty of the manager of a county primary for the election of county officials to call and count the ballots cast for the various candidates, and the question of the

ELECTIONS—*Continued.*

qualification of the electors whose votes he failed to count is unnecessary in considering an indictment against the manager for fraudulently not counting the votes. *Ibid.*

5. *Primary Elections—Manager of Primaries—False Returns—Indictments—Misjoinder—Counts—Election by Solicitors.*—The joinder of counts in an indictment against a manager of a county primary election of officers, that he unlawfully, etc., failed to count the ballots cast for T., a candidate for the office of treasurer, and also of A., a candidate for that office, at the same election, is proper, and the solicitor is not required to elect between the counts. *Ibid.*

6. *Primary Elections—Manager of Primaries—False Returns—Filing and Registration—Evidence.*—That a paper-writing purporting to be the return of a primary election, signed by the managers, was filed and recorded in the office of the register of deeds, does not make it competent evidence upon the trial of the manager of the election for unlawfully, etc., not returning the count of the ballots cast, the filing and registration not being required by statute. It is necessary to prove the returns by competent evidence. *Ibid.*

ELECTORS, QUALIFICATIONS OF. See Elections.

ELECTRICITY. See Negligence.

EMPLOYER AND EMPLOYEE. See Negligence; Master and Servant.

EMPLOYERS' LIABILITY ACT. See Master and Servant.

EMPLOYMENT OF CHILDREN. See Master and Servant.

ENTRY. See Trespass.

EQUALIZATION. See Cities and Towns.

ESCROW. See Deeds and Conveyances.

EVIDENCE. See Negligence; Nonsuit; Questions for Jury; Injunction; Principal and Agent.

1. *Evidence—Personal Property—Possession—Title.*—The possession of personal property is evidence of ownership. *Sutton v. Lyon*, 3.

2. *Operation.*—The plaintiff sued for damages alleged to have been received while working for defendant at his sawmill. Defendant denied the ownership of the mill or that he operated it: *Held*, evidence that defendant was the owner of the mill on her land, which was sawing her timber, was some evidence that the defendant was operating it. *Ibid.*

3. *Principal and Agent—Tax List—Declarations—Evidence.*—An abstract of taxes made by one purporting to be an agent is incompetent as against the principal in the absence of other evidence of agency, it being necessary that an agency be proved *aliunde* the declarations of the agent. *Ibid.*

4. *Principal and Agent—Evidence Aliunde.*—Agency may be proved by the testimony of the agent. *Ibid.*

EVIDENCE—*Continued.*

5. *Criminal Conversation—Husband and Wife—Evidence.*—In an action brought by the husband for damages for criminal conversation with his wife, the evidence of the wife in behalf of the defendant to rebut the evidence of the plaintiff is incompetent. Revisal, sec. 1636. *Grant v. Mitchell*, 15.

6. *Parol Evidence—Letters—Contents—Substance—Effect—Questions for Jury.*—Witnesses testifying to the contents of letters, when such testimony is admissible, should state their substance as near as may be, and not their effect; and when in an action by the husband for damages for criminal conversation with the wife, a witness is allowed to testify upon the question of defendant's relationship with the wife as to the contents of ten or twelve letters the defendant has written her, it is reversible error for the witness to state, "They were all what I would call love letters, and were couched in very passionate terms." *Ibid.*

7. *Criminal Conversation—Evidence—Letters from Defendant—Defendant's Conduct—Witness's Conversation.*—A relevant letter written by the defendant to plaintiff's wife, in an action for damages for criminal conversation brought by the husband, is competent evidence; as also the conduct of the defendant when questioned as to his relationship and conversations by the witnesses with him respecting it, which are germane to the issue. *Ibid.*

8. *Mortgages — Sales — Fraud—Relationship—Presumptions—Evidence—Questions for Jury.*—No presumption of fraud arises from the mere fact that a son of the mortgagee purchased the mortgaged lands at a foreclosure sale made under a power contained in the instrument; but the near relationship of the purchaser to the mortgagee is a circumstance in evidence which, taken with other evidence that the purchaser was insolvent, a very young man, dependent upon his father, the mortgagee, to whom he reconveyed at the same recited consideration as his bid, there being no advertisement of the land and the bid being for a third or half the value of the land, is sufficient to go to the jury upon the question of a fraudulent sale. *Owens v. Hornthal*, 19.

9. *Navigable Waters—Drawbridges—Construction—Damages to Vessels—Negligence—Accident—Evidence.*—Defendant was erecting a bridge for railroad purposes across the navigable waters of Albemarle Sound, under authority duly conferred by the State. There were two draws therein, a large one near the northern shore and a smaller one, 70 feet long, near the southern shore. The plaintiff was "tacking" his sailing vessel against the wind, in the daytime, for the purpose of going through the northern draw, when informed that it was not operated or open, and then changed his course for the southern draw. The latter was open about 35 feet on one side and the other side was obstructed by a large pile driver, used in the construction of the bridge. Seeing the obstruction, the skipper attempted to tack and stand away from the bridge so as to lay his course through the open space, but his vessel for some unexplained reason failed to "go about," fell off before the wind, and the sails filled in a strong breeze, which caused the vessel to be wrecked on a shoal: *Held*, upon this evidence,

EVIDENCE—*Continued.*

the proximate cause of the loss was an accident, the failure of the vessel to respond, and the defendant was not liable for the damages sustained. *Whitehurst v. R. R.*, 48.

10. *Evidence—Ancient Documents — Self-evidence — Circumstances.* — Ancient documents relative to the inquiry, bearing date or purporting to bear date at or before a period of thirty years prior to the time they are offered in evidence, are admissible without the ordinary requirements of proof of execution or as to handwriting, when produced from a proper or natural custody, free from suspicious circumstances or those indicative of fraud or invalidity; and these preliminary requirements are for the determination of the court. *Nicholson v. Lumber Co.*, 59.

11. *Same—Supporting Evidence—Questions for Jury.*—It is not now necessary that when an ancient document is offered in evidence as a muniment of title it should be fortified by some evidence of possession or occupation under and consistent with the purport of the instrument; but its presence or absence is a relevant circumstance for the consideration of the jury after the document has been received in evidence. *Ibid.*

12. *Evidence—Handwriting—Nonexpert—Witnesses.*—A witness, whether an expert or another, who has acquired knowledge and formed an opinion as to the character of a person's handwriting from having seen such person write or from having, in the ordinary course of business, seen writing purporting to be his and which he has acknowledged or upon which he has acted or been charged, may give such opinion in evidence when a relevant circumstance. *Ibid.*

13. *Same—Comparisons.*—A witness, whether an expert or not, who has been properly allowed to express an opinion as to the handwriting of a given paper, on being shown a writing admitted to be genuine, etc., may show the two papers to the jury and, by making comparisons between them, explain and point out the similarity or difference between the two. *Ibid.*

14. *Evidence—Plats, etc.—Jury's Deliberations—Appeal and Error.*—It is reversible error for the trial judge, under objection, to permit the jury to take plats of or certificates relating to the location of disputed lands to their room and inspect them in their deliberations. *Ibid.*

15. *Same—Unbroken Seals.*—In an action for damages to goods which had been transported by several carriers over their lines, there was evidence tending to show that the final carrier received the goods in carload shipment with the seals on the car unbroken, but when the car and its contents were inspected at destination the back end of the car was nearly empty, its contents piled in the front end, broken and defaced. There was also evidence that the car had been properly packed at the initial point, and on behalf of the terminal carrier that its transportation had been on schedule time, without accident to its train: *Held*, (1) it was competent for the terminal carrier to show as a reason for accepting the shipment that it received the car with the seals unbroken from the former carrier; (2) that the evidence was sufficient for the jury to consider upon the negligence of the

EVIDENCE—*Continued.*

former carrier in failing to properly transport the shipment for delivery to its connecting line, and to rebut the presumption of negligence as to the latter one. *Boss v. R. R.*, 70.

16. *Pleadings—Demurrer—Notes—Default of Interest—Maturity—Demand—Evidence—Summons.*—In an action brought upon a note before its maturity under a provision that the note would be due and payable ten days after demand for payment of interest thereon due, a demurrer to the complaint will be denied when there are allegations that demand had been made for the payment of interest after default, which necessarily implies that the demand was made on the defendant and that the same had not been paid; and it appears from an inspection of the summons, which it is proper for the court to make in such instances, that the stated period of time had elapsed before the institution of the action. *Bank v. Duffy*, 83.

17. *Evidence—Goods Sold and Delivered—Memoranda—Corroboration.*—In an action to recover the price of cotton seed sold and delivered, it is competent in corroboration of the witness of defendant to introduce the seed book of defendant showing prices paid by the defendant for seed during the time in question, when the entries had been made by the witness himself. *Carson v. Blount*, 103.

18. *Evidence—Similar Contracts—Corroboration—Inference.*—The plaintiff sued for an alleged contract price of cotton seed sold and delivered to the defendant during a certain period of time, claiming that the defendant had agreed to pay therefor at the market price on any day that plaintiff should call for a settlement. The defendant, on the contrary, claimed that he was to pay for the cotton at the market price at the date of delivery: *Held*, evidence was competent to show that defendant had made a similar contract with plaintiff's witness, to induce which the defendant told the witness he had shipped the plaintiff's cotton also, it being a circumstantial fact from which an inference may be drawn tending to corroborate the plaintiff's version of the contract. *Ibid.*

19. *Deeds and Conveyances—Parol Trusts—Trusts and Trustees—Mortgage—Sales—Mortgagee a Purchaser—Bona Fide—Evidence.*—Two brothers, R. and F., bought certain lands, and to secure the purchase price executed a deed in trust to S., giving certain cotton bonds payable to L. and S. Before the death of R., L. and S. assigned the bonds to E. Brothers, and upon default the lands were sold by S. under the terms of the deed in trust, and conveyed to the purchaser, E., of the firm of E. Brothers. Subsequently, E. sold the lands to F. for the same amount of cotton bonds, *i. e.*, bonds payable in a certain amount of merchantable lint cotton. In an action brought by the heirs at law of R. to declare a parol trust in their favor in the lands thus conveyed to F: *Held*, that while the fact that F. bought the land from E. for exactly the same amount of lint cotton that R. and F. had agreed to pay L. and S., it was open to explanation, and, different inferences being capable of being drawn from the facts, the question was properly left for the jury to say whether, under the circumstances of the case, F. was a *bona fide* purchaser of the lands in his own right, or as a tenant in common with R. *McLawhorn v. Harris*, 107.

EVIDENCE—*Continued.*

20. *Insurance, Life—Application—Misrepresentations—Proof of Loss—Statements—Prima Facie Case—Evidence—Questions for Jury.*—A statement made in a proof of loss after the death of the insured by her father and next of kin, beneficiary under the policy sued on, that the insured had had pneumonia prior to her application for the policy, and in contradiction of her representation in her application that previously thereto she had not had it, is *prima facie* evidence only of the falsity of her representations, leaving it for the plaintiff to satisfy the jury, upon all the evidence, that she did not have it prior to her application. *Brock v. Insurance Co.*, 112.

21. *Evidence, Corroborative—Tally-book of Lumber—Computation by Witness.*—In an action to recover the price of nine car-loads of lumber sold and delivered, the defendant contended that eight of the cars did not contain the quantity of lumber contended for by the plaintiff, and introduced, by the witness making it, a tally of the lumber as the cars were unloaded, this witness testifying that he tallied the lumber to a certain other witness, who was introduced: *Held*, competent for the latter witness to figure up each piece and tell how much was in each car according to the tally made by B. (the former witness) and read over to him, and to say from the tally in the books how it corresponded with the testimony of B.; for the jury would not be permitted to take the books in the jury-room, and it would be impossible for them to carry the figures in their minds; and to make the computation on trial would unduly delay it. *Bissett v. Lumber Co.*, 162.

22. *Railroads—Collision—Evidence—Presumptions.*—Evidence that plaintiff's intestate, an employee of defendant railroad company, was killed in a collision between two of defendant's trains, is sufficient upon the question of defendant's negligence to take the case to the jury, the fact of the collision raising a presumption of negligence. *Adams v. R. R.*, 175.

23. *Fraud—Evidence—Deceit in One Transaction—Intent—Scienter.*—In an action for deceit and false warranty in the exchange of a mule for plaintiff's mare, and likewise in the substitution of a mare for the mule upon demand of plaintiff that defendant make good his representations, the deceit or false warranty in the first transaction, if established, will be evidence of the defendant's intent, or *scienter* in the last, as the two are so closely connected with each other as to render the evidence admissible to show fraud in the second exchange. *Robertson v. Halton*, 215.

24. *Fraud—False Warranty—Vendor and Vendee—Recommendation of Wares—Evidence—Questions for Jury.*—While a statement made by the seller in recommending his goods may not ordinarily amount to a warranty, it may be otherwise when the statement takes the form of an opinion or estimate of quality or value, and it is doubtful whether or not a warranty was intended, for then the jury should decide whether a warranty was, in fact, intended. *Ibid.*

25. *Fraud—Deceit, Elements of—Evidence.*—To constitute deceit there must be an untrue statement, which is knowingly made, or the person making it must be consciously ignorant whether it be true or not, with the intent that the other party shall act upon it, or it should be made

EVIDENCE—*Continued.*

under circumstances apparently fitted to induce him to do so, in reliance upon it, in the manner contemplated or manifestly probable, so that he thereby suffers damage; and in order to maintain the action it is sufficient to show that the defendant practiced a deception with the design of depriving the plaintiff of some right, profit, or advantage, and to acquire it for himself or avail himself of it in some way. *Whitmire v. Heath*, 155 N. C., 304, cited and approved. *Ibid.*

26. *Railroads—Crossings—"Look and Listen"—Injury After Crossing—Negligence—Contributory Negligence—Nonsuit.*—When the negligence complained of in an action against a railroad company for injuring plaintiff's horse and wagon after he had crossed the railroad track at a public crossing was that by keeping a proper lookout and in the exercise of reasonable care the defendant's engineer could have avoided the injury; the fact that the plaintiff failed to "look and listen" for the approaching train before attempting to cross has no bearing upon the questions of either negligence or contributory negligence. *Hines v. R. R.*, 222.

27. *Railroads—Evidence—Contributory Negligence—Continuing Act—Nonsuit.*—When there is evidence that the engineer on defendant's train was negligent in not keeping a proper lookout or in the exercise of ordinary care, in consequence of which the plaintiff's horse backed the wagon to which it was hitched upon defendant's slowly moving train, to plaintiff's damage, it would bar the plaintiff's right to recover if shown that, after the horse began to back, the driver was negligent, and this negligence continued to the time of the injury, under the surrounding circumstances and conditions. *Ibid.*

28. *Burden of Proof—Evidence—Instruction—Expression of Opinion by the Court—Appeal and Error.*—When the validity of the indorsement of a negotiable instrument sued on by the indorsee is denied by the answer, and the only evidence is that introduced by the plaintiff, which fully states the necessary matters to show that he is a holder in due course, it is correct for the judge to charge the jury to return a verdict for the plaintiff if they find the facts to be as testified to by him; but reversible error for the trial judge to remark in the presence of the jury that if the verdict was for the defendant he would set it aside, for this is an expression of opinion upon the credibility of the evidence forbidden by statute. *Park v. Exum*, 228.

29. *Cities and Towns—Defect in Streets—Injury to Pedestrian—Lights at Night—Negligence—Evidence.*—In an action to recover damages of a city, alleged by plaintiff to have been received by reason of defendant's negligence in permitting a hole to remain in its sidewalk, into which she fell on a dark night, when there was no light or sufficient light, which it was the duty of the defendant to provide, the absence of lights at the place of the injury is not negligence *per se*, but only a relevant fact on the determinative questions whether the streets were kept in a reasonably safe condition and whether the authorities had properly performed their duty concerning them at the time and place of the occurrence of the injury. *Johnson v. Raleigh*, 269.

EVIDENCE—*Continued.*

30. *Deeds and Conveyances—Executors and Administrators—Special Proceedings to Sell Land—Destroyed Records—Void Deed—Parol Evidence.*—In an action involving title to land, defendant claimed under an administrator's sale in an adjoining county, the deed of the administrator being put in evidence by plaintiff for the purpose of attacking it: *Held*, it was competent for the plaintiff to introduce parol evidence of the contents of the records in the adjoining county, which had been destroyed by fire, to show that the special proceeding by the administrator to sell the land was void on its face. *McKellar v. McKay*, 284.

31. *Evidence—Ademption.*—A testator having made a will by which he bequeathed a certain sum of money to M. for life, with certain limitations over to the children of M., went on a note of M. to the bank in order to procure a certain sum of money for the sole benefit of M., which was afterwards paid by her executors. In an action by M. to recover the legacy, the executors pleaded that their payment of the note was an ademption and satisfaction *pro tanto*: *Held*, upon the evidence, that there was no presumption of an ademption, or evidence thereof. *Grogan v. Ashe*, 286.

32. *Wills—Gifts—Ademptions—Declarations—Evidence.*—A testatrix who has made a will by which she devised a certain sum of money, expressing the purpose for which it was devised, went on a note at a bank with her devisee for the latter's sole benefit, which note was subsequently paid by her executors. In an action to recover the legacy: *Held*, the testimony of the bank officers who made the loan is competent to show the declarations of the testator made at the time of the transaction when she executed the note, which were substantially in accordance with the purpose expressed in the will. *Ibid.*

33. *Railroads—Notice—Evidence—Questions for Jury—Contributory Negligence.*—Plaintiff's intestate went to the defendant's freight depot to receive heavy machinery packed in boxes, and when leaving, with the boxes on his wagon, the wagon wheel fell into a hole, which caused the boxes to fall on him and crush his head, and he died from the injury thus received. There was evidence tending to show that the hole was on the defendant's premises and in the only available way of ingress and egress, and that the railroad company had been previously notified of the danger of this hole and had promised to remedy it: *Held*, (1) evidence sufficient as to defendant's negligence to sustain a verdict in plaintiff's favor; (2) the proximate cause of the injury was the falling of the wagon wheel into the hole. *Autry v. R. R.*, 293.

34. *Witnesses—Opinion Evidence—Nonexperts—Experience.*—Opinions of witnesses as to the value of lands, houses, etc., when relating to the measure of damages caused thereto in an action concerning them, are competent when the witnesses, by experience and information, are qualified to speak. *Wyatt v. R. R.*, 307.

35. *Witnesses — Ancient Documents — Comparison of Handwriting — Evidence.*—On the admissibility of testimony of witnesses as to the genuineness of handwriting of ancient documents by comparison with that of other like documents free from suspicion, when the witness has had full opportunity to observe and note them, and he states that

EVIDENCE—*Continued.*

he has thus been enabled to form a satisfactory opinion as to the handwriting of the ancient document in question, *Nicholson v. Lumber Co.*, 156 N. C., 59, cited and approved as applicable to the facts in this case. *LaRoque v. Kennedy*, 360.

36. *Evidence—Deeds and Conveyances—Description—Identity of Lands—Objection and Exceptions—Procedure.*—In an action involving the question of title to lands it is competent to offer a certified copy of the deed and identify the handwriting of the officer who made the certificate, and if thereafter the party who thus introduces the deed in evidence fails to locate the land within its boundaries or description, the opposing party should by motion call it to the attention of the court and ask that the deed be withdrawn. *Ibid.*

37. *Same — Intrinsic Identification — Description of Witnesses.* — When a deed to lands concerning which the title is in dispute has been properly introduced in evidence, it is not essential that evidence of location under the description or boundaries of the deed come from defendant or from living witnesses; for the descriptions contained in the deed may indicate where the land is situated without extrinsic proof; and in this case, from the minute description of the witnesses, the land is sufficiently identified by an ancient mill located on "South-West Creek." *Ibid.*

38. *Damages—Ponding Water—Evidence.*—In this action for damages for ponding water back upon plaintiff's land, the testimony of a witness, to the effect that some fifteen years previous he had cut cypress timber up beyond the pond and had floated it to the pond, was properly admitted to show the conditions up beyond the pond bearing on the controversy. *Ibid.*

39. *Carrier of Goods—Negligence—Defense—Evidence.*—In an action to recover of a carrier the penalty prescribed by Revisal, sec. 2634, for failure to settle a claim relating to the shipment of a puncheon of molasses, the defense was available to the carrier that the puncheon had burst by reason of the fermentation of the molasses, for which the defendant was not responsible, and this caused the damage sought by the plaintiff. *Currie v. R. R.*, 432.

40. *Carriers of Passengers—Mileage Exchanged—Wrongful Refusal—Intermediate Point—Consent—Evidence.*—When the owner of the carrier's mileage book has requested, under the rules of the company, a ticket to his destination in exchange for his mileage, and has been refused by the agent an exchange except to an intermediate point, and then requested, with the same result, a ticket to a further point towards his destination, it is competent to show that he had not consented to the agent's giving him the ticket to the intermediate point as evidence that he had not withdrawn his request for the ticket to the point beyond. *Dorsett v. R. R.*, 439.

41. *Evidence—Rebuttal—Examination on Matters Already Testified—Appeal and Error.*—Examination of a witness in rebuttal upon evidence he has already gone over in his original examination, while irregular, does not constitute reversible error on appeal. *Ibid.*

42. *Master and Servant—Safe Place to Work—Safe Appliances—Former Conditions—Evidence.*—When the injury complained of was alleged to have been caused by the master's not furnishing for the use of

EVIDENCE—*Continued.*

the servant in performing his duties a proper appliance in fastening a basket to a hoisting rope, or that the hook on the rope was at the time wrapped around with a small string insufficient for the purpose, it is competent for a witness to testify that at this same place a year or two before the basket fell with her on two occasions, under the same conditions which in this case caused the injury. *Russ v. Harper*, 444.

43. *Carriers of Goods—Live Stock—Knowledge—Evidence—Questions for Jury.*—It is some evidence of notice to a carrier of the damaged condition of horses it had transported under its usual live-stock bill of lading, that its depot agent was standing in such position near the car that the horses would pass before him, while being unloaded, and that they were covered with perspiration, were in a suffocated condition, very weak, and that instead of leading them in the usual manner, they had to be taken by the tail and hip and steadied down the gangway to keep them from falling. *Kime v. R. R.*, 451.

44. *Statute of Frauds—Contracts, Written—Lessor and Lessee—Registration—Lease—Evidence.*—A written contract of lease of lands is good between the parties without registration, and a creditor of the lessee, who had thought he was selling goods to the lessor, cannot avail himself of the want of registration of the lease, in his action against the lessor; and it is therein competent to prove the existence of the lease as a substantive fact. *Plaster Co. v. Plaster Co.*, 455.

45. *Deeds and Conveyances—Contracts to Convey—Encumbrances—Title—Pleadings—Evidence.*—In an action brought to enforce a contract to convey lands, presenting an issue as to whether the plaintiff offered to pay the balance of the purchase money if the defendant would clear the property of liens, which he was obligated to do, it is competent for the plaintiff to put in evidence the complaint as well as the answer, when the relevant parts of the answer otherwise would not have been clear. *Gallimore v. Grubb*, 575.

46. *Prisoner's Declarations—Caution—Evidence—Reversible Error.*—Upon a preliminary hearing before a justice of the peace upon a charge of larceny, the magistrate asked the defendant if he desired to be a witness, who responded in the affirmative, and was "sworn" with the other witnesses. It appeared that he was an ignorant young negro, and without counsel: *Held*, the failure of the magistrate to caution him that he was not required to testify and that his refusal to do so would not prejudice him, render his declarations incompetent as evidence. Revisal, sec. 3194. *S. v. Vaughan*, 615.

47. *Larceny and Receiving—Evidence—Questions for Jury.*—Tried for larceny of tin, there was evidence tending to show that the prosecutor had been missing the tin from his shop and that he found it on defendant's house and identified it by its marking. Defendant's statements to prosecutor were contradictory as to where he got the tin. Upon the stand the defendant testified he got the tin from an entirely different person from those he had told the prosecutor of, and this person testified he had gotten it from a dead man: *Held*, evidence sufficient to go to the jury upon the question of knowingly receiving stolen property. *S. v. Marable*, 616.

EVIDENCE—*Continued.*

48. *Primary Elections—Manager of Primaries—False Returns—Filing and Registration—Evidence.*—That a paper-writing purporting to be the return of a primary election, signed by the managers, was filed and recorded in the office of the register of deeds, does not make it competent evidence upon the trial of the manager of the election for unlawfully, etc., not returning the count of the ballots cast, the filing and registration not being required by statute. It is necessary to prove the returns by competent evidence. *S. v. Cole*, 618.

49. *Cruelty to Animals—Unlawful Killing—Evidence—Instructions—Harmless Error.*—A charge to the jury, on a trial of an indictment, under Revisal, sec. 3299, for the willful killing of the prosecutor's dog, that if the dog was actually killing the prosecutor's turkeys at the time it would be no defense or justification, is harmless error, the charge being otherwise correct and there being ample evidence for conviction, and no evidence that the danger to the turkeys was imminent or such as called for immediate action. *S. v. Smith*, 628.

50. *Manslaughter—Evidence Sufficient—Competency.*—Evidence in this case held competent and sufficient for conviction of manslaughter, at least, which tended to show that a teacher at a negro school violently assaulted his pupil, sixteen or seventeen years old, with a stick of lightwood about two feet long, the size of witness's arm, by striking him several times on the head, stunning him and causing him to stagger around like a drunken person; that he went to the door bleeding at the nose and told the prisoner he thought he had no right to beat him so much; that the pupil did not offer to hit the teacher; that the pupil had lived with a witness, his aunt, for five years, and that morning about 11 o'clock he went home, walking fast, his head thrown back, crying, his nose bleeding, and he staggered about the room, lying at intervals upon the bed; that he was taken to a doctor about five miles away, and when witness saw him next, in about two hours, he was lying on the floor of a neighboring store, nearly dead; and by an expert physician that he made a *post-mortem* examination, and that deceased died from cerebral hemorrhage, caused presumably by a blow or fall. *S. v. Stewart*, 636.

51. *Objections and Exceptions—Evidence, Competent in Part.*—When some of the testimony of a witness is competent and some is not, a general objection to the whole will not be sustained. *Ibid.*

52. *Witness, Expert—Physician—Opinion from Observation.*—An expert who has made a *post-mortem* examination of the deceased, whom the prisoner is accused of having murdered, may express his opinion as to the cause of the death without having a hypothetical question propounded to him, as his opinion is not based on the evidence of other witnesses. *Ibid.*

53. *Witness, Expert—Opinion—Hypothetical Question—Statement of Facts—Part Statement—Objections and Exceptions.*—In hypothetical questions asked an expert witness, a physician, as to the cause of the death of one whom the prisoner is accused of having murdered, upon the assumption that the jury found certain facts, in evidence, to be true, it is not necessary that all the facts should be stated; and if the party objecting thinks that an omitted fact would have elicited a different opinion from the witness, he should have incorporated it in his questions on cross-examination. *Ibid.*

EXAMINATION IN REBUTTAL. See Evidence.

EXECUTION. See Sales.

Appeal and Error—Injury to Person—Execution on Person—Insolvent Debtor's Oath—Habeas Corpus—Valid Discharge—Final Judgment—Bond to Stay Execution—Bail.—Judgment being rendered by a court of competent jurisdiction against the defendant in a certain sum for an injury committed to person of the plaintiff—a tort—who appealed without giving bond to stay execution: *Held*, (1) upon the return of execution against defendant's property unsatisfied, an execution upon the person may issue (Revisal, 625, 727); (2) filing an inventory of his property, etc. (Revisal, sec. 1930), will not exempt the defendant from arrest; (3) the execution can only be stayed by giving a bond securing the judgment (Revisal, 598); (4) the writ of *habeas corpus* cannot be successfully sued out (Revisal, 1822, subsec. 2); (5) to obtain the benefits of the provisions of Revisal, 1930 to 1933, the defendant must show a valid discharge from imprisonment; (6) bail cannot be given to release the defendant pending his appeal in lieu of the bond to stay execution. *Howie v. Spittle*, 180.

EXECUTORS AND ADMINISTRATORS.

1. *Executors and Administrators—Removal of Causes—Action by Administrator—Venue.*—An action by an administrator upon a life insurance policy of his intestate is properly brought in the county where the administrator resides, not necessarily where the bond is filed, the addition of the words, "administrator, etc.," being descriptive of his title or the capacity in which he sues (Revisal, secs. 424 and 421); and Revisal, sec. 421 makes a distinction between actions in which the administrator is sued, for then the action shall be brought in the county where the bond is filed. Revisal, secs. 419, 421, have no application. *Whitford v. Insurance Co.*, 42.

2. *Executors and Administrators—Removal of Administrator—Adverse Interests.*—In proceedings by the heir at law to remove the administrator of the estate of the intestate, duly appointed, on the ground of an adverse interest, it appeared that intestate's estate consisted largely of lands, with but little personal property, and the adverse interest insisted upon was the claim of plaintiff that the administrator owned jointly with the estate certain mules, hogs, farming implements, etc., to which he was claiming the whole. There was no evidence of bad faith or fraudulent concealment, and the defendant had permitted an inspection and appraisement of the property by the plaintiff, had since held it intact, and had given a solvent and sufficient bond for plaintiff's protection: *Held*, there was no evidence of an adverse interest which would warrant the removal of the administrator. Revisal, sec. 38. (*Simpson v. Jones*, 82 N. C., 323, cited and distinguished.) *Morgan v. Morgan*, 169.

3. *Same—Judgment—Questions of Law—Appeal and Error.*—When the lower court rests its judgment as to the removal of an administrator for an interest adverse to the intestate's estate solely upon a question of law, it is reviewable on appeal. *Ibid.*

4. *Executors and Administrators — Clerk's Appointment — Next of Kin Illiterate—Discretion of Clerk.*—Two brothers and two sisters, as next of kin of deceased, filed their renunciation of administration on the estate with the clerk of the court, the elder brother requesting the ap-

EXECUTORS AND ADMINISTRATORS—*Continued.*

pointment of a certain designated person as administrator and the younger brother requesting only that an administrator be appointed, without designating any particular person. The clerk appointed the person designated by the elder brother, and the younger brother applied subsequently for his removal, without designating any grounds therefor otherwise than may appear under the above stated facts: *Held*, (1) there was no legal ground shown for the removal of the administrator thus appointed; (2) if no renunciation or recommendation had been made, it was within the discretion of the clerk to appoint any one of the next of kin; (3) as none of the next of kin in this case could read or write, it would have been proper for the clerk to refuse to appoint either one of them. *In re Saville*, 172.

5. *Executors and Administrators—Deeds and Conveyances—Proceedings Void Upon Their Face—Collateral Attack.*—Proceedings by an administrator to sell lands to make assets, which are void upon their face, may be collaterally attacked. *McKellar v. McKay*, 283.

6. *Issues—Pleadings Insufficient.*—A next friend for a grantor in a deed having been appointed on the ground that the grantor was *non compos mentis*, he instituted an action against the grantee to set aside the deed and restrain him from cutting the timber thereunder. A guardian was appointed for the grantor after the institution of the action, who was made a party thereto, but took no active part therein. The restraining order was issued and was continued to the hearing. After the death of the grantor, his executors were made parties defendant and filed an answer saying "that in their opinion the action was not for the best interest of the parties." The restraining order was dissolved and defendants taxed with costs: *Held*, the defendants' answer did not raise any issue of fact, in the absence of allegation of bad faith or mismanagement of the next friend who had instituted the action. *Hockaday v. Lawrence*, 319.

EXPRESSION OF OPINION. See Appeal and Error.

EXTRAORDINARY REMEDY. See Mandamus.

FALSE WARRANTY. See Fraud.

FEDERAL EMPLOYERS' LIABILITY ACT. See Master and Servant.

FELLOW-SERVANT. See Railroads.

FEME COVERT. See Marriage; Principal and Agent; Courts; Deeds and Conveyances; Contracts.

FINDINGS OF FACT. See Appeal and Error; Reference.

"FLYING SWITCH." See Negligence; Contributory Negligence.

FORCIBLE TRESPASS. See Trespass.

FRAUD AND MISTAKE. See Evidence; Auctions and Auctioneers.

1. *Fraud—False Warranty—Deceit—Two Transactions—Damages—Special Loss.*—The plaintiff exchanged a bay mare with defendant for his mule and $20, the difference in value between the two animals, and finding the mule did not come up to representations made by the defendant, the latter substituted a mare for the mule. In an action for deceit and false warranty, as to both transactions: *Held*, the measure of damages is the difference between the value of the last

FRAUD AND MISTAKE—*Continued.*

mare, as she was and as she was represented to be, or as, under the contract or representation, she should have been; and that to permit a recovery upon the false warranty and deceit as to the mule was to mulct defendant twice in damages unless the plaintiff had shown some special loss in addition to the ordinary damages which result in such cases from the deceit or false warranty. *Robertson v. Halton*, 215.

2. *Fraud—False Warranty—Vendor and Vendee—Recommendation of Wares—Evidence—Questions for Jury.*—While a statement made by the seller in recommending his goods may not ordinarily amount to a warranty, it may be otherwise when the statement takes the form of an opinion or estimate of quality or value, and it is doubtful whether or not a warranty was intended, for then the jury should decide whether a warranty was, in fact, intended. *Ibid.*

3. *Same—Questions of Law.*—When the words or statements made by the seller as to the value of the wares he is selling, etc., and which induced the purchaser to buy, clearly show a warranty, it becomes a question of law for the court to so declare, without the aid of the jury. *Ibid.*

4. *Fraud—Deceit, Elements of—Evidence.*—To constitute deceit there must be an untrue statement, which is knowingly made, or the person making it must be consciously ignorant whether it be true or not, with the intent that the other party shall act upon it, or it should be made under circumstances apparently fitted to induce him to do so, in reliance upon it, in the manner contemplated or manifestly probable, so that he thereby suffers damage; and in order to maintain the action it is sufficient to show that the defendant practiced a deception with the design of depriving the plaintiff of some right, profit, or advantage, and to acquire it for himself or avail himself of it in some way. *Whitmire v. Heath*, 155 N. C., 304, cited and approved. *Ibid.*

5. *Lessor and Lessee—Lease—Fraud and Mistake—Notice to Vendor—Inquiry.*—One dealing with a lessee of a business concern who, in the transaction, describes himself as lessee, has notice of such facts as will put him on reasonable inquiry that he is not dealing with the lessor, and the lessor cannot be held liable for goods sold and delivered to the lessee by mistake and without his authority, when he had not induced or misled the seller into making the transaction. *Plaster Co. v. Plaster Co.*, 455.

FRONT-FOOT RULE. See Cities and Towns.

FUTURES. See Contracts.

GIFTS. See Wills.

GOVERNMENTAL FUNCTIONS. See Cities and Towns.

GUARDIAN AND WARD. See Pleadings.

Guardian and Ward—Removal—Conflicting Interests.—A father, guardian for his child, claiming as tenant by curtesy the rents and profits of lands to which his wife had not acquired possession or right of possession, and which had descended to his ward as heir at law, is such an adverse claimant to the rights of the ward as will entitle the latter to his removal. Rev., 1806. *In re Dixon*, 26.

HABEAS CORPUS. See Execution.

HANDWRITING. See Evidence.

HARMLESS ERROR.

1. *Contract, Continuous.*—Nothing appearing of record to show that a contract alleged by plaintiff with the defendant, whereby the latter was to take the output of the shingle mill of the former, contained any agreement of the period of time in which he was to do so, and there being no evidence that any shingles were made or offered to defendant, or that the plaintiff could get timber to make any more shingles when he shut down the mill, or of the capital invested, etc.: *Held*, no error of which the plaintiff could complain as to the amount of recovery in this case for the failure of defendant to continue to take the output of the mill. *Pool v. Walker*, 40.

2. *Insurance, Life—Misrepresentations—Disease—Witnesses, Nonexpert—Harmless Error.*—The defense in an action to recover upon a life insurance policy being the misrepresentation of the insured that she had not had pneumonia previous to her application for the policy, exceptions to testimony of nonexpert witnesses that they did not know whether or not she had suffered from the disease, upon the ground that only physicians could testify on the subject, will not be sustained, as their testimony would not tend to establish the fact either way. *Brock v. Insurance Co.*, 112.

3. *Instructions—Harmless Error—Appeal and Error.*—When it would have been proper for the court to have instructed the jury to find for the plaintiff, if they found the facts to be as testified to by the witnesses, the defendant is not prejudiced by an instruction given to the effect that they should so find upon certain phases of the evidence. *Investment Co. v. Postal Co.*, 259.

4. *Negligence—Contributory Negligence—Issues—Instructions—Harmless Error.*—In an action for damages for personal injuries received, the first issue being upon the question of defendant's negligence causing the injury, the second issue read, "If so, did plaintiff contribute to his injury?" *Held*, the error in the second issue was cured under an instruction that the jury should consider the issue as if it had read, "Did the plaintiff contribute by his own negligence to his injury?" *Richardson v. Edwards*, 590.

5. *Counsel — Improper Remarks — Harmless Error — Instructions.* — Improper remarks made by counsel to the jury are not reversible error when it appears that the court has instructed the jury not to consider them, but to confine themselves in their consideration to the facts bearing upon the issues; and exception to the instructions not being more specific or full must be taken by way of prayers for special instruction thereon. The trial judges are cautioned to immediately and fully correct abuses of this character. *S. v. Davenport*, 596.

6. *Cruelty to Animals—Unlawful Killing—Evidence—Instructions—Harmless Error.*—A charge to the jury, on a trial of an indictment, under Revisal, sec. 3299, for the willful killing of the prosecutor's dog, that if the dog was actually killing the prosecutor's turkeys at the time it would be no defense or justification, is harmless error, the charge being otherwise correct and there being ample evidence for conviction, and no evidence that the danger to the turkeys was imminent or such as called for immediate action. *S. v. Smith*, 628.

HIGHWAYS. See Cities and Towns.

1. *Public Highways—Bridges—Vehicles—Automobiles—Negligent Operation—Question for Jury.*—In an action for damages for injury alleged to have been sustained because of the defendant's negligence in running his automobile over a bridge, without observing proper caution for plaintiff's safety, overtaking plaintiff thereon and frightening his mules so that they became uncontrollable, throwing plaintiff to the floor of the bridge under their feet, and running his conveyance over him, there was conflicting evidence as to the speed of the automobile and the ability of defendant to slow up in time to avoid the injury: *Held*, in this case, the charge of the court was correct under Laws 1909, ch. 445, secs. 9, 10, 11, and 12, regulating the operation of vehicles in use on the highways: (2) the case was almost entirely one of fact, and properly submitted to the jury. *Gaskins v. Hancock*, 57.

2. *Public Highways—Bridges—Automobiles—Negligent Operation—Damages—Implied Notice.*—One driving an automobile along public highways and over bridges is liable for such compensatory damages as are proximately caused by his negligence in not exercising proper care in looking out for horses, etc., thereon; and he is required to take notice that such machines are liable to scare them. *Ibid.*

3. *Public Highways—Conveyances—Automobiles—Nuisance.*—It is not negligence *per se* for a person to use an automobile in traveling along public highways and across public bridges. *Ibid.*

HOMESTEAD RESERVED. See Deeds and Conveyances.

HOMICIDE.

1. *Murder—Special Venire—Regular Jurors—Interpretation of Statutes.*—Chapter 343, Laws 1909, providing a term of court for New Hanover County, provides that jurors drawn for the term "shall be regular jurors and subject only to the challenges now allowed by law to regular jurors." Hence, when the regular panel for the first week had been exhausted and a case for a capital felony was reached on Saturday and continued to Monday of the following week, it was required that a special venire should have been drawn under Revisal, secs. 1973, 1974, and objections to the regular panel is without merit. *S. v. Sandlin*, 624.

2. *Manslaughter—Evidence Sufficient—Competency.*—Evidence in this case held competent and sufficient for conviction of manslaughter, at least, which tended to show that a teacher at a negro school violently assaulted his pupil, sixteen or seventeen years old, with a stick of lightwood about two feet long, the size of witness's arm, by striking him several times on the head, stunning him and causing him to stagger around like a drunken person; that he went to the door bleeding at the nose and told the prisoner he thought he had no right to beat him so much; that the pupil did not offer to hit the teacher; that the pupil had lived with a witness, his aunt, for five years, and that morning about 11 o'clock he went home, walking fast, his head thrown back, crying, his nose bleeding, and he staggered about the room, lying at intervals upon the bed; that he was taken to a doctor about five miles away, and when witness saw him next,

HOMICIDE—*Continued.*

in about two hours, he was lying on the floor of a neighboring store, nearly dead; and by an expert physician that he made a *post-mortem* examination, and that deceased died from cerebral hemorrhage, caused presumably by a blow or fall. *S. v. Stewart*, 636.

3. *Murder—Self-defense—Evidence.*—When there is evidence tending to show that the prisoner on trial for the murder of deceased had a quarrel with him at a near-beer stand, followed by a scuffle, and soon thereafter the deceased struck the prisoner down as the latter was leaving; that the prisoner kicked at deceased as he ran under a horse hitched to a buggy standing there, then ran around the buggy and pursued the deceased down the road a short distance, where the deceased was afterwards found with his throat cut, with evidence of identification of the prisoner's footprints there and exclamations of the prisoner heard by witnesses at the time and place, that prisoner "has cut me to death"; that the prisoner soon returned bloody, saying "it was the blood of the other fellow": *Held*, there was no evidence to support the plea of self-defense, especially where a judgment of manslaughter has been rendered on the verdict. *S. v. Dove*, 653.

4. *Same—Aggressor.*—When it appears by the prisoner's evidence, upon a trial for murder, that he and the deceased had words which brought on a conflict resulting harmlessly, in which he testified that he caught the deceased by the coat tail, when he fell to the floor; and soon thereafter there was another conflict on the same subject of quarrel, in which he testified that he kicked at the deceased when he was going around a buggy which separated them, thus renewing the difficulty, the question of self-defense is excluded under the admissions of the prisoner. *S. v. Garland*, 138 N. C., 678, cited and approved. *Ibid.*

5. *Same—Justifiable Homicide.*—The principles of justifiable self-defense held to be applicable in *S. v. Dixon*, 75 N. C., 279, where one may repel force by force, against one who manifestly intends or endeavors by violence or surprise to commit a known felony such as murder and the like, is never permissible in its application except when the prisoner is free from legal blame at the beginning and an actual assault is being made with the present purpose to kill and with the present ability, real or apparent, to carry out the felonious purpose. *Ibid.*

6. *Murder — Witness — Declarations — Evidence—Impeachment.*—Upon a trial for murder evidence is competent on the part of the State tending to show on cross-examination declarations on the part of defendant's witness, after the occurrence and before the trial, made to an officer charged with the duty of arresting the prisoner, that the latter was a bad man, when it has a direct tendency to contradict the testimony he had theretofore given in the prisoner's favor. *Ibid.*

HOTELS. See Landlord and Tenant.

HUSBAND AND WIFE. See Contracts; Evidence; Parties; Principal and Agent.

Abduction—Husband and Wife—Coercion—Presumptions—Rebuttal—Burden of Proof—Instructions.—Upon evidence to sustain the charge, it is not error for which the defendant, charged with abduction of a

HUSBAND AND WIFE—*Continued.*

girl under fourteen years of age (Revisal, 3358), can complain, for the judge to instruct the jury that where a married woman commits a crime in the presence of her husband it is presumed, in the absence of proof to the contrary, that she did it under his coercion, and unless the State has satisfied them that this presumption is not true, then they should return a verdict of not guilty. *Semble*, that in cases of this character the presumption that the wife was acting under coercion of her husband does not obtain. *S. v. Nowell*, 648.

IDENTIFICATION. See Evidence.

IMPEACHMENT. See Evidence.

INCONSISTENT VERDICT. See Verdict.

INDEPENDENT ACTION. See Insurance.

INDEXES. See Judgments.

INDICTMENT.

1. *Indictment—Counts—Election—Practice.*—The solicitor is not put to his election as to which of several counts in a bill of indictment relating to one transaction he will prosecute, until the close of the evidence; and the trial judge is not required until then to restrict the trial to any special count. *S. v. Davenport*, 596.

2. *Indictments — Sufficiency—Counts—Informalites—Primary Elections.* An indictment against a manager of a primary election for county officials, charging (1) that defendant "did unlawfully, willfully, and fraudulently count and call but fourteen votes for T., a candidate for the office of treasurer . . . when in fact twenty votes were duly and lawfully cast" for him, and (2) a like charge in respect of fraudulently not calling and counting votes cast at such primary for A. for the office of treasurer, expresses the charges sufficiently, and may not be quashed because of informalities or refinements. Revisal, sec. 3254. *S. v. Cole*, 618.

INDORSEMENT. See Bills and Notes.

INJUNCTION. See Pleadings.

1. *Injunction—Cutting Timber—Insolvency—Allegations—Good Faith—Practice.*—A restraining order to prevent the defendant from cutting timber should be continued to the hearing of the cause when the plaintiff shows an apparent title to the lands and satisfies the court that his claim is made in good faith; and an allegation of insolvency is not now required. Revisal, secs. 806, 807, 808, 809. *Lodge v. Ijames*, 159.

2. *Same—Evidence.*—The plaintiff seeks in its action to enjoin the defendant's cutting timber upon certain lands, claiming title under a certain deed. There was conflicting evidence upon the plaintiff's claim of possession of the land through their tenants, agents, and employees for a long period of time, and as to whether the deed or the possession of plaintiffs covered the *locus in quo*: *Held*, that

INJUNCTION—*Continued.*

as the plaintiff's claim clearly appeared to have been made in good faith and an apparent title was established, the restraining order should be continued to the hearing. *Ibid.*

3. *Cities and Towns—Injunction—Issues of Fact—Questions for Jury—Hearing—Questions of Law.*—A town ordinance prohibited the erection of any sawmill or other steam mill within certain boundaries. Within these boundaries the defendant had begun to erect a sawmill before the passage of the ordinance, and was stopped by a restraining order at the suit of plaintiff, who, defendant alleged, was interested in a sawmill operated in the prohibited territory without molestation. The defendant denied that the operation of his sawmill was a nuisance under the conditions and surroundings of its location: *Held*, (1) a permanent injunction should have been refused and the restraining order continued only to the hearing; (2) operating a sawmill is not a nuisance *per se*, and it is a question of law whether it was a nuisance under the circumstances, or whether there was a discrimination, dependent upon what the jury found the facts to be. *Barger v. Smith*, 323.

INJURY TO PERSON. See Arrest and Bail; Negligence.

INNOCENT PURCHASER. See Conversion.

INSANITY. See Homicide.

INSOLVENT DEBTOR'S OATH. See Execution.

INSTRUCTIONS.

1. *Judgment—Default and Inquiry—Actual Damages—Instructions—Appeal and Error.*—After judgment by default and inquiry on the question of unliquidated damages has been entered and a trial upon the inquiry is being had, it is for the plaintiff to show by his evidence the amount of damages he has sustained, in order to recover more than nominal damages; and a charge by the court that the plaintiff is entitled, at least, to recover some actual damages in any view of the case, is erroneous when the evidence is conflicting on this point. *Blow v. Joyner*, 140.

2. *Instructions—Requests—Substantially Given.*—An instruction need not be in the express language of a correct request, if it is sufficiently responsive and gives a correct statement of the law applicable to the questions presented. *Hooker v. R. R.*, 155.

3. *Burden of Proof—Evidence—Instruction—Expression of Opinion by the Court—Appeal and Error.*—When the validity of the indorsement of a negotiable instrument sued on by the indorsee is denied by the answer, and the only evidence is that introduced by the plaintiff, which fully states the necessary matters to show that he is a holder in due course, it is correct for the judge to charge the jury to return a verdict for the plaintiff if they find the facts to be as testified to by him; but reversible error for the trial judge to remark in the presence of the jury that if the verdict was for the defendant he would set it aside, for this is an expression of opinion upon the credibility of the evidence forbidden by statute. *Park v. Exum*, 228.

INSTRUCTIONS—*Continued.*

4. *Instructions—Harmless Error—Appeal and Error.*—When it would have been proper for the court to have instructed the jury to find for the plaintiff, if they found the facts to be as testified to by the witnesses, the defendant is not prejudiced by an instruction given to the effect that they should so find upon certain phases of the evidence. *Investment Co. v. Postal Co.*, 259.

5. *Appeal and Error—Contention of Parties—Admissions—Instructions—Procedure.*—When made for the first time on appeal, an exception to the charge that it did not correctly state the admissions of the parties will not be considered, as this should have been called to the attention of the judge at the time. *LaRoque v. Kennedy*, 360.

INSURANCE.

1. *Mistake—Weight of Evidence.*—When the proof of loss contains a statement that would invalidate the policy of life insurance sued on, if true, that the insured had had pneumonia prior to the time of her application, contrary to her representations therein made, the statement made in the proof of loss affects only the weight of the evidence for the jury to consider, when there is also evidence that the statement was made under a mistake. *Brock v Insurance Co.*, 112.

2. *Same.*—The insured, in her application for life insurance, represented that she had not previously had pneumonia. After her decease, the beneficiary, in his proof of loss, made a statement that she had had pneumonia previous to her application: *Held*, evidence sufficient to go to the jury in rebuttal of the *prima facie* case made out for the defendant in the plaintiff's suit upon the policy, that plaintiff was mistaken and was speaking from hearsay and not from his personal knowledge, and that the insured had not had pneumonia, as stated in her application. *Ibid.*

3. *Insurance, Fire—Vendor and Vendee—Public Policy—Action Upon Insurance Policy—Damages.*—A manufacturer and vendor of a piano which mechanically plays tunes when a nickel is inserted in a slot, took out a "floating policy" on his stock of such pianos, and his agent, in the hope of effecting a sale, placed one of them with the owner of a house of ill-fame. Under these conditions the house caught fire and the piano was destroyed, it appearing from the examination of the remains of the slot machine that some money had been put in by the guests of the house: *Held*, the title and right of possession remained in the vendor; the vendee was in nowise a party to the insurance contract, and the question of public policy is too remote to be considered on the question of recovery in an action brought by the vendor against the insurer upon the policy contract. *Brown v. Kinsey*, 81 N. C., 245, cited and approved. *Electrova Co. v. Insurance Co.*, 232.

4. *Insurance, Fire—Policy Contracts—Interest of Parties—Public Policy.* Contracts will not be declared void as against public policy unless the case is clear and free from doubt and the injury to the public is substantial and not theoretical or problematical, and the advantage or interest of either party will not be considered. *Ibid.*

5. *Insurance, Fire—Policy Contract—Collateral Acts.*—A contract will not be set aside as being against public policy if the illegal act com-

INSURANCE—*Continued.*

plained of is but collateral to it, for if such act has no direct connection with the contract sought to be set aside, the contract is not affected by it. *Ibid.*

6. *Insurance, Fire—Policy Contract—Independent Action—Public Policy.* If the plaintiff, in his action upon a contract, resisted upon the ground of public policy, does not require the aid of the illegal act to establish his claim, he may recover. *Ibid.*

7. *Same.*—A floating policy of insurance issued to a vendor of pianos is lawful, for a valid purpose and supported by a consideration, and the vendor may recover upon the contract in his action against the insurer for the loss by fire of one of the pianos covered by the policy, independent of any question of public policy arising from the fact that he had placed it in a house of ill-fame with the hope of selling it to the owner, and while there under these conditions the piano was destroyed. *Ibid.*

8. *Insurance—Policies—False Representations—Equity.*—This action to recover premiums paid for a policy of life insurance and interest thereon, alleging that it was induced by the false representations of defendant's agents, is controlled by the principles announced in *Whitehurst's case*, 149 N. C., 273; *Jones' case*, 151 N. C., 54; *Jones' case*, 153 N. C., 388; *Sykes' case*, 148 N. C., 13, and similar ones. *Hughes v. Insurance Co.*, 592.

INSURER. See Carriers of Goods.

INTENT. See Contracts; Auctions and Auctioneers; Evidence; Rape; Trusts and Trustees; Wills.

INTERLOCUTORY ORDER. See Appeal and Error.

INTERSTATE COMMERCE. See Railroads.

INTOXICATING LIQUORS.

1. *Intoxicating Liquors—Unlawful Sales—Revenue License—Defense—Evidence—Presumptions.*—Upon a trial for the illegal sale of intoxicating liquors, it is not reversible error for the judge to exclude from the evidence a *subpœna duces tecum* issued to the collector of internal revenue for the purpose of showing that no license to sell had been issued to the defendant, as no presumption is raised on the question of an illegal sale because no United States license to sell has been issued him. *S. v. Rochelle*, 641.

2. *Intoxicating Liquors—Unlawful Sales—Alibi—Evidence Scrutinized—Instructions.*—In defense to an action for the illegal sale of intoxicating liquors, the defendant relying on an *alibi*, it was not error for the trial court to quote from a Supreme Court decision, that the defendant's evidence in such cases "should be closely scrutinized, because of its liability to abuse," when it appears that he carefully and properly explained how this evidence should be scrutinized and accepted by the jury, and that an *alibi*, if found by them, would be a complete defense. *Ibid.*

INTOXICATING LIQUORS—*Continued.*

3. *Spirituous Liquors—Barter and Exchange—Loan of Liquors—Interpretation of Statutes.*—When one lends spirituous liquor with the understanding that it shall be returned in kind, the title to the liquor passes absolutely for the consideration of its being replaced, and the transaction is a barter or exchange and comes within the meaning of the word "sale," and therefore is a violation of the State prohibition law. Laws Extra Session of 1908, ch. 71. *S. v. Mitchell*, 659.

INVESTMENT. See Trusts and Trustees.

1. *Issues Sufficient—Slander—Issues Approved.*—When under the issues submitted the defendant has had opportunity to present evidence of any defense he has set up in his answer and has not been otherwise prejudiced, there is no reversible error. The issues in this action for slander approved. *Fields v. Bynum*, 413.

2. *Issues Submitted—Issues Tendered—Appeal and Error.*—There is no reversible error in refusing proper issues tendered when those submitted by the trial judge were sufficient to enable the parties to present every phase of the controversy. *Gallimore v. Grubb*, 575.

3. *Issues—"Last Clear Chance"—Objections and Exceptions—Issues Submitted—Issues Requested.*—When the complaining party has not submitted an issue, or excepted to the issues tendered, he cannot successfully appeal for the failure or refusal of the judge to submit the issue. *Davidson v. R. R.*, 578.

4. *Issues—Real Controversy.*—In this action by a contractor for balance due for constructing a building, the issue submitted presents the real controversy, and no error is found. *West v. Wilkinson*, 487.

5. *Negligence—Contributory Negligence—Issues—Instructions—Harmless Error.*—In an action for damages for personal injuries received, the first issue being upon the question of defendant's negligence causing the injury, the second issue read, "If so, did plaintiff contribute to his injury?" *Held*, the error in the second issue was cured under an instruction that the jury should consider the issue as if it had read, "Did the plaintiff contribute by his own negligence to his injury?" *Richardson v. Edwards*, 590.

JOINT MAKERS. See Bills and Notes.

JUDGMENT, PRO FORMA. See Appeal and Error.

JUDGMENTS. See Appeal and Error; Equity.

1. *Judgment—Default and Inquiry—Nominal Damages.*—When a complaint has been properly filed showing a right of action for unliquidated damages, a judgment by default and inquiry establishes plaintiff's right of action, and that he is at least entitled to nominal damages. *Blow v. Joyner*, 140.

2. *Power of Courts—Sentence of Imprisonment—Temporary Withholding of Capias—Conditioned on Prisoner Leaving County—Rearrest—Limitation of Actions.*—A verbal order of the trial judge to the clerk not to issue a capias to carry into effect a sentence of eight months imprisonment of defendant in the county jail, until fifteen days after the adjournment of court, and his saying to the prisoner if she would

JUDGMENTS—*Continued.*

leave the county within the fifteen days and not return she would not be compelled to serve her sentence, is not a decree of banishment, as it is for the prisoner's volition as to whether she would leave and avoid serving a legal imprisonment; and the fact that she did leave within the time allowed and returned after a longer period of time than that of the sentence will not avail her as a defense, as her absence was not equivalent to serving her sentence, and there is no statute of limitations in such cases. *In re Hinson*, 250.

3. *Judgments—Dockets—Cross-indexed—Liens.*—Judgments which have been docketed, but not cross-indexed, do not constitute a lien upon land or take precedence over mortgages subsequently registered. *Wilkes v. Miller*, 428.

JUDICIAL DISCRETION. See Mandamus.

JURISDICTION. See Courts.

1. *Courts, Justices'—Action on Contract—Nonresident Defendants—Bona Fide Residents—Motion to Dismiss—Procedure.*—For a justice of the peace to acquire jurisdiction in an action upon contract against a nonresident of that county there must be other *bona fide* resident defendants; and when it appears that a nonresident of the county has been thus sued with other defendants, who are residents, but not *bona fide* parties, he may subsequently move to dismiss the action in the justice's court and again on appeal in the Superior Court. *Austin v. Lewis*, 461.

2. *Same—Pleadings.*—In an action upon contract for the sale of lumber at a certain sum, brought before a justice of the peace, it was alleged and claimed that it was delivered to H. & T. for one L., a nonresident, to whom it was duly shipped; that L. had received it and plaintiff had been paid through H. & T., excepting a certain balance, the amount in controversy: *Held*, the action should have been dismissed upon the motion of L., he being a nonresident of the county, and it appearing that H. & T. were not *bona fide* defendants. Revisal, secs. 1449, 1450. *Ibid.*

JURORS. See Jury; Courts.

JURY. See Evidence; Homicide.

JUSTICE OF THE PEACE. See Courts.

JUSTIFICATION. See Slander.

KNOWLEDGE. See Principal and Agent.

LABORERS. See Liens.

LANDLORD AND TENANT.

1. *Landlord and Tenant—Repairs to Leased Premises—Agreement.*—The landlord is not required to keep the leased premises in repair, in the absence of any agreement between the parties to that effect. *Lumber Co. v. Coley-Bardin*, 255.

2. *Same—Implied Covenant.*—A covenant on the part of the landlord is not implied, from the fact of a lease of a hotel, that he will keep the leased premises in repair or that they shall be fit for the purposes for which they are rented. *Ibid.*

"LAST CLEAR CHANCE." See Issues.

LEGACIES. See Wills.

LEGISLATIVE ACTS. See Statutes; Constitutional Law.

LEGISLATIVE POWERS. See Statutes.

LESSOR AND LESSEE. See Contracts; Landlord and Tenant; Tenants in common.

LETTERS. See Evidence.

LIENS. See Claim and Delivery.

1. *Lien—Mechanics and Laborers—Architect's Plans and Specifications—Interpretation of Statutes.*—An architect who furnishes plans and specifications for a building is not a mechanic or laborer within the meaning of the Revisal, sec. 2016, and he has no lien thereon for the same. *Stephens v. Hicks*, 239.

2. *Liens—Mechanics and Laborers—Architect's Supervision—Interpretation of Statutes.*—An architect, who has superintended the work upon a building in course of erection, under a contract with the owner to do so, is not entitled to a mechanic's or laborer's lien, as work of this character does not fall within the intent of the statute. Revisal, sec. 2016. *Ibid.*

3. *Liens—"Material"—Architects—Plans and Specifications—Interpretation of Statutes.*—Plans and specifications of the architect are not "material" within the meaning of the statute giving a lien for material furnished, etc. Revisal, sec. 2016. *Ibid.*

4. *Liens—Mechanics and Laborers—Architect—Married Women—Executory Contracts—Charge Upon Separate Realty.*—The claim of an architect for plans and specifications is not within the intent of Revisal, sec. 2016, giving mechanics and laborers a lien upon the building constructed, etc., and a contract with him to make them is of an executory nature, and hence when the contract or agreement to furnish them is made with a married woman, prior to the act of 1911, ch. 109, without the written consent of her husband, and is not of such character as to charge her separate property, before the passage of the said act, the contract or agreement is not enforcible, and her property is not chargeable. *Finger v. Hunter*, 130 N. C., 529; *Ball v. Paquin*, 140 N. C., 83, cited and distinguished. *Flaum v. Wallace*, 103 N. C., 296, and that line of cases cited and applied. *Ibid.*

5. *Married Women—Property Rights Act—Statutes—Prospective—Interpretation of Statutes.*—Chapter 109, Laws of 1911, relating to married women's property rights, provides that a married woman "shall be authorized to contract," meaning thereafter, and that the act "shall be in force from and after its ratification," referring, without express words of retrospection, to future transactions, and is therefore prospective by its express terms. Retrospective legislation which interferes with the rights of parties to make a contract discussed by WALKER, J. *Ibid.*

LIGHTS. See Negligence.

LIMITATION OF ACTIONS. See Mortgages; Deeds.

LIVE-STOCK BILLS OF LADING. See Carriers of Goods.

LOAN. See Intoxicating Liquors.

"LOOK AND LISTEN." See Negligence; Railroads.

MALICE. See Slander.

MANDAMUS.

1. *Public Officials—Recorder's Court—Election of Recorder by Aldermen —Failure to Elect—Mandamus.*—Mandamus will lie to compel the board of aldermen of an incorporated town to elect a recorder for a recorder's court, in the manner prescribed by statute. *Battle v. Rocky Mount*, 329.

2. *Same—Ministerial Duties.*—A mandamus issued to compel the board of aldermen to act in obedience to the legislative mandate and elect a recorder for a recorder's court which the statute has created, cannot direct when they shall appoint or interfere with discretionary powers conferred upon them, but can only require that they shall act in obedience to the law. *Ibid.*

3. *Appeal and Error—Public officials—Mandamus—Public Interest—Procedure—Power of Court.*—When it appears on appeal to the Supreme Court from admitted facts that a board of aldermen of an incorporated town are acting in violation of a command of a statute that they elect a recorder in the manner therein stated, judgment will be entered in this Court requiring the writ of mandamus to issue, in view of the public interests involved; but in this case the writ is stayed for a reasonable period, so that, if there has been an election in the meantime, the clerk will not issue the writ, but certify the judgment to the Superior Court in the usual manner and form. *Ibid.*

4. *Mandamus— Road Commissioners— Vacancy— Issue as to Election — Cause Transferred to Term—Interpretation of Statutes.*—In a suit for mandamus brought by two members of a board of road commissioners of a township to compel the other two members to meet with them and elect a fifth member to fill a vacancy caused by the resignation of one of them, the pleadings raised an issue as to whether a certain person had been lawfully elected to fill the vacancy by a majority vote at a previous meeting, the plaintiffs contending that the vote was a tie and that the one claimed to have been elected, and who was acting with the defendant commissioners, was a usurper with merely a colorable title: *Held*, the issues presented a question of fact as to whether the one claiming to have been elected to fill the vacancy caused by the resignation of the member of the board had received a majority of the votes at the meeting, or whether the vote was a tie, resulting in no election; and an order made by the judge transferring the cause to the Superior Court at term for the trial of the issue joined was correct. Revisal, sec. 824. *Edgerton v. Kirby*, 347.

5. *Mandamus—Public Officer—Legal Duty—Discretionary Powers.*—Generally, mandamus will lie to compel a public officer to perform a legal duty as distinguished from a discretionary power, if the legal duty is mandatory. *Ibid.*

6. *Mandamus—Extraordinary Remedy—Remedy at Law.*—Mandamus is an extraordinary remedy, and the writ will not issue except in cases of ne-

MANDAMUS—*Continued.*

cessity, where no other adequate remedy is available; and when an issue of fact is raised by the pleadings the determination of which may conclude the matter, the issuance of the writ should in the meanwhile be denied. *Ibid.*

7. *Mandamus—Power of Courts—Judicial Discretion—No other Adequate Remedy.*—The issuance of the writ of mandamus is within the judicial and not the arbitrary discretion of the court, and where there is a right with no other adequate remedy, this writ should not be denied, if it is the proper remedy. *Ibid.*

MANSLAUGHTER. See Homicide.

MARRIED WOMEN. See Marriage; Contracts; Courts; Deeds and Conveyances; Principal and Agent.

MECHANICS AND LABORERS. See Lien.

MEMORANDUM. See Auctions and Auctioneers.

MENTAL ANGUISH. See Telegraphs.

MILEAGE BOOK. See Carriers of Passengers.

MINISTERIAL DUTIES. See Mandamus.

MISREPRESENTATIONS. See Insurance.

MISTAKE. See Fraud and Mistake; Evidence.

MOB. See Trespass.

MORTGAGES. See Claim and Delivery; Trusts and Trustees.

1. *Power to Mortgage—General Indebtedness—Vote of People.*—A legislative enactment authorizing a special school district to "purchase and hold real and personal property and to sell, mortgage, and transfer the same for school purposes," etc., and approved by a majority of the qualified voters of the school district, at most only authorizes a mortgage on specific property, and is not sufficient to the validity of bonds issued by the trustees for school purposes, which constitute a general indebtedness of the district, and where their payment may be enforced by taxation. *Ellis v. Trustees*, 10.

2. *Mortgages, Constructive — Possession — Beyond Court's Jurisdiction — Limitation of Actions—Equity.*—When a sale of mortgaged lands is made by the mortgagees under a power contained in the instrument, who remain beyond the borders of the State and the jurisdiction of our courts, claiming constructive possession through their tenants, the statute of limitations will not run as against the mortgagors, for the foreclosure of a mortgage is equitable, with the right of the mortgagor to an accounting for rents and profits, and differs from an action in ejectment because the latter is of a possessory character. *Owens v. Hornthal*, 19.

3. *Mortgages—Fraud—Relationship—Evidence— Questions for Jury.*—An erroneous charge of the trial judge, that the plaintiff had made a *prima facie* case of fraud in his action to set aside a deed given to the purchaser under a foreclosure sale of a mortgage appearing to be an inadvertence, is harmless when it appears from the whole charge that the burden of proof was properly put upon the plaintiff. *Ibid.*

MORTGAGES—*Continued.*

4. *Mortgages—Deeds and Conveyances—Purchase Money—Registration—Priority.*—A deed made to lands by a vendor and contemporaneously executed with a mortgage back to secure the purchase price are regarded in law as concurrent acts, or the same act, the title resting only a moment in the vendee and passing simultaneously into the purchase-money mortgagee. Hence, when the deed and mortgage are executed at the same time, and the vendee attempts to mortgage the land to a third person, who has his deed registered first, no priority can thereby be obtained over the purchase-money mortgagee. *Hinton v. Hicks*, 24.

5. *Mortgages—Auctioneer—Memorandum—Statute of Frauds—Principal and Agent.*—At a foreclosure sale of land under a mortgage, the auctioneer is the agent of the vendor thereunder for the purposes of the sale, and of the vendee who has become such under the prescribed conditions thereto. *Love v. Harris*, 88.

6. *Same.*—By bidding at a foreclosure sale of lands the purchaser sanctions the authority of the auctioneer whom the vendor has employed, constituting him his agent to make a written memorandum thereof; and a proper memorandum so made is binding upon the purchaser and does not fall within the inhibition of the statute of frauds. *Ibid.*

7. *Same—Signature of Vendee—Intent.*—It is not necessary that the auctioneer at a foreclosure sale subscribe the vendee's name to the memorandum of sale; it is sufficient if the vendee's name appears in the memorandum made by the auctioneer and the intention is manifested thereby to bind him to the sale. *Ibid.*

8. *Same.*—A memorandum made on the back of a notice of sale of lands under a mortgage immediately after the last and highest bid, "Sold to C. J. for $1,500, 22 January, 1910," is a sufficient memorandum to bind the vendee under the statute of frauds, the notice being an offer to sell the property and the memorandum written on the notice an acceptance according to its terms. *Dickerson v. Simmons*, 141 N. C., 325, cited and distinguished. *Ibid.*

9. *Mortgages—Valid Sale—Resale—Title—Second Purchaser—Notice—Mortgagor—Guarantee—Implied Warranty.*—A purchaser at a valid mortgage sale of lands having refused to comply with the terms of his bid, the vendor again on the same day put up the lands for sale under the mortgage, without the consent of the mortgagor and after the bidders had dispersed, whereat it was bid in by another. But the first purchaser having subsequently agreed to take the lands according to the terms of sale, a deed was made to him, the purchase price received and applied to the mortgage and the cost of sale, and a surplus paid over to the mortgagor: *Held*, (1) the second purchaser acquired no right to the title to the land; (2) he purchased with notice of the infirmity of the second sale; (3) the first sale being valid, the first purchaser had a right to demand a deed to the land; (4) by making the second sale there were no elements of warranty or an implied guarantee of a ratification by the mortgagor. *Ibid.*

10. *Mortgages—Notes—Interest—Maturity on Default—Reasonable Provisions.*—Where a deed is payable in installments and is secured by a mortgage containing provision that the entire debt shall mature on failure to pay the interest or specified portions of the principal as it

MORTGAGES—*Continued.*

comes due, or any other reasonable stipulation looking to the care and preservation of the property or the maintenance of the lien thereon, such provision or stipulation, in the absence of circumstances tending to show fraud or oppression or "unconscionable" advantage, is enforcible as a valid contract obligation. *Bizzell v. Roberts*, 272.

11. *Waiver—Option of Mortgagee.*—Provision in a mortgage that the mortgage notes shall mature and become payable on failure of the maker to pay the interest as it may become due at the stated periods is primarily for the benefit of the mortgagee, and, as a rule, will be waived by him by the acceptance of all arrears, the occasion of the default, and invariably so when the maturing of the debt is expressed to be at the option or election of the mortgagee and he accepts the arrears with the expressed or implied intent to waive the forfeiture. *Ibid.*

12. *Judgments—Dockets—Cross-indexed—Liens.*—Judgments which have been docketed, but not cross-indexed, do not constitute a lien upon land or take precedence over mortgages subsequently registered. *Wilkes v. Miller*, 428.

13. *Mortgages—Notes—Substitution—Subsequent Judgment—Liens—Priorities.*—The substitution of one note and mortgage for another will not discharge the original note and mortgage unless the latter is surrendered to the mortgagor, or canceled of record; for it is only a renewal or acknowledgment of the same debt, and will constitute a prior lien on the lands to that of a judgment obtained after the registration of the original mortgage, but before the one taken in substitution of it. *Ibid.*

MOTIONS. See Pleadings.

MUNICIPAL INDEBTEDNESS. See Constitutional Law.

MUNIMENTS OF TITLE. See Evidence.

MURDER. See Homicide.

NAVIGABLE WATERS. See Water and Water-courses.

NECESSARY EXPENSES. See Bond Issues; Constitutional Law.

NECESSARY INCIDENTS. See Drainage Districts.

NEGLIGENCE. See Contributory Negligence; Evidence; Questions for Jury; Instructions; Pleadings.

1. *Negligence—Defective Machinery—Sawmill—Ownership—Evidence.*—For the purposes of plaintiff's action for damages alleged to have been received at the defendant's sawmill while at work as an employee, evidence which tends to show that the mill was attached to defendant's land as a part of the realty, or, if unattached thereto, that it was easily moved, remained on the land for a year unused, and defendant had ordered the plaintiff not to go on the premises, is evidence of ownership. *Sutton v. Lyons*, 3.

2. *Navigable Waters—Drawbridges—Construction—Damages to Vessels—Negligence—Accident—Evidence.*—Defendant was erecting a bridge

NEGLIGENCE—*Continued.*

for railroad purposes across the navigable waters of Albemarle Sound, under authority duly conferred by the State. There were two draws therein, a large one near the northern shore and a smaller one, 70 feet long, near the southern shore. The plaintiff was "tacking" his sailing vessel against the wind, in the daytime, for the purpose of going through the northern draw, when informed that it was not operated or open, and then changed his course for the southern draw. The latter was open about 35 feet on one side and the other side was obstructed by a large pile driver, used in the construction of the bridge. Seeing the obstruction, the skipper attempted to tack and stand away from the bridge so as to lay his course through the open space, but his vessel for some unexplained reason failed to "go about," fell off before the wind, and the sails filled in a strong breeze, which caused the vessel to be wrecked on a shoal: *Held*, upon this evidence, the proximate cause of the loss was an accident, the failure of the vessel to respond, and the defendant was not liable for the damages sustained. *Whitehurst v. R. R.*, 48.

3. *Public Highways—Bridges—Vehicles—Automobiles—Negligent Operation—Questions for Jury.*—In an action for damages for injury alleged to have been sustained because of the defendant's negligence in running his automobile over a bridge, without observing proper caution for plaintiff's safety, overtaking plaintiff thereon and frightening his mules so that they became uncontrollable, throwing plaintiff to the floor of the bridge under their feet, and running his conveyance over him, there was conflicting evidence as to the speed of the automobile and the ability of defendant to slow up in time to avoid the injury: *Held*, in this case, the charge of the court was correct under Laws 1909, ch. 445, secs. 9, 10, 11, and 12, regulating the operation of vehicles in use on the highways; (2) the case was almost entirely one of fact, and properly submitted to the jury. *Gaskins v. Hancock*, 56.

4. *Public Highways—Bridges—Automobiles—Negligent Operation—Damages—Implied Notice.*—One driving an automobile along public highways and over bridges is liable for such compensatory damages as are proximately caused by his negligence in not exercising proper care in looking out for horses, etc., thereon; and he is required to take notice that such machines are liable to scare them. *Ibid.*

5. *Public Highways—Conveyances—Automobiles—Nuisance.*—It is not negligence *per se* for a person to use an automobile in traveling along public highways and across public bridges. *Ibid.*

6. *Evidence—Negligence—Proximate Cause—Questions for Jury.*—The plaintiff, a brakeman on defendant's train, got upon the pilot of the engine, according to a known custom, upon entering a freight yard at a station, for the purpose of opening switches for the train, with the knowledge of the engineer operating the train. In this yard there were several switches to be thrown open, some distance apart. Plaintiff was standing in the foothold of the pilot made for the purpose, holding by his hands to a rod of iron crossing the pilot at the top, his back to the front and looking towards the cab windows of the engineer and fireman, to give signals by hand-waving. The engine

NEGLIGENCE—*Continued.*

front shut off the view of the engineer, and the fireman was not in his widow. While thus situated the V-shaped pilot plowed through a pile of cinders or something on the track, knocking plaintiff's foot off the foothold onto the track between the rails, and throwing his weight upon the bar to which he was holding. This bar gave way, and plaintiff caught the lift-lever to prevent his further slipping, and while in this condition, screaming for help, the pilot pushed his foot onto the rails, causing the injury complained of. The train could have been stopped, at the speed it was going, almost instantly: *Held*, the failure of the engineer to be on lookout and to stop the train upon hearing the unusual commotion (he testified that he took plaintiff's screams for a woman laughing), together with the other circumstances of the case, was sufficient evidence to go to the jury upon the questions of defendant's negligence and its proximate cause of the injury. *Cromartie v. R. R.*, 97.

NEGOTIABLE INSTRUMENTS. See Bills and Notes.

NEW TRIAL. See Issues.

NEXT OF KIN. See Descent and Distribution.

NON COMPOS MENTIS. See Executors and Administrators.

NONRESIDENT. See Jurisdiction.

NONSUIT. See Evidence; Negligence.

1. *Appeal and Error—Evidence—Nonsuit, Premature.*—It is reversible error for the trial judge to sustain a motion to nonsuit upon plaintiff's evidence before he has rested his case. Revisal, sec. 39. *McKellar v. McKay*, 283.

2. *Same.*—While it is within the discretion of the trial judge to refuse to allow the plaintiff to amend his complaint, in an action involving title to lands, so as to allege matters upon which to ask for equitable relief, it is error, upon his refusal to do so, to grant defendant's motion of nonsuit before the plaintiff had rested his case, so as to preclude him from showing in proper instances that a deed under which the defendant claimed was obtained under a proceeding void upon its face. Revisal, sec. 39. *Ibid.*

3. *Nonsuit—Evidence, How Considered.*—Upon defendant's motion to nonsuit upon the evidence, the court will not select a portion of a witness's statement more favorable to the defendant, for the evidence making for plaintiff's claim must be taken as true and interpreted in the light most favorable to him, and if therefrom "two minds could reasonably draw different conclusions from the evidence, and one of them would be favorable to plaintiff, the matter is for the jury. *Hamilton v. Lumber Co.*, 519.

NOTES. See Bills and Notes.

NOTICE. See Appeal and Error; Bills and Notes; Cities and Towns; Contracts; Evidence; Negligence; Principal and Agent.

NUISANCE. See Highways; Cities.

OBJECTIONS AND EXCEPTIONS. See Procedure; Appeal and Error.

1. *Instructions—Specific Matters—Objections and Exceptions—Procedure.* If the charge of the judge is not specific, there must be a request for special instructions to make them so; otherwise, an exception to the charge for that reason will not be considered on appeal when the charge sets forth in a correct manner principles of law applicable to the case, and with sufficient clearness. *Saunders v. Gilbert*, 463.

2. *Issues—"Last Clear Chance"—Objections and Exceptions—Issues Submitted—Issues Requested.*—When the complaining party has not submitted an issue, or excepted to the issues tendered, he cannot successfully appeal for the failure or refusal of the judge to submit the issue. *Davidson v. R. R.*, 578.

3. *Objections and Exceptions—Evidence, Competent in Part.*—When some of the testimony of a witness is competent and some is not, a general objection to the whole will not be sustained. *S. v. Stewart*, 636.

4. *Witnesses—Competency—Findings of Court—Objections and Exceptions.*—The trial judge, upon questioning an eight-year-old witness introduced by a party litigant, ascertained that the witness did not know who made her, had no knowledge of the obligation of an oath, and did not know what they would do with her if she told a lie on the witness stand, and found that she was not qualified to testify. No objection was made to this in the trial court: *Held*, (1) objection on appeal is too late; (2) the evidence sustained the ruling of the court. *Ibid.*

5. *Witness, Expert—Opinion—Hypothetical Question—Statement of Facts—Part Statement—Objections and Exceptions.*—In hypothetical questions asked an expert witness, a physician, as to the cause of the death of one whom the prisoner is accused of having murdered, upon the assumption that the jury found certain facts, in evidence, to be true, it is not necessary that all the facts should be stated; and if the party objecting thinks that an omitted fact would have elicited a different opinion from the witness, he should have incorporated it in his questions on cross-examination. *Ibid.*

6. *Objections and Exceptions—Sufficiency of Evidence—Verdict—Procedure.*—Objection that there was not sufficient evidence to sustain a conviction of the offense charged will not be entertained after verdict. *S. v. Leak*, 643.

OPINION. See Evidence.

ORDINANCE. See Cities and Towns.

PAROL TRUSTS. See Trusts and Trustees.

PARTIES.

1. *Water and Water-courses—Permanent Damages—Husband and Wife—Necessary Parties—Easements.*—The action of the trial judge in permitting the wife of the plaintiff to be made a party plaintiff after the jury had been impaneled in his action for permanent damages to his land alleged to have been caused by the defendant's wrongful diversion of the flow of water thereon, is not reversible error, the land being held under a deed to the husband and the wife. The wife

PARTIES—*Continued.*

was a desirable and perhaps a necessary party in order that on payment of permanent damages an easement might pass to defendant. *Hooker v. R. R.*, 156.

2. *Demurrer Ore Tenus—Defect of Parties—Pleadings.*—A demurrer *ore tenus* to the complaint upon the ground of defect of parties, or that the plaintiff did not have the legal capacity to sue, will not be sustained, as such defense is deemed waived unless taken by a written answer or demurrer. Revisal, sec. 478. *Kochs v. Jackson*, 326.

3. *Same—Corporation—Partnership.*—A demurrer *ore tenus* will not be sustained on the ground that the plaintiff's name appeared to be either that of an incorporated company or a partnership, and that neither the fact of incorporation nor the names of the partners were alleged. Revisal, sec. 478. *Ibid.*

4. *Deeds and Conveyances—Registration—Sale Under Execution—Title Acquired—Parties.*—A purchaser of personal property at an execution sale cannot acquire any right superior to that of the owners of a prior registered mortgage thereon, who were not parties to the action. *Ibid.*

PARTITION.

1. *Tenants in Common—Partition—Appeal from Clerk—Judge's Discretion—Appeal and Error.*—In proceedings under a petition for partition of lands, the action of the judge in setting aside the report of the clerk for a partial division and ordering a sale, for the reason that he has found as a fact that the land cannot be fairly divided, is within his discretion, and is not reviewable on appeal. *Taylor v. Carrow*, 6.

2. *Partition—Tenants in Common—Actual Partition—Sale.—Prima facie,* tenants in common are entitled to actual partition; but only when such partition can be made without injury to any of the parties. Revisal, 2512. *Ibid.*

3. *Tenants in Common—Partition—Interlocutory Orders—Final Decree.*—Until the decree of confirmation by the judge, the proceedings for the partition of lands are not final, but interlocutory, and rest in his discretion. *Ibid.*

4. *Same—Reference.*—Before the decree of confirmation, orders made by the judge in proceedings for partition, as to a part sale and part actual division, allotting a certain part of the lands to one of the petitioners, are interlocutory, and it is within his discretion thereafter and before entering the final order of confirmation to refer the matter to new commissioners under an order to sell the land for a division of the proceeds, having found that his former order would not have been fair to all the parties interested. *Ibid.*

5. *Partition—Appeal from Clerk—Different Judges—Interlocutory Orders.* When appeals from the clerk in proceedings for partition are made successively to different judges, a judge before whom comes a later appeal may set aside or modify a former interlocutory order, it not being required for that purpose that the same judge should have passed upon the former appeals. *Ibid.*

PARTNERSHIP. See Contracts; Demurrer.

1. *Partnership—Death of Partner—Dissolution—Debts—Real Estate—Heirs at Law.*—When lands are purchased by a partnership with partnership funds, upon the death of one of the partners, in the absence of any agreement in the articles of partnership to the contrary, his share therein descends to his heir at law as real estate, if the personal property of the partnership is sufficient to pay all the partnership debts and demands. *Sherrod v. Mayo*, 145.

2. *Same—Deeds and Conveyances.*—When the rule applies that lands purchased by partnership funds descend to the heir at law, it is immaterial whether the heir of the deceased partner claims his interest by deed from him or by inheritance. *Ibid.*

3. *Same—Surviving Partner.*—The heir at law to whom a deceased partner had conveyed by deed his share of lands purchased with partnership funds is entitled to the lands against the rights of the surviving partner, in an action by the latter for possession for the purpose of winding up the partnership affairs, when it appears that the partnership personalty is sufficient for the purpose of paying the partnership debts and satisfying any claim the surviving partner may have, and there is no provision in the articles of the partnership agreement of a contrary purpose. *Ibid.*

4. *Partnership—Dissolution—Personalty — Surviving Partner — Debts.*—The surviving copartner has the closing up of partnership affairs, the reduction of personal property to cash and the settlement of partnership affairs, and the title to this class of personal property vests at once in the surviving partner and not in the personal representative of the deceased partner. Revisal, sec. 1579. *Ibid.*

5. *Partnership—Personalty—Sale by Partner—Vendee—Interest Acquired.* A sale by a partner of his interest in a partnership vests in the purchaser only the vendor's share of the surplus which remains after payment of the partnership debts and the settlement of accounts between the partners, and not a share of the partnership personal effects. *Ibid.*

6. *Partnership—Contribution of Partners—Dissolution—Payment of Creditors—Interest—Profits.*—A partner is not entitled to interest on his contribution to the partnership funds or assets until after the date of the dissolution of the firm and the partnership creditors have been paid, in the absence of an agreement to that effect; and the reason applies with greater force to the interest upon profits, which cannot be sooner ascertained. *Moore v. Westbrook*, 482.

7. *Partnership—Contributions—Dissolution—Payment of Debts—Adverse Interests—Statute of Limitations.*—The statute of limitations begins to run against a claim of an advancement made by one of the partners to the firm upon a dissolution after the firm's creditors have been paid, for at that time the relationship between the parties becomes adverse. *Ibid.*

PAYMENT. See Bills and Notes; Claim and Delivery.

PENALTY STATUTES. See Interpretation of Statutes.

PERSONAL INJURY. See Negligence.

PERSONALTY. See Partnership.

PHYSICIAN. See Evidence.

PLATS. See Evidence.

PLEA. See Homicide.

PLEADINGS. See Demurrer.

1. *Pleadings — Preparation — Discovery —Affidavits—Procedure.*— When the record or proceedings do not disclose the facts upon which a motion is made to examine a defendant for the purpose of preparing a complaint in an action, the mover must show by affidavit such facts as will entitle him to the order he asks, so that it may appear that it is material and necessary that the examination should be had, and that the information desired is not already accessible to the applicant. Revisal, sec. 865. *Bailey v. Matthews*, 78.

2. *Same—Materiality—Good Faith—Courts.*—The court is not bound to order an examination of a defendant for the purpose of preparing a complaint, unless it is made to appear under oath of the mover that such an order is necessary, that the evidence sought to be elicited is material, and that the application is made in good faith. *Ibid.*

3. *Pleadings—Preparation—Discovery—Place of Examination.*—An examination of defendant to discover facts necessary to be obtained in preparing a complaint must be made in the county of his residence. Revisal, sec. 866. The right of respondent to refuse to answer incriminative questions touched upon. *Ibid.*

4. *Pleadings — Demurrer—Corporate Existence—Sufficient Averment.*—A demurrer to a complaint, in an action against the maker of a note, brought by a bank, an indorsee for value, which was entered upon the ground that the corporate existence of the plaintiff had not been alleged, will not be sustained when it appears from the averments of the complaint that the defendant had dealt with the plaintiff as if it had a lawful right to contract with him, and that he impliedly admitted its corporate existence by indorsing the note to it as acting in a corporate capacity. *Bank v. Duffy*, 83.

5. *Pleadings—Interpretation—Cause of Action—Demurrer.*—The allegations of a pleading will be liberally construed in favor of the pleader for the purpose of ascertaining its meaning and determining its effect, with a view of doing substantial justice between the parties (Revisal, sec. 495), and if it can be seen from its general scope that a party has set out a cause of action or defense, though inartificially stated, he will not be deprived of it upon demurrer. *Ibid.*

6. *Pleadings — Interpretation — Demurrer — Frivolous — Practice.* — The courts do not encourage the practice of parties moving for judgment upon an answer or demurrer upon the ground that they are frivolous, and if it raises a question, whether of law or fact, fit for consideration or discussion, a judgment upon that ground will be denied. *Ibid.*

PLEADINGS—*Continued.*

7. *Mortgages—Notes—Debtor and Creditor—Additional Security—Maturity—Original Debt—Pleadings—Demurrer.*—When a mortgage creditor has taken a note or other collateral as additional security for his debt, which has matured, he may proceed to collect it according to its tenor, whether the principal debt is due or not, if there is no binding stipulation to the contrary; and in his suit upon the collateral note under these circumstances a demurrer to the complaint will not be sustained. *Bizzell v. Roberts*, 272.

8. *Pleadings—Interpretation—Substantial Justice.*—The allegations of a pleading shall be liberally construed with a view to substantial justice between the parties, and every reasonable intendment is made in favor of the pleader. *Wyatt v. R. R.*, 307.

9. *Same—Railroads—Fire Damage—Defective Locomotive—Sparks.*—In an action against a railroad company for damages caused by fire from the defendant's locomotive, it was alleged that the defendant negligently and carelessly permitted said engine to emit sparks and coals of fire, which fell upon plaintiff's property, etc.: *Held*, the preceding allegation in the same paragraph, "in operating and running an engine," merely indicated where the engine was at the time, and what was being done with it, and the pleading was sufficient for the introduction of the plaintiff's evidence tending to show, as the cause of his damage, that the locomotive was defective. *Ibid.*

10. *Parties—Non Compos Mentis—Issues—Pleadings Insufficient.*—A next friend for a grantor in a deed having been appointed on the ground that the grantor was *non compos mentis*, he instituted an action against the grantee to set aside the deed and restrain him from cutting the timber thereunder. A guardian was appointed for the grantor after the institution of the action, who was made a party thereto, but took no active part therein. The restraining order was issued and was continued to the hearing. After the death of the grantor, his executors were made parties defendant and filed an answer saying "that in their opinion the action was not for the best interest of the parties." The restraining order was dissolved and defendants taxed with costs: *Held*, the defendants' answer did not raise any issue of fact, in the absence of allegation of bad faith or mismanagement of the next friend who had instituted the action. *Hockoday v. Lawrence*, 319.

11. *Pleadings—Demurrer—Allegations of Pleading Attacked—Extrinsic Matters.*—The pleading to which a demurrer has been filed must itself present the defects against which the demurrer is directed and the latter must stand or fall by the facts alleged in the pleading attacked; and extraneous matters cannot be relied on to show its deficiencies. *Dalrymple v. Cole*, 353.

POSSESSION. See Evidence; Mortgages.

POSSESSION, CONSTRUCTIVE. See Mortgages.

POSSESSION OF WIFE. See Tenant by Curtesy.

PREMATURE APPEAL. See Appeal and Error.

PRESCRIPTIVE RIGHT. See Water and Water-courses.

PRESUMPTIONS. See Evidence; Husband and Wife; Negligence.

PRIMA FACIE CASE. See Evidence.

PRIMARIES. See Elections.

PRINCIPAL AND AGENT. See Master and Servant; Auctions and Auctioners.

1. *Principal and Agent—Tax List—Declarations—Evidence.*—An abstract of taxes made by one purporting to be an agent is incompetent as against the principal in the absence of other evidence of agency, it being necessary that an agency be proved *aliunde* the declarations of the agent. *Sutton v. Lyons*, 4.

2. *Principal and Agent—Evidence Aliunde.*—Agency may be proved by the testimony of the agent. *Ibid.*

3. *Principal and Agent—Husband and Wife—Goods Sold and Delivered—Feme Covert—Sign—False Representations—Questions for Jury.*—In an action to recover from the husband the purchase price of goods sold and delivered, there was evidence tending to show that plaintiff's salesman made the sale in the store of the wife, with her name properly displayed by sign reading "M. Schultz," in accordance with the provisions of Revisal, sec. 218; the transaction was conducted personally with the husband, L. Schultz; and the evidence was conflicting as to whether the plaintiff's salesman thought the husband's name was Max and was led to believe that he was the M. Schultz to whom the goods were sold, and not to his wife, Mamie; that the salesman made the order to Max S., and was corrected so as to make it read M. Schultz; that the impression was caused by the representations of defendant, as an inducement to the trade, reasonably relied upon by the plaintiff, that the sale was being made to the husband; that the husband appeared to have full control or management of the store: *Held*, an instruction was erroneous that fixed the liability upon the husband unless the jury found that he informed the salesman at the time that he was the agent of his wife, or unless the salesman ascertained that fact from the sign displayed; (1) the burden of proof was on the plaintiff to show that the husband, by false representations reasonably relied on, had imposed himself upon the company or its agent as M. Schultz, and assumed that essential portions of plaintiff's evidence should be accepted as true; (2) it ignored defendant's evidence, that about five months previous he had informed the managers of plaintiff corporation, at its home office, that he was acting merely as agent for his wife. *Morse v. Schultz*, 165.

4. *Principal and Agent—Acts of Agent—Reputation in Part.*—One who sues on a contract made for his benefit by one assuming to act as his agent may not accept the benefits under the contract made for him and repudiate the agency as to those moving upon the same subject-matter to the other party. *Ibid.*

PRINTING. See Appeal and Error.

PRIORITIES. See Liens.

PRIVILEGES. See Slander.

PROCEDURE. See Appeal and Error; Mandamus.

1. *Verdict Inconsistent—Procedure.*—In an action brought by the indorsees of a negotiable instrument before maturity to recover against the makers, the defense was that the note was without consideration and that the indorsees bought with notice at the time of purchase. Upon a former trial the jury found: (1) That the note was indorsed in due course before maturity; (2) that it was not given for a valuable consideration; (3) that the plaintiffs were not purchasers with notice. The presiding judge set aside the verdict on the third issue, and at a subsequent term the jury found that the plaintiffs were purchasers with notice, and the trial judge rendered judgment for plaintiff: *Held*, the findings of the issues by the two juries were inconsistent, and the verdict should have been set aside. *Hardy v. Mitchell*, 76.

2. *Pleadings — Preparation — Discovery — Affidavits—Procedure.*— When the record or proceedings do not disclose the facts upon which a motion is made to examine a defendant for the purpose of preparing a complaint in an action, the mover must show by affidavit such facts as will entitle him to the order he asks, so that it may appear that it is material and necessary that the examination should be had, and that the information desired is not already accessible to the applicant. Revisal, sec. 865. *Bailey v. Matthews*, 78.

3. *Same—Materiality—Good Faith—Courts.*—The court is not bound to order an examination of a defendant for the purpose of preparing a complaint, unless it is made to appear under oath of the mover that such an order is necessary, that the evidence sought to be elicited is material, and that the application is made in good faith. *Ibid.*

PROMISE. See Statute of Frauds.

PROPERTY RIGHTS. See Cruelty to Animals.

PROXIMATE CAUSE. See Contributory Negligence; Damages; Negligence.

PUBLIC POLICY. See Insurance.

PUNITIVE DAMAGES. See Damages; Slander.

PURCHASE MONEY. See Liens.

PURCHASER. See Tenants in Common; Trusts and Trustees.

QUESTIONS OF LAW. See Courts; Appeal and Error; Fraud; Reference.

RAILROADS. See Carriers of Goods; Carriers of Passengers; Pleadings; Tenants in Common; Water and Water-courses.

1. *Railroads—Master and Servant—Messenger Boys—Employment of Children—Dangerous Employment—Negligence—Causal Connection—Evidence.*—The plaintiff's intestate was a boy under twelve years of age, employed by the defendant railroad company as a messenger boy, with the duties of carrying dispatches and messages from and between its certain officers, necessitating his going over defendant's yard where there were numerous tracks whereon the trains continuously were passing, in the course of his employment: *Held*, evidence only

RAILROADS—*Continued.*

that the intestate was last seen before the injury riding on the corner of defendant's box car, and that he was found thereafter lying on defendant's track in the injured condition which within a few hours caused his death, is insufficient to take the case to the jury upon the question of defendant's negligence, and a motion to nonsuit was properly sustained. *Pettit v. R. R.*, 119.

2. *Railroads—Master and Servant—Employment of Children—Dangerous Duties—Instructions to Servant—Scope of Employment—Evidence.*—In an action to recover damages of defendant for its negligent killing of plaintiff's intestate, a boy under twelve years of age, employed to carry dispatches or messages across defendant's numerous tracks, where trains were continuously passing and repassing, the question as to whether the defendant had instructed the intestate as to the dangerous character of his employment becomes immaterial when there is no evidence tending to show that the intestate was engaged in his duties to the defendant under the scope of his employment at the time in question or that the injury occurred by reason thereof, the burden of showing which was upon the plaintiff. *Ibid.*

3. *Same—Trains Without Light or Guard.*—Evidence that plaintiff's intestate, an employee on defendant's train, was killed in a collision with another of defendant's trains, which occurred before daylight while the train was running backward, with no man or light on the rear car, is evidence of defendant's negligence beyond the presumption of negligence raised by the mere fact that he was killed in a collision. *Adams v. R. R.*, 174.

4. *Railroads—Master and Servant—Disobedience of Orders—Evidence—Questions for Jury.*—It being material to the issue upon defendant's negligence in an action for damages for the wrongful killing of plaintiff's intestate, as to whether the intestate, an employee of defendant, at the time complained of, was acting in disobedience to defendant's orders, or whether he was acting under the orders of one who had no authority from defendant to give them, the questions are for the jury under conflicting evidence. *Ibid.*

5. *Railroads—Negligence—Evidence—Contributory Negligence—Nonsuit.* Under conflicting evidence, when there is a motion by defendant to nonsuit, the evidence will be considered in the view most favorable to plaintiff; and when it appears from the evidence of the latter that the injury complained of was caused by the backing of his horse, which had become frightened at the approaching train, and a consequent injury to the horse and the wagon hitched to him, by a collision with the defendant's slowly moving train, and that by keeping a proper lookout and in the exercise of ordinary care the defendant's engineer could have avoided the injury, the question raised is one for the jury, unless it appears that, as a matter of law, the plaintiff by his own negligence contributed to the injury complained of. *Hines v. R. R.*, 222.

6. *Railroads—Evidence—Contributory Negligence—Continuing Act—Nonsuit.*—When there is evidence that the engineer on defendant's train was negligent in not keeping a proper lookout or in the exercise of ordinary care, in consequence of which the plaintiff's horse backed

RAILROADS—*Continued.*

the wagon to which it was hitched upon defendant's slowly moving train, to plaintiff's damage, it would bar the plaintiff's right to recover if shown that, after the horse began to back, the driver was negligent, and this negligence continued to the time of the injury, under the surrounding circumstances and conditions. *Ibid.*

7. *Railroads—Freight Depot—Dangerous Conditions—Negligence.* — A railroad company is required to keep its premises in a reasonably safe condition for persons who come for the purpose of receiving freight from their depots. *Autry v. R. R.*, 293.

8. *Same—Notice—Evidence—Questions for Jury—Contributory Negligence.*—Plaintiff's intestate went to the defendant's freight depot to receive heavy machinery packed in boxes, and when leaving, with the boxes on his wagon, the wagon wheel fell into a hole, which caused the boxes to fall on him and crush his head, and he died from the injury thus received. There was evidence tending to show that the hole was on the defendant's premises and in the only available way of ingress and egress, and that the railroad company had been previously notified of the danger of this hole and had promised to remedy it: *Held*, (1) evidence sufficient as to defendant's negligence to sustain a verdict in plaintiff's favor; (2) the proximate cause of the injury was the falling of the wagon wheel into the hole. *Ibid.*

9. *Railroads—Off Right of Way—Contributory Negligence—Buildings—Inflammable Conditions.*—In an action for damages against a railroad company for the negligence of the defendant in setting fire to plaintiff's buildings, adjoining but not on the right of way, by sparks emitted from a passing locomotive, there being no evidence that the fire was communicated from combustible matter on the right of way, the right of plaintiff's recovery depends upon whether he could show that the fire was caused by a defective engine, or that it was negligently operated, and evidence sought to establish his contributory negligence is incompetent which tends to show that the buildings destroyed were old, neglected, and inflammable, for the plaintiff would have the right to assume that the defendant would not run an engine so defective or in such a negligent manner as to cause the fire. *Wyatt v. R. R.*, 307.

10. *Evidence — Railroads —Negligent Burning —Time of Injury —Other Times.*—While in estimating the value of lands and houses on the issue of damages the jury is restricted to the time of the injury, testimony as to the value at other times is competent when it bears on the value at that time. *Ibid.*

11. *Railroads—Fire Damage—Measure of Damages—Evidence—Tax Deeds.* Tax deeds are incompetent evidence of value of plaintiff's lands and buildings, in his action to recover damages to his buildings and lands caused by defendant's negligence, or to show a reduction in the damages from the amount that plaintiff's evidence tended to establish. *Ibid.*

12. *Railroads—Negligence—Presumptions—Operation of Trains—Damage by Fire—Skillful Employees—Prudent Operation—Questions of Fact —Burden of Proof.*—When, in an action to recover damages for the

RAILROADS—*Continued.*

destruction of plaintiff's buildings by fire along or near the right of way of a railroad company, which was alleged to have been caused by the latter's negligence, either in the defective condition of defendant's locomotive or in its operation or running, there are two issues, presenting the questions separately, (1) as to whether the engine set the property on fire, and (2) whether it was properly equipped and competently run in a careful manner, the affirmative answer to the first issue raises a presumption of negligence which the defendant must rebut by showing under the second issue that the locomotive was properly equipped, and with competent employees in charge, who prudently operated it. *Currie v. R. R.*, 419.

13. *Same—Intimation of Court—Opinion—Interpretation of Statutes.*—In an action to recover damages against defendant railroad company for the alleged negligent burning and destruction of plaintiff's property by fire along the former's right of way, when by their affirmative answer to an issue the jury have found that the fire was caused by defendant's locomotive, a presumption of fact is raised, upon the question presented by the second issue as to whether the engine was properly equipped and run by competent employees, which it is for the jury to decide; and should the trial judge instruct that if the defendant's evidence on the second issue is found to be true as fact by the jury, they should answer the issue for the defendant, it would be an expression of opinion by the judge upon the weight of the evidence prohibited by statute. *Williams v. R. R.*, 130 N. C., 116, cited and overruled. *Ibid.*

14. *Railroads—Damages by Fire—Running of Trains—Defective Locomotive—Negligenec—Evidence.*—Testimony that the defendant's engine, which caused the destruction of plaintiff's buildings along the right of way of the former, had patches on the wire netting, and that the covering of the manhole had long openings in it, when square ones would have been safer, and the former had been rejected at the master mechanics' convention because the sparks would get hung there, and would choke up the engine, with the effect that flames would come out of the furnace when the door was open, etc., and that the defendant used this netting because it had a stock on hand: *Held*, some evidence that an old and defective spark arrester on the locomotive had caused the damages alleged. *Ibid.*

15. *Railroads—Operation of Trains—Negligence—Evidence.*—When pertinent to the inquiry as to whether plaintiff's damage by fire was caused by the negligence of the defendant's employees on its locomotive, evidence only of the speed of the train, without inquiry as to what the engineer or his fireman were doing at the time it passed the plaintiff's property, or whether sparks were then escaping, etc., is sufficient to show that the locomotive was carefully or prudently being run and operated, *quære*. *Ibid.*

16. *Railroads—Negligence—Damage by Fire—Evidence—Nonsuit.*—Evidence held sufficient as tending to show negligence of defendant in causing the destruction of plaintiff's lumber plant near the right of way by fire from its passing locomotive, which tends to show that on Sunday, the day of the fire, two of defendant's locomotives passed

RAILROADS—*Continued.*

in twenty minutes of each other; there was no smoke or other evidence of fire in the plant before the locomotives passed; thereafter, within fifteen minutes, the plant was burning; the engineer on the second locomotive did not notice any smoke there as he passed the plant; and sparks, cinders, and heavy smoke were coming from this train. *Ibid.*

17. *Railroads—Interstate Commerce—Federal Employers' Liability Act.*—The act of Congress of April 12, 1908, known as the Federal Employers' Liability Act, applies only to a carrier by railroad while engaged in interstate commerce, and only to an employee "suffering injury while he is employed by such carrier in such commerce." *Zachary v. R. R.*, 496.

18. *Same.*—The killing of a railroad employee by a local switch engine while backing down the main line for the purpose of cutting out box cars from an interstate train, to place them in making up an unconnected train to run from and to points in the State, after he had left the train and was crossing the railroad yards to his boarding place, does not constitute a cause which falls within the provisions of the Federal Employers' Liability Act. *Ibid.*

19. *Same—Lessor and Lessee—North Carolina Railroad.*—By reason of its lease to the Southern Railway Company, the North Carolina Railroad Company does not become an interstate carrier, and while the latter is held to be liable as lessor for the negligent acts of omission or commission in certain instances when an injury is inflicted by its lessee, yet the Federal Employers' Liability Act can have no application when it appears that the employee was injured after he was off duty from an interstate train, and expecting to go on duty after another train had been made up for a destination within the State. *Ibid.*

20. *Railroads—Master and Servant—Railroad Crossings—Negligence—Questions for Jury.*—Evidence tending to show that plaintiff's intestate, an employee of a railroad, was killed at night by defendant railroad company's shifting engine running backward without light or flagman on the end of the tender, at the rate of fifteen or twenty miles an hour, and while he was going to his boarding place, where he and other employees customarily passed, is sufficient for the jury upon the question of defendant's negligence. *Ibid.*

21. *Railroads—Crossings—Look and Listen—Master and Servant—Nature of Employment.*—While an employee of a railroad must exercise reasonable care for his own safety, the rule that one who crosses a railroad track must, as a matter of law, look and listen before doing so does not apply in all its strictness to one who is employed in a railroad yard and whose duty makes it necessary for him to go frequently upon the tracks. *Ibid.*

22. *Railroads—Crossings—Master and Servant—Nature of Employment—Contributory Negligence—Questions for Jury.*—There was evidence tending to show that defendant's fireman, who had just come in on defendant's train, was hurrying across its tracks at night to his boarding-house for his supper, going by the way ordinarily used by

RAILROADS—*Continued.*

himself and other employees, with the purpose of soon returning to go out as fireman on another train of the defendant, and was run over and killed by defendant's switching engine running backward at the rate of fifteen or twenty miles an hour, without light or lookout on the end of the tender; that another engine nearby with its blower on was making a loud noise so that the bell of the engine causing the death could not be heard by the intestate. There was evidence to the contrary: *Held*, the question of contributory negligence was not one of law, but for the jury to determine. *Ibid.*

23. *Railroads—Master and Servant—"Flying Switch"—Negligence—Evidence—Questions for Jury.*—When it appears that plaintiff's intestate, in an action for damages against a railroad company for his negligent killing, was engaged within the scope of his employment in uncoupling cars from which other cars were being switched upon a siding, and that while the cars were moving he had placed himself on the front of a car for the purpose of uncoupling others from it, and was seen in this position by a witness, and a moment after he had disappeared, having fallen between the cars, to his injury and consequent death, evidence tending to show that at the time of the injury defendant's engineer was making what is known as a "flying switch," and that this method of switching cars is not a safe and proper one to pursue, is sufficient upon the defendant's negligence to be submitted to the jury on that issue, and motion as of nonsuit should not be sustained. *Hamilton v. Lumber Co.*, 519.

24. *Railroads—Master and Servant—Fellow-servant Act—Logging Roads—Negligence—"Ways"—Interpretation of Statutes.*—The Fellow-servant Law, Revisal, sec. 2646, applies to logging roads operated by the agency of steam; but the right of action given an employee injured by reason of defective "machinery, ways, or appliances," by the use of the word "ways" refers in that particular to roadways and objective conditions relevant to the inquiry which it is the duty of the employer to provide; and not, as in this case, where the alleged negligent killing of an employee was by reason of the negligence of the defendant's engineer in making a flying switch, a method testified to as not being a safe and proper one. *Ibid.*

25. *Railroads—"Flying Switch"—Master and Servant—"Assumption of Risks"—Continuing to Work—Contributory Negligence.*—Where it is shown that plaintiff's intestate was killed while acting under the direction of defendant's engineer in making a "flying switch," which was not a safe and proper one to pursue, the doctrine of assumption of risks is not applicable in its technical meaning; and the effect of the intestate having worked on in the presence of dangerous conditions which are known and observed must be considered on the question whether the attendant dangers were so obvious that a man of ordinary prudence and acting with such prudence should have quit the employment rather than incur them. *Ibid.*

26. *Railroads—"Flying Switch"—Master and Servant—Continuing to Work—Contributory Negligence—Disobedience of Orders—Evidence.*—When, in an action against a railroad company for damages for the negligent killing of plaintiff's intestate, a brakeman and switchman,

RAILROADS—*Continued.*

while making a "flying switch," the defense is relied on that the intestate continued to do the work when the danger of thus switching was obvious and apparent to him, it is competent for the plaintiff to show that the engineer sent some one to help the intestate perform the services then required of him, as relevant to the inquiry as to whether the intestate was acting with the knowledge of the engineer as vice principal, or acting under his orders; or whether the intestate had reasonable apprehension of being discharged if he disobeyed them. *Ibid.*

27. *Railroads—Crossings—Issues—Negligence—"Last Clear Chance" —Evidence.*—In an action for damages to plaintiff's team while endeavoring to cross defendant railroad company's track at a public crossing, no issue as to the last clear chance is raised on evidence tending to show, on plaintiff's part, that at a signal from defendant's watchman he was endeavoring to and would have crossed safely except for the act of defendant's yardmaster in slapping his mules in the face, causing them to run into a passing train; and on defendant's part, that the watchman signaled the plaintiff's driver to stop, and that the injury was caused by his not having done so and by whipping up his team when the yardmaster was endeavoring to prevent his crossing at the time. *Davidson v. R. R.*, 578.

28. *Issues—"Last Clear Chance"—Objections and Exceptions—Issues Submitted—Issues Requested.*—When the complaining party has not submitted an issue, or excepted to the issues tendered, he cannot successfully appeal for the failure or refusal of the judge to submit the issue. *Ibid.*

29. *Railroads—Crossings—Contributory Negligence — Instructions — Evidence—Intimation of Court.*—In an action for damages for injury to plaintiff's mules and wagon at a railroad crossing in a collision with the passing train of defendant railroad company, under conflicting evidence as to whether the proximate cause was the negligence of the defendant's employees or the negligence of the plaintiff's driver in whipping up the mules when the employees were endeavoring to keep them from crossing the track, it is reversible error appearing of record for the trial judge to instruct the jury that they should answer the issue as to contributory negligence in the affirmative, should they find that plaintiff's driver, by assisting the defendant's employees to stop the mules, could have avoided the injury complained of; and if they do not so find, they will answer this issue "Yes." *Ibid.*

30. *Railroads—Master and Servant—Safe Place to Work—Evidence—Questions for Jury.*—The plaintiff, a brakeman on defendant railroad company's train, demanded damages from the company in this action for an injury to his foot, which was mashed by the revolving wheel of an engine to a train upon which his services were engaged, and introduced evidence tending to show negligence in that the defendant furnished an old engine with a dangerous step and one placed too high up for safety in boarding a moving train; that defendant permitted a sprinkling hose to drip water on the step and form ice there, making

RAILROADS—*Continued.*

the step more dangerous; that defendant did not instruct him, an inexperienced hand, in the discharge of his duties; that it was necessary for plaintiff to use this step in the performance of his duties; that he had been instructed to use this step, and had done so with the knowledge of the conductor, and that instruction had been given to another employee to remove the ice which had formed on the step, which had not been done, and that the ice was not seen by him in attempting to board the engine at night while running three or four miles an hour at a station: *Held*, the case was properly submitted to the jury upon the question of negligence and contributory negligence. *Urquhart v. R. R.*, 582.

31. *Railroads—Master and Servant—Safe Place to Work—Assumption of Risks.*—The doctrine of assumption of risks has no application where an employee of a railroad company is injured in the discharge of his duties, proximately caused by defective ways or appliances furnished by the company which his employment requires him to use. *Ibid.*

32. *Defective Steps—Negligence.*—A step to an engine or tender without sides thereto is a defective appliance. *Ibid.*

RAPE.

1. *Rape—Assault with Intent—Evidence Sufficient.*—Evidence of an assault upon a twelve-year-old girl with the intent to commit rape held sufficient which tended to show undue familiarities taken with the person of the girl by the prisoner in placing his hands upon her person under her clothes, in a secluded place, desisting when a neighbor called her, and appearing at the time to be listening for interruptions; and that this familiarity had been taken in like manner previously on the same day. *S. v. Leak*, 644.

2. *Instructions—Prayers Requested—Substance—Sufficient Compliance.*—The prayers for special instruction requested by defendant in an action for an assault with intent to commit rape being substantially given, no error is found therein. *Ibid.*

3. *Rape—Assault with Intent—Burden of Proof.*—In order to convict of an assault with the intent to commit rape, not only the assault, but the intent, must be shown beyond a reasonable doubt, and the purpose of accomplishing the intent notwithstanding resistance made. *Ibid.*

4. *Rape, Assault with Intent—Conviction—Less Offense.*—When the prisoner is tried for an assault with intent to commit rape, the jury may return their verdict of a less offense, assault and battery, or simple assault, if there is evidence thereof. *Ibid.*

5. *Rape, Assault with Intent—Other Acts—Intent—Evidence.*—Upon a trial for an assault with the intent to commit rape, it is competent to show that a short time before it is alleged the defendant committed the assault with the felonious intent, the prosecutrix passed him as he was sitting on the steps, and that he caught her by the ankle and said, "You are as fat as a pig, aren't you?" as evidence tending to show another assault committed under the indictment, and the prisoner's animus and intent upon the second assault. *Ibid.*

RAPE—*Continued.*

6. *Rape, Assault with Intent—Evidence—"Listening"—Opinion—Fact.*—The testimony of the prosecutrix, that the prisoner "listened" at the time of making the alleged assault with intent to commit rape, is not objectionable upon the ground that it was an expression of an opinion. *Britt v. R. R.*, 148 N. C., 37; *Wilkinson v. Dunbar*, 149 N. C., 20, cited and approved. *Ibid.*

RATIFICATION. See Principal and Agent.

RECORD, PRINTING. See Appeal and Error.

RECORDER'S COURT. See Courts; Interpretation of Statutes.

REFERENCE.

1. *Reference—Findings of Facts—Exceptions—Trial Judge—Deliberation—Some Evidence—Appeal and Error.*—When exceptions are made to the findings of fact of a referee, it is the duty of the trial judge to deliberate and decide upon each exception and draw his own conclusions from the evidence thereon, using his own faculties in ascertaining the truth of the matter; and when he otherwise acts upon the report, and sustains the referee's findings merely because there is some evidence to support them, it constitutes reversible error. The different rule of the Supreme Court on appeal discussed by WALKER, J. *Thompson v. Smith*, 345.

2. *Appeal and Error—Reference—Findings of Fact—Objections and Exceptions—Assignments of Error—Procedure.*—A party appealing from a finding of fact by the referee, upon the ground that there was no evidence to support it, should enter his exception to the evidence before the referee as well as to the findings of fact, and have both exceptions reviewed by the judge, and then on appeal embrace in his assignments of error the exceptions to the evidence, for the appellate court is not required to examine the record for incompetent evidence not pointed out by exception, and pass upon its admissibility. *Moore v. Westbrook*, 482.

3. *Reference—Issues Demanded.*—The trial judge should submit to the jury issues demanded by a party to a case referred who has not waived his right, under the reference, to a jury trial. *Ibid.*

4. *Procedure—Interpretation of Statutes.*—A former judgment appealed from and affirmed by the Supreme Court, "that the defendants do recover against the plaintiff and the surety on his prosecution bond the costs of this action," does not preclude a subsequent trial judge from taxing the cost of reference "against either party or apportioning it among the parties in his discretion" (Revisal, sec. 1268); and, in this case, it is ordered that at a subsequent term the trial judge pass on the question and tax the cost of the reference in accordance with the statute. *Horner v. Water Co.*, 494.

5. *Appeal and Error—Reference—Judgment—Burden of Presumptions—Procedure.*—The presumption on appeal to the Supreme Court is that the judgment of the lower court is correct; and a *pro forma* judgment entered by the trial judge confirming a report of a referee improperly throws the burden of this presumption upon the appellant and is unfair to him, and to the Supreme Court, which has a right to the judge's well-considered conclusions. *Overman v. Lanier*, 537.

REGISTRATION. See Contracts; Deeds and Conveyances; Elections; Liens.

RELATIONSHIP. See Evidence.

RELEASE, CONDITIONAL. See Master and Servant.

RELIGIOUS SOCIETIES.

1. *Religious Denominations—Congregational—Individual Churches—Management—"Conference."*—In a congregational religious system or denomination, as distinguished from a connectional one, the association of churches is purely voluntary for the purpose of joining their efforts for missions and similar work, having no supervision, control, or governmental authority of any kind over the individual congregations, which are absolutely independent of each other. *Conference v. Allen*, 524.

2. *Same—Appointment of Pastor.*—A congregational association of churches has no authority to appoint a pastor for one of its churches to supersede the one whom that church has regularly appointed. *Ibid.*

3. *Same — Trustees at Will — Notice — Interpretation of Statutes.* — A church has authority to appoint a "suitable number" of its own trustees under our statutes, for the purpose of acquiring and holding church property, "from time to time and at any time . . . in such manner as such body, etc., deem proper," and remove them or any of them at will, and while the congregational regulations of the denomination with which the church in question is affiliated has provided a notice to be given for the trial of "offenses," it does not apply to the election or removal of trustees nor take from the church its rights when in conflict with the statutes. Revisal, secs. 2670, 2671. *Ibid.*

4. *Same—"Majority Rule"—Interference.*—A church of the congregational system having the right under our statutes to remove its trustees or any of them at will, and having duly and regularly elected certain trustees to supersede several theretofore elected, holds the church property through those trustees later elected, and has the right to the use of the church for religious services without molestation from the trustees removed, or from its conference; especially so, in this case, where the trustees as newly constituted were a majority, even counting the deposed ones. *Ibid.*

REMOVAL OF CAUSES.

Executors and Administrators—Removal of Causes—Action by Administrator—Venue.—An action by an administrator upon a life insurance policy of his intestate is properly brought in the county where the administrator resides, not necessarily where the bond is filed, the addition of the words, "administrator, etc.," being descriptive of his title or the capacity in which he sues (Revisal, secs. 424 and 421); and Revisal, sec. 421, makes a distinction between actions in which the administrator is sued, for then the action shall be brought in the county where the bond is filed. Revisal, secs. 419, 421, have no application. *Whitford v. Insurance Co.*, 42.

REPAIRS. See Landlord and Tenant.

REPUDIATION. See Principal and Agent.

RESERVATION. See Deeds and Conveyances.

RES GESTÆ. See Evidence.

RETURNS. See Elections.

REVENUE LICENSE. See Evidence.

REVISAL.

SEC.

38. No adverse interest shown upon which to remove administrator. *Morgan v. Morgan*, 169.

39. Motion to nonsuit upon evidence should not be sustained before plaintiff rests his case. *McKellar v. McKay*, 283.

111. When mother is next of kin and entitled to equal distribution with children. *Wells v. Wells*, 246.

132. Has not application in this case as to the mother being next of kin and entitled to equal distribution with children. *Wells v. Wells*, 246.

218. Sign of defendant free trader displayed in accordance with this section, evidence sufficient to submit case to jury, with burden on plaintiff. *Morse v. Schultz*, 165.

395 (6). When the statute of limitations runs from the discovery of the fraud or when it should have been discovered in the exercise of ordinary care. *Sinclair v. Teal*, 458.

419. Venue in action by administrator upon life insurance policy should be where administrator's bond is filed. *Whitford v. Insurance Co.*, 42.

421. Venue in action by administrator upon life insurance policy should be where administrator's bond is filed; not place of his residence. *Whitford v. Insurance Co.*, 42.

424. Venue in action by administrator upon life insurance policy should be where administrator's bond is filed; not place of residence. *Whitford v. Insurance Co.*, 42.

478. Demurrer *ore tenus* to complaint for defect of parties or legal capacity to sue is not sufficient and deemed waived if not in writing. *Kochs v. Jackson*, 326.

495. Pleadings interpreted to obtain substantial justice between the parties. *Bank v. Duffy*, 83.

591. Appellant failing to request judge to appoint a day to settle case on appeal, appellee's cases taken. *Burlingham v. Canady*, 177.

598. When execution against the person can only be stayed by giving a bond securing the judgment. *Howie v. Spittle*, 180.

625. When execution against the person may issue upon return of execution against the property unsatisfied. *Howie v. Spittle*, 180.

727. When execution against the person may issue upon return of execution against the property unsatisfied. *Howie v. Spittle*, 180.

REVISAL—*Continued.*

SEC.

806. Application made in good faith to restrain cutting timber need not allege insolvency. The order should be continued to hearing if apparent title to lands is shown. *Lodge v. Ijames*, 159.

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809. Application made in good faith to restrain cutting timber need not allege insolvency. The order should be continued to hearing if apparent title to lands is shown. *Lodge v. Ijames*, 159.

824. Upon mandamus against road commissioners, an issue as to whether a certain person had been elected a member upon the facts in evidence should be transferred to Superior Court for trial. *Edgerton v. Kirby*, 347.

865. Matters necessary to be shown to examine defendant preparatory to drawing complaint. *Bailey v. Matthews*, 78.

866. Examination of defendant preparatory to drawing complaint made in county of his residence. *Bailey v. Matthews*, 78.

1206. Upon former appeal it was adjudged that receiver pay certain liens for labor and material, and nonpayment cannot be urged on second appeal. *Riley v. Sears*, 267.

1268. After sustaining an appeal the judgment of the trial court ordering that a recovery be had of defendant of the costs of the action, does not preclude the trial judge from subsequently taxing the costs of reference therein. *Horner v. Water Co.*, 494.

1491. This section not applicable under the special facts in this case. *Dunn v. Patrick*, 248.

1504. Trial judge should fix compensation for services of surveyor. *LaRoque v. Kennedy*, 361.

1579. Title to partnership personalty vests in surviving partner, and not in administrator. *Sherrod v. Mayo*, 144.

1636. In criminal conversation brought by husband evidence of wife incompetent in rebuttal. *Grant v. Mitchell*, 15.

1689. A *bona fide* wholesale dealer in cotton bound by representation of his agent at time of making contract, as showing mutual intent that actual cotton was not to be delivered. *Sprunt v. May*, 388.

1689. To prevent repugnancy to this section the provisions as to wholesale dealers and manufacturers, placed at the end of section 1689, should refer to section 1691. *Rodgers v. Bell*, 378.

1689. The provisions of this section, exempting manufacturers and wholesale dealers, apply to quantum of proof, and properly refer to section 1691. *Rodgers v. Bell*, 378.

1691. The provisions of section 1689, as to wholesale dealers and manufacturers, apply to quantum of proof and refer to this section. *Rodgers v. Bell*, 378.

REVISAL—*Continued.*

SEC.

1822 (2). Writ of *habeas corpus* cannot successfully be sued out, when. *Howie v. Spittle*, 180.

1930. When filing inventory of property will not exempt the defendant from arrest. *Howie v. Spittle*, 180.

1930 *et seq.* Defendant must show a valid discharge from imprisonment. *Howie v. Spittle*, 180.

1981a. This section does not include employment of children except as therein stated. *Pettit v. R. R.*, 119.

2006. Surety on stay bond liable for rents and profits in ejectment proceedings. *Dunn v. Patrick*, 248.

2008. This action not applicable under the special facts in this case. *Dunn v. Patrick*, 248.

2008. Surety on stay bond liable for rents and profits in ejectment proceedings. *Dunn v. Patrick*, 248.

2016. Architects' plans and labor are not within the meaning of this section. *Stephens v. Hicks*, 239.

2107. Laws of 1911, ch. 109, does not extend to conveyances of personalty or gifts by the wife to the husband, and this section is to prevent a burden or charge upon the wife's property. *Rea v. Rea*, 629.

2176. Against one not a holder of negotiable instrument in due course, the absence of consideration is a defense. *Hardy v. Mitchell*, 76.

2512. *Prima facie* tenants in common are entitled to actual partition, but without injury to parties. *Tayloe v. Carrow*, 6.

2634. In order to recover the penalty for failure of railroad company to pay claims, the claim must be presented within the required time, and evidence in defense is competent to show destruction of the goods from inherent vice or defects. *Currie v. R. R.*, 432.

2670. The regulations of a congregational church as to the appointment of trustees cannot interfere with the provisions of this section. *Conference v. Allen*, 524.

2671. The regulations of a congregational church as to the appointment of trustees cannot interfere with the provisions of this section. *Conference v. Allen*, 524.

3194. A trial magistrate should caution defendant without counsel, tried for larceny, that his refusal to testify would not prejudice, and defendant's declarations otherwise are incompetent evidence. *S. v. Vaughan*, 615.

3299. A dog is a domestic animal and is the subject of property, and under an indictment for cruelty to animals, his past vicious habits and the knowledge of the owner thereof is not a sufficient defense. *S. v. Smith*, 628.

3358. *Semble*, the principle that a husband is responsible for certain acts of his wife does not apply in instances of abduction of a girl under fourteen years of age. *S. v. Nowell*, 649.

3576. Conduct of manager of elections interfering with freedom or purity of election is punishable. *S. v. Cole*, 618.

3592. A willful neglect or ommission of duty by board of aldermen, makes them liable to indictment. ***Battle v. Rocky Mount***, 330.

REVISAL—*Continued.*

SEC.

3670. An entry is unlawful when made with a strong hand and by multitude of people upon the possession of lands of another, though with a superior title. *S. v. Davenport*, 596.

3823. To prevent repugnancy to this section, the provisions as to wholesale dealers and manufacturers, placed at end of section 1689, should refer to section 1691. *Rodgers v. Bell*, 378.

ROAD COMMISSIONERS. See Mandamus.

RULE OF THE PRUDENT MAN. See Contributory Negligence.

SALES. See Auctions and Auctioneers; Intoxicating Liquors; Mortgages; Partition; Partnership; Trusts and Trustees.

SCHOOL DISTRICTS.

1. *School Districts—Indebtedness—Constitutional Law—Vote of People.*— A special school district created by the Legislature is subject to the restrictions and limitations of the Constitution in reference to municipal indebtedness, and to the methods and powers of taxation therein prescribed. *Ellis v. Trustees*, 10.

2. *Same—Bond Issues—Schoolhouse—Necessary Expense—Injunction.*— The erection of a school building is not a necessary expense within the meaning of Art. VII, sec. 7, of our Constitution, and an issue of bonds for that purpose by a special school district is invalid and may be enjoined, unless the proposed issue shall have accordingly been submitted to a vote of the people. *Ibid.*

3. *Bond Issues—Municipal Indebtedness—School Districts—Taxation.*— The payment of bonds constituting a valid municipal indebtedness may be enforced by appropriate taxation. *Ibid.*

4. *Same—Power to Mortgage—General Indebtedness—Vote of People.*— A legislative enactment authorizing a special school district to "purchase and hold real and personal property and to sell, mortgage, and transfer the same for school purposes," etc., and approved by a majority of the qualified voters of the school district, at most only authorizes a mortgage on specific property, and is not sufficient to the validity of bonds issued by the trustees for school purposes, which constitute a general indebtedness of the district, and where their payment may be enforced by taxation. *Ibid.*

SCIENTER. See Evidence.

SCOPE OF EMPLOYMENT. See Master and Servant.

SECOND APPEAL. See Appeal and Error.

SECURITY, ADDITIONAL. See Mortgages.

SELF-DEFENSE. See Homicide.

SENTENCE. See Judgments.

SETTLEMENT OF CASE. See Appeal and Error.

SIDEWALKS. See Trespass.

SLANDER.

1. *Slander—Privileged Utterances—Interest—Justification—Good Faith—Manner.*—To justify words alleged to have been slanderously spoken, and to bring himself within the protection which attaches to communications made in the fulfillment of a duty, the defendant must show something more than an honest belief in the truth of his utterances, for he must show that the communication was made in good faith on an occasion which justified his making it; and the manner in which it is uttered may take them out of the privilege. *Fields v. Bynum*, 413.

2. *Same—Presence of Others—Accusations.*—When in an action for slander the defendant seeks to avoid civil liability upon the ground that the occasion was a privileged one, and it appears that the defendant sought the plaintiff and in the presence of other persons accused him of burning a certain mill in the operation of which the defendant had a certain interest, and charged him with burning another mill on same place previously, also saying to the plaintiff that his neighbors believed that he burned it, the communication cannot be said to have been fairly and impartially made on a proper occasion, in a proper manner, which is necessary for the defendant to establish in order to make his plea available. *Ibid.*

3. *Slander—Pleadings—General Damages—Measure.*—When general damages are sought in an action of slander for words spoken which are actionable *per se*, compensatory damages may be awarded which embrace compensation for those injuries which the law will presume must naturally, proximately, and necessarily result, including injury to the feelings and mental suffering endured in consequence; and it is not incumbent on the plaintiff to introduce evidence that he has suffered special damage in such instances. *Ibid.*

4. *Same—Malice—Intent—Punitive Damages.*—When there is evidence tending to show slander actionable *per se*, as appears from the facts in this case, and general damage is alleged, it is also competent for the jury to award punitive damages in their discretion, if they are satisfied by the greater weight of the evidence that the utterances were made from personal malice, with the design or purpose to injure the plaintiff, in a wanton or reckless disregard of his rights. *Ibid.*

SPECIAL PROCEEDINGS. See Executors and Administrators.

SPIRITUOUS LIQUORS. See Intoxicating Liquors.

STATUTE OF FRAUDS. See Auctions and Auctioneers.

1. *Statute of Frauds—Third Persons.*—The statute of frauds is not available as to third parties, and strangers to the transaction cannot avail themselves of this plea. *Plaster Co. v. Plaster Co.*, 455.

2. *Statute of Frauds—Debt or Default of Another—Parol Promise—Original Liability.*—The liability of a promisor to answer, "upon special promise, the debt, default, or miscarriage of another person" under the statute of frauds, is governed by whether the promise creates an original obligation or is collateral to it and merely superadded to the promise of another to pay the debt, he remaining liable, for in the latter instance the promisor is not liable unless there is a writing to that effect, whether the promise is made at the time the debt is created or not. *Peele v. Powell*, 553.

STATUTE OF FRAUDS—*Continued.*

3. *Same—Credit.*—The obligation of a promisor to answer for the "debt, default, or miscarriage of another" is original and binding if made at the time or before the debt is created, when the credit is given solely to the promisor or to both. *Ibid.*

4. *Same—Express Promise—Consideration—Evidence.*—To make the oral special promise binding upon the promisor to answer for the debt, etc., of another, the promise must be express and not solely implied by law, and founded upon a consideration such as the immediate and pecuniary benefit of the promisor in the transaction, as in instances of joint principals, or the release of the original debtor, or harm or benefit passing between the promisor and the creditor, or to pay out of a particular fund of the debtor in the hands of the promisor; but if the funds are not actually in his hands and he does not receive them, his promise is not personally binding. *Ibid.*

5. *Statute of Frauds—Debt or Default of Another—Consideration Expressed—Implication.*—A written promise to answer for the debt, etc., of another need not express the consideration, and it may be established by parol. *Ibid.*

6. *Statute of Frauds—Debt or Default of Another—Parol Promise—Liability—Definition.*—A parol promise to answer for the debt, etc., of another which is not enforcible is defined to be "an undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made continues liable." *Sheppard v. Newton*, 139 N. C., 535, cited and approved. *Ibid.*

7. *Statute of Frauds—Debt or Default of Another—Evidence of Debt—Deceased—Transactions and Communications.*—In an action upon the special promise of the deceased, against his administrator, for goods sold and delivered to another, it is competent for the plaintiff to prove the indebtedness of such other person by his verified account and other competent evidence, as such would not involve evidence of transactions and communications with a deceased person, prohibited by statute, but to recover of the estate of the deceased, the promise to answer for the debt must be shown in a manner not prohibited by the statute of frauds. *Ibid.*

8. *Statute of Frauds—Debt or Default of Another—Promise—Running Accounts—Specific Occasion—Evidence.*—In an action against a promisor to recover on an account for goods sold and delivered, there was testimony by a witness, an employee of the plaintiff, that about the time of the sale of the last item the plaintiff told him not to let the debtor have any more goods without the written order of the promisor; that the debtor had no credit: *Held*, evidence that the debtor had credit prior to that time, and a general statement made by the witness that the goods had been theretofore sold on the credit extended the promisor must be accompanied by evidence of something said or done by the promisor authorizing the extension of credit, to have any weight. *Ibid.*

9. *Statute of Frauds—Debt or Default of Another—Promise—Insufficient Evidence.*—In an action to hold an alleged promisor liable for a running account of goods sold to another, evidence that the promisor

STATUTE OF FRAUDS—*Continued.*

told the plaintiff to let the debtor have goods and he would see that they were paid for, without anything to show that goods were sold the debtor at that time, should not be construed as prospective and retrospective, so as to include goods sold before and after that time. *Ibid.*

10. *Same—Declarations.*—Evidence of a parol declaration of a promisor to pay the debt of another, in an action upon the promise, that the promisor had told the plaintiff that the debt was all right, is not sufficient to make the promisor liable. *Ibid.*

11. *Evidence—Running Account—Book Items.*—In an action upon a running account, the items appearing upon the ledger and day-book of the plaintiff are mere declarations in his own interest, and as such are incompetent when standing alone and unsupported by proper evidence to make them competent. *Ibid.*

STATUTE OF LIMITATIONS.

1. *Partnership—Contributions—Dissolution—Payment of Debts—Adverse Interests—Statute of Limitations.*—The statute of limitations begins to run against a claim of an advancement made by one of the partners to the firm upon a dissolution after the firm's creditors have been paid, for at that time the relationship between the parties becomes adverse. *Moore v. Westbrook*, 482.

2. *Appeal and Error—Statute of Limitations—Burden of Proof—Evidence —Objections and Exceptions.*—When without exception appearing, and jury trial waived, the trial judge has found against a party pleading the statute of limitations, as to whether the ruling of the judge can be reviewed on appeal, the burden being upon the party pleading the statute, *quœre. Ibid.*

STREETS. See Highways; Cities and Towns; Trespass.

SUBSTITUTION. See Bills and Notes.

SURVEYOR'S ALLOWANCE. See Courts.

SURVIVING PARTNER. See Partnership.

TAX DEEDS. See Evidence.

TAX LIST. See Evidence.

TAXATION. See Bond Issues; Constitutional Law; Drainage Districts.

TELEGRAPHS. See Tenants in Common.

1. *Telegraphs — Negligence — Delivery — Reasonable Diligence.*—The defendant telegraph company received for transmission and for delivery over an independent telephone company, from its terminal at a nearby point, a message announcing the sickness of addressee's father and asking the addressee to come at once. The addressee, at the time in question, was four and one-half miles in the country from his home, and the defendant's agent immediately put in a continuous long-distance call and communicated the message to him upon his return. In the addressee's action to recover damages for mental anguish:

TELEGRAPHS—*Continued.*

Held, a delay of twenty minutes in the delivery under the circumstances was no evidence of negligence on the part of defendant. *Barnes v. Telegraph Co.*, 150.

2. *Telegraphs—Delivery by Telephone—Person Addressed—Messages—Contents Disclosed.*—When the sender of a message delivered it to a telegraph company with the understanding that the company has no office at the place of delivery, and will have to deliver it by the telephone line of an independent company to its destination at a nearby point, the agent of the defendant is only required to telephone the message to the person addressed, for the telegraph company is not allowed to disclose the contents of the message to anyone else, except with the consent of the sender and the sendee, or at least the sender or the sendee, depending upon the nature of the message or the terms of the contract. *Ibid.*

3. *Same—Principal and Agent—Agency of Wife.*—A telegraph company has not the right to deliver a message, especially by telephone, in a manner which necessarily discloses its contents, to one not the agent of the addressee to receive telegrams, or to one who is not expressly or impliedly authorized to receive them; and there is no implied authority from the relationship of wife. Cases in which the manual delivery of the message itself is involved, distinguished. *Ibid.*

4. *Telegraphs—Stipulations—Damages—Demand—Sixty Days—Delivery by Telephone.*—When a telegram is written by the sender on the company's regular form, containing the stipulation that a claim or demand for damages must be presented to the company in writing within sixty days after the message has been filed with it, and is received for transmission with the understanding that it is to be delivered to a nearby town by telephoning it over the lines of an independent company, it is a valid defense, under this stipulation, that the addressee received the message by telephone more than sixty days before the institution of the action and no written demand had been made within sixty days after notice to him of the delay. *Ibid.*

5. *Telegraphs—Death Message—Mental Anguish—Damages—Arrival for Funeral—Train Schedules—Evidence.*—In an action for damages against a telegraph company for negligent delay in the delivery of a telegram announcing the death of a brother and the time and place of burial, with a request that the sendee "wire if you (he) come," for the plaintiff to recover he must show that he could have reached the place in time to attend the funeral, etc., if the telegram had been promptly delivered; and where the distance was great and by rail, it is competent for him to testify that he knew the "connections" and movements of the trains from having been there before, and that he could have reached the destination in time had the message been delivered promptly, the use of the word "schedule" being immaterial. *Kivett v. Telegraph Co.*, 296.

6. *Telegraphs — Death Message — Mental Anguish — Relationship — Presumptions—Other Evidence—Measure of Damages.*—While in an action against a telegraph company for damages for mental anguish caused by the negligent failure of the company to deliver a message announcing the death of a brother, mental anguish will be presumed from the relationship of the parties, this presumption does not ex-

TELEGRAPHS—*Continued.*

clude other evidence tending to prove a close association between them, and in this case it was competent for the plaintiff to testify that his deceased brother had stayed with him, in the West, three years. *Ibid.*

7. *Telegraphs—Death Message—Mental Anguish—Negligence—Restrictions—Measure of Damages—Instructions—Substantial Compliance.*—Defendant's prayers for special instruction limiting recovery in an action for mental anguish caused by the actionable negligence of defendant telegraph company in a delayed delivery of a message announcing a death, to the mental suffering directly caused by the plaintiff's inability to attend the funeral on that account, and to the character or degree of suffering which would amount to mental anguish for which damages could be awarded, were substantially given in this case by the judge in his charge, and, therefore, no error committed of which the defendant can complain. *Ibid.*

8. *Telegraphs—Death Message—Street Address—Delivery—Reasonable Efforts.*—An attempted delivery of a telegram at the street address given in the message will not of itself relieve a telegraph company of negligence, for upon the failure of the company to make delivery there it is its duty to make reasonable efforts to deliver it elsewhere, and especially when informed of the place where the addressee could be found. *Ibid.*

9. *Telegraphs—Death Message—Delivery—Offer to Deliver—Street Address—Evidence.*—When the uncontradicted evidence is that the messenger of a telegraph company carried a telegram for delivery to the boarding-house of the addressee, and refused to leave it there, in his absence, with the keeper of the house, though she offered to pay the charges due thereon, the defense that the messenger "offered" the message at the boarding-house is without evidence to support it, and unavailing. *Ibid.*

10. *Same—Delivery to Messenger.*—Defendant telegraph company having attempted to deliver a telegram announcing a death, by a messenger, at the street address given therein, was informed where the addressee was to be found: *Held*, it was not sufficient for one who was in charge of defendant's office at the point of delivery to testify that she gave it to another messenger boy for delivery, for it was necessary to show the efforts to deliver the telegram by the one to whom it was given for that purpose. *Ibid.*

11. *Telegraphs—Death Message—Mental Anguish—Negligence—Issues—Contributory Negligence—Instructions.*—In an action to recover damages of a telegraph company for damages arising from its actionable negligence in its delay in delivering a telegram announcing a death, it was not error for the trial judge to refuse to give defendant's prayers for special instruction, that no recovery could be had if the plaintiff did not use all available means in having the funeral postponed, etc., when no issue as to his contributory negligence had either been tendered or submitted to the jury, as the instructions were not proper upon the issue as to defendant's negligence. *Ibid.*

12. *Telegraphs—Two Messages—Negligence Alleged as to One—Instructions on the Other.*—There were two telegrams concerning which negligence is alleged, but damages asked only as to one: *Held*, it was

TELEGRAPHS—*Continued.*

not error, under the circumstances of this case, for the trial judge to refuse to give requested instructions, pertaining to the message upon which no damages are sought, though the instructions may, in themselves, state correct principles of law. *Ibid.*

13. *Issues, Form of—Sufficiency—Telegraphs—Mental Anguish—Issues Approved.*—It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy and each party has a fair opportunity to present his version of the facts and his views of the law, so that the case, as to all parties, can be tried on its merits. The issues submitted in this case for damages alleged to have been caused by defendant's failure to deliver a death message approved. *Wilson v. Taylor*, 154 N. C., 216, cited and approved. *Ibid.*

14. *Telegraphs — Principal and Agent — Declarations — Furtherance of Agent's Duty—Evidence.*—In an action for damages for mental anguish for the negligent delay in the delivery of a telegram, there was evidence tending to show that after the delivery of the telegram had been attempted, the plaintiff, addressee, called at defendant's office and asked for it: *Held*, declarations of defendant's agent to the effect that no such message had been received there are competent, as they were made in furtherance of the duty that the agent owed to the defendant. *Ibid.*

15. *Telegraphs— Telephones —Electricity— Dangerous Instrumentality — Wires—Care Required—Negligence—Electric Storms.*—A telephone company having taken its instrument from a house of a subscriber, left the loose ends of the wire fastened together hanging from the porch plate, without "grounding" and without a lightning arrester. During an electric storm plaintiff was standing near these ends of the wire and was struck with and injured by electricity: *Held*, evidence sufficient for the jury to find that the negligence of the telephone company caused the injury, without testimony of an eye-witness to the effect that he saw the discharge of the lightning leap from the wires and strike the plaintiff. *Starr v. Telephone Co.*, 435.

16. *Electricity—Storms—Metal Wires— Conductivity— Effect—Courts—Judicial Knowledge.*—The courts may take judicial knowledge of well-known and established facts, and it was not error for the judge to instruct the jury, upon the evidence introduced, that metal is a good conductor and that it will attract lightning which forms in electrical storms, and carry it to the earth; that the human body is a better conductor than the air, and when sufficiently near to the ends of wires strongly enough charged with electricity, the current will leap through the body to the ground, etc. *Ibid.*

17. *Telegraphs—Death Message—Error in Transmission—Delivery—Negligence—Evidence—Nonsuit—Instructions.*—Evidence tending to show that while attempting to deliver a message announcing a death the agent of a telegraph company was informed where the addressee could be found, and made no personal effort to deliver it there, but intrusted the communication to another who was not in the defendant's employment, and that had the message been correctly transmitted and delivered as sent the addressee could and would have at-

TELEGRAPHS—*Continued.*

tended the funeral, is sufficient upon the issue of defendant's negligence, and a motion to nonsuit or instructions directing a verdict for defendant on the evidence should be refused. *Mullinax v. Telegraph Co.*, 541.

18. *Telegraphs—Contributory Negligence—Information—Evidence.*—In an action to recover damages from a telegraph company for mental anguish caused by the defendant's negligence in failing to correctly transmit and properly deliver a message announcing a death, thereby causing his absence from the burial of the deceased, the plaintiff must show more than mere negligence on defendant's part, for if it appears that he received information of the death from some other source in time to attend the funeral, and under such circumstances that he could have gone and failed to go, he would be guilty of contributory negligence, the proximate cause of the injury, which would bar his recovery. *Ibid.*

19. *Telegraphs—Negligence—Telegrams—Principal and Agent—Information—Damages.*—A telegraph company cannot escape liability for damages when it intrusts to another the delivery of information to the addressee of a message announcing a death, which by reasonable efforts it should have delivered in time to have avoided the consequences. *Ibid.*

20. *Same—Rule of the Prudent Man—Burden of Proof.*—It is the duty of an addressee who has received partial information from another concerning a message wherein his name was erroneously transmitted, announcing the death of one "Jennie Rans," which should have been "Jennie Rains," not to be negligent himself; and the burden is upon him to show that he acted as a reasonably prudent man would have done under all the circumstances in making inquiry from the defendant's agent or otherwise, or that he had not been put upon such reasonable inquiry as should have caused him to go to the funeral, and thus avoid the damages sought. *Ibid.*

21. *Same—Negligence.*—A telegram addressed to "J. H. Mullinax," announcing the death of "Jennie Rains," was erroneously transmitted to "J. H. Mullins," announcing the death of "Jennie Rans." The defendant telegraph company introduced evidence tending to show reasonable efforts to deliver it, and subsequently that its agent received information from a certain person that the plaintiff could be found at a certain place, and such person took a memorandum of the substance of the message and communicated it to the plaintiff and his wife. There was conflicting evidence as to whether the plaintiff knew himself to be the addressee or that the deceased was a sister of his; and if the sending point of the message had been communicated to him the night before he would have known that the deceased was his sister. There was evidence tending to show that if the message had been correctly communicated to him promptly that night he could have made necessary financial arrangements in time to have taken a train to his destination and reached there for the funeral: *Held*, the burden was upon the defendant to show, on the question of contributory negligence, that the plaintiff could have gone to the funeral of the deceased had he acted within the rule of the prudent man. *Ibid.*

TELEGRAPHS—*Continued.*

22. *Telegraphs — Contributory Negligence — Death Message — Postpone Funeral.*—In an action for the recovery of damages for mental anguish alleged by plaintiff as caused by defendant's negligence in not properly transmitting and sooner delivering a telegram relating to a death, the burden is upon the defendant to show, if the defense is relied on, that the damages could have been avoided by the postponement of the funeral, and the plaintiff cannot be chargeable for the failure to postpone it by one over whom he had no control, in this case the husband of plaintiff's deceased sister. *Ibid.*

TELEPHONES. See Telegraphs.

TENANT BY CURTESY.

Tenant by Curtesy—Wife's Possession.—A deed to grantor's daughter, reserving a life estate in himself, does not make the husband of the grantee a tenant by curtesy when he has issue born alive, etc., if the wife predeceases the grantor, the requisite of her possession of the lands being wanting; and the title to the land upon the death of the grantor passes directly to her heirs. *In re Dixon*, 26.

TENANTS IN COMMON. See Partition.

1. *Tenants in Common—Unity of Possession—Tenant a Purchaser—Interests Acquired.*—Destroying the unity of possession of cotenants in common will dissolve the tenancy, and thereafter a former tenant in common may acquire the entire property. *McLawhorn v. Harris*, 107.

2. *Tenants in Common—Leases by One—Acts Prejudicial—Rights of Cotenants.*—A tenant in common is not permitted to do acts which are prejudicial to his cotenant's estate, or to carve out his own part of the estate or to convey it in such a manner as to compel his cotenant to take his share in certain parts. *Investment Co. v. Postal Co.*, 259.

3. *Same—Easements—Severalty.*—Servitudes and easements upon lands cannot be granted by a tenant in common without the consent of his cotenants, and any one of them may prevent it until the estate is divided into separate parts; and when each holds his own part in severalty, either of them may impose the servitude and grant the easement upon his own share, as he pleases. *Ibid.*

4. *Same—Damages—Tort Feasor.*—When a tenant in common has granted to a stranger for a valuable consideration a license which he has no right to make, whether it is a lease, an easement, or a revocable license, and the delivery and enjoyment of the privilege has been interfered with and prevented by his cotenant, the cotenant having the right thus to interfere is not a tort feasor, and the grantee may recover in his action against his grantor such damages incident to the wrong as were in the reasonable contemplation of the parties and capable of ascertainment with a reasonable degree of certainty. *Ibid.*

5. *Same—Telegraph—Railroads—Consent—Cotenant.*—When a telegraph company and a railroad company are tenants in common in a telegraph line upon and along the right of way of the latter under a contract for a term of years, which was to be used by both companies for their respective business, with stipulations as to the number of wires to be strung and used for each and for additional wires to be strung and used for like purposes, imposing mutual burdens on the

TENANTS IN COMMON—*Continued.*

contracting parties for their maintenance, etc., the telegraph company has no right to grant to another corporation, in furtherance of a disconnected and separate business, the privilege of affixing two telephone wires to these poles and of imposing this additional burden upon the owners, in the absence of an express provision to that effect and without the consent of its cotenant. *Ibid.*

6. *Measure of Damages—Telegraphs—Railroads—In Contemplation of Lease—Reasonable Contemplation—Ascertainment.*—The defendant telegraph company and a railroad company were tenants in common of a line of telegraph along the latter's right of way, and the defendant leased to a separate and independent telephone company the right to the use of the poles for the purpose of stringing and operating two telephone wires for the use of the lessee. In the contract of lease there was a provision that either of the parties thereto may terminate the lease upon giving thirty days previous notice to the other. The railroad company, the cotenant of the defendant, prevented the licensee from stringing the wires before the time agreed upon for the commencement of the lease: *Held*, plaintiff, the licensee, was entitled to recover its reasonable costs and expenses incurred in making proper preparations to carry out the contract, including freight charges paid in delivering the material along the route and the loss incident to purchase and resale where the same could not be used to advantage or otherwise disposed of, under the rule that they must have been within the reasonable contemplation of the parties and reasonably capable of ascertainment. *Ibid.*

TENDER. See Waiver.

1. *Tender—Profert—Readiness to Pay—Suit—Payment Into Court.*—To constitute a valid tender, the party claiming its benefit must allege and show that since its refusal he has always been ready to pay the same, and upon suit brought he must pay the money into court. *DeBruhl v. Hood*, 52.

2. *Same—Verdict.*—The verdict of the jury rendered in an action upon a mortgage note will not be affected by a tender of a larger amount made before the commencement of the action, which was refused and not kept good; for the refusal thereof left the matter open and at large, and the court could find the true amount. *Ibid.*

TIMBER DEEDS. See Deeds and Conveyances; Evidence.

TITLE. See Deeds and Conveyances; Sales; Trespass.

1. *Evidence—Personal Property—Possession—Title.*—The possession of personal property is evidence of ownership. *Sutton v. Lyons*, 3.

2. *Same—Operation.*—The plaintiff sued for damages alleged to have been received while working for defendant at his sawmill. Defendant denied the ownership of the mill or that he operated it: *Held*, evidence that defendant was the owner of the mill on her land, which was sawing her timber, was some evidence that the defendant was operating it. *Ibid.*

3. *Independent Conditions—Performance—Executory Contracts—Title—Damages.*—A contract appearing to be a bargain and sale of certain timber interests in land further stipulated that the grantor was to cut

TITLE—*Continued.*

the timber into lumber at a certain price per thousand feet, keep it stacked for six months, with advances of money to be made by the grantee in certain proportions, and the balance of the purchase price to be paid when the lumber was delivered to the defendant's factory: *Held*, the title to the timber did not pass to the grantee, for by a proper interpretation of the contract its subject-matter was the sale of lumber, to which the title would only vest upon the performance by the grantor of his obligation to hold it for six months and then deliver it to the grantee; and hence the contract was executory and the latter would not be liable for any loss by fire occurring to the lumber while it was in the grantor's possession, before the expiration of the six months and its delivery under the terms of the contract. *Hendricks v. Furniture Co.*, 569.

4. *Deeds and Conveyances—Contract to Convey—Clear Title—Absence of Warranty — Purchase Money—Encumbrances—Equity—Judgment.*— An agreement made by the vendee of lands to take a deed without warranty is not a waiver of his right to demand a clear title, and he is not required to take the land with liens thereon, but may insist upon their cancellation before he pays the purchase money and takes the deed; and where their payment can be made and the liens discharged, the courts may direct the payment of a sufficient part of the purchase money to the holders of the encumbrances, though they are not parties to the suit; or may authorize the vendee to pay them off on the failure of the vendor to remove them, and reimburse himself, out of his deferred payment of the purchase price. *Gallimore v. Grubb*, 575.

TORT FEASOR. See Contracts; Tenants in Common.

TRANSACTIONS AND COMMUNICATIONS. See Evidence.

TRANSCRIPT. See Appeal and Error.

TRESPASS.

1. *Forcible Trespass—Assault—Abusive Language—Punitive Damages—Jury's Discretion—Instruction.*—In an action to recover damages for an alleged forcible trespass and assault on the person, where judgment by default and inquiry had been entered at a subsequent term, there was allegation and proof that the defendant did "unlawfully and wrongfully and with a strong hand enter and forcibly trespass" on the lot and yard of the plaintiff's residence, and in the presence of plaintiff and his wife "threatened, cursed, abused, and assaulted the plaintiff, and refused to leave" after he had been commanded to do so, but remained and continued to use vulgar and profane language, etc.: *Held*, upon the facts and circumstances of this case, (1) it was permissible for the jury to award punitive damages; (2) the question of punitive damages was properly submitted to the jury as one within their discretion, under a proper charge of the law applicable, and was not a matter of law for the court. *Blow v. Joyner*, 140.

2. *Assault— Forcible Trespass— Threats— Res Gestæ— Evidence.*— Whatever is said or done by a mob or unlawful assembly, in the nature or character of threats tending to show its purpose or *quo animo*, is competent as a part of the *res gestæ* in an action for assault or forcible trespass. *Saunders v. Gilbert*, 463.

TRESPASS—*Continued.*

3. *Assault— Forcible Trespass— Uulawful Assembly— Mob — Evidence.*— In this case, *Held*, a crowd of armed people who had followed the plaintiff to his home and remained on the street there in a threatening manner, using abusive language, constituted an unlawful assembly. *Ibid.*

4. *Assault — Forcible Trespass — Mental Shock — Physician — Common Knowledge—Evidence.*—In an action of assault and forcible trespass, which had caused the *feme* plaintiff to suffer from nervousness and mental shock, the court, from common knowledge, may assume that her attending physician will give her an opiate or sedative, and the testimony of her attending physician that he told her he was giving her morphine will not constitute reversible error. *Ibid.*

5. *Forcible Trespass—Assault—Unlawful Assembly—Mob—Evidence—Firing—Aggravation of Damages.*—An action for forcible trespass or assault is shown when it appears that an unlawful assembly of people followed the plaintiff to his home and there remained in such a threatening attitude and using such violent and abusive language as to make him reasonably apprehensive of his safety; and the asserted justification of defendant in firing upon the plaintiff under these circumstances, after plaintiff had fired with the hope of scaring the mob away, is not material, except upon the question of damages. *Ibid.*

6. *Forcible Trespass—Unlawful Assembly—Unlawful Use of Streets—Actual Entry—Evidence.*—It is not necessary for a threatening and armed assembly to commit a forcible trespass or assault that they should actually enter on the premises of the one assaulted, for if an entry can readily be made and by their conduct on the street in front of his house they cause him to reasonably apprehend violence from them, their use of the street is unlawful, and as much calculated to produce a breach of the peace as if actual entry had been made. *Ibid.*

7. *Forcible Trespass—Assault—Punitive Damages—Foundation.*—An action cannot be maintained solely for the purpose of recovering punitive damages for forcible trespass; but if a right of action exists, though the damages are nominal, the jury may, in a proper case, award punitive damages. *Ibid.*

8. *Forcible Trespass— Title— Possession.*— Forcible trespass is a crime against the possession and not against the title. *S. v. Davenport*, 596.

9. *Same—Evidence, Incompetent.*—The question to be determined under an indictment for forcible trespass is whether the defendant unlawfully ousted the occupant from the possession of the *locus in quo*, and evidence is incompetent which tends to show the defendant's title, or that those in possession were endeavoring to avoid civil process in an action involving title, or the process of injunction, by going across the State line, which ran through the *locus in quo*, whenever process was attempted to be served on them by the lawful officers of this State. *Ibid.*

10. *Forcible Trespass—Definition—Possession.*—Forcible trespass is the high-handed invasion of the actual, and not the constructive, possession of another, when he is present in person, or through his agents and employees, and forbids the same, putting him or them in fear, inciting resistance by force, and under circumstances endangering the public peace. *Ibid.*

TRESPASS—*Continued.*

11. *Forcible Trespass—Right of Possession—Unlawful Entry.*—Entering upon lands in the possession of another, against his will, with a strong hand or with a multitude of people, as, in this case, with forty persons, some of them armed with axes and others with guns, is unlawful, even though the entry were made under a superior title. Revisal, sec. 3670. The common and statute law discussed by WALKER, J. *Ibid.*

12. *Same—Assault.*—It is sufficient evidence of an assault upon a trial for forcible trespass, if the trespasser uses such threats or menaces, which he attempts to execute, as to cause the one in possession to reasonably apprehend imminent danger in remaining there. *Ibid.*

13. *Forcible Trespass—Evidence Sufficient—Intent.*—In this case, evidence of forcible trespass *held* sufficient, that defendant's employer and another lumber company claimed the title to a tract of timber land known as Allen Swamp. The defendant through its agents and employees was in possession of a part of the lands, claiming possession of the whole. The prosecutor's agents and employees then entered into possession of another locality of the swamp and built camp of log huts, whereupon the defendants, about forty in number, armed themselves with axes and guns, demanded the possession of the prosecutor's agents and employees, and, being refused, proceeded to tear down and burn the huts without physical resistance being offered: *Held*, further, evidence of the intent of defendants not to injure the prosecutor's witness was incompetent. *Ibid.*

14. *Forcible Trespass—Misdemeanors—Accesssories—Aiders and Abettors.* In misdemeanors there are no accessories, and in this case those who were present in numbers, some armed with axes and others with guns, while one of their number caused the prosecutor's agents to abandon the *locus in quo*, were his aiders and abettors and equally guilty of forcible trespass. *Ibid.*

TRIAL BY JURY. See Waiver.

TRUSTS AND TRUSTEES.

1. *Deeds in Trust—Intent of Grantor—Interpretation.*—The owner of lands may convey them to a trustee for the benefit of another, with such restrictions and upon such terms as he sees proper, and the courts will construe and carry out his intent if it be not unlawful or against public policy. *Braddy v. Dail*, 30.

2. *Deeds in Trust—Intent—Interpretation—Power of Sale—Proceeds—Reinvestment—Life Estates—Remainders.*—A deed in trust for the purpose, expressed in the preamble, of making provision for grantor's daughter against future contingencies, and expressing a desire that the daughter should enjoy the "proceeds, rents, and income" during her natural life, free from liabilities or interference of any one whatsoever, with a power in the body of the conveyance to convey the land "to such person or persons as she" may designate, "if in the judgment of....., trustee, it is desirable to make the change, and invest the proceeds" for the daughter: *Held*, the proceeds of such sale, made in pursuance of the deed, are to be reinvested by the trustee, and held upon the uses and trusts expressed in the conveyances for the benefit of the daughter for life. Upon a sale, the daughter would not be entitled to have the value of her life estate turned over to her. *Ibid.*

TRUSTS AND TRUSTEES—*Continued.*

3. *Deeds and Conveyances—Parol Trusts—Conflicting Evidence—Questions for Jury.*—When there is sufficient but conflicting evidence as to an express parol trust engrafted upon a purchase of land, the question is one for the jury, under proper instructions from the court. *McLawhorn v. Harris*, 107.

4. *Deeds and Conveyances—Trusts and Trustees—Sales—Mortgage—Purchaser.*—Under a fair and open sale of lands made by the trustee according to the terms of a deed in trust securing a bond for money loaned, the owner of the bond may bid in the lands and become the purchaser in his own right. *Ibid.*

5. *Deeds and Conveyances—Parol Trusts—Trusts and Trustees—Mortgage—Sales—Mortgagee a Purchaser—Bona Fide—Evidence.*—Two brothers, R. and F., bought certain lands, and to secure the purchase price executed a deed in trust to S., giving certain cotton bonds payable to L. and S. Before the death of R., L. and S. assigned the bonds to E. Brothers, and upon default the lands were sold by S. under the terms of the deed in trust, and conveyed to the purchaser, E., of the firm of E. Brothers. Subsequently, E. sold the lands to F. for the same amount of cotton bonds, *i. e.*, bonds payable in a certain amount of merchantable lint cotton. In an action brought by the heirs at law of R. to declare a parol trust in their favor in the lands thus conveyed to F.: *Held*, that while the fact that F. bought the land from E. for exactly the same amount of lint cotton that R. and F. had agreed to pay L. and S., it was open to explanation, and, different inferences being capable of being drawn from the facts, the question was properly left for the jury to say whether, under the circumstances of the case, F. was a *bona fide* purchaser of the lands in his own right, or as a tenant in common with R. *Ibid.*

6. *Same—"Majority Rule"—Interference.*—A church of the congregational system having the right under our statutes to remove its trustees or any of them at will, and having duly and regularly elected certain trustees to supersede several theretofore elected, holds the church property through those trustees later elected, and has the right to the use of the church for religious services without molestation from the trustees removed, or from its conference; especially so, in this case, where the trustees as newly constituted were a majority, even counting the deposed ones. *Ibid.*

UNLAWFUL ASSEMBLY. See Trespass.

VENDOR AND VENDEE. See Deeds and Conveyances; Fraud; Partnership.

VENIRE. See Jury.

VENUE. See Removal of Causes.

VERDICT. See Tender; Bills and Notes.

VICE PRINCIPAL. See Master and Servant.

VOTE OF PEOPLE. See Constitutional Law.

WAGERING CONTRACTS. See Contracts; Interpretation of Statutes.

WAIVER.

1. *Drainage Districts—Bond Issues—Limited Liability—Protection of State's Guarantee—Conveyance of Interest—Waiver—Interpretation of Statutes.*—The limitation of liability on the bonds issued under chapter 509, Laws of 1909, was to protect the State and the State Board of Education because of the power in the said act enabling the State to guarantee three-fourths of said bonds, to be repaid out of the sales of land, which was waived by the Southern Land Reclamation Company by proper resolutions, to whom the State Board of Education has conveyed its interest; and by chapter 67, Laws of 1911, any defect in the machinery of the tax levy was cured so that the interest on the original issue of $400,000 of bonds could be taken care of and thus enable the sale of the bonds by the drainage commissioners. *Carter v. Commissioners*, 183.

2. *Mortgages—Default—Waiver—Option of Mortgagee.*—Provision in a mortgage that the mortgage notes shall mature and become payable on failure of the maker to pay the interest as it may become due at the stated periods is primarily for the benefit of the mortgagee, and, as a rule, will be waived by him by the acceptance of all arrears, the occasion of the default, and invariably so when the maturing of the debt is expressed to be at the option or election of the mortgagee and he accepts the arrears with the expressed or implied intent to waive the forfeiture. *Bizzell v. Roberts*, 272.

3. *Murder—Defenses—Insanity—"Not Guilty"—Double Issues—Waiver—Inherent Prejudice.*—The prisoner was permitted to amend his plea upon trial for murder and set up insanity as a defense, and without objection a double issue as to defendant's insanity and guilt was submitted to the jury: *Held*, (1) the prisoner waived his right by not excepting at the time; (2) the submission of the double issue was not inherently prejudicial, and did not constitute reversible error. *S. v. Sandlin*, 624.

WANT OF CONSIDERATION. See Bills and Notes.

WARRANTY IMPLIED. See Mortgages.

WATER AND WATER-COURSES.

1. *Navigable Waters—Drawbridges—Construction—State's Powers—Nuisance.*—Subject to the supervisory power of the National Government, a State may authorize the construction of a drawbridge over navigable bodies of water within its borders, and no cause of action arises against a railroad for an illegal obstruction in such waters by reason of thus erecting a bridge for public purposes and benefit, leaving reasonable spaces for the passage of vessels, for structures of this character are lawful and not nuisances. *Whitehurst v. R. R.*, 48.

2. *Water and Water-courses—Wrongful Diversion—Natural Water-course—Overflow—Drainage.*—One who diverts water from its natural course so as to damage another, whether it be a corporation or an individual, or who cuts ditches through a watershed to conduct water to a water-course, which is thereby rendered inefficient to carry it off and thereby damages the land of another, is liable for the damages thus caused. *Hooker v. R. R.*, 155.

3. *Same—Railroads.*—A railroad company, in making its roadbed, cut lateral ditches to convey water from its natural course and watershed

WATER AND WATER-COURSES—*Continued.*

into a stream, branch, or run, a natural water-course, flowing through plaintiff's land, and thereby overcharged the stream, causing it to overflow and pond back upon the lands of plaintiff, to his damage: *Held*, the plaintiff is entitled to recover the damages thus caused. *Ibid.*

4. *Same—Lateral Ditches—Adjoining Owner.*—When it appears that the lands of plaintiff were damaged by reason of defendant's wrongful diversion of water into a natural water-course by the use of lateral ditches dug by defendant, the fact that the water had to flow through these ditches upon the lands of another before reaching the *locus in quo* does not affect the plaintiff's right of recovery. *Ibid.*

5. *Water and Water-courses—Wrongful Diversion—Natural Water-course—Overflow—Proximate Cause—Intervening Cause.*—When it appears that the defendant had had lateral ditches on the land of an upper owner dug for the purpose of carrying the water from its natural course into a natural water-course so as to cause it to overflow, to the damage of plaintiff's lands, the diversion by means of these ditches is the proximate cause; and the defendant's position cannot be advantaged, on the ground of intervening negligence, by the fact that the upper owner had, at the instance and expense of the defendant, enlarged the ditches in order to provide for the increased flow of the water as diverted. *Ibid.*

6. *Instructions—Requests—Substantially Given.*—An instruction need not be in the express language of a correct request, if it is sufficiently responsive and gives a correct statement of the law applicable to the questions presented. *Ibid.*

7. *Damages—Ponding Water—Evidence.*—In this action for damages for ponding water back upon plaintiff's land, the testimony of a witness, to the effect that some fifteen years previous he had cut cypress timber up beyond the pond and had floated it to the pond, was properly admitted to show the conditions up beyond the pond bearing on the controversy. *LaRoque v. Kennedy*, 360.

8. *Damages—Ponding Water—Adverse User—Prescriptive Right—Easement.*—When damages are claimed by plaintiff to his land by reason of defendant's elevating his dam and thus raising the level of the water on the lands of the former, and defendant claims a prescriptive right by adverse user for twenty years or more, testimony tending to show that the water had been maintained at the same or a higher level by a former dam located at the same place as the one complained of at a date more than twenty years previous, and a continuous maintenance at that level, with evidence of watermarks on trees, etc., sustaining defendant's contention, is sufficient to sustain a verdict that an easement had thereby been acquired. *Ibid.*

9. *Same—Limitation of Actions—Ouster—Adverse Possession.*—In defense to an action for damages for ponding water back upon plaintiff's land, the defendant offered evidence tending to show that he and those under whom he claimed had maintained the level of the water as it then was, or at a higher level, for more than twenty years, etc.: *Held*, sufficient to show ouster and title by adverse possession. *Green v. Harmon*, 15 N. C., 161, cited and approved. *Ibid.*

WHOLESALE DEALERS. See Contracts.

WIFE'S SEPARATE PROPERTY. See Courts.

WILLS.

1. *Wills—Construction—Intent—Life Estate—Specific Devises.*—A. devised to the husband, S., "all my possessions, land, stock, farming implements, household and kitchen furniture, him all I have, his lifetime (if I leave no heirs); he must pay all my debts, if any, . . ." with "request of him if I leave no heirs. I would like for him to give all to E. and M., M. my organ and watch and chain after his death": *Held*, though the devise is inartificially drawn, the words "heirs" meant children; and the husband took the devised property for life, with limitation to the children, if any, at the time of her death; if no children, then over to E. and M., with special provision that M. should have the organ and watch and chain. *Swindell v. Smaw*, 1.

2. *Executors and Administrators—Wills—Compensation—Fixed Sum and Commissions—Death of Executor—Interpretation of Wills.*—A will provided for the compensation of the two executors, etc., therein named by the maker, that they should receive "out of my estate, in full compensation for all services and responsibilities to be by them rendered and incurred, whether as executors or trustees, the single sum of $2,000 each, and in addition thereto" a commission of a certain per cent of the receipts and disbursements. The executors named entered into the discharge of their duties as such, and collected and disbursed certain sums of money. One of the executors died about two months after the testatrix: *Held*, (1) as to the compensation of the deceased executor, his executors could not recover any part of the fixed sum of $2,000, the time for its payment not being fixed by the will and it being impossible for the courts to prorate it; (2) the Superior Court will fix the percentage of commissions to be allowed upon the receipts and disbursements as upon a *quantum meruit*, not exceeding 5 per cent, and allow one-half thereof to plaintiff's intestate. *Ellington v. Durfew*, 253.

3. *Wills—Legacies—Gifts by Testators—Ademption—Intent.*—A prior legacy may be adeemed or satisfied by a payment or transfer of property to the legatee made for that purpose by the testator during his lifetime, and is largely a question of intention, upon which parol evidence is competent. *Grogan v. Ashe*, 286.

4. *Wills—Executors—Declarations—Distributees—Several and Independent Interests—Evidence.*—The interests of the executor and distributees under a will are several, distinct, and independent, and in an action to set aside the will for fraud and undue influence, his declarations, made against the validity of the instrument, whether before or after the will has been probated or he has qualified thereunder, are incompetent except in so far as they may affect his qualification as executor. *In re Fowler*, 340.

5. *Wills—Intent—Debts—Order of Payment—Personal Property—Charge Upon Realty—Executors and Administrators.*—While, ordinarily, personal property must first be exhausted by the personal representatives of the deceased before resorting to the sale of real property for the payment of the debts of the deceased, it is within the power of a

WILLS—*Continued.*

testator to say what property shall be first liable and in what order; and it clearly appearing from the will that it was the intent of the deceased that his interests in realty should be liable for his debts, rather than a specific bequest of personalty, this intent will be carried out. *Jones v. Huntley*, 410.

6. *Same—Specific Legacy.*—A specific bequest to M. by item 1 of a will, "My insurance policy of $1,000 in" a certain named company, giving its date, with the "will and desire that she shall have all the benefits accruing thereunder in the event" of the testator's death; which by item 2 provides that the burial expenses be paid out of any other property, after which the balance of the personal property and real estate shall be divided among the heirs as the law may direct: *Held*, the intent of the testator was that all his debts be paid from the property embraced in the second item, extending to an ownership of an interest in remainder (Revisal, sec. 3140), in exoneration of the specific bequest contained in item 1. *Ibid.*

WITNESS, COMPUTATION BY. See Evidence.

WITNESS, NONEXPERT. See Evidence.

WITNESSES. See Evidence.

Witnesses—Competency—Findings of Court—Objections and Exceptions. The trial judge, upon questioning an eight-year-old witness introduced by a party litigant, ascertained that the witness did not know who made her, had no knowledge of the obligation of an oath, and did not know what they would do with her if she told a lie on the witness stand, and found that she was not qualified to testify. No objection was made to this in the trial court: *Held*, (1) objection on appeal is too late; (2) the evidence sustained the ruling of the court. *S. v. Stewart*, 636.